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# SOCIAL ASPECTS AND THE PROTECTION OF STAFF IN CASE OF CHANGE OF RAILWAY OPERATOR: THE CURRENT SITUATION



ENGLISH



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## Document Control

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# Social Aspects and the Protection of Staff in Case of Change of Railway Operator: The Current Situation

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## Preface



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Europe is continually growing closer together, also in the railway sector, and is experiencing an ongoing dynamic and change. As many railway companies are now operating on a European scale, this development more and more affects also public rail passenger transport. Therefore, social partners in the rail sector on the national and European level have an increasing responsibility for analysing and accompanying these developments as well as for determining necessary reactions or measures. The project „Social Aspects and the Protection of Staff in Case of Change of Railway Operator (The Current Situation)“ documents that the social partners CER and ETF are aware of this responsibility and are ready to bear it. Especially during the economic and political crisis in the EU of the past years it has become evident that the issue of social policy, a „social Europe“, has to gain more importance in various respects. European and national railway policy, liberalisation and competition cannot function without sufficiently taking into account the concerns of employees in this area. Adequate good working conditions and the protection of staff in case of a change of operator are indispensable. Both from the perspective of employees and trade unions as well as from the perspective of employers these social conditions are preconditions for the rendering of high-quality services. They are also important for maintaining and improving the attractiveness of employment in the railway sector. Due to demographic change in almost all EU member states, these conditions constitute a crucial challenge in the area of public railway passenger transport.

Instigated above all by EU Parliament and the social partners ETF and CER, the European legislator has taken the right path towards meeting these social concerns by formulating options to protect staff in Regulation 1370/2007. The project conducted by the social partners, which documents the current situation of employee protection in regional passenger transport, shows, however, that this is not sufficient. The findings of the project are a snapshot. Yet they give for the first time an overview of the social conditions in public rail passenger transport in all member states and reveal big differences in the national baselines and in the application of social options. Therefore, it is highly necessary to continue on and further develop this path on a European level while safeguarding the principle of subsidiarity on the national, regional, and local levels. In their „joint opinion“ of 23 September 2013, ETF and CER have expressed their view in the form of five principle statements. The basis was the result and the key findings of this project.

Now, ETF and CER ask the decision makers and politicians to follow these principles. The social partners are willing to provide active support in the process. In this way, a mutual benefit for all parties - employees, passengers, customers, railway companies and policy makers - can be achieved in Europe.

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<sup>1</sup> Community of European Railway and Infrastructure Companies

<sup>2</sup> European Transport Workers' Federation

## Executive Summary

In light of the developing competition, and with an increasing number of public service contracts being tendered out in passenger rail transport, the European social partners in the sector, ETF and CER, considered it necessary to assess the current situation in relation to social aspects and transfer of staff in the sector. This constitutes the first social partner study to assess social aspects of tendering in the award of contracts for passenger rail services. Evidence available thus far has been limited to a few isolated case studies. It is therefore the first comprehensive independent expert analysis on the protection of staff in cases of a change of railway operator and the creation of common social level playing field at EU level. The study aimed to know more about current practice and to provide the basis for further social partner discussions on the consequences of lost tenders for the employees.

Articles 4(5) and 4(6) and Recitals 16 and 17 of the PSO Regulation (Regulation (EC) 1370/2007), which provide different options for the transfer of staff and to protect social standards are at the heart of this study. They allow competent authorities to require public service operators to meet certain minimum social standards in relation to the employment of staff to deliver the service. Another option is to require a transfer of staff to the new operator within the meaning of Directive 2001/23/EC even if the conditions of the Directive are not fulfilled. A combination of both options is also possible. It is within the remit of the competent authority whether or not to make use of these options offered by the Regulation; there is no legal requirement to use one or both options, unless this is required by national law.

