

**REGULATION AND COMPETITION
IN THE EUROPEAN LAND TRANSPORT INDUSTRY:
SOME RECENT EVOLUTIONS**

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Abstract

This paper provides an overview of some of the most salient recent evolutions in the fields of organisational forms and competition in the European public transport industry. It focuses mainly on local and regional public transport, and to a lesser extent on the railway sector. Competitive tendering is now a well-established practice in several European countries and it is still spreading to further areas. The paper illustrates recent trends and the diversity of approaches used.

The paper also presents the main features of a very important European Commission Proposal to revise a regulation pertaining to the allocation of exclusive rights and subsidies. It then discusses some of the resulting challenges under both 'market initiative' and 'authority initiative'.

INTRODUCTION

A wide variety of organisational forms can be observed across Europe. Some regimes are based upon the principle of market initiative, others on the principle of authority initiative. In both cases, one can observe a large variation in the amount of public sector co-ordination and planning. A common feature of most regimes, though, is the growing involvement of the private sector in service production, either through deregulation or through competitive tendering.

This has led to the development of major international operators. These originate almost exclusively from Britain and France for the time being. The early deregulation of the British bus market in 1986 led to the appearance of new major groups: Arriva, First, Go-Ahead and Stagecoach. Out of these, Arriva is probably the most active on the continent; Go-Ahead and Stagecoach both withdrew from Scandinavia. The long-standing contracting-out tradition in France combined with the new European trend led to the expansion of the existing French groups to the rest of the continent, not without major reshuffling and participation of the main state transport companies, though. Connex, Keolis and Transdev are now the three main names. The private Connex is certainly the most well known and most active all around the world, while the mixed or public Keolis and Transdev are lagging behind.

A wide variation in market access and subsidisation regimes can also be observed, reducing considerably the transparency for potential entrants. This, besides other reasons, led the European Commission to decide to revise its regulation 1191/69 (dating back to 1969 but amended in 1991 by regulation 1893/91) pertaining to the payment of compensations for Public Service Obligations to transport operators.

This paper will first provide an overview of some of the most salient recent evolutions in the fields of regulation and competition in the European public transport industry in a selected number of countries. The focus will mainly be on local and regional public transport, and to a lesser extent on the railway sector. The paper will then present the European Commission's proposal in its current version. Finally, the resulting challenges will be discussed and some conclusions presented.

RECENT EVOLUTIONS

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. In the meantime, several countries adopted or continued to develop a contractual approach, often giving competitive tendering a place in their new regime (Denmark, Sweden, Germany, the Netherlands, Italy, etc). A paper presented during last conference (van de Velde, 2001) aimed at providing an overview of those main directions of change in term of organisational framework during the following decade.

This section of the paper will briefly review a number of recent evolutions in the organisational frameworks of local and regional public transport in selected European countries since last conference, focusing primarily on the place take by contracting and competition within those frameworks.

Remark: This overview covers neither all European nor all EU countries. A selection was made of a number of cases where interesting evolutions could be observed.

Great Britain

After many years of decline, the bus market (measured in passenger journeys) has grown modestly every year since 2000, but this does not exceed 1%, furthermore most of this growth is due to London (ca. 10% in 2002/03), which was already growing continuously since 1993. Outside London, only Scotland witnessed a very modest growth of 1 or 2%, other regions continued to decline with the exception of a few cities.

The major change in London was the introduction of a road user charge in 2003, leading to a 16% reduction in traffic inside the charging zone after three month (TfL, 2003). TfL reports that 50-70% of this has transferred to public transport, which represents an increase of 3% in public transport activity crossing into and out of the zone and an increase of 1% in underground usage to stations in the zone. Patronage on buses entering the charging zone during the morning peak hour (08:00-09:00) was estimated to increase by 14%, while supply has gone up 19% in the number of buses in the charging zone. Most of the growth is, however, in the suburbs or associated with all-night services. While the London bus network virtually did not require subsidisation anymore since 1997/98 (except concessionary fare rebates, tough), this subsidisation level started to rise rapidly again under the policy of the new organisation

'Transport for London', led by the new Mayor for London. This policy with added supply, combined with growing operating expenses (due to increasing wages resulting from labour shortages) in recent years, and with a road user charging scheme that appears to be more expensive in operations than expected and generating less income than expected, may, according to observers, lead to a financial crisis (see the paper by Preston et al. in this conference).

In terms of competitive tendering, not much changed in London. With the move back to gross-cost contracts, quality incentives are now being redeveloped. In the deregulated markets outside of London, where competitive tendering is used only to complement the commercial network, a study published by the Department for Transport (2002), based on case studies of local bus tenders, revealed that on average the number of bids per contract continues to decline and contract prices tend to rise with, however, a large variation over the country. Furthermore, concentration continues, even though new companies also appear and though no cartels or market dominance seem to have appeared. Explanations seem to be located, according to the study, amongst others, in increasing staff shortages, more realistic amortisation practices than in the past, higher quality specifications by local authorities, the expectation of more commercial rates of returns by the large groups, and reduced patronage on some services.

No new legislation is planned after the Transport Act 2000 that created formal powers for local authorities to create Quality Partnerships, or (exclusive) Quality Contracts (i.e. a competitive tendering scheme replacing deregulation) when it can be shown that quality partnerships cannot work and proper notice has been given to incumbents. While the peak-time for quality partnerships seems to have been 2-3 years ago, little is happening at the time, contrary to expectations. The same is true for quality contracts where legal obstacles prove to be very strong. Existing quality partnerships continue to deliver, as the area-wide agreement in GMPTE (Manchester) reducing the number of days in the year where bus services can be changed by the operators. In this area, bus patronage is reported to have grown by 4% over the past two years.

Finally, the existing tension between the competition policy and the integrated transport policy of the Labour administration has been exacerbated by the new Enterprise Act (2002), regulating anti-competitive behaviour. This act now imposes severe penalties on such behaviour, further discouraging commercial operators to co-ordinate services (in particular timetables).

See the paper by Nash (2003) in this conference for a discussion on the developments in the railway sector.

Eire

Bus franchising (competitive tendering with 'adequate' commercial freedom) is due to become the primary means of organising bus services in the Greater Dublin Area. New services will be subject to this new approach first, to be followed by a phased tendering of the rest of the services starting in 2004. An independent body will be established to organise Greater Dublin public transport (service definition, fares and quality) and its tendering. Long-distance buses entering Dublin will also be submitted to this regime. Suburban railways will continue to be operated by the national railways but under a negotiated public service contract, while LRT and metro services will be procured on a PPP-basis by the Railway Procurement Agency.

