

## **THE EVOLUTION OF ORGANISATIONAL FORMS IN EUROPEAN PUBLIC TRANSPORT**

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### **INTRODUCTION**

The European public transport scene was revolutionised by the British deregulation of 1986 but the more cautious bus reform by route tendering introduced in London in 1984 appeared to be a more convincing example for many countries. Copenhagen, e.g., introduced a similar regime and route-by-route competitive tendering has now become the norm in almost the whole of both Denmark and Sweden and can reckon on a growing number of adepts in other countries. Network tendering, as practiced in French urban areas and in the British railway sector, is the main alternative. This regime has the advantage of enabling operators to enjoy some of the service design freedoms enjoyed by deregulated operators. In practice, however, operators have much less leeway to use their inventiveness to change services in France than in Britain. Both route and network tendering are in (slow) evolution though. Various quality control instruments are being added and the more daring authorities transfer some planning powers to operators as traditional tendering proved to be more successful in cost-cutting than in increasing passenger numbers.

A major impetus for a further spread of reform in EU-countries is the commitment of the European Commission to revise regulation 1191/69 pertaining to the payment of compensations for Public Service Obligations to transport operators. As yet, many countries struggle with the legal and practical implications of the pending changes.

This paper will provide an overview of some important recent evolutions in a number of countries of the European Union, present the EU-proposal, possible amendments and discuss some main resulting challenges.

### **THE PAST 10 YEARS**

#### **Introduction**

More than a decade ago, a paper by Gwilliam and van de Velde (1990) analysed the potential for regulatory change in European bus markets. That paper was written in the context of the analysis of the consequences of the British bus deregulation that took place a few years earlier. It reviewed attitudes to deregulation in ten Western European countries (Eire, West Germany, Italy, France, Spain, the Netherlands, Belgium, Denmark, Sweden and Portugal) and focused on the rejection of the British free-entry deregulation by most of the analysed countries. While most authorities still adopted a rather conservative stance to most forms of competitive pressure, a number of them had already started to introduce competitive tendering.

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That paper was probably the first one engaging in such an international comparison of the evolution of organisational forms in public transport in Europe. Organisational forms continued to evolve in the ensuing decade and numerous publications have in the meantime reported on their performances.<sup>1</sup> This chapter aims at providing an overview of the main directions of change that could be witnessed in those countries during the last decade without focussing on performance changes. Legal and regulatory changes are complex to describe and often contain many subtleties. As it is impossible to treat this exhaustively within the scope of this paper, this chapter will focus on the main evolutions within the general legal and regulatory frameworks of local and regional public transport (sometimes including rail) in the same ten member states of the European Union in terms of contracting and competition. We include some plans for the near future but refer the reader to Gwilliam and van de Velde (1990) for developments prior to 1990.

## **The countries**

- **Great Britain**

Few things changed during the 90s in the organisational form of local and regional public transport put in place in the 80s in Britain (deregulation, liberalisation and privatisation outside London; central planning, privatisation and full outsourcing in London). The railways, on the contrary, were submitted to radical changes after 1993. The London tendering scheme passed from gross-cost to net-cost and then returned to gross-cost. Deregulated areas settled down, concentration took place and passengers continued to decrease.

The main changes came with the new transport policy promoted by the New Labour government since 1997 as policy initiatives were developed to tackle some of the problems linked to deregulation and privatisation. These give local authorities since the 2000 Transport Act some more control on local public transport supply by legalising quality partnerships<sup>2</sup>; a practice that had appeared to improve public transport quality. Tendering exclusive rights to operators has also become possible but only as an exception, i.e. under the condition that such so-called 'quality contract' is the only practicable way of implementing the policies the authority set out in its bus strategy.

- **Eire**

Public transport organisation (large publicly owned operators) in Ireland has remained stable in the past decade. However, government consultation papers have been published describing reform proposals that would lead to the reform, and partly privatisation, of the large publicly owned companies and a larger participation of the private sector. As a first step, Dublin bus has been asked to introduce some sub-contracting by competitive tendering of bus routes. Further steps would include the creation of an independent regulatory body that would take care of further competitive tendering. In parallel, more private operators have been allowed to enter on the basis of market initiative (under the current legislation dating back to 1932) for as

<sup>1</sup> The ISOTOPE study (1997), in which this author participated, refers to several such studies and contains additional evidence.

<sup>2</sup> In such partnerships, local authorities can guarantee, e.g., some level of investment in public facilities (such as bus lanes or shelters) in exchange for improvements in the quality of service supply by independent transport operators, such as vehicle quality standards. Guarantees in terms of frequencies may not be asked though.

much as these do not compete with pre-existing services. Both actions are meant to generate a larger pool of operators for the future regime.

It is not clear yet how the balance between the current legal market initiative regime and the authority initiative<sup>3</sup> through tendering will settle as further decisions have to be made on this point. While integrated planning and tendering will clearly get a place, it seems that market initiative will also be allowed to keep a role, especially outside of the Greater Dublin Area. It should be noted in this context that a fringe of non-licensed private operations has gradually developed besides the state-run companies.

- **Denmark**

The transport law for Copenhagen made the usage of competitive tendering compulsory. This process started in 1990 and will be ended by 2002. There is no obligation to use competitive tendering in the rest of Denmark, yet the usage of competitive tendering has gradually become the norm in the last ten years, such that provincial ‘public transport companies’<sup>4</sup> are now in effect only public transport planners. There currently remain only two urban companies that do not use competitive tendering, one of which has decided to introduce it soon. Recently it was decided that a first batch of about 15% of the railway sector would also be submitted to competitive tendering.

The tendering regime developed in Copenhagen started with rather simple gross cost contracts. As in all other regions of Denmark, it was chosen to retain revenue risk. Quality management features were gradually added. Yet, quality incentives to operators are solely related to operational aspects and not to tactical (service design) aspects. This regime tends to serve as an example for the rest of the country. Recently a new ‘Capital region development council’ (HUR) was created to integrate public transport planning in Copenhagen with wider regional issues. The pre-existing ‘Capital region public transport company’ (known as HT), that was responsible for the planning of bus services in the region, was integrated in this new structure. A further five local railways and a metro line (in construction) will be integrated too while regional rail services remain under the responsibility of the Danish State railways (DSB). Yet, all modalities continue to fall under one integrated fare regime managed by HT.