The goals of this study were to:

- Obtain a broad overview about the existing rules dealing with social standards and transfer of staff and determine the extent to which they set a binding frame of reference applying to all potential operators;
- Establish the extent to which competitive tendering is used in the selection of passenger rail transport PSO providers and urban transport providers;
- Assess whether social criteria are included in tender criteria; which social criteria are used and the extent to which the provisions or the spirit of EU Regulation 1370/2007 (Articles 4(5) and 4(6) read in conjunction with Recitals 16 and 17) on Public Services Obligations are used in this context;<sup>3</sup>
- Establish the protections applied (if any) to safeguard social standards for staff in the case of a change of operator and in the case of a transfer of staff when there is a change of operator.

The first thing to be noted is that the experience of competitive tendering in the award of public service contracts in the passenger rail sector in Europe is limited, but has increased significantly in recent years and is likely to grow. Similarly, the legal and practical national baseline situation, which sets the framework for the tendering of passenger rail services varies significantly from country to country.

Social standards set in sector specific legislation and – more importantly – in sectoral collective agreements can play a critical role in creating a social level playing field by securing employment conditions for staff in tendering processes. However, the number of countries in which such sectoral agreements currently exist in the rail passenger sector is limited to five Member States (Denmark, Germany, Italy, Netherlands and Sweden). Although there are some limited trends in some countries towards the negotiation of sectoral agreements, these developments are in their infancy. A particular concern is the absence of sectoral collective agreements (and the lack of traditions to negotiate such agreements) in countries where tendering is not yet widespread but will increase in the years to come. Where universally applicable rules for the passenger rail transport sector are absent and there is no requirement to transfer staff, the lack of a social level playing field can lead to significant redundancies and reduced terms and conditions for those able to find re-employment with the new operator.

It must be noted that where sectoral collective agreements are in place, it is possible that the provisions in some company level agreements are up to 20% higher than sectoral agreements. Reference to sectoral standards alone in tender processes can therefore still lead to a lowering of terms and conditions for affected staff.

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<sup>3</sup> The spirit of the Regulation included in European or national legislation, collective agreements, or rules existing even before the Regulation come into force.

Sectoral collective agreements are advantageous, if they are open ended, universally applicable and do not only set limited minimum standards (which may also be the case with a legislation that applies to all companies of the sector). When such sectoral collective agreements are re-negotiated this is usually to achieve improvements in working conditions. A transfer of staff, which might not cover all employees of the old operator to provide services, only provides protection of employees' rights and terms and conditions in most of the countries for a period of one year. This can be different where the staff transfer is governed by the rules of Directive 2001/23/EC on the transfer of undertakings. From the perspective of employees, rules for the whole sector including the transfer of staff would be the most advantageous solution.

With regard to existing sectoral collective agreements (in the passenger rail sector), it must be noted that they are often not universally applicable and therefore only bind the signatory parties. Such gaps can only be reliably addressed by rendering such agreements universally valid.

Where such collectively agreed (and widely applicable) sectoral social standards are not in place, other measures are required to protect the social level playing field in the tendering of PSO contracts. Even where such agreements are in place, the use of social standards and social criteria can create greater certainty in situations where collective agreements are not universally binding.

In countries where a significant share of staff in the passenger rail sector are civil servants or staff with a specific employment status, specific provisions regulating social standards tend to be in place for these types of staff.

Despite the possibilities offered by Articles 4(5) and 4(6) and Recitals 16 and 17 of the PSO Regulation, the use of social criteria in tenders (without the requirement to transfer staff as another way of ensuring social standards) is very limited and the impact of the regulation remains minimal, with only one country enshrining respect for minimum social standards by virtue of the determination of social criteria. This is done at the sub-national (Bundesland) level and the same provisions do therefore not apply to all tender processes.