The reform of public transport regulation outside the Greater Dublin Area has not yet been determined. A consulting report (SDG, 2002) suggested a diversified approach. The existing express network would be transferred to a management company (itself possibly subject to management tendering) charged with the gradual competitive tendering of the existing services, and regulated by a national regulator. Additional commercial services provided by private operators would fall under an authorisation regime, improving the currently outdated legal framework equally based upon market initiative. Urban bus services in the province would be contracted out competitively by one of two regional regulators, using net-cost contracts with additional incentives. Local regional services would fall under a two-tier deregulated regime (i.e. commercial services plus non-commercial tendered services), bearing some resemblance to the British regime but much improved by integrative measures.

This proposal was received with criticism by the Public Transport Partnership Forum (PTPF, 2003), an official consultative body on public transport matters. The final reform proposal has not yet been determined but the suggestions made in the report mentioned here indicate that market initiative for commercial services is likely to retain a place in the new regime, while integrated planning will gain in importance as well, there were most appropriate.

The minister for transport declared in November 2002 that he had the intention to re-establish the three companies (Dublin buses, national buses and national railways) falling under the CIE-holding as independent commercial State companies with strong commercially focussed boards. Privatisation is not envisaged. Additionally, further infrastructure investments are planned for the Dublin area.

Denmark

Almost all bus services have now been tendered in Denmark (with the exception of the municipality of Århus. Contract forms are in slow evolution. Based upon repeated requests by operators to transfer more powers to them, Copenhagen is now experimenting with a patronage incentive contract added on top of an existing tendering contract for an urban express bus route. The new Metro-services also fall under a passenger incentive contract. The discussion on the advantages and disadvantages of net-cost contracts continues in the provinces, but is also influenced by the mitigated success in Sweden. The addition of specific incentives, as is developing in the Copenhagen area, is more likely to be followed in the rest of the country, as an incentive linked to passenger growth in Silkeborg.

On the supply side, it can now be observed that most large companies are foreign-owned with Arriva and Connex having together about two-thirds of the market. The rest being in the hands of many small Danish firms. There was a fear for this growing concentration, which was exacerbated by the upward trend in contract prices after the major cost reduction reached in the 1990's with the introduction of competitive tendering. But prices are reported to be still about 10% under the old level, while bus quality has been increased markedly. To control this trend, Copenhagen decided to use tendering with negotiation after pre-selection for the first time in its June 2003 tendering round, and further tendering will follow this same path. New contracts will also be longer (6+2 instead of 4 years). Prices have now been stabilised or reduced slightly.

Sweden

Competitive tendering has continued to spread in Sweden and almost all routes have been tendered at least once by now. The content of contracts evolves only slowly. The large majority of contracts is still gross-cost. Net-cost contracts seemed to be developing further a few years ago, but by 2000 only 3% of contracts were net-costs, though that share has been reported to have grown slightly later on (SLTF, 2002, p. 20). Yet, in the meantime, existing net-cost experiences seem to have come into difficulties for various reasons, amongst which the division of service planning responsibilities between operator and transport authorities seems to play a major role. The Helsingborg contract (lasting until June 2004) is likely to return to gross-cost and the future of other experiences, such as 1999 Sundsvall-contract, should be followed in more details. Other contracts based on gross-costs but with added passenger incentives (as in Jönköping) or with at least some freedom of design may well develop where, as in Stockholm, the tendering authority declares that quality and customer focus is the next goal after cost reduction.

Profitability problems have been mentioned in the sector for several years. Gross-cost contracts, the alleged resulting strong focus on cost competition and inadequate indexation clauses in the past are blamed. In recent tendering rounds, though the picture is not yet clear, contractual price increases have been reported. See Alexandersson and Pydokke (2003) in this conference for more details and an overview of the last 15 years of competitive tendering in Sweden.

On the supply side, a further internationalisation could be witnessed, even if the British players Stagecoach and Go-Ahead left the market (for Go-Ahead this was linked to problems with two tendered railways contracts), leaving only Arriva in Sweden as British player. The Swedbus company formerly owned by Stagecoach being taken over by Concordia, a Norwegian company. Perhaps even more than in other countries, the presence of French groups is very visible. Keolis (ex-VIA-GTI/Cariane, and part of the French state railway SNCF group) took over the shares of Go-Ahead and bought 70% of Busslink, the public bus operator in Stockholm. Connex is very present with many contracts, including the Stockholm metro. This Swedish branch of Connex is furthermore their head-office for the northern and eastern parts of Europe.

Norway

In Oslo, the public company has been split into three modal (metro, tram and bus) divisions since July 2003 (the bus division already existed since 1997). There are all owned by the same municipal company, which continues to function as a central planner and principal to the service contracts. The planned privatisation of the bus division could not be achieved until now as there is no clarity as to the future contracting or tendering regime. Meanwhile Connex grows by take-over and won contracts in Stavanger (Rogaland), in Akershus and Vestfold.

The development of quality contracts has slowed down. One reason for this is that it is not clear to people whether this approach will remain acceptable after the expected enactment of the proposed EU-regulation (due to replace the 1191/69 regulation and which is, interestingly, directly applicable in Norway). Quality contracts are being used in Norrland, Hordaland and Kristiansand. Net contracts are in the minority. There seems to be a development towards tendering on gross cost basis, but there is on the whole still very little of it around. The share of tendered operations has grown from 10 to 15% of the whole bus market during the last 1½

year. A new 'output-based' tendering competitive tendering regime is due to be implemented in Telemark too, but a lack of budget is slowing down the reform. See Berge et al. (2003), Hagen (2003) and Odeck et al. (2003) in this conference for some issues relating to quality contracts, subsidisation regimes and staff costs in competitive tendering.

By 2004 a new trial scheme for urban public transport will start. Several larger cities have been invited to participate in this new type of organisation where all finances, investments, costs will be bundled into one budget, avoiding separated budgets for investments and operations. While these organisations will also carry the responsibility for contracting and tendering, this is not the main aim of the reform.

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. Autonomous entry by private operators, while still legally possible, hardly ever took place in practice. A seemingly interminable reform discussion took place in the period from 1992 to 2000, and two experiences with competitive tendering (with mixed results) took place in 1994 (see van de Velde, 1995).

This resulted in the enactment of a new Passenger Transport Law by January 2001. The reform aim was twofold: more attractive public transport services (especially in areas worst hit by congestion) and an improvement in cost recovery ratios. Powers were decentralised to provincial and regional authorities, competitive tendering for concessions was introduced gradually (35% of services have in principle to be competitively tendering by 2003, a target that will not be reached) and authority-owned local transport companies are to be put at arm's length or privatised. 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.