The growing concentration of the market (and lately the take-over of the former state owned Combis –formerly DSB Bus– that had come into financial difficulty by the British Arriva) leads some to fear the appearance of an oligopoly.

- **Sweden**

The organisation of public transport in Sweden has moved since 1989 from an ossified market initiative regime, where operators had exclusive monopoly rights, to a regime that is essentially based on authority initiative and where regional transport authorities (sometimes in the form of a company owned by local and regional authorities) are responsible for the public

<sup>3</sup> In short, we speak of market initiative regimes when (independent and/or private) operators are legally allowed to autonomously take the initiative to create transport services or request from an authority an authorisation to operate such services. We speak of authority initiative regimes when operators have legally no right to create services autonomously and where market entry can only be the result of a specific request by an authority to create transport services according to more or less detailed prescriptions by that authority (van de Velde, 1999).

<sup>4</sup> The Danish law gives regional authorities (municipalities and provinces) outside the Capital region of Copenhagen the power to organise public transport jointly or separately. For this purpose they can create ‘public transport companies’ that are allowed to produce all services themselves or contract out services.

transport planning (routes, timetable and fares), while operations is contracted out by competitive tendering. Tendering is not limited to bus services. It has also spread to most regional railway services and the Stockholm metro. Tendered contracts, mostly of the route-by-route type, have led to substantial cost reductions. In the same period, publicly owned companies operators were privatised or taken over. Overall, the number of operators decreased.

The content of contracts evolved slowly. Some have expressed their fears that the current gross cost contracts exert too much pressure on costs and do not allow for sufficient innovation. A minority movement towards net cost contracts and more freedom of planning for operators can be seen but this is currently limited to the cities of Helsingborg, Sundsvall and Östersund where network contracts have been let.

- **The Netherlands**

Local and regional public transport in the Netherlands was historically based upon the principle of market initiative but moved de facto gradually away from that principle, giving a great degree of stability to incumbent operators, which were mostly authority-owned. The 1988 Passenger Transport Act was meant to simplify the regulatory framework (limited deregulation), to better integrate services and give more control on the growing deficits. A lump-sum subsidisation regime was implemented while the nation-wide ticket and fare integration introduced in 1980 was maintained. The subsidisation was rather complex and often fine-tuned by the Ministry. It moved from a supply norm base, to a passenger-km base and finally a passenger revenue base but it was crippled with exceptions and time lags that weakened its incentive power. Regional transport companies, owned by the state or local authorities, were amalgamated into one large group before being split again and for some parts privatised in order to generate competitors for the pending tendering regime. Autonomous entry by private operators, while still legally possible, hardly ever took place in practice.

The period from 1992 to 2000 witnessed a seemingly interminable discussion on the introduction of a competitive tendering regime instead (two experiences with competitive tendering (with mixed results) even took place in 1994). The reform aim was twofold: more attractive public transport services (especially in areas worst hit by congestion) and an improvement in cost recovery ratios. This was to be realised by a decentralisation of tasks and powers to provincial and regional authorities, the introduction of competitive tendering for concessions and putting authority-owned local transport companies at arm's length or privatising them. According to the resulting 2000 Passenger Transport Act, 35% of services have to be competitively tendering by January 2003 (2006 for municipal transport services). A go/no-go decision to move to 100% in 2006 will take place after a Parliamentary evaluation (based on passengers, quality and costs) in 2004. Implementation is currently starting and the first tendered concessions should be granted soon.

- **Germany**

The decentralization of subsidisation and parts of the legislation to the German states were main changes that took place after German reunification. In most cases, local authorities were granted the power (or duty) to establish regional transport plans that are leading when operators requests authorisations to provide transport services, even if the legal principle of market initiative remained. At the same time, the Verkehrsverbünde –transport associations coordinating public transport in larger areas that were sometimes created by operators– were granted a more formal position and were sometimes re-established as co-operation of local authorities.

German public transport is legally based on the principle of free entrepreneurship and market initiative. Yet, financial support to publicly owned companies is organised in such a way and markets are so strictly regulated in practice that freedom of initiative hardly exists and incumbents have, de facto, a preferential position. Furthermore, most services are provided by publicly owned companies even if, in the countryside, a substantial part is provided by small private operators, more often on the basis of traditional sub-contracting, even if competitive tendering is gaining ground in these areas.

German law makes a distinction between profitable services, which can be granted without tendering to requesting operators, and non-profitable services, that have to be tendered since a change in the law enacted a few years ago. Despite this, few services are tendered as services provided by municipal companies are defined to be profitable using revenues from cross-subsidisation from other public utilities (such as electricity distribution). Furthermore, several sources of subsidy (such as those on rolling stock investments) prevent new entrants from having a fair access to markets. The regional railway sector saw more changes with the growing usage of competitive tendering after the decentralization of financial means from the federal government to the federated states. Yet, the current organisation of the DB (the national railway company) and its behaviour are seen by some people as not conducive to a quick spread of further competitive tendering.

The whole (cross-)subsidisation issue is currently subject to the scrutiny of courts. The stakes are high. The presumption of many observers that much of this subsidisation is incompatible with the current German legislation may be confirmed by the judgement. This would mean that a substantial part of German public transport is suddenly illegal in that it should have been tendered rather than simply granted to the historic operator. In order to prepare for such an eventuality, several operators have started to prepare themselves by trying to reach a true commercial operation status in order to avoid competitive tendering, some Verkehrsverbünde have started to orientate themselves on competitive tendering and the Union of German cities realises what the new position of authorities might (have to) become. Even if many still favour the status quo, the general expectation is that markets, eventually, will open up. However, private entry is for the time being more easily achieved by takeovers than by participation in the few cases of competitive tendering.

