

## ZVON Pilot Project

# **Cross-border Awards of Regional Passenger Rail Transport in Central Europe – Strategies for the Legal Realization Using the Example of German-Polish Awards**

## **Executive Summary**

The realization of competitive cross-border awards of regional passenger rail transport (RRT) faces different obstacles. In particular distinctions in funding, the missing cross-border coordination of traffic plans and the necessary permits for railway vehicles and the traffic companies in the countries concerned hinder cross-border awards of RRT. Furthermore, the common practice to tender only within one's own territory does not promote cross-border competition. Last but not least the different national award regimes and a lack of information on infrastructure at the time the transport services will be provided hamper joint cross-border awards.

Despite these problems awards of cross-border transport services have been taking place. Commonly, there are three different ways to realize them. First, the competent authorities of the countries concerned could separately award a contract that includes transport services ending at the border and the obligation of the contracting partner to cooperate with the traffic company operating in the other country. Second, the competent authorities could procure jointly on the basis of one national public procurement and contract law. And third, if in one country the railroad line to be operated upon is of minor scope the competent authority of the other country could include this part into its procurement procedure as commercial transportation. That means it would contractually oblige the traffic company to provide transport services beyond the border, while these services are not compensated for.

Since its coming into force on 3<sup>rd</sup> December 2009 Regulation (EC) No 1370/2007 (Reg. 1370/2007) is the legal basis of every award of RRT within the European Union. Reg. 1370/2007 precedes national procurement law and applies to the national and international operation of RRT, Art.1 para. 2 s. 1 Reg. 1370/2007. Thus, the regulation is also applicable for cross-border awards.

Pursuant to Art. 5 para. 3 s. 1 and 2 Reg. 1370/2007 public service contracts are as a rule awarded on the basis of a competitive tendering procedure. 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. The procedure allows for negotiations in case of specific or complex requirements. As Art. 5 para. 3 Reg. 1370/2007 only provides a skeleton regulation the Member States may concretize it.

On the basis of Art. 5 para. 6 Reg. 1370/2007 competent authorities may also decide to make direct awards of public service contracts where they concern transport by

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rail, unless prohibited by national law. So, this provision has only one substantial prerequisite that national provisions must not prohibit direct awards ('national reservation').

Problems for competitive cross-border awards between Germany and Poland arise especially out of the legal and practical awarding situation in Poland. On the one hand, in contrast to Germany competitive tendering of RRT is not yet well-established in Poland and several Voivodeships established their own traffic companies (internal operators) which decrease their willingness for joint competitive cross-border tendering. On the other, there is a legal uncertainty after coming into effect of the new Polish act on public transport (PTZ-Act) on 1<sup>st</sup> March 2011 as the competence for cross-border awards is unclear (problem: determination of 'border zone' and 'corresponding entity').

Another problem is that Polish competent authorities cannot enter into contracts that run longer than three years before they adopt a traffic plan. All local autonomous bodies are bound to adopt a traffic plan until 1<sup>st</sup> March 2014.

Furthermore, the PTZ-Act transfers the competence for RRT to other authorities than before without providing them with corresponding financial means. Before 1<sup>st</sup> March 2011 all international transport services by rail and fast train services between voivodeships were financed by the Minister of Transport (MT). Other transport services were financed by the voivodeships. The available financial means of the voivodeships derived from their household and additionally from earmarked grants from the national household (12,5 Mio. zloties per voivodeship in 2009 and 6,25 Mio. zloties in 2010). After 1<sup>st</sup> March 2011 the MT finances only international long-distance traffic and fast train services between voivodeships. All the other transport services, e.g. international services within the 'border zone', are financed by voivodeships or local autonomous bodies. The voivodeships still receive some earmarked grants from the national household (from 2011 to 2015 6,25 Mio. zloties per voivodeship).

As a result, under the current legal situation the competent authorities suffer from a structural underfunding.

Due to the financial situation and legal uncertainties practitioners in Poland often seek pragmatic solutions rather than law-oriented ones. The past practice in the field of RRT exemplifies this. Similar to today, the funding of the voivodeships was often not sufficient enough to conclude long-term contracts with traffic companies. Thus the duration of public service contracts sank from originally three years to only one year. Not seldom traffic companies operated without having concluded a contract or entered into interim-agreements with the competent authorities. Contracts were usually directly awarded.