The particularity of the new Dutch regime is that it aims at tendering competitively whole networks whereby it is to the operator to design the services to be produced and the fares to be charged within the aims and limits stated by the concessioning authority. The first cases can now be observed but most authorities seem to be reluctant to actually give a lot of freedom to the operators. Only a few cases seem to follow the original idea of the reform. While it is still too early to be able to draw clear conclusions, one can observe that operators are offering between 10 and 60% more bus-hours for the same amount of subsidy as before. See Hermans and Stoelinga (2003) in this conference for more details on the reform and first conclusions, and Van de Velde and Pruijmboom (2003) in this conference for further details on the first cases of service design tendering.

Germany

Germany continues to live in a rather hybrid situation. While German public transport is legally based on the principle of free entrepreneurship and market initiative, financial support to companies is organised in such a way that freedom of initiative and entry hardly exists and incumbents (that are mostly publicly owned) have, de facto, a preferential position. While commercial (i.e. profitable) services can be granted without tendering to requesting operators, non-commercial (i.e. non-profitable) services have to be tendered since 1996. Despite this, all

forms of subsidies (in particular cross-subsidisation from other public utilities, capital grants and investment subsidies) continue to be used to maintain a fiction of profitability and avoid the competitive tendering obligation. As will be seen further, this legal distinction between commercial and non-commercial services is at the centre of much debate.

The result is that there is still very little competitive tendering to be observed in the bus sector. One notable exception is the transport authority of Frankfurt (Main), planning to move to 100% competitive tendering within 8 years. There is, besides this, a slight tendency to have more contracting and quality agreements than before, but the traditional ways of covering public transport deficits *ex post* seems to stand in the way of a further spread of such *ex ante* contractual practices. Regional rail was the sector where most competitive tendering could be observed in Germany a few years ago. Tendering in this sector continues at the same slow pace. Yet, besides this, most regional railway contracts have now been awarded directly to DB for periods of 10 to 15 years without tendering, despite a court decision in 2002 declaring that competitive tendering was applicable. Tendering rules were subsequently modified to state that only a 'substantial' part of the transport services had to be tendered competitively. The regional DB-contracts now include provisions to gradually submit 10 to 30% of those networks to competitive tendering. Still, MehrBahnen, a union of new entrants, blames politicians for supporting this conservative stance and some observers are concerned by the contractual terms continuing to reward DB on an average price basis, even after the planned contracting out of the most unprofitable routes. Further court ruling on this issue is expected by September 2003.

The future may see important changes taking place, though, as another court case has finally led to a ruling by the European Court of Justice on 24 July 2003. This case is extremely complex and impossible to present in details here. The case is related to a dispute between a privatised, former communist, company (Altmark Trans, further AT) in the Eastern part of Germany and a newer public company (Nahverkehrsgesellschaft Altmark, further NVGA) pertaining to the attribution of a few route authorisations. Routes had been granted to AT in 1990 until 1994, these were then extended until 1996. NVGA wanted to be granted the authorisations after 1994, but was rejected by the Traffic Commissioner as AT was seen to fulfil all requirements, require the lowest level of subsidy and as the law foresees the protection of the grandfather's rights of AT. AT's authorisations were then extended until 2002. NVGA then complained to the traffic commissioner that AT did not fulfil the legal requirements to be granted a commercial authorisation as AT required subsidies, furthermore NVGA thought to be able to produce more economically. After a rejection by the Traffic Commissioner, NVGA complained to the Administrative Court, which rejected the case. However, AT's authorisation were cancelled in appeal, as the court considered the services were indeed not commercial, due to the existence of subsidies. Furthermore, the Court found that since 1996 the European regulation 1191/69 applied to public transport in Germany, and that subsidies should accordingly have been granted by public service contract or obligation and the procedure for granting non-commercial authorisations. Yet, the local authority had established no contract, nor obligation. This also meant that NVGA could not either be granted the authorisations on a commercial basis, as they too required subsidy. AT then complained at the Federal Administrative Court (FAC), which found that some subsidies are compatible with national law, also for so-called commercial services. Yet, the FAC decided to ask pre-judicial questions to the European Court of Justice (ECJ) to clarify a few matters relating to the applicability of several European principles (state aid and public service obligations) to this case, as it was thought that European law would perhaps confirm the appeal.

In a nutshell, the ECJ ruled on 24 July 2003 that the existing EU-regulation 1191/69 (as modified by regulation 1893/91) pertaining to public service obligations and contracts does apply but allows member states to exclude local public transport from its application. Germany made use of this right of exclusion until 1995 and could have chosen for a partial applicability of 1191/69 to non-commercial services only from 1996 onwards. However, the ECJ comes to the conclusion that the current German legislation may well not give enough legal certainty on that matter as operators, also in the opinion of the FAC itself, are free to choose either procedures (commercial or non-commercial). The ECJ refers this matter to be decided by the FAC, ruling that partial exclusion can only be allowed when legal certainty exists. The ECJ adds that in those cases where exclusions would be allowed, the German jurisdictions would still have to ensure that a number of other principles resulting from further European rules pertaining to state aid are respected such that the granting of specific public transport subsidies would not constitute state aids and not require notification. The ECJ states four conditions that have to be fulfilled simultaneously: (i) public service obligations (PSO's) imposed upon the operator have to exist and be clearly defined, (ii) the parameters to calculate the corresponding subsidy have to be determined objectively and transparently beforehand, (iii) there shall be no over-compensation, and (iv) when competitive tendering has not been used to select the operator, the subsidisation level shall be determined by the typical cost of well-managed and equipped companies faced with similar obligations.

The consequences of this ruling are far from being clear yet and it was interesting to see that, after the court ruling, all stakeholders saw in the judgement exactly what they wanted to see; a situation leading to contradictory comments. Some observers expect that, in a first time, politicians will keep quiet, believing that a status quo can be maintained. Whether the case will be continued by the FAC remains to be seen, but further court cases are likely to emerge, very much to the surprise of many proponents of the status quo.

A first analysis could lead to the following considerations (though final conclusions have to be left to lawyers and courts). If the FAC reconfirms the freedom of choice for operators to ask for authorisations both under commercial basis or under non-commercial basis, this will lead to the general applicability of the 1191/69 regulation on all services. According to this, subsidies can only be granted when the imposed PSO's lead to specific costs. All subsidies then have to be granted by a public service contract or obligation. German legislation foresees in such a case a preference for contracts, leaving obligations to exceptional situations. Furthermore, such contracts, according to German legislation, have to be tendered competitively. If the FAC rules otherwise, then the four conditions stated by the ECJ apply, which boils down to a similar regime in the German case as a pre-determination of both PSO and subsidy for specific services requires the existence of a contract, and the proof of non-over-compensation has, in German law, to be reached by preference through tendering. Average cost comparisons, as an alternative, would be notoriously difficult in this sector, unless adequate benchmarking could effectively be developed.