- **Belgium**

Public transport legislation in Belgium changed considerably after the federalisation of the country in three regions (Flanders, Wallonia and Brussels) in 1990. The national bus company was split into two regional (Flemish and Walloon) operators. The remaining urban operators (Antwerp, Ghent, Liège, Verviers and Charleroi), owned by the state until 1989, were merged with their respective regional operators. The existing operator in Brussels (STIB/MIVB) was 'recreated' as a separate regional transport company. Management contracts were signed between each regional government and its own operator(s). These contracts mostly include specific aims related to the quantity and quality of service and include commitments from the authority as to the subsidisation budget available to the operator. The current contract between the Flemish government and its operator "De Lijn" is valid for the period 1997-2001.

About 30 to 40% of non-urban public transport in Belgium is traditionally operated by so-called "tenants". These small family companies operate under gross cost contracts and owe their position to historic rights rather than to competitive tendering. Their services are planned by the regional operator. "De Lijn" decided a few years ago not to renew the current tenant contracts and to use competitive tendering instead while continuing to operate the remaining 60% of services in-house. Besides trade union pressures, the wish to maintain production

expertise and bargaining power in front of possible oligopolies is one of the reasons for this choice. In the meantime, several tenants were taken over by foreign companies, such as Linjebuss (Connex-Vivendi). Wallonia on the contrary has not yet decided to introduce competitive tendering. On the contrary, the public operator there has even bought one of its tenants and is participating in bids elsewhere together with others. Recently, the region of Brussels decided to reorganize its public operator to provide more accounting transparency and more efficiency. For this purpose, a split will gradually be made between planning and production, introducing elements of internal benchmarking and also some competitive tendering.

With different speeds, Belgium is moving towards the so-called Scandinavian model (split between planning and operations, gradual introduction of competitive tendering of the operations, continued public planning by the former public operator). However, full-scale tendering is consciously rejected.

- **France**

The legislation introduced in 1982, and according to which control on public transport had been decentralised<sup>5</sup> to the Départements<sup>6</sup> except where (co-operating<sup>7</sup>) municipalities had themselves taken over responsibility for their urban area, meant that the principle of authority initiative was gradually to replace all remnants of market initiative (some routes were/are still profitable in the countryside). According to this regime, transport authorities have to contract services to operators unless they decide to retain their legal right to public production. This period saw a gradual spreading of contracting and tendering and sometimes the introduction of public private partnerships for the developments of new (underground) rail systems in provincial cities. Pure private financing hardly ever took place, however.

The usage of competitive tendering became compulsory only after 1994 but the legislation continued to allow authorities to provide services directly or through their own company. The competitive tendering legislation applicable to public transport allows for negotiations within the procedure; a main difference with the tendering legislation applicable to service contracts in France (and in Europe). An important discussion took place during the following years about its applicability to public transport. The question was whether usual public transport contracts had to be assimilated to simple service contracts in view of the high level of subsidisation (typically about two thirds of total production costs) and the low level of revenue risk incurred by operators in most (urban) cases. A court ruling gave more sight on the borderline between both situations. The consequence is that contracts classified as 'service contracts' now fall under stricter tendering rules that do not, in principle, allow for negotiations within the procedure.

The railway sector is not yet covered by tendering obligations but contracting has recently been introduced for regional railway services following an experimental phase considered successful in those Régions that had implemented it. All Régions will now have to contract their rail services to the national railway company SNCF (monopolist by law). Competitive tendering of these services, especially looking at the success of French operators in foreign railway contracts, is to be expected sooner or later, even if this topic remains rather taboo.

<sup>5</sup> The Paris region retained the older legislation. This case will not be discussed here.

<sup>6</sup> France is subdivided in Régions, Départements and Communes (municipalities).

<sup>7</sup> Authorities were given large freedoms to organise local co-operations to compensate for the small size French municipalities.

- **Italy**

Changes in legislation took place during this decade in order to fit public transport to the general process of decentralisation that took place in Italy. Regions were given the possibility to decide on the organisational form of their public transport systems. Competitive tendering became possible, was chosen sometimes, but was not compulsory. Furthermore, some public companies were put at arm's length or privatised. Overall, however, few changes can be observed and only a few regions started to move cautiously towards the first reforms.

Rome has recently introduced a number of changes similar to the London or Copenhagen regime (splitting the company in planning and operations divisions). Furthermore, a contract was signed between planning division and city to set parameters concerning service design, competitive tendering of the operations became possible and was started.

- **Spain**

Regional authorities are in Spain responsible for transport policy and for network planning, timetables and fares in public transport. Public transport is operated under a regime of authority initiative by own production or concession to private operators. A major change that has been carried through during the last decade is the introduction of contracts between these authorities and the national government in order to guarantee a clear relationship between the subsidies given by the government and the performances of the various public transport systems. Contractualisation with transport operators is gaining ground, as is competitive tendering in this context.

- **Portugal**

A legislation dating back to 1990 in Portugal introduced some deregulation in public transport but this has not been followed in practice, however, such that older legislation is still active. According to the new legislation, operators are free, outside Lisbon and Porto, to provide services based on market initiative (authorisations regime). Yet, urban public transport and a number of other main services are considered a public service that can be operated either by the local authority or under a concession that can be granted without competition. However, one new suburban railway line in Lisbon has now been competitively tendered.

## **THE PENDING REFORM OF THE 1191/69 REGULATION**

The European Commission produced in July 2000 (European Commission, 2000) a long awaited proposal for a regulation 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". This text, if adopted, is meant to replace the current regulation 1191/69 (as amended by regulation 1893/91). The Commission's proposal is based upon the general principle of the development of competition for the provision of public transport, in accordance with the conclusions of the European Council of Lisbon of March 2000 that asked to speed up liberalisation in areas such as transport.

The reform of the 1191/69 Regulation is certainly the most important contentious issue of the past years in public transport at the European level and will be a major determinant for all organisational forms in Europe in public transport in the future years, if eventually adopted.

