

GERMANY

1. Introduction

Essential to the legislative framework governing public passenger transport services in Germany is a law called the Personenbeförderungsgesetz ('**PBefG**'). This law remained unchanged after the Regulation came into force on 3 December 2009. It was enacted at federal level and therefore applicable in all 16 'Bundesländer' (federal countries in Germany). Nevertheless its provisions are applied by authorities which are part of the administration at the level of the Bundesländer. In order to be allowed to operate passenger transport services with trams, buses and motor vehicles in general, operators are required to hold a licence according to the PBefG.

In the absence of legislative changes to the PBefG at federal level, the Bundesländer themselves such as Nordrhein-Westfalen, Lower-Saxony, Baden-Württemberg and Bavaria issued guidelines in order to comply with the Regulation as long as the PBefG remains unchanged.

According to the coalition contract between the governing parties CDU, CSU and FDP in Germany, the PBefG shall be revised in light of the European framework for passenger transport. The guiding principle in that regard shall be a competitive close-range passenger transport service whereas commercially operated services shall be given priority.¹

2. Most relevant rules of the PBefG

1.1 PSO

The conditions for a licence for public passenger transport services are set out in sec. 13 and 13a PBefG. The licence determines obligations to be fulfilled by the operator after its grant, such as the obligation to run the public transport service,² to transport individuals if the conditions for transport are maintained (sec. 22) as well as to maintain a tariff system (sec. 39). A judgment dated 29 October 2009 of the highest German administrative court ('**BVerwGE**'), indicates that these obligations correspond to PSO under European law.³

¹ Coalition contract of the current German government, 37.

² sec. 21.

³ Case 3 C 1/09 para 29.

1.2 Two competent authorities

According to sec. 8 para 3 PBefG, the competent authority granting a licence according to the PBefG ('Bezirksregierung', regional government body) must cooperate with another competent authority organising close-range passenger transport ('Aufgabenträger', authority at communal/local level such as Landkreise and kreisfreie Städte), and with the transport operators to integrate close transport connections, facilitate cooperation and ensure matching timetables and tariff systems. The objective pursued is to ensure sufficient transport supplies for the public as well as economically reasonable transport.

The 'Aufgabenträger' is not competent to grant a licence under the PBefG but to engage in PSC and to deal with the financial issues of public close-range passenger transport (see e.g. Guidelines of Baden-Württemberg, sec. 2.4). Both authorities are however competent authorities within their individual field.

1.3 Priority to Commercial Transports ('Eigenwirtschaftliche Verkehre')

Furthermore, pursuant to sec. 8 para 4, in principle, transport services in public close-range passenger transport should be performed in a commercial manner, so-called 'Eigenwirtschaftlicher Verkehr'. The provision states that the income generated by ticket sales, income by compensation rules set by law in the tariff or schedule area as well as further income according to the German Commercial Code shall match the costs of the transport performance. Compensation granted by law which has to be included in this context is compensation for discounted transport of individuals during their education (sec. 45a PBefG) or for the transport of disabled people free of charge (sec. 145, 148 of the German Social Code). Also the German administrative court BVerwGE decided that compensation granted according to these rules does not lead the performance to escape the qualification of 'Eigenwirtschaftlicher Verkehr'.⁴

As a consequence, sec. 8 para 4 implies a priority principle for those transport services which can be considered as '*eigenwirtschaftliche Verkehre*'.⁵ By reason of this priority principle, the competent authority has to check whether the envisaged transport performance can be fulfilled by means of commercial transport ('eigenwirtschaftlich') before tendering for transport services in exchange of (additional) compensation. The BVerwGE⁶ called this a 'sort of competition of licences' (commercial transports enjoy priority before "subsidised" transports) which takes place before the competition of bids for a tender.

⁴ BVerwGE judgment of 29 October 2009 in case 3 C 1/09, para 25.

⁵ BVerwGE judgment of 29 October 2009 in case 3 C 1/09, paras 18-20 and 22.

⁶ Judgment of 29 October 2009 in case 3 C 1/09, para 22.