In view of these eventualities, one might expect a higher acceptance of the EC's proposal to replace regulation 1191/69. Yet, the German States (Länder) are still not unanimous about a more widespread use of contracting and tendering. It is nevertheless my opinion that the EC's proposal provides in fact a better fit with the existing German legislation, its economic principles and the aims of the EU-treaty in terms of open and fair competition by allowing explicitly both general non-contractual subsidisation and specific contractual subsidisation (see further in this paper). This feature of the German (and British) regimes is currently not foreseen in regulation 1191/69.

Other factors still may precipitate a movement towards contracting and tendering. First, the ECJ ruling made clear that the state aid principles of the EC Treaty are applicable to public transport and that problems may appear, including the repayment of state-aids. Then, the inter-utility cross-subsidisation arrangements, being payments ex post seem difficult to combine with all pending requirements and are increasingly difficult to maintain in view of the liberalisation in the other sectors. Finally, prejudiced entrants may launch a frontal attack on this system, but whether this will even happen is uncertain as many still have weak positions or stand to lose in terms of reputation. On the other hand, expansionist municipal companies may also themselves force the opening of Pandora's box, even if this may backfire.

Despite all arguments presented above, it should be noted that the majority of the public transport sector in Germany still seems convinced that nothing will happen and that the status quo will be maintained. Future will tell which version is correct.

Note that in the meantime, the existing authorisations of AT have expired in 2002, who applied for and was awarded new authorisations under the commercial framework, but this time refusing any subsidy and bearing the deficits on the fortune of its owner, apparently to get rid of all the hassle!

On the supply side, the German market is still very fragmented, though a few German players such as Sippel, are growing. Few international players have entered the German market until now due to all uncertainties. The main foreign participant for the moment is Connex with a large variety of operations (local public transport, regional routes, regional railways, freight railways and even a few commercial long-distance services operated on open-access to the German rail network). The other is Rhenus-Keolis, a cooperation between the private German Rethmann Group (51%) and the French Keolis (49%) which is part of the SNCF group. British groups, such as Arriva are trying to enter the market, but without success until now.

The main way to enter the German market is through the slight privatisation trend of municipal public transport companies. Connex only won its first bus tender recently, the rest of its activities is mainly the result of privatisation or take-over. The reasons for the privatisations lay not so much in pro-competition positions, but much more in urgent financial reasons, such as the dear financial situation of many municipalities (especially in Eastern Germany), the pending loss of the possibility of cross-subsidising between public utilities due to further competition in the electricity sector (etc.) and further tax reforms. It is expected that the buyers will be both international players, a few more enterprising German municipal public transport companies, small to medium sized German private operators and, foremost, the German state railways (DB), the privatisation of which is envisaged for as early as 2005!

Belgium

Not much has changed in Belgium since the last Thredbo conference. The three regional public companies detaining the monopoly of public transport are regulated by management contract defining quality and minimum service levels. In Flanders, this is complemented by voluntary agreements with municipalities who want to order additional services against payment and against additional infrastructural measures to ease traffic congestion.

The two regional operators outside Brussels continue to sub-contract 30 to 40% of their operations to 'tenants'. The Walloon company, operating in the southern part of the country, continues the historical regime of negotiated contracts without competition. The Flemish

company, operating in the northern part of the country, has on the contrary cancelled the existing contracts and tendered them out competitively in 79 batches by 1 January 2003. The small size of the batches, together with a qualification procedure, were conscious attempts to keep the large international operators at a distance, to the advantage of the traditional local and familial transport operators. Even so, large international groups as Connex have been growing by buying existing familial operators. The award criteria included quality aspects besides the price and two negotiation rounds were organised. Unfortunately, no information concerning the effects of this tendering has been disclosed until now other than that prices have been going both directions, partly due to changes in service levels. There is no intention to increase the share of tendering any further. The rest of the operations remains in-house, to be benchmarked by the regional operator itself.

While Flanders and Brussels seemed to be moving towards the Scandinavian model of gross-cost route tendering at the time of last conference, it now seems that only Flanders has made some moves in that direction. Besides this it should be mentioned that free public transport has been developing rapidly in Belgium. After the experience of free public transport in the Flemish city of Hasselt, this has spread to elderly people all over the country.

France

Major changes could be observed on the supply side in France during the last four years, with quite a substantial concentration and a stronger influence of the state sector at the expense of the purely private sector. At the end of 1999 already, the French state railways (SNCF) entered in the urban public transport market by taking over, through their subsidiary SNCF-Participations, a share in the formerly private transport group VIA-GTI and merging it with its own bus subsidiary (Cariane). The resulting group, called Keolis, is owned for 43,5% by SNCF-Participations, 48,7% by a subsidiary of the Paribas banking group (former owner of VIA-GTI, but who is expected to sell this participation one day or the other) and 7,8% by competitor Vivendi, now Veolia. The new CEO comes from SNCF. Connex, the largest private group, part of the Veolia group (formerly Vivendi), now for a majority active outside of France, took the French Verney group over in 2002, one of the last large private family-owned (Verney-Michelin) transport group. In 2001, the Italian San Paolo IMI banking group, through its subsidiary FINOPI, took 7% of the capital of Transdev, an other main player in France, owned by the government-owned banking group 'Caisse des Dépôts et Consignations'. In 2002, an alliance with the Paris public transport company (RATP), another main government-owned company, was signed, RATP entering for 25% into Transdev's capital. This being the result of RATP being allowed under a new legislation to operate or win contracts also outside of its traditional Paris area.

No major changes took place on the tendering/contracting side. France remains in favour of the tendering of whole urban network, from smaller towns up to the large networks of Lyon (due for renewal in 2004) or Lille. Paris and Marseille continue to be run by authority-owned companies. There have been discussions on organising tendering by smaller batches (sub-networks) to favour competition, but no authorities have yet accomplished the step.

A long-standing French legal dispute delineating the borderline between two different kinds of competitive tendering procedures has been (partially) resolved by a new piece of legislation, confirming existing jurisprudence. Yet, further uncertainties relating to the extent to which negotiations may be used as last step in tendering procedures seem to remain and further court cases cannot be excluded.

In the Paris region, the formal transport authority powers on public transport were somewhat changed, allowing the Regional authority to enter into the board controlling public transport in the Paris region (STIF). A contract exists since 2000 between STIF and RATP, replacing the former deficit-balancing subsidy by a gross-cost contract, and still only minute financial incentives on the revenue side. The contract is due for renewal in 2004.

The railway sector is not yet covered by tendering obligations but the contracting experiments started several years ago with monopolist SNCF are judged positively. Competitive tendering is to be expected, eventually, here too, now that not only other French transport groups but also SNCF has become active in tendered operations in several other countries.