## **The reasons for a new proposal**

The current regulation 1191/69 enumerates forms of compensation that are compatible with the reimbursement for the discharge of certain ‘obligations inherent in the concept of the public service’ that are allowed by the EC treaty. It allows competent authorities to impose public service obligations on operators, when these are necessary to ensure the provision of adequate transport services, and to reimburse operators for the cost of this. It lays down detailed rules for calculating the financial burden resulting from the imposition of such obligations and exempts such compensations from the Treaty’s state aid notification procedure. Regulation 1893/91 amends this basic framework by establishing a second mechanism –the conclusion of public service contracts– as the normal method of securing the fulfilment of public service objectives, while leaving room for the imposition of obligations. However, it does not address the question of how to award public service contracts. The award of certain public service contracts is subject to directives on public procurement (92/50/EEC and 93/38/EEC), but many contracts –notably those classified as concessions– are not subject to those procedures. Furthermore, the regulation does not address the question of the opening of the market for the provision of public transport services.

When regulation 1191/69 was adopted, and amended, public transport markets were mostly not opened to competition, operators were exclusively national and in most member states a significant proportion of public transport was provided by public administrations or publicly owned companies holding a monopoly position. An argument used by the Commission to justify action is that the economic situation of public transport changed considerably during the past decade. All but four member states have introduced some elements of competition – mostly competitive tendering– in their national legislation and operators originating in other member states make increasing use of these opportunities. This has led to the appearance of international operators and, as operators established themselves in other member states and entered the market there, the Commission concludes that it is time to establish clear rules at Community level to avoid the need for the Commission or the courts to resolve legal questions case by case, promoting legal certainty and harmonising key procedural aspects in member states, while removing obstacles which the present regulation places in the way of modern approaches to public transport (European Commission, 2000).

Some of the argumentation relates to the Treaty. Firstly, while the Treaty requires member states to ensure freedom of establishment, it also allows under certain conditions to restrict this principle when necessary for the operation of ‘services of general interest’. Yet, this has to be proportionate. The Commission considers that no text currently provides sufficient guidance for authorities and operators to assess, with a degree of legal certainty, whether an exclusive right is proportionate or not. Secondly, while the current regulation exempts compensations from the Treaty’s compulsory state aid notification, it does not provide for mechanisms to assess the proportionality of such compensations. While that may have been appropriate at the time, the gradual emergence of a single market for the provision of public transport means, according to the Commission, that there is now both national and Community interest to prevent abuses. Moreover, as the Treaty requires public financing to distort neither competition nor the freedom of establishment, the Commission considers that fair, open and non-discriminatory procedures are needed to avoid over-compensation<sup>8</sup>. In that respect, the Commission also refers to the Isotope research study (ISOTOPE Research Consortium, 1997). According to this study, competitive tendering has the advantage to lead to substantial improvements in cost-effectiveness while allowing for increases in attractiveness (measured

<sup>8</sup> Yet, where such procedures can not be employed, compensations should be paid in line with accurate calculations of their financial effect, a procedure close to the current one.

in ridership trends), larger cost-effectiveness improvements could be reached by full deregulation but these were not matched by simultaneous increases in ridership and closed markets regimes, while reaching improvements in attractiveness too –though smaller– were at a substantial disadvantage in terms of cost-effectiveness.

Finally, the Commission also considers that the existing regulatory framework is out of date and inadvertently rules out approaches that ought to be permitted. For example: enabling ticketing and information integration with long-distance services, simplifying the rules on the calculation of compensations and on separate accounting, clarifying how authorities can lay down general ‘rules of the game’ applying to all operators without having to conclude public service contracts with each one, and clarifying how authorities can protect existing employees in situations where public service contracts change hands (European Commission, 2000).

## **The proposal**

Considering that the recent opening of national public transport market on the basis of national legislation and the emergence of multinational operators requires to update Community law, the Commission (European Commission, 2000) states that its proposal is developed aiming at ensuring better value for money and better quality services, ensuring that operators have real opportunities to gain access to other markets through fair, open and non-discriminatory procedures for the award of financial compensations and exclusive rights, harmonising key aspects of the competitive procedures developed in the different member states, and promoting legal certainty about rights and duties of operators and authorities in relation to Community law on state aids and exclusive rights as they affect public transport. The Commission stresses that the regulation does not determine the goals public services should achieve, nor the way to pursue them, nor the balance between the role of authorities and operators in service specification and development. It does not lay down specific institutional structures and continues to allow member states to decide which bodies will act as competent transport authority. And while the proposal is based upon the principle of controlled competition (i.e. competitive tendering), it still allows for a wider diversity of mechanisms throughout the Community (European Commission, 2000).

The proposed regulation, which is very close to the recommendations included in the expert study the Commission commissioned (NEA et al., 1998)<sup>9</sup> as a preparation to this proposal, is applicable to national and international public passenger transport by rail, road and inland waterway. It lays down the conditions under which competent authorities may compensate operators for the cost of fulfilling public service requirements, the conditions under which they may grant exclusive rights in public transport and it introduces the principle that competent authorities should normally pursue legitimate public service objectives within a framework of ‘regulated competition’, i.e. fair, open and non-discriminatory competitive tendering (art. 1). It determines that the public procurement directives 92/50/EEC and 93/38/EEC, when these make competitive tendering of public service contracts compulsory, should get priority above the new regulation (art. 2) and it defines (art. 3) the main concepts used in the proposal (such as competent authority, direct award, exclusive rights, integrated service, public service requirements, etc.).

Art. 4 requires authorities to strive towards the realisation of ‘adequate public passenger transport service’ whichever way public transport is initiated. It requests specific attention for a minimum number of issues in the evaluation of public service adequacy and selection and

<sup>9</sup> The author of this paper was member of the consortium that wrote this study.

award criteria (quality of services, consumer interests, fares, accessibility, integration, environment, regional development, health and safety, professionalism, complaint management etc.)

Public service contracts have to be concluded for the award of all exclusive rights and/or for the payment of all financial compensations for public service requirements (art. 5). However, compensations paid for compliance with general rules for public transport operation (general ‘rules of the game’) in accordance with article 10 are also allowed. As a general rule (art. 6), public service contracts have to be competitively tendered for a maximum five years (but payback periods can be taken into account when specific investments have to be made).