2. Application of the PBefG in light of the Regulation (main principles according to guidelines)

The recently published guidelines express the approach taken in various federal countries towards the application of the PBefG after the Regulation came into force. Until a possible amendment of the PBefG these guidelines aim to provide legal certainty within each federal country.

One main position reflected in the guidelines is that the licence granted according to sec. 13 PBefG would not grant an exclusive right for PSO.⁷ The core argument in this respect is that the PBefG would not be a sufficient legal basis to grant such a right given the freedom of profession protected by Article 12 of the German constitution.⁸

Nevertheless, it is acknowledged in the guidelines that licences which already exist are protected by reason of sec. 13 para 2 No 2 PBefG.⁹ According to this provision of the PBefG, a new licence shall not be granted if the transport needs can be served by means of the already existing measures (lit. a), the new transport would not significantly improve the supply of transport services already provided (lit. b) or the existing providers agree upon a deadline set by the authority to make necessary adaptations to their services (lit. c). The fact that over years an undertaking has provided the services according to the public interest shall be taken into consideration for public close-range passenger transport in this context.¹⁰ According to the BVerwGE, this protection of licence holders results *de facto* in a prohibition of double-licence.¹¹ Hence, for new applicants, it is difficult, if not impossible, to receive licences on lines which already have an existing licence-holder. (New) PSC which are granted by the Aufgabenträger do not supersede the protection for existing licences in this context.¹²

Furthermore, there is an assumption that the Regulation would only be applicable if the competent authorities intend to intervene in public passenger transport by means of financial compensation or (additional) exclusive rights in order to ensure the fulfilment of PSO. Hence, as long as transport services are offered without compensation from the state, the Regulation would not be applicable for a licence according to the PBefG.¹³ It is assumed in the guidelines that, in the absence of changes to the PBefG, there would be still a priority of 'eigenwirtschaftliche Verkehre' because the Regulation 1370/2007 would not rule on the relationship between commercial and non-commercial transport.¹⁴ This position can be explained by the fact that the guidelines assume that a licence according to the PBefG shall not be considered as an exclusive right (see above). This, according to the authorities' position, results from the fact that transport services are beyond the scope of the Regulation if no compensation is granted.

⁷ Guidelines Baden-Württemberg sec. 2.2., guidelines of Nordrhein-Westfalen, sec. 4; guidelines Lower-Saxony sec. 2.

⁸ Guidelines Baden-Württemberg sec. 2.2.

⁹ Guidelines of Nordrhein-Westfalen, sec. 6.

¹⁰ Sec. 13 para 3 PBefG.

¹¹ BVerwGE judgment of 2 July 2003, 3 C 46.02, para 17.

¹² Guidelines of Nordrhein-Westfalen, sec. 6; guidelines Baden-Württemberg sec. 7.9.

¹³ Guidelines Baden-Württemberg sec. 3.1, guidelines of Nordrhein-Westfalen, sec. 4.

¹⁴ Guidelines Baden-Württemberg sec. 3.3.

Given the two layers of competent authorities, the guidelines draw the conclusion that the responsibility in terms of state aid is borne by the 'Aufgabenträger', at the local level. This authority has to make sure that compensation payments are in line with the Regulation.¹⁵ Also the BVerwGE, in a judgment of 19 October 2006,¹⁶ states that state aid conformity is not evaluated in the procedure for a licence according to the PBefG. Therefore, the authority which grants this licence is in principle not competent to evaluate state aid conformity.¹⁷ It shall be pointed out that this judgment has been issued prior to entry into force of the Regulation. Nevertheless, according to the guidelines, the authority responsible for a licence under the PBefG shall not check state aid and public procurement law, nor is it bound to grant of PSC.¹⁸