Italy

Changes in legislation took place essentially in 1997 in order to decentralise public transport to the regions, introduce contracting and the possibility to use competitive tendering and put public companies at arm's length. A transition period of 5 years was adopted. The Italian regions have then started to develop their own framework, but further national legislation is going to impose the usage of competitive tendering. The changes introduced in Rome already before 2000, meaning a move towards the London/Copenhagen regime and introducing a first round of tendering, were apparently not followed by further action in later years.

Transdevit (Italian subsidisary of the French Transdev) already won several contracts in the country and Arriva has started to buy a major regional operator, but the expectation is that the market will only be truly open within a few years, though all reforms should be in place by the end of 2003. See Marcucci (2003) in this conference for more information.

Portugal

Little seems to have changed in Portugal. New legislation still lacks measures of implementation such that a status quo can be observed. A new law defining transport authorities in the metropolitan areas and new financing principles has been adopted but is not yet implemented.

Eastern Europe

Public transport in Eastern European countries is faced with many challenges, the change of organisational forms from communist to more market-driven ones being only of those. Public transport still has a rather high market share and, in a number of cases, much of the population remains very dependent upon public means of transport, but a lack of financial means at all levels and an outdated infrastructure and rolling stock equipment pose formidable problems to these countries. See the paper by Gleijm (2003) in this conference for a further analysis of this situation and the way forward.

Recent evolutions: a simplified categorisation

The examples presented above illustrate the diversity of approaches adopted throughout Europe. Figure 1 presents a simplified categorisation of the various evolutions observed over the last two decades. Four main groups can be distinguished:

1. *From public management under authority initiative towards an involvement of the private sector:* either ‘delegated management’ of the public network, private ‘concessioning’ with private investment in infrastructure and/or rolling stock, or ‘sub-contracting’ of centrally-planned services (as a number of cases in France and cases in Eastern Europe).
2. *From public companies operating under market initiative towards a further involvement of the private sector:* either a return to a private ownership under a same market initiative ‘authorisation’ scheme (as in some German cases), or a ‘deregulation’ by moving towards open entry (as in Britain outside London). A movement towards sub-contracting in this case maintains the position of the public company, but will in the extreme reach a situation identical to sub-contracting under authority initiative (as in London), except for some legal consequences.
3. *From public companies operating under market initiative towards authority initiative with private involvement:* a move similar to nr. 1, but with a different starting point and leading to the abolition of (most) market initiative possibilities (as in Denmark, Sweden or the Netherlands; see also London in point 2).
4. *Reform of the existing regimes:* Any reform of existing regimes, such as new contracting forms, new selection mechanisms, new incentives, better regulation, etc. (as the replacement of negotiation by tendering in Belgium/Flanders; the introduction of management contracts with the public companies in Belgium; the evolution of contractual forms in France or in London, adding several incentives).

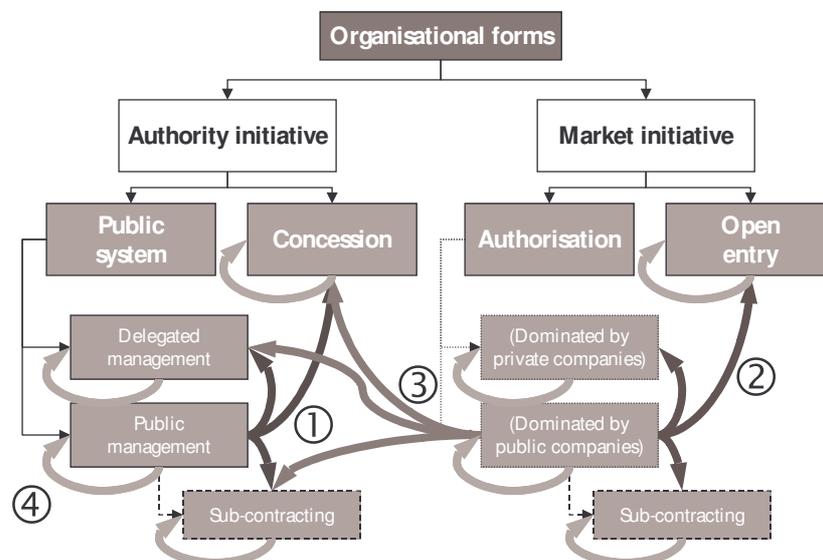


Figure 1 Evolution of organisational forms

THE PENDING REFORM OF THE 1191/69 REGULATION

In July 2000, the European Commission produced (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, meant to replace the current regulation 1191/69 dating back to 1969 but amended in 1991

(regulation 1893/91), is certainly one of the most controversial issues of the past years in public transport at the European level. It may become a major determinant for all organisational forms in European public transport in future years, as could already be seen in the presentation of the German case. Yet, after more than five years of preparation, the text has not yet been ratified by the European Council of Ministers.

This section of the paper will present (i) the arguments put forward by the European Commission for the need to develop a new regulation, (ii) a short history of the proposal and (iii) the main elements of the intended regime. Comments on the resulting challenges will be discussed in the next section of the paper.

The reasons for a new regulation

The current regulation 1191/69 allows competent authorities to impose public service obligations on operators, when these are deemed necessary to ensure the provision of adequate transport services, and to reimburse operators for the cost of this. To this effect, the regulation 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. Detailed rules for calculating the financial burden resulting from the imposition of such obligations are included and the regulation 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, neither does it address the question of the opening of the market for the provision of public transport services. Other European texts regulate the award of certain public service contracts, such as the 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.

When regulation 1191/69 was adopted, and amended, public transport markets were mostly not opened to (international) 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. To justify action, the Commission argues that the economic situation of public transport changed considerably during the past decade: most member states have now 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 resulting in the appearance of international operators. From this fact, the Commission concludes that clear rules are now needed at Community level to promote legal certainty and harmonise key procedural aspects in member states such as to avoid having to resolve legal questions case by case (by the Commission or the courts), while removing obstacles which the present regulation places in the way of modern approaches to public transport (European Commission, 2000).

Some of the Commission’s argumentation relates to the Treaty. Firstly, the Treaty requires member states to ensure freedom of establishment, but allows also restricting this principle when necessary for the operation of ‘services of general interest’ and when ‘proportionate’. The Commission considers here that no text currently provides sufficient guidance to assess, with a degree of legal certainty, when an exclusive right is proportionate.

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, in the eyes of the Commission, appropriate at the time, the gradual emergence of a single market for the provision of public transport means 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. In that respect, the Commission refers to the Isotope study (ISO-TOPE Research Consortium, 1997) according to which competitive tendering has the advantage to lead to substantial improvements in cost-effectiveness while attractiveness improvements (ridership increases) can simultaneously be reached. The study also concludes that larger cost-effectiveness improvements can be reached by full deregulation but experience (in Britain) was not matched by simultaneous increases in ridership. Closed markets regimes, while reaching improvements in attractiveness too –though smaller– were at a substantial disadvantage in terms of cost-effectiveness. Additionally, the European Council of Lisbon of March 2000 asked to speed up liberalisation in areas such as transport, which was additional support for the general principle of the development of competition for the provision of public transport services.