However (art. 7), direct contract award may be authorised by the Commission for specific cases in rail-bound activities when rail safety standards can not be fulfilled in any other way or when co-ordination costs between infrastructure and operations would otherwise exceed potential benefits (furthermore bus activities of an operator may be included in such contracts when these are fully integrated<sup>10</sup>). Direct award is also allowed for contracts of less than Euro 400.000/year (Euro 800.000 when an authority includes all its services in one contract), measured by the total payment to the operator and ticket revenue not transferred to the authority. Finally, direct award is also allowed once when an operator proposes a new service where none exists and that this service does not require financial support through public service contract.

Public service contracts can also be awarded for individual routes according to a simplified ‘quality comparison’ procedure (art. 8), after publication of a notice inviting proposals, when the award of an exclusive right is not subject to financial compensation.

A number of safeguards are also defined in art. 9. An authority can require from an operator to subcontract up to half the value of the services covered by the contract, an operator can be excluded from contract award if that would give him more than one quart of the relevant market and in the award of exclusive right contracts, an authority can require from the winning operator to offer to staff previously engaged the same rights as what would have been the case in application of Directive 77/187/EEC<sup>11</sup>.

Authorities may also (i.e. in combination with awarding public service contracts or not) specify general rules or ‘minimum criteria’ to be respected by all operators (‘rules of the game’) in a specific area and may include corresponding compensations (art. 10). Such compensations have to be available to all operators. However, these may not limit tariffs for all categories of passengers and the amount of compensation may not exceed 20% of the value of the services considered. Furthermore, the corresponding additional costs, revenues and compensations have to be identifiable in their accounts and show the absence of transfers to others activities (art.15).

Various procedural issues and final provisions are defined in further articles. One important provision requires operators to treat services subject to public service contracts as a separate accounting division. The core of the current regulation 1191/69, as amended by regulation 1893/91, continues to be valid for all compensations that are not the result of a competitive tender (art. 16 and appendix 1). A transition period of three years (six years in cases of in-

<sup>10</sup> Defined as: same pool of employees having the same contractual status, single operating account, information service, ticketing and timetable.

<sup>11</sup> This Directive pertains to the rights of employees in transfers of undertakings or businesses.

vestment in rail infrastructure) is given to the member state to make sure their regulations are in line with this regulation (art. 17).

## **Suggested amendments and commentary**

The proposal will now be discussed in Parliament. During this period, amendments and compromises will be made. A first step is the concept report delivered in May 2001 by the MEP designated as reporter by the regional policy, transport and tourism commission of the European Parliament (European Parliament, 2001). This amendment report (further referred to as 'AR'), containing 77 amendments, will be presented and discussed in this section. It will also benefit from comments by the Committee on Economic and Monetary Affairs and the Committee on Legal Affairs and the Internal Market of the European Parliament. The report of the first of these two committees has not yet been agreed upon, but a draft indicates by and large an agreement with the principle of the Commission's proposal even if a number of amendments are suggested, e.g. aiming at clarifying the possibility for negotiations within the competitive tendering procedure. The report of the second committee, which has been approved, suggests amendments that reinforce the competitive nature of the Commission's proposal by abolishing number of exceptions and protections against competition. This will all be discussed in the Parliament's commission before being submitted to the vote in commission and then in plenary.

While the list of amendments may change substantially in the process, we nevertheless think that it is useful to review them at this stage and in this paper as they give a clear view on the points of view and (mis)conceptions that determine the debate and the evolution of organisational forms in public transport in Europe. We will present in this section the discussion on the amendments, grouped in a few main topics to which they pertain. As much as possible we will explain the origins of the amendments and their link with corresponding national situations. To clarify presentation, we have indented and italicised the paragraphs that include our explanations and comments on the proposed amendments.

- **Limiting the general principle of competitive tendering**

The AR (amendments to art. 1, 3 and 9) wants to limit the general principle of competitive tendering by allowing a competent authority to decide to produce services by itself, through an own company or through public service contracts (in which case the regulation would apply); a motivated choice not to use competitive tendering would then have to be mentioned to the Commission but an amendment to art. 7 aims at suppressing the Commission's role in authorising each exception to the general rule of compulsory competitive tendering.

*The AR is clearly opposed to the compulsory usage of competitive tendering and follows strictly the principles written in the current French legislation according to which authorities can produce service themselves or decide to contract these out in which case specific tendering rules should apply. This principle of local democracy, and subsidiarity, is put forward to justify this choice. It is also put forward in an amendment to the considerations that the existence of the two types of companies (authority monopolies and commercial operators) would allow for a comparison and to some competition by emulation.*

As a problem of reciprocity appears by allowing authorities to abstain from competitive tendering, the AR defines a new category of 'territory-bound operator' under art. 3, i.e. an opera-

tor created to provide services in a specific territory and that is not allowed<sup>12</sup> to participate in competitive tendering for service contracts in other areas. Conversely, operators that are not territory-bound and that participate in competitive tendering are requested (amendment to art. 6) to provide accounting and statutory proof of the absence of cross-subsidisation originating in other transport activities or in other sectors to be allowed to participate in competitive tendering. The Commission, however, argues that reciprocity clauses are legally very doubtful in Community law.

*The fear is that subsidised authority-owned monopolies may use parts of their subsidy or their preferential financial situation to compete unfairly with private operators elsewhere leads here to the creation of 'territory-bound operators' that would clearly mostly be public operators or publicly-owned<sup>13</sup> operators. This compromises between the French desire to continue to allow direct production by transport authorities (or its own operator) and the international concern for distortion of competition that could appear if protected (subsidised) companies would be allowed to participate in competitive regimes elsewhere. Essentially, this reciprocity provision seems to be mainly aimed at large French state owned monopolies, such as SNCF and RATP, who have recently started to compete and operate outside of their traditional territory<sup>14</sup> even if they vehemently reject any form of competition on their traditional territories.*

The AR also aims at avoiding tendering by enlarging the concept of 'integrated service' (art. 3 and 7) from those provided by one operator to all services provided by several operators. In addition, the requirement for prior approval by the Commission based on performances indicators is suppressed.