This position seems to stem from an implied reasoning according to which the Regulation does only concern public procurement and state aid issues whilst the PBefG, as part of the German industrial law ('Gewerberecht'), exists in parallel.¹⁹ This parallelism would mean that both frameworks are applied independently from each other and one authority would not refer to the legal framework of the other. The licence to operate a service and its state aid implications are in a way seen as independent issues. Therefore, PSC are considered not to be binding on the decisions made under the PBefG. The guidelines however recommend that the 'Aufgabenträger' makes the PSC legally depending on the grant of a licence according to the PBefG.²⁰ Alternatively, it is recommended that the 'Aufgabenträger' notifies the responsible authority for the application of the PBefG about the award of PSC in line with the general duty to cooperate under sec. 8 para 3 PBefG.²¹ In Lower-Saxony, the authority responsible for the licence under the PBefG expects to be informed in advance by the 'Aufgabenträger' if it wants to procure transport services and make a notification in the Official Journal according to Article 7 para 2 of Regulation 1370/2007.²² In order to allow for a joint behaviour of both authorities, it is also envisaged to match procedural deadlines between both authorities.²³ This concerns for instance the deadline for applications for a licence according to sec. 13 PBefG which can be matched with the deadline according to Article 7 para 2 Regulation 1370/2007.²⁴

A further change according to the guidelines is that sec. 13a PBefG will not be applicable any more as this legal basis for a licence according to the PBefG made reference to Regulation 1191/69 which expired with the entry into force of Regulation 1370/2007 (Article 10). Therefore, the sole legal basis for licences according to the PBefG is now sec. 13 PBefG.²⁵

¹⁵ Guidelines Baden-Württemberg sec. 4.1.

¹⁶ Case 3 C 33/05, para 37.

¹⁷ Similar position in the guidelines of Nordrhein-Westfalen, sec. 3, guidelines Lower-Saxony sec. 7.

¹⁸ Guidelines Lower-Saxony sec. 7.

¹⁹ Guidelines Baden-Württemberg sec. 7.1, guidelines of Nordrhein-Westfalen, sec. 2.

²⁰ Ibid., 7.2.

²¹ Guidelines of Nordrhein-Westfalen, sec. 3.

²² Guidelines Lower-Saxony sec. 6.

²³ See for instance guidelines of Nordrhein-Westfalen, sec. 5.

²⁴ Guidelines of Nordrhein-Westfalen, sec. 5.

²⁵ Guidelines Baden-Württemberg sec. 7.3, guidelines of Nordrhein-Westfalen sec. 7, guidelines Lower-Saxony sec. 4.

The duration of the licence according to the PBefG is still governed by sec. 16 para 2 PBefG. The maximum duration for line transport with motor vehicles is therefore eight years. The duration for PSC may be longer, according to sec 4 para 3 of Regulation 1370/2007, but without directly affecting the duration of the licence.²⁶

²⁶ Guidelines Baden-Württemberg sec. 7.11, guidelines of Nordrhein-Westfalen, sec. 8.

FRANCE

A study carried out by UTP in 2009 shows that competition is growing fast in the urban public transport sector.²⁷ In the last four years, more than 40% of the tenders resulted in a change of operator. Also, the study reveals that even if the operator stays the same, the competition has an impact on the costs and the quality of the services and on the different management methods and that the competition is international, not only national.

Organisation of public transport²⁸

In France, passenger transport is organised by four levels of power: the state itself, the Regions, the Departments and the Municipalities or groups of Municipalities.

These competent authorities take the main decisions concerning the definition of the service and the financing of the service.

The operators are in charge of the performance of the public transport services in the framework decided by the competent authorities.

Railway Transport

SNCF (Société Nationale des Chemins de fer Français) is in charge of providing railway services to the customers for the long lines, TER ('Transport Express Régionale'), and the 'Transilien' (in Ile-de-France).

Regional Transport

The Regions are the competent authorities for the regional railway transport services which are run by SNCF through PSC. The Regions also organise connections by coaches between cities with average distances.

Urban Transport

250 urban networks of transport serve the French agglomerations, organised by the Municipalities, generally by 'intercommunales' (regrouping of municipalities or association of municipalities), and sometimes with the Departments (then called mixed trade-unions), such as the STIF (syndicat des transports d'Ile-de-France).

²⁷ See Study on 'Une concurrence accrue dans les transports publics urbains au bénéfice des voyageurs' [2009], commissioned by Union des transports publics et ferroviaires.