The other option requiring transfer of staff is rarely explicitly based on the provisions of the regulation. In the 18 EU countries for which information was made available for the study for the passenger rail and urban public transport sector, 5 currently have no provisions (either in law or collective agreement) to require the transfer of staff in the case of a change of operator; in 6 countries transfer of staff is optional and depends on such requirements being specified by the competent authority and in 7 countries transfer of staff is required and binding either in legislation or collective agreement. But even in these cases, this only applies to certain types of staff. This presents a picture of around half of Member States not offering any (binding) employment protection to staff when the contract to operate the service they deliver changes hands.

In cases where staff transfer is optional, this possibility is currently rarely used by competent authorities. Even in countries where transfer of staff is binding, provisions regarding who is to be transferred, under which terms and conditions and how long these conditions are protected varies significantly from country to country.

At present, countries which require transfer of staff on the basis of the national implementation of transfer of undertakings legislation and/or who determine that the transfer of a PSO contract to a new operator classifies as a transfer of undertakings even where there is no transfer of assets offer the most 'reliable' and wide ranging protections for staff.

Economic considerations, the feeling of legal uncertainty, the lack of knowledge and guidance about the possibilities offered by the PSO Regulation and its practical application play a role in the limited application of the options provided by Articles 4(5) and 4(6) of the Regulation. Other challenges include the position of staff with special employment status in cases of staff transfer, which in many countries remains unresolved. Where trade unions are not strong, it is also possible to observe a lack of push for the inclusion of social criteria in tender processes.

As a result, it must be concluded that at present social standards (and employment) in tendering are most effectively protected in current practice through the application of the legislative provisions on the transfer of staff, particularly in the framework of a transfer of undertakings (as defined in national legislation, even where there is no transfer of assets). In a limited number of cases this is achieved through the application of Article 4(5), but these cases tend to offer a lower standard of protection because of different regional and local interpretations.

In cases where staff transfer is not compulsory, the existence of a social level playing field set in sectoral collective agreements (whether or not they are mentioned in tender documents) can offer a certain level of protection, if such standards are (effectively) universally binding. However, as indicated above, it must be borne in mind that the standards in such agreements can be around 20% lower than those set in the best company level agreements.

Given that currently no sectoral collective agreements in the passenger rail sector are universally binding, the setting of social standards and social criteria in tendering would arguably provide for greater certainty.

In addition, it must be noted that a combination of provisions on transfer of staff and social standards set in tendering is the best way to ensure that employment is protected and a social level playing field is achieved for all operators, transferred employees and staff newly recruited to deliver the service.

The fact that around half of Member States currently do not provide for the transfer of staff and only in a minority of Member States sectoral collective agreements are in place protecting a social level playing field must be a matter for concern as the use of tendering for the award of PSO contracts becomes more widespread.

In conclusion, the current experience shows that although the PSO Regulation offers two options – social standards or transfer of staff - (or a combination of both) and in some instances an emerging trend towards the inclusion of social standards/transfer of staff in tendering, overall the actual use of provisions remains limited. Non-binding provisions in this area are not suited to provide adequate protections, particularly for many of the countries only beginning to make passenger rail services subject of tendering processes. This creates a risk of social dumping and an associated lowering of the attractiveness of work in the sector at a time when skill shortages are likely to impact both service provision and service quality. Very different framework conditions exist at national level, which must be taken into account in any further developments. From the point of view of the experts, binding regulation at EU level to ensure the integration of social aspects in awarding public service contracts makes sense, the concrete implementation of such measures at national level should be done by every Member State. In order to create a social level playing field at a good level, the EU legislation shall clarify that social standards are adequate social standards for the sector, thus going beyond minimum standards (such as minimum wages or general working time regulations).

# 1 Introduction

## 1.1 Background to the study

Around 463,000 individuals are currently employed in the passenger rail sector in the European Union<sup>4</sup>. They are working in a sector which is in flux and not insignificantly impacted by policy developments at EU level. Over the last two decades, it has seen seismic changes resulting from market liberalisation in some countries.

Passenger rail services in Europe provide a