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 every single operator, and clarifying how authorities can protect existing employees in situations where public service contracts change hands (European Commission, 2000).

History of the proposal

The first version of the proposal was published by the European Commission in July 2000 and titled "*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 version of the proposal followed rather closely the suggestions made by the expert study (NEA et al., 1998) that the European Commission had commissioned to prepare the reform. The new regulation will be adopted according to the so-called 'co-decision' procedure involving both the European Parliament and the Council.

The Parliament first produced a concept report in May 2001 (European Parliament, 2001) requesting a rather long list of 77 amendments. It was striking to see that many amendments contained elements that were out of place in such legislation, going further than guaranteeing fairness by including political 'guidance'. Some were superfluous, addressing questions that could easily be solved within usual tendering and contracting procedures. Some illustrated the (mis)conceptions that determine the debate and the evolution of organisational forms in public transport in Europe; some amendments even showing a blatant factual misunderstanding of the instruments suggested by the proposal. Only few amendments pointed at possible true problems, but most aimed at weakening the proposal; illustrating the controversial character of the issue and, perhaps, the lobby power of the establishment.

It was also interesting to see how much these amendments related to existing national legislations, trying to reach a legal status quo at the national level or trying to protect incumbent public operators from competitive threats. In a caricature, one could distinguish three types of wishes in the amendments suggested. 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 (see van de Velde (2001) for a detailed discussion of these suggested amendments).

The discussion in Parliament took place on 14 November 2001 upon which the Commission reacted by sending an amended proposal (European Commission, 2002) to the Council of Ministers on 21 February 2002. We now have to wait for action by the Council. During the last one and a half year, the successive Spanish, Danish and Greek presidencies of the Council (all opposed to the proposal for various reasons) did not put the topic on the agenda of the Council such that the proposal rested. The expectation is that the current Italian presidency will, as Italy is perceived to be a strong supporter of the current proposal after implementing a national law introducing competitive tendering in public transport. The following Irish and Dutch presidencies are also expected to be favourable to the proposal.

If the Council does not reject the proposal, it can then either approve it or formulate a modified ‘common position’. This text will then have to be sent to the Parliament for a second reading. The Parliament can then reject the amended text, adopt it or formulate further amendments. In the latter case, the Commission will have to issue a position statement on the amendments and the text will be sent to the Council for a second reading. The Council may then adopt the text by majority of votes, unless the Commission issued a negative statement on the amendments in which case unanimity is required. If the Council rejects the text, then a ‘conciliation’ procedure between Parliament and Council will be started. If the conciliation committee manages to formulate a common proposal, then both Parliament and Council will have to accept or reject the new text in a third reading. In the absence of a common proposal or rejection by Council or Parliament, the text would then be rejected, leaving the Commission to start the whole procedure all over again.

The next months *may* thus bring news into this topic.

The proposal

In the following, we will briefly present the main features of the proposal. We will start by presenting the main aims, applicability and define a few core concepts. We will then present the main elements pertaining to the ‘public services contracts’ and the ‘general rules’. We will finish with the presentation of a few general conditions on accounting, financial compensations and transitional measures.

- **Aims, applicability and definitions**

The purpose of the regulation is *“to improve the efficiency and attractiveness of public passenger transport in the Community as part of an integrated transport policy committed to sustainable mobility, with due consideration for town planning, regional development and the*

environment, and to promote legal certainty for competent authorities' interventions in public passenger transport” (art. 1). The regulation expects that the competent authorities shall “secure adequate consumer-oriented public passenger transport services that are of high quality and reasonably priced, providing integration, continuity, safety and full social coverage” (art. 4).

To realise these aims, the regulation gives the competent authorities in principle two instruments (art. 4): concluding ‘public service contracts’ and/or laying down ‘general rules’ for public passenger transport operation. Both will be presented in the subsequent subsections.

The regulation is applicable upon “*national and international operation of public passenger transport by rail, road and inland waterway. It lays down the conditions under which competent authorities may compensate transport operators for the cost of fulfilling public service requirements and under which they may grant exclusive rights for the operation of public passenger transport*” (art. 1).

The regulation is applicable on the award of ‘public service contracts’ (“*any legally enforceable agreement between a competent authority and an operator for the fulfilment of public service requirements*”, art. 3), including all public service concessions (“*a public service contract that grants an operator the right to exploit a particular service, together with the associated economic risk*”, art. 3). However, the (stricter) awarding procedures of the public procurement Directives will prevail when those Directives make the tendering of a public service contract mandatory (art. 2).

- **Public service contracts**

The core article of the regulation (art. 5) determines that ‘public service contracts’ have to be concluded in two cases: “*for the award of all exclusive rights*” and “*for the payment of all financial compensation for the cost of complying with public service requirements, including compensation taking the form of the use of assets where such use will be charged below market rates*”. The payment of financial compensations paid for compliance with ‘general rules’ (see further) for public passenger transport operation, however, does not fall under the contracting obligation (art. 5).

- a) Competitive tendering of public service contracts**

Contracts have to be tendered competitively according to fair, open and non-discriminating procedures (art. 6 and 12). In the case of contracts with an estimated annual value of more than EUR 3.000.000, competent authorities may negotiate with potential operators on the tenders they have submitted, but extensive transparency conditions apply in all cases (art. 13). A new awarding procedure has to be organised for contract modification that result in higher financial compensations or new exclusive rights when these modifications pertain to more than 20% of the worth of the contract.

A number of issues have at least to be taken into account within the selection and award criteria (art. 4a): quality of the service, level and transparency of tariffs, integration of services (also with neighbouring areas), accessibility, environment, vehicles and infrastructure, safety and health, staff qualifications, employment and social conditions, complaint procedures and costs of providing the services.

Contracts shall be limited in time (max. 8 years for bus services and 15 years for rail or water based services, with possibilities for extensions when important investments have to be real-

ised) and shall not cover a larger geographical area than needed (art. 6a). Operators are obliged to provide the information necessary to monitor and evaluate their performance to the competent authorities (art. 6a).

b) Exceptions on the obligation of competitive tendering

Public service contracts can be awarded without competitive tendering in three cases:

(1) Direct award of public service contracts

Competent authorities may decide, on a case-by-case basis to directly award public service contracts for heavy rail services if national or international rail safety standards could not be met in any other way. For metro and tram services, they can award the contract to themselves or to an operator they control if this is more efficient, and for metro services also when the size or technical uniqueness of the system means that the incumbent operator would have a significant advantage under competitive tendering (art. 7).