²⁸ This section is mainly retrieved from the following website: <<http://www.itransports.fr/fr/transports>> accessed 18 May 2010.

According to the study on 'Contracting in urban public transport', the French urban public transport law (outside the Paris region), which is based upon the principle of authority initiative (by contrast to market initiative), gives the transport authority the first right to create passenger transport services. Hence, the competent authority has the right to decide either to provide itself the services (own production or own company with specific public status – '*en régie*') or to delegate these services to a different manager ('*Délégation de service public*' or public procurement).²⁹ In the latter case, the competent authority for urban transport award PSC for the running of networks through competitive tendering procedure, generally to private companies subsidiary of European size groups (Kéolis, Transdev, Véolia Transport), but also to public or private more modest size companies.

Whatever the mode of management is, the running of the whole network is generally entrusted to the operator which benefits, moreover, from an exclusive right.³⁰

According to the study on 'Contracting in urban public transport', a specific feature of PSC in France is the network contracting, whereby (re-)design freedoms are given to transport operators.³¹ This organisational form is often called the 'French model'.³² The study further observes that in most contracting cases, the operator is subject to both the production cost risk and the revenue risk. In many cases, additional quality and target incentives are added.

Departmental Transport

The Departments are competent authorities for the connections by coaches, regular lines and school transportation, which they award to 1,500 coach companies after a competitive tender. 30,000 coaches travel on the French roads.

²⁹ See NEA, Study on 'Contracting in urban public transport' [2008], commissioned by the European Commission 16.

³⁰ V. BEAUDOUIN and K. MAUBERT, 'Une concurrence accrue dans les transports publics urbains au bénéfice des voyageurs', [2009] UTP Législation et Affaires européennes.

³¹ Ibid., 22.

³² Ibid.

UNITED KINGDOM

Background³³

Responsibilities for public transport in Great Britain vary according to the type of administrative area and mode of transport (bus or rail).

In the period up to 1986 almost all bus services in the UK had been operated by either state or municipally owned undertakings. Since 1986:

- most bus services outside London have been deregulated and are operated on a market initiative basis. Meanwhile, all state-owned, and most municipally owned bus undertakings, were privatised from 1986 onwards;
- bus services inside London are generally planned by a public authority and were progressively tendered, and the remaining publicly operated services were privatised in 1995.

In this move of deregulation, all passenger rail services were privatised (through franchising) in 1996 and 1997 whereas all services in Northern Ireland remain largely publicly owned and operated.

The organisational form of PSC in London is route contracting whereby a competent authority determines a number of transport and social objectives which serve as a planning framework for its own transport department.³⁴ According to the study on 'Contracting in urban public transport', *'[c]ompetitive tendering procedures are used and operators are submitted to gross-cost contracts'*.³⁵ The study underlines that this organisational form is also known as the 'Scandinavian model' or the 'London model' as it is observed in other places in the Copenhagen, Stockholm and London areas.

However, in general, public transport services are governed by the principle of free market initiative, although some subsidy might be necessary.³⁶ According to the study, such subsidisation compensating PSO and allocated in proportion to the achieved results (e.g. the number of transported aged citizens) actually stimulates the free market to provide more services. Regulation may still be needed for such market-initiative systems to function properly. This organisational form is largely used in the UK, outside London.

Organisation of the rail industry in Britain³⁷

Train operating companies (TOC) provide passenger train services. Most of these companies have a franchise awarded by the Department for Transport in order to operate a service. The authority sets

³³ See 'Organisation and major players of short distance public transport. New development in European Union' [2006] UITP 85.

³⁴ See NEA, Study on 'Contracting in urban public transport' [2008], commissioned by the European Commission, 20.

³⁵ Ibid.

³⁶ Ibid. p. 24.

³⁷ This section mainly relies on the brochure 'Organisation and major players of short-distance public transport; New developments in the European Union' [2010] UITP.

out the requirements for the provision of the services and the public funds available.