*The enlargement of the definition of integrated services is an attempt to prevent the application of the proposal to integrated multi-operators in German agglomerations (Verkehrsverbände) while integrated single-operator in French agglomerations would benefit from an exemption according to art. 7. This is probably dictated by the fact that doubts had arisen as to whether exceptions for integrated urban networks could actually be applied in the German case where rights are granted on a route-by-route basis.*

The rather sibylline article 7, pertaining to the conditions under which competitive tendering is not compulsory, is subject to a large number of amendments aiming at increasing the number of cases for exemption and suppressing all approval procedures by the Commission. The AR adds exceptions for specific quality aims, innovative experiments, system complexity, age, intensity of use, etc. and when the incumbent operator would have an incontestable advantage. It increases the threshold values to Euro 1 million and 2 million and allows the splitting of contracts leading to avoidance of tendering explaining that the original provision would be difficult to enforce. It defines additional cases under which direct award becomes possible (unsuccessful tendering, extreme urgency and maintaining an operator of last resort up to a level of 10% of the relevant network).

*While the two first of these additional points are procedural questions that are common to tendering procedures, the last one raises a more important issue that is especially rele-*

<sup>12</sup> Including all operators in which these detain more than 20% of the shares.

<sup>13</sup> By 'public' or 'publicly-owned' operators we refer to the European meaning of the word referring to direct operations by (local) government administrations or owned by (local) government.

<sup>14</sup> This territoriality principle existed in French law but was recently removed precisely in order to allow RATP to operate outside of its historical territory.

*vant in those cases where route-by-route tendering is used (such as in London, Copenhagen or in Flanders) and where the tenderer who may wish to retain some operational expertise or may wish to have a weapon available if oligopolies were to develop.*

An amendment to art. 9 specifies that no parts of the regulation may be used to ‘dismantle’ integrated operators.

*Integrated operators are further protected by this rather political statement using the quality benefits of integration as excuse. Regimes as London or Copenhagen, that would here be qualified as ‘dismantled’ prove the contrary, but this was clearly not understood. This is illustrative of the scant vision one has, in France in particular, about the functioning of integrated network route-by-route tendering schemes that are widely used outside France. It is the concept of equality between citizens within an administrative territory that is, strangely, responsible for the wrong perception that such equality can intrinsically not be achieved by multiple sub-contractors. Behind this lays the French tradition – though often fiction in practice– according to which service planning powers are supposed to be given to the operator.*

The AR also wants to remove the preferential position of the European procurement directives.

*According mainly to a German interpretation, this would otherwise impose tendering of all local and regional public transport according to Directive 92/50/EEC, leaving – ironically– little purpose to the present proposal. The main reason for the Commission to add this provision is essentially to reduce uncertainty as to the applicability of the various texts.*

- **Public service contracts**

The AR adds nuances to existing clauses. The French public service concepts of ‘continuity, adaptability and equality’ and the German concern for safety are added to the list of selection or award criteria. Sentences are rewritten such as to make sure that authorities retain powers to dictate service characteristics to operators and a whole range of elements such as imposed fares, additional service integration, future conversions to rail-based services, high quality employment and collective labour agreements are added in list of elements to take into account when selecting operators and awarding contracts. In the case of the rights of employees, the AR goes even above what is usual in Community law (Directive 77/187/EEC) by requiring similar or better rights when personnel is transferred to a winning operator. Amendments to art. 6 aim at lengthening the maximum contract lengths to eight years. Strangely, a minimum length of four years is also introduced. Even more strangely, authorities are asked to include a clause allowing them to cancel a contract in case they decide to replace bus by rail services during the contract’s life. More usefully, an amendment is made to allow for enough flexibility by precisising that changes can be made during the contract without amounting to a new contract for as much as the contract length is not modified.

*These additions, seemingly aiming at more decision power for the authorities, rest on misunderstandings and most are, strictly speaking, superfluous as the original text does not limit competent authorities in the specification of service requirements that operators have to fulfil. In fact, the proposal is designed such as to confirm the general interest approach and ensure that authorities pay attention to at least a minimum number of (quality) dimensions in defining selection and award criteria. Many of the elements added here are political in nature and tend to impose specific intervention aims to (local) authorities*

*and do not fit in general legal texts at the European level. Rather than giving additional power to tendering authorities, they implicitly show a lack of trust in the future behaviour of tendering authorities by stressing a number of political aims that could (or should) be furthered.*

- **Direct award**

The AR aims at abolishing the clause (art. 7) limiting the exemption from competitive tendering when an operator suggest a new non-subsidised service where no services exists to only the first time such a new service is proposed. It argues that this is an unnecessary provision as no state aid is involved and as it unnecessarily limits local democracy.

*The proposal gives a right to an existing operator to benefit from its position for suggesting new services. The reason is that not allowing this may unduly prevent the appearance of such additional profitable services. The proposal limits this to the first time in order to remain coherent with the general competition principles of the proposal. Taking this into account, one has to come to the conclusion that the state aid argument produced here by the AR is not relevant as this is being taken care of in art. 8 (quality comparison procedure). The local democracy argument is however more relevant in view of the general approach taken by the AR.*

The AR suggests not limiting the direct award of non-subsidised contracts to route contracts (art. 8).

*This corresponds to a particular German wish to extend direct awards to more than single routes, even if the current principle of the German law is route-based.*

- **General subsidisation for ‘minimum criteria’ (‘rules of the game’)**

The AR suggests abolishing all limitations of the additional subsidisation for minimum criteria (i.e. general ‘rules of the game’).

*It is interesting to see that the nature of the proposal on this point is not at all understood by most observers, including the Reporter. While subsidisation according to art. 10 is possible in addition to a public service contract or in absence of such a contract (i.e. in free market regimes), the article is mostly wrongly perceived as one limiting the maximum level of total subsidisation of the sector; reason for which the amendments are proposed. One could perhaps doubt whether the limitation to partial subsidisation and to 20% of service value is adequate, but the main reason for this limitation is to avoid that general subsidisations, as it exists in Germany (e.g. to compensate for general through-tarification requirements inside Verkehrsverbände, etc.), makes any objective comparison as to which level of subsidisation is adequate impossible by having a never-applied normal full fare as point of reference for the ‘commerciality’ of passenger transport services.*

- **Other issues**

The AR maintains the 25% market share limit but adds a free choice for the authority to grant all services to only one operator (art. 9) and suggests to abolish the possibility to require from a winning operators to sub-contract up to 50% of the value of their services. Instead it suggests to limit this to sub-contracting to incumbent previously involved in public transport production.