However, lately, some voivodeships announced the intention to tender competitively in the future. So far, no prior information notice of a competitive tendering procedure is known.

Against the described background there is one main conclusion to be drawn: The overriding obstacle of realizing German-Polish-Awards in the area of RRT is the underfunding of Polish competent authorities. If funding is assured cross-border awards can be carried out on the basis of Reg. 1370/2007 and – where applicable – one of the national procurement regimes.

For instance, 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). Since Reg. 1370/2007 is applicable to the international operation of RRT its Art. 5 covers also cross-border situations. In the case that Art. 5 para. 3 Reg. 1370/2007 is the legal basis for a cross-border award only one national procurement regime can be applied to concretize the competitive tendering procedure. Otherwise it would be unclear which national rules apply, if the involved national procurement regimes have different specifications. Besides, legal protection in each member state could lead to diverging outcomes which would contradict the principle of equal treatment as provided for by Art. 5 para 3 s. 2 Reg. 1370/2007. The national procurement regimes (Germany: 'GWB'; Poland: Public Procurement Act) comply with the requirements of Art. 5 para. 3 s. 2 Reg. 1370/2007 because they are implementations of Directive 2004/18/EC.

Apart from competitive tendering competent authorities can jointly make direct awards of public service contracts concerning RRT. As a legal basis for a direct award only Art. 5 para. 6 Reg. 1370/2007 is suitable. In contrast, Art. 5 para. 2 Reg. 1370/2007 is not suitable because traffic companies of voivodeships are not internal operators of German competent authorities. Plus, it cannot be expected that voivodeships will confer the necessary rights upon German competent authorities to make the traffic companies their internal operators.

A direct award on the basis of Art. 5 para. 6 Reg. 1370/2007 requires that in none of the involved member states the national reservation applies. Whereas in Poland direct awards are legitimate, in Germany they are generally prohibited. The Federal Court of Justice ('BGH') ruled that pursuant to German procurement law RRT have to be procured by competitive tendering (decision of 8<sup>th</sup> February 2011, X ZB 4/10) unless a derogation rule allows for direct awarding. Possible derogation rules are: Sec. 4 para. 3 No. 1 and 2 Public Procurement Regulation ('VgV'), sec. 3 para. 5 lit. h Contracting Rules for Service Contracts ('VOL/A'), sec. 3 para. 5 lit. l Contracting Rules for Service Contracts. At that, cases of inter-municipal cooperation do not have to comply with procurement law.

The concept of inter-municipal cooperation goes back to a Judgement of the CJEU on 09.06.2009 (C-480/06, ECR 2009, I-4747 – Kommission/Germany). In this decision the CJEU identifies – in our view – as the decisive legal prerequisite for an inter-municipal cooperation that it does not distort competition. Hence, applied to German-Polish-Awards the prerequisite is met if the voivodeship's traffic company

carrying out the cross-border transport services has been an internal operator and does henceforth only work for the voivodeships concerned.

Without assured funding a joint award is risky. The risks cannot be avoided by contractual rules. In such a case competent authorities could still – in order to provide cross-border transport services without transfer – proceed as follows: Each of them awards the transport services for their territory including an obligation in the award documents that forces the operator (traffic company) to cooperate with the other relevant operator(s) in a way to mutually hand over the railway vehicles at the border.

If only a small fraction of transport services on foreign territory is concerned the competent authority could contractually oblige the operator to provide transport services beyond the border while these services are not compensated for (commercial transportation).

In order to overcome the legal uncertainty in Poland with regard to competence for cross-border traffic the respective voivodeships and the minister of transport should be part of the procurement procedure. In that way, both possible competent authorities would be involved.

As a consequence of the survey, the following suggestions have been made to adapt Polish law:

1. Rules on competence concerning cross-border RRT should be clearer and simpler.
2. Amount of funding of the voivodeships should be adjusted to the amount of newly assigned traffic tasks.
3. Polish procurement law should explicitly allow for cooperation in joint cross-border awards.