Indeed, as explained by the UK's RB, PSC for rail services are usually known as rail franchise agreements. These are the contracts which the Department for Transport holds with train operating companies for the provision of passenger train services. These contracts are awarded by the Department following open competition. Franchises are generally of seven years extendable to ten years. Whilst key elements of the service provided to passengers are mandated as part of the contract, other features are left to the commercial judgement of bidders and operators. Operators are responsible for the day-to-day management of train services, as well as operation and maintenance of franchised stations. PSC are enforced and monitored by the Department for Transport.

There are currently 15 rail franchises (25 at time of privatisation) managed by the Department for Transport. Others have been devolved to Scotland, Wales, London and Merseyside and are managed locally. Some franchises pay a premium to the Government, while others require subsidy. However, within each franchise (even a premium-paying franchise) there will be services, routes or other outputs that are not commercially viable and would not operate commercially if they were not specified by Government.³⁸

Franchises effectively confer exclusive operating rights within the area served, although:³⁹

- rights may be shared on certain sections of route, or between stations served by different routes;
- Railways Act 1993 permitted 'open access' competition, although in practice this is limited by:
 - Regulatory processes
 - Lack of track capacity
 - Economic circumstances of rail industry in Britain
 - In most cases, passenger rail services require considerable public subsidy

Organisation of the local bus industry in Britain⁴⁰

Bus services in London

In London the system is centrally planned, with the routes and frequencies being specified by Transport for London (TfL). Initially, all contracts were placed on a gross cost basis, with the competent authority bearing the revenue risk. From 1995 net cost contracts were used, but these did not bring about the expected advantages. The TfL reverted back to gross cost contracts, with performance-related incentives.

³⁸ See the contribution of the UK's Regulatory Body.

³⁹ See 'Organisation and major players of short distance public transport. New development in European Union' [2006] UITP 87.

⁴⁰ This section is mainly inspired by 'Organisation and major players of short distance public transport. New development in European Union' [2006] UITP 86-88.

Bus services outside London

Bus service legislation is mainly based on free market principles (no exclusive rights). The market is deregulated. Multi-operator ticket schemes can however be set up and promoted, subject to certain conditions laid down by the Office of Fair Trading. There is a market trend towards concentration of supply in the hands of a small number of major operating groups, but with a significant number of small operators. There are fewer medium sized firms. Also, the shares of the bus market held by the larger players are broadly stable, and competition concerns make further large-scale consolidation unlikely.

SCANDINAVIAN COUNTRIES

According to the study on 'Contracting in urban public transport', it would appear that, in Sweden and in Denmark, route contracting is the organisational form of PSC. The transport authority determines a number of transport and social policy goals which then serve as planning framework for its own transport department. By doing this, the competent authority states its 'public service aims'. Through its transport department, the authority then organises the contracting out of the services planned. Competitive tendering procedures are used.⁴¹ This organisational form is also known as the 'Scandinavian model' or the 'London model'.⁴²

SWEDEN⁴³

Sweden is divided into 21 counties partly responsible for public transport in the county. Each county consists of a number of local authorities, which also have self-government.

Financing of public transport is generally by local authorities and the county council covering deficits of one half each. The National Public Transport Agency has the task of procuring railway lines extending beyond county borders and where conditions for commercial operation do not exist. The Government finances activities in this area.

Long-distance bus traffic is fully deregulated, whereas long-distance railway traffic is partly deregulated. From 1 October 2009, open access is guaranteed on weekends and holidays as well as for international services. As of 1 October 2010, state railways are opened up to competition.

Almost all (around 98%) regional and local bus traffic and regional railway traffic in Sweden as well as the local rail traffic (metro, light rail and commuter services) in the county of Stockholm are now procured by competition. Long-distance railway lines as well as ferry lines, where conditions for commercial operation do not exist, are also procured. The railway industry is characterised by decentralisation and multiple suppliers of railway operations and supporting services.⁴⁴

At local and regional level, gross cost contracts are used, whereby the winning bidder receives compensation for the costs incurred by the discharge of PSO whereas revenues from the selling of tickets accrue to the authority.⁴⁵ For long-distance services, net cost contracts are used whereby the public operator keeps the income from the tickets along with a subsidy granted in accordance with its

⁴¹ See NEA, Study on 'Contracting in urban public transport' [2008], commissioned by the European Commission, 20.