Additional requirements have to be fulfilled in all these cases (art. 7a): they shall publish at least one year beforehand their preliminary decision to do so and the evidence and analysis on which they have based this preliminary decision, other potential operators may, during the six months following publication, submit an alternative offer which competent authority shall have to consider and publish its reasons for its decision to accept or reject them. Furthermore, competent authorities shall ensure the efficiency and effectiveness of services included in contracts directly awarded. To this end, they shall review at least once every five years trends in unit costs and usage rates in relation to the operator's own previous performance, standards of performance in the industry as a whole and the performance of comparable services provided by other operators. In cases of significant underperformance, decide on the steps the authority and the operator shall take to reach improvements within three years. A failure to reach improvements leads to contract termination and an obligation to go to competitive tendering.

Competent authorities may directly award public service contracts for services having an estimated average annual value of less than EUR 1.000.000 (or EUR 3.000.000 if a competent authority incorporates all its public service requirements in a single public service contract) (art. 7).

(2) Award following quality comparison

A competent authority may directly award a public service contract for a service that is limited to an individual route and that will not be subject to financial compensation (except compensations for complying with ‘general rules’ –see further– and that do not exceed one-fifth of the value of the services covered by the contract) provided that: *“a notice has been published inviting proposals; and on that basis the authority has selected, by means of a comparison of the quality of the proposals received, the operator or operators that will provide the best service to the public.”* (art. 8).

This clause is important as it allows for the existence of market initiative regimes with exclusive rights within the scope of the regulation. According to this procedure, the expiry of exclusive rights may be published, resulting in a call for market initiatives. It is important to realise that this is not an order placed by an authority as this would be authority initiative, but rather a form of regulated market initiative. Nonetheless, the awarding procedure shall be fair, open, non-discriminatory and transparent (art. 12 and 13), just as for competitive tendering.

(3) Award without quality comparison

When an operator proposes takes the initiative to propose a new service where none exists, the competent authority may directly award the exclusive right to provide that service to that operator without quality comparison, provided that the service will not be subject to financial compensation (except compensations for complying with ‘general rules’ –see further– and that do not exceed one-fifth of the value of the services covered by the contract). No service may be subject of such direct award more than once (art. 7).

This second market initiative clause allows rewarding an incumbent or entrant for its autonomous initiative (entrepreneurship) by granting an exclusive right. An obligation of competitive tendering, or any other comparison of bids, based upon the new idea would indeed be counterproductive as it would discourage ‘entrepreneurs’, knowing that their new idea may be granted to someone else.

c) Guarantees on the functioning of the contract market

The regulation contains a number of rules to guarantee the functioning of the market for service contracts. A competent authority may, e.g., require that the selected operator awards sub-contracts for up to half of the services covered by the contract to non-nominated third parties to which neither the competent authority nor the operator is affiliated, this *“in order to ensure that alternative potential providers of public transport services have a chance to remain in existence or that the implementation of controlled competition does not prevent the participation of small and medium enterprises”* (art. 9). A competent authority may also decide to exclude operators that already has or would, as a consequence, have more than a quarter of the value of the relevant market for public passenger transport services, or may require from the selected operator to offer current working conditions to the transferred staff, in which case the authority shall list the staff and give details of their contractual rights.

• General rules

The second main building block of the regulation is the ‘general rules’. *“Competent authorities may lay down general rules to be adhered to by all operators. These rules shall be applied without discrimination to all transport services of a similar character in the geographical area for which the authority is responsible”* (art. 10). Such rules can relate to a number of issues, such as: norms for vehicles and infrastructures, compulsory participation in integrated ticketing and sales systems, or tariff obligations, setting maximum tariffs for some or all trips.

Such rules may be compensated financially provided that compensation is available to *all* operators on a non-discriminatory basis, yet under specific quality requirements (art. 10).

• General conditions

The regulation further includes a number of additional general conditions.

Operators have to treat public service contracts concluded with a particular competent authority as a separate activity for accounting purposes.

Financial compensations that do not result from competitive tendering (i.e. those resulting from ‘general rules’ or direct award) have to fulfil rules stipulated in Appendix 1 of the regulation. Concisely, these mean that features that can be offered commercially may not be subject to financial compensation, that compensations may not be higher than the resulting addi-

tional costs, that the amounts have to be fixed for at least one year and have to be based on an estimation of the average financial effect of the obligation on all operators concerned.

Existing contracts or situations fall under transitional measures (art. 17): fairly tendered public service contracts with a reasonable length remain valid; a competent authority providing a given bus service itself or through its own operator may continue to provide this service for eight more years; non-tendered bus contracts in the bus sector may be extended when all conditions for direct award are fulfilled, when the contracts do not grant an exclusive right and when all tariff compensations are granted according to the ‘general rules’.

Furthermore, the regulation requires all competent authorities to grant at least half of its public service contracts (calculated in value of all contracts granted before 1 February 2003) within four years according to the rules of the regulation, and all contracts within eight years.

A clause of reciprocity has been included in the regulation for the length of this transitional period such as to allow excluding from contract award operators benefiting from exclusive rights or financial compensations that are not compatible with the regulation. When applied, this clause has to be valid for all operators on a non-discriminatory basis, unless these can prove that the majority of their services has already been awarded according to the provision of the regulation (art. 17).

A CHALLENGE TO NATIONAL REGIMES

A number of observations and challenges can be deducted from the country overview presented above, combined with the pending changes of legal setting at the European level, but as the following points will illustrate, the attention paid to the European Commission’s proposal and the ensuing discussions varies considerably from country to country, both in intensity and in focus.

Note first that the Commission’s proposal does not impose the usage of competitive tendering in all cases. It does leave national or regional authorities with a choice between market initiative regimes and authority initiative regimes. However, it does require in all cases efficiency and imposes therefore fair and transparent procedures when exclusive rights or subsidies are allocated. This, nevertheless, mostly leads to an obligation to use competitively tendered contracts.

- **Tendering obligation versus adequacy and local democracy**

While the compulsory usage of contracting to award exclusive rights or specific subsidies seems acceptable to most if not all stakeholders, and while the legal situation in countries such as Sweden, Finland, Denmark, the Netherlands, France, Italy, Ireland and Great-Britain is broadly in line with the proposal, there still remains important barriers to the acceptance of the proposal. The least of all are differences in procedures, market shares thresholds, contractual terms, etc. for which compromises can easily be reached. The main barrier remains the compulsory usage of competitive tendering. The amended proposal indeed foresees several mechanisms to allow direct award in rail-based (urban) public transport, responding to the requests made by the Parliament, but the additional requirements formulated by the Commission require in exchange the establishment of effective benchmarking resulting in compulsory competitive tendering anyway in the event of proved under-performance.

