

Legal solutions for cross-border awards of passenger rail service contracts

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Location of ZVON



Characteristics of the Upper-Lusatia - Lower-Silesia area

- Situated in the German federal state of Saxony on the borders to Poland (Lower Silesia) and the Czech Republic (Liberec and Usti Regions)
- Opportunities: Strong local commitment of population and economy, cross-border cooperation, Threats: Demographic change, loss of population
- ZVON is composed of the districts of Bautzen and Goerlitz and the city of Goerlitz, 3.100 sqkm, 470 t inhabitants (> 150 inh. /sqkm)

Special conditions regarding rail transport

- Cross-border tariff cooperation installed by ZVON
- Long distance cross-border services used to be operated mostly by the state-owned railway undertakings without subsidies, but have been stopped
- > Necessity for the authorities to organise and subsidise alternative services
- Successful competitive cross-border award of regional services between Usti, Liberec (CZ) and ZVON regions in 2009

The goals of the pilot project

- In practical terms: Find a feasible way to organise the future "RE 100" services (Dresden - Goerlitz - Wroclaw) at reasonable costs
- > Promote competitive tendering of cross-border awards of public regional rail transport services for passengers
- > Propose a legally secure approach to realize competitive and non-competitive cross-border awards

Methods

- Analysis of legal and practical obstacles of cross-border awards
- Discussion with Lower Silesia transport authority (PL)

Findings: Typical Problems of Cross-border Awards

- Common practice for authorities to tender only within their own territory does not promote competition
- Distinctions in funding and subsequent problems
- Missing coordination of traffic plans
- Railway vehicle permits in both countries (> see VBB pilot project)
- Permits of traffic company in both countries
- Different national award regimes
- Lack of information on infrastructure at the time the transportation services will be provided
- Jurisdiction on cross-border awards

Findings: Current Award Practice

- Two awards - each concerning transportation services ending at the border
- Joint procurement procedure based on one public procurement and contract law
- Obligation to provide transportation services beyond the border, while these services are not compensated for by competent authority (commercial transportation)

Findings: Legal Basis of awards of public passenger rail service contracts (PSC) (I)

- Starting point of each award of a PSC:
Regulation (EG) No. 1370/2007 (Reg. 1370/2007)
- Reg. 1370/2007 precedes national law
- Reg. 1370/2007 applies to the national and international operation of RRT (Art. 1 Reg 1370/2007)

Findings: Legal Basis of awards of public passenger rail service contracts (PSC) (II)

- Public service contracts as a rule awarded by competitive tendering procedure
- Art. 5 para. 3 Reg. 1370/2007:
'The procedure adopted for competitive tendering shall be open to all operators, shall be fair and shall observe the principles of transparency and non-discrimination.'
- Procedure allows negotiations in case of specific or complex requirements
- National law may fill this framework

Findings: Legal Basis of awards of public passenger rail service contracts (PSC) (III)

- Art. 5 para. 6 Reg. 1370/2007:
'Unless prohibited by national law, competent authorities may decide to make direct awards of public service contracts where they concern transport by rail.'
- Only one requirement for direct award of services: national provisions must not prohibit direct awards ('national reservation')
- Explicit reference to national law

Findings: Situation in Poland (I)

- In contrast to Germany: Competitive tendering of regional rail transport (RRT) not yet well-established in Poland

- Legal uncertainty after coming into effect of the new Polish act on public transport (PTZ-Act) on 1. March 2011:
 - > Competence for cross-border awards unclear (determination of 'border zone' and 'corresponding entity')

- Transfer of competence for RRT to new competent authorities without providing them with corresponding financial means (=structural underfunding)
 - > Lack of money led to praxis of short-term contracts / services without contractual basis / interim agreements

Findings: Situation in Poland (II)

- Voivodeships established own rail traffic companies ('internal operators')
 - > This could decrease their willingness to carry out competitive joint cross-border tendering
- Due to legal uncertainty legal practitioners seek pragmatic solutions rather than law-oriented ones
- Before adoption of new traffic plan (to be done by 01.03.2014) entering into contracts with a duration longer than 3 years not allowed
- Reservations of competent authorities to rely only on Reg. 1370/2007 as legal basis for cross-border awards

Findings:

Realizing German-Polish Awards / General remarks

- To overcome legal uncertainty: Respective voivodeships and minister of transport should be part of the procurement procedure
- If funding is assured the award can be carried out on the basis of one of the national procurement regimes
- Without assured funding a joint award is risky; the risks cannot be avoided by contractual rules

Findings: Realizing German-Polish Awards / Competitive tendering

- Competent authorities can jointly award a contract on the basis of
 - Art. 5 para. 3 Reg. 1370/2007 (competitive tendering)
 - in conjunction with one national procurement regime (open or restricted procedure)

- In case of applying more than one procurement regime:
 - Unclear which rules apply, if involved national procurement regimes have different specifications
 - Legal protection in each member state could lead to diverging outcomes - contradiction to equal treatment

Findings:

Realizing German-Polish Awards / Direct award (I)

- Generally only Art. 5 para. 6 Reg. 1370/2007 suitable
- Art. 5 para. 2 Reg. 1370/2007 (internal operators) not suitable:
 - Traffic companies of voivodeships are not internal operators also of German competent authorities
 - It cannot be expected that voivodeships will confer necessary rights upon German competent authorities to make traffic companies their internal operators

Findings:

Realizing German-Polish Awards / Direct award (II)

- Direct awards require that in none of the involved member states the national reservation applies
 - In Germany direct awards are generally prohibited (BGH, 08.02.2011)

- Possible derogation rule: Inter-municipal cooperation
 - In our view: Inter-municipal cooperation legitimate if German-Polish cooperation does not distort competition

Voivodeships' traffic company carrying out the transportation services must have been internal operators and should henceforth only work for concerned Voivodeships

Findings: Realizing German-Polish Awards / Procurement in Case of unsecured Funding

- Two separate awards
 - Including obligation into award documents forcing the contractually bound operator (traffic company) to cooperate with the other relevant operator(s), e.g. in a way to mutually hand over the railway vehicles
- Only small fraction on foreign territory
 - Obligation of operator to provide transportation services beyond the border – no compensation for these services by competent authority (commercial transportation)

Transferability to other passenger rail authorities

- Cross-border services can be awarded by competitive tendering or direct award
 - Legal, organisational and financial framework in Poland are partly conquerable obstacles to cross-border awards
- > Suggestions to the Polish legislator to change the framework
1. Rules on Competence concerning cross-border RRT should be more simple
 2. Amount of Funding of the voivodeships has to be adjusted to amount of newly assigned traffic tasks
 3. Polish procurement law should explicitly allow cooperation in joint cross-border awards

>> You will find the details on www.inter-regio-rail.eu



Thank you for your attention!

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