*Interestingly, the AR argues that this would prevent favouritism, while the suggested solution seems even worse in this respect.*

The AR suggests abolishing appendix 1, ruling the calculation of compensations when no competitive tendering is used, and replace it by its core principles.

*Yet the main reason put forward –i.e. avoiding bureaucracy– would, combined with all exceptions provided by the suggested amendments, open the door to a situation in which the payment of compensation is even less regulated than at present.*

The AR suggests a new article limiting the validity of the proposal to a period of 10 years and an evaluation by the Parliament and Council after 8 years.

*Taking all exceptions and transitional periods suggested in the AR into account, one could wonder whether any implementation at all may take place under these circumstances.*

## **OBSERVATIONS**

The spread of contracting and competitive tendering is incontestably one of the main features of the reform of organisational forms in European public transport during the last decade. The ensuing internationalisation of the market, with the appearance of larger international operators, is another main feature. Using a concept for the economics of institutions (Williamson, 2000), one can say that the introduction of contracting and tendering in Europe took place through changes at three levels. Either through changes in contractual content (France, Sweden) with the same governance form and the same legal setting, or through changes in governance form by introducing new organisational forms within existing or amended legal settings (Germany), or by changing legal settings altogether (the Netherlands).

The general discussion on these changes both in national, European and wider forums tends to be too limited. On the one hand, the potentials that could be provided by market initiative based regimes tend to be forgotten as many authorities are tempted by getting or keeping direct decision power on such politically risky topic as public passenger transport. On the other hand, the discussion also tends to be too dogmatic as many see competitive tendering as a simple solution to all public transport problems both in terms of efficiency and effectiveness (attractivity), while other perceive it to be a useless instrument. While competitive tendering clearly has shown its potential and has a role to play in the future of public transport when based on authority initiative, it should not be forgotten that it is nothing more than an outsourcing method. Success requires that specific attention be paid to transport policy aims, to the details of tendering implementation and perhaps too to the universality with which tendering should be implemented.

In this section, we will discuss a few of these issues, as raised by the proposal and the amendments suggested.

- **A challenge to national regimes**

The attention paid to the discussion of this reform proposal varies considerably from country to country. Interestingly, some candidate member states to the European Union seem to be even more concerned with compliancy with future European rules than current member countries. The European proposal and the ensuing discussions, with all their vagueness and uncer-

tainties, pose a substantial challenge to Hungary, e.g., as to the direction to be chosen in reforming local public transport in Budapest and the rest of the country. While the former state-led public transport system is being reformed, the intention would be to devise a ‘Europe proof’ regime such as to avoid the need for further reforms in the near future as the country is intending to join the European Union. A similar behaviour could be witnessed several years ago in Norway and Sweden when both endeavoured to integrate hypothetical future European tendering rules in their national legislation even before becoming member of the European Union (eventually, the Norwegian people rejected membership in a referendum). The problem then and now, albeit to a lesser extent, is that little can be said about the outcome of the current European proposal. So one could say that the Commission’s proposal, while aiming at reducing legal uncertainty, is for the time being temporarily increasing legal uncertainty.

- **Is market initiative forgotten?**

The regulation (art. 1) clearly limits the scope of the regulation to exclusive rights and financial compensations. This means that market initiative regimes where entry is possible at all times and for which no other financial compensations are available than those resulting from general ‘rules of the game’ (art. 10), such as compensations for fare rebates for specific groups of passengers (elderly, handicapped, etc.), are not affected by the regulation. In other words, the proposal allows member states<sup>15</sup> to choose between market initiative and authority initiative regimes but imposes in each case rather strict market principles to follow. If market initiative is chosen, fair subsidisation remains possible through art. 10 and exclusive rights are possible through art. 8. Exclusive rights are recognised as an instrument that may improve attractivity (for reasons such as integration, stability, etc.) but as these limit competition in time, the proposal imposes in this case the usage of a simpler quality comparison procedure to compare proposals. Imposing formal competitive tendering would indeed make autonomous market initiative impossible either by limiting the scope of proposals to the content and timing of the reference terms in a call for tender, or it would be demotivating for entrants in that it would oblige authorities to publish the potential entrant’s innovative ideas in a call for tender open to all.

The possibility for market initiative offered by the proposal (both deregulated markets and light touch regulation) is often overlooked by observers. It is especially those observers for which such provision is unknown in their own national framework that tend to overlook it. One example can illustrate this. An article published in a French professional journal (*La Vie du Rail*, 2000) for the public transport industry concluded –proudly– that, by and large, French practice had served as an example for the proposal (usage of competitive tendering, recognition of the importance of the ‘public service’, integrated networks, etc.). Quite importantly, the article did not even seem to see the possibility given by the proposal to use completely different regimes based on market initiative, such as the British deregulation or possible variants on the German market initiative regime.

Other, as German observers who are used to the legal principle of market initiative, recognise the possibilities offered by the proposal. Some even rejoiced too early thinking that the compulsory competitive tendering threat could be avoided by using these market initiative provisions that seemed to be directly copied from the existing German legislation. Reality is different, however. The market initiative provisions of the proposal are there to allow a free regime choice for member states or competent authorities while guaranteeing simultaneously fair competition and the possibility for the usage of instruments that could improve public trans-

<sup>15</sup> Or any of its administrative sub-divisions that has been made responsible for public transport legislation according to the national legislation of that member state.

port quality ('rules of the game' and exclusive rights) when desired. This allows regimes that can be positioned in a range varying from the British deregulation at one extreme, to half-way the German 'market initiative' at the other extreme. A clear reason for Germany to be worried by the consequences of the proposal; this can also be measured by the current blossoming of congresses on the potential consequences of the proposal in Germany. Furthermore, Germany finds itself in an awkward situation as its own legal framework is currently subject to scrutiny by German courts as general practice seems to have become quite remote from the general legal principle of the German public transport law. While a literal interpretation of German laws is indeed quite compatible with the Commission's proposal, it would require major changes to current practices. The main danger for Germany therefore is a judgment by German courts, more than a threat from Brussels. From a pragmatic point of view, full compliance with the proposal and the spirit of German law is not possible within short, neither from a market initiative perspective, nor from an authority initiative perspective as most involved actors seem to have no advantage in embracing the proposal. Incumbent operators would lose their protected positions, authorities would have to develop bureaucracies and contracting machineries to replace parts of the current situation, municipalities would suffer financially from the demise of their (inefficient) operators, various fiscally attractive constructions would vanish for them too rendering public service contracts potentially more expensive and both the federal and state governments may have to review their legislation.