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 in-house. Many in Denmark too are opposed to the idea, even if current practice does not vary fundamentally from the European proposal as most authorities indeed use competitive tendering in public transport even if no law forces them to do so. The fear is that the imposition by the European commission of competitive tendering in this sector would form a precedent that could lead to further contracting-out obligations for other local public services, as in health care, even if the Commission reacts that this has to be limited to economic 'industries' that are subject to exclusive rights. Subsidiarity rule is nevertheless likely to be called upon to prevent the acceptance of the proposal on this point even if the interests of public operators and political fears for strikes may be more important in rejecting tendering than the more noble local democracy reasonings.

The proposal, if eventually accepted, will also be of particular relevance for the Eastern European Accession Countries that are due to become member of the Union in 2004 (see Gleijm, 2003). Interestingly, some candidate member states to the European Union, such as Hungary, seem to have been even more concerned with compliancy with future European rules than current member countries. The intention being to devise a 'Europe proof' regime at a time when national reforms are needed anyway, such as to avoid the need for further reforms when the country joins the European Union. Yet, vagueness and uncertainties linked with the proposal led governments to be faced with substantial puzzles. A similar situation could be witnessed several years ago when Norway and Sweden both endeavoured to integrate hypothetical future European tendering rules in their national legislation before becoming member of the European Union (eventually, the Norwegian people rejected membership in a referendum).

- **Tendering obligation versus healthy competition and fairness**

Others, who practice contracting-out and do not reject it as a matter of principle, still call upon the possibility to maintain parts of their operations in-house for two main reasons: being able to maintain the expertise to judge the performances of private sub-contractors, and maintaining some 'public competitive threat' to the perceived tendency of oligopolisation in the industry.

The question of fairness in competition is seen as a particularly important issue in a transition period where some companies may benefit from long purses resulting from monopoly rights in parts of their operations. A reciprocity rule has therefore been included in the latest version of the proposal, though it remains to be seen whether such provision can indeed be implemented. Such a provision also exists in the Netherlands. Observers point mainly at the French state-owned companies, rejecting any form of competition in their traditional monopoly areas, but very happy to participate in competition in other countries and in the rest of France (since a recent legal change suppressing their territorial limits).

- **The proposal versus court cases**

Parts of the Commission's arguments for revising Regulation 1191/69 is based upon the need to provide more legal certainty in view of the growing internationalisation of the market, such as to avoid court cases and unwelcome outcomes.

The court case presented in the German paragraph could be an example of such an eventuality, though it refers mainly to what some observers see as a substantial discrepancy between practice and legal principles in the German framework, for which the European implications

have now been clarified by the European Court of Justice, referring the case back to the German courts. Germany remains therefore in an awkward situation. While German laws seem indeed quite compatible with the Commission's proposal, practices will ultimately have to change radically. But huge barriers to change are present making a speedy transformation unlikely or only at a very high price: incumbent operators would lose their protected positions, authorities would have to develop bureaucracies and contracting machineries to replace parts of the current practices, 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. Most actors seem, indeed, to have many reasons not to embrace the proposal.

This European judgement will not necessarily have strong implications in the rest of Europe as it, basically, simply reiterates that the current regulation 1191/69 should be applied. It clarifies, though, that state aid issues apply in principle to public transport too and enumerates conditions to their allocation with only an indirect reference to competitive tendering as selection mechanism. More interestingly, it effectively suggests the usage of benchmarking as alternative means to judge the adequacy of the level of subsidy. Issues related to the selection of operators in view of the freedom of establishment are not addressed, neither are issues relating to general non-contractual subsidies. It is perhaps in these fields that further court cases could be expected. The wait is for operators to file complaints.

Whether the judgement will slow down or speed up the adoption of the Commission's proposal is unclear. Some may see it as a further argument against the abolition of direct subsidisation of public monopolies – though this is likely to be shortsighted – and against the Commission's proposal, others may see it as a warning that their national subsidisation framework may ultimately be endangered by an outdated regulation, a reason for which the Commission's proposal may get additional support.

- **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 (or regions) 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 non-contractual subsidisation remains possible through art. 10 and exclusive rights can be awarded through art. 8. The Commission recognises that exclusive rights may improve attractiveness (for reasons such as integration, stability, etc.). Yet, the proposal imposes a competitive awarding procedure as such rights limit competition in time. A simpler quality comparison procedure is foreseen, as imposing formal competitive tendering would make autonomous market initiative impossible. Indeed, this would either limit the scope of the proposals to the content and timing of the terms of reference in a call for tender, or it would be demotivating for entrants as it would oblige authorities to publish the potential entrant's innovative ideas in a call for tender open to all.

It is interesting to see that the possibility for market initiative offered by the proposal (both under deregulated markets British-style and under more subtle 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. Such partial vision of the world is sometimes also propagated by French transport groups, as Connex who see the French authority initiative network competitive tendering as the final step of evolution after failing experiences of deregulation and free enterprise.

Other, as German observers who are used to the legal principle of market initiative, recognise the possibilities offered by the proposal, even if some vested interests 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 authorities a free choice of regime while guaranteeing simultaneously fair competition and the possibility to use instruments that can improve public transport quality (‘rules of the game’ and exclusive rights) when desired.

As a consequence, market initiative regimes 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. This is a clear reason for Germany to be worried by the proposal. This led to a blossoming of congresses on the potential consequences of the proposal and, later on, on the potential consequences of the ruling by the European Court of Justice.

Market initiative is present in Britain, in Germany – albeit in a moribund state, in some parts of Eastern Europe – though often not fully within legality, and 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.

- **What about the national railways?**

The proposal is also valid for railways services, though many would expect that the (national) railways would ultimately be excluded. Some observers also point to the fact that the proposal seems to be at odds with the discussions on further liberalization of the railway sector in the context of further revisions of Directive 91/440 and related Directives. The tendency there seems to favour open-access and a few services have already emerged in Germany (a.o. by Connex).

CONCLUSION

The discussion both in national, European and wider forums tends to be 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, discussions also tend to be too dogmatic as many see competitive tendering as a simple solution to all public trans-

port problems both in terms of efficiency and effectiveness (attractivity), while others 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 and to the details of tendering implementation; and it would be good to question the universality with which tendering should be implemented.

This paper provided an overview on some evolutions in the legal and organisational setting of public transport in Europe. The spread of contracting, mostly in combination with competitive tendering is incontestably one of the main features of the reform of organisational forms in European public transport during the last two decades. 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 different 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) (see Van de Velde and Pruijmboom (2003) in this conference for a further elaboration upon these concepts, linking them to barriers to change in the Dutch case).

Further changes linked with the (pending) adoption of a new European Regulation on this matter may revolutionise the sector in those countries that have had a conservative stance until now. Nevertheless, even after so many years of discussion and for reasons enunciated in the paper, the final word has not yet been pronounced and it is questionable whether the epilogue will be performed before 2004.

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