⁴² Ibid.

⁴³ This section is mainly inspired by the study on the 'Organisation and major players of short distance public transport. New development in European Union' [2006] UITP 79-80 and on 'Organisation and major players of short-distance public transport; New developments in the European Union' [2010] UITP 77-78.

⁴⁴ G. Alexandersson and S. Hulten 'Predatory bidding in competitive tenders: a Swedish case study' [2006] European Journal of Law & Economics, 81.

⁴⁵ Ibid.

bid.⁴⁶ However, with the doubling project aiming at doubling the public transport share 2025, it is intended to make more recourse to net cost contracts than at present.

DENMARK⁴⁷

Denmark, outside the Greater Copenhagen Region

- Buses

Public bus transport is managed by the transport competent authorities created by the five regions.

With the 2007 reform, in-house bus operators in Aarhus and Odense have been privatised and have become independent companies. There is a progressive move toward the tendering out of contracts.

Contracts are generally gross cost contracts.

- Railways

The Danish State Railways. DSB operates under a net cost contract for the Ministry of Transport and 11% of the railway transportation has been tendered out with competitive processes.

⁴⁶ Ibid.

⁴⁷ This section is mainly inspired by the study on the 'Organisation and major players of short distance public transport. New development in European Union' [2006] UITP 11-12 and its update of 2010, 21-22.

EASTERN EUROPEAN MEMBER STATES

According to some literature, public transport was dominant in the post-communist countries following the socialist ideology and also because communist dictatorships ensured that private car ownership and use would be extremely expensive and difficult, while public transport was widely available and subsidised to such an extent that it was almost free.⁴⁸ Public transport was seen as being most consistent with a planned economy, with its limits on consumption, mobility and location choice. Central governments in socialist countries provided generous financing for all public transport investments and operations.⁴⁹

With the overthrow of communist governments in Central and Eastern Europe from about 1989 to 1992, most of these transport policies changed. A major change consisted in the transfer of responsibility regarding the organisation of public transport to municipalities which are often considered as not having the necessary resources.

This was accompanied by the rocketing growth of private cars and a consequential decline in public transport use. Thus, in general both the quality and quantity of public transport services are said to have fell in most Eastern European countries. The recovery percentage of the costs incurred by passenger revenues increased with the augmentation of fares.⁵⁰

According to the study 'East European Rail: the State of the Network',⁵¹ domestic long-distance (InterCity) passenger transport had also experienced a decline in the number of passengers. This trend is comparable to all Eastern Member States but it would appear that the approaches are different.

The study shows that, in **Poland**, the regional governments are responsible for organising passenger rail services and have recourse to adequate funding for this task. Problems arise from the extent to which local government supports the necessary services.

In the **Czech Republic**, the public transport authority has three subdivisions, which are responsible for (i) the provision of long-distance transport services, (ii) regional basic transport services and (iii) other local transport services. Responsibility for providing 'regional basic services' pertains to the districts (*kraje*), represented via district offices (*Krajské úřady*). Transport contracts for the provision of regional basic services exist between the district office and České dráhy a. s. (the national railway company), and in some cases also private operators. The basic duration of the PSC currently in force is one year (minimum duration according to the Railway Act) – with an exception of two tendered services with a duration of four and five years.

⁴⁸ J. Pucher and R. Buehler, 'Transport Policy in Post-Communist Europe' 6-9, available at: < <http://policy.rutgers.edu/faculty/pucher/PDF%20of%20chapter.pdf>>.

⁴⁹ Ibid.

⁵⁰ Ibid.

⁵¹ This section is mainly inspired by the following article: K. Tanczos and G. Bessenyei, 'East European Rail: the State of the Network' BUILT ENVIRONMENT, vol. 35 n°1 / 54-56.

In **Hungary**, responsibility for PSC lies with the Ministry of Transport. In the 1990s this responsibility was partially transferred to the municipalities. The Ministry is the competent authority for regional transport, and the municipalities for local transport.