Market initiative is present in Britain, in Germany –albeit in a moribund state– and in a more vital state but mostly in interregional transport in many other countries as Sweden, Norway, Portugal, Ireland and Eastern Europe. This fact has to be recognised and requires adequate regulation to avoid jeopardising its potential.

- **Compulsory competitive contracting**

The reasoning of the European Commission is based on the developments on the European market (some member states opening their markets and internationalisation of supply) and the threat of a possible ruling by the European Court of Justice against the current subsidisation practices if the existing regulation 1191/69 is not amended. But this leaves many observers indifferent. This is reinforced by the fact that transport operators have not yet complained about the current situation.

While the compulsory usage of contracting for the granting of exclusive rights and/or subsidies is acceptable to most if not all stakeholders and while the existing or pending legal situation in several countries (such as Sweden, Finland, Denmark, the Netherlands, France, Italy, Ireland and Great-Britain) is broadly speaking in line with the proposal, there remains important barriers to the unconditional acceptance of the proposal. The least of all are differences in procedures, market shares thresholds, contractual terms, etc. Compromises can easily be reached on these topics without altering the fundamentals of the proposal. The main barrier to the acceptance of the proposal remains the compulsory usage of competition in the form of competitive tendering even if, compared to the initial project, the actual proposal already included a number of possible –but uncertain– escapes for some stakeholders, such as large integrated urban networks.

A fundamental problem for a number of countries, France on top, is the frontal attack on the legal right of local authorities to produce public transport themselves. Even Denmark, where current practice does not vary fundamentally from the European proposal and where most authorities use competitive tendering in public transport even if no law forces them to do so, is opposed to the idea that the European commission would impose competitive tendering here as this is perceived as a precedent that could lead to further contracting-out obligations for

other local public services. The Commission would put forward that this is to be limited to economic ‘industries’ that are subject to exclusivity rights. Yet, subsidiarity rule is nevertheless likely to be called upon to prevent the acceptance of the proposal on this point. More countries, as Italy or Belgium, would probably follow similar argumentations. However, the vested interests of public operators and political fears for strike threats may actually be as important in rejecting tendering as the more noble local democracy reasonings.

The reporter to the European Parliament is trying to find a way out by allowing a free choice between own production and contracting, which is presented by the amendments as a fundamental right of (local) administrations and as respect for local democracy. As a compromise, reciprocity rules are introduced. But it is questionable how viable this solution would be in practice. Furthermore, it would require an unlikely legal step back in France, where a recent legal change had made the reverse movement by opening up markets to companies that were previously limited to their traditional monopoly area.

- **What about railways?**

The proposal is also valid for all railways services. Many expect that railways will, one way or another, be able to benefit from some form of exception or, as a result of compromising, eventually be excluded from the proposal. Some observers of the railway business have pointed to the fact that this proposal seems to be at odds with the discussions on a further liberalization of the railway sector as discussed in the context of the revision of Directive 91/440. Some may try to escape, as Germany and Italy where railway markets have already – at least formally – been liberalised and where railways have to operate without operational subsidies. Others, as France, may expect to benefit from some exception. Others still, as Sweden or the Netherlands, will have to think further about the consequences of this proposal for the monopoly rights they have granted –with or without contract– to their national railway operator for their main railway network. While recognising the importance of these issues, we can not debate them within this paper for reasons of space.

- **Fair competition, conservatism and local democracy**

A long list of amendments to the proposal has been formulated. In a caricature, one could distinguish three types of wishes in the proposed amendments. French wishes, having a rather political content, and pertaining to social aims in public transport, protection of the labour force and respect of local democracy. German wishes, having a rather conservative content, and aiming at a status quo in the rather complex organisational forms developed in Germany. British and Dutch wishes, having a rather procedural or fairness content, and aiming at ensuring fairness in the transition from existing contracts to new contracts, at ensuring fairness in international competition (reciprocity) and at ensuring exemptions for truly exceptional situations.

Many amendments contain elements that are out of place in such legislation in that they go further than guaranteeing fairness by including political ‘guidance’, some are superfluous in that the questions addressed can easily be solved within usual tendering and contracting procedures by the competent authorities when needed. While a few amendments point at possible true problems (e.g. the complexity of some metro systems), on the whole, almost all proposed amendments aim at weakening the proposal. Acceptance of the current list of amendments would lead to a situation where little would be left of the original proposal: compulsory competitive tendering would not be introduced, the proposal would boil down to a simple competitive tendering procedure regulation for those who choose to use competitive tendering, publicly-owned monopolies would continue to exist and compensations would probably be

calculated according to less stringent rules than in the current regulation. The question, indeed, is whether such regulation would be more compatible with the rest of the European legislation than the current one. Clearly, the final word has not yet been spoken.

## CONCLUSIONS

This paper has reviewed some of the salient legal and organisational changes in Europe during the last decade. Competitive tendering has now gained a substantial position in the European public transport landscape but it would be wrong, though, to think that it has become dominant. Authority-owned companies, either in a legal setting of market initiative or one of authority initiative, continue to dominate the urban market in most of Europe.

The current reform proposals at the level of the European Commission would lead to a cataclysmic change in this landscape. But there are still many barriers to such a change as could be seen from the discussion on the elements that are currently being used in the suggested amendments to this proposal. By doing so, we hope to have adequately illustrated some of the main influences in terms of national traditions, legal settings and usages in terms of organisational forms and contractual forms.

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*The sources of information on legal and organisational forms in Europe are mainly legal texts and personal communications during interviews with observers and actors involved in the reforms in the various countries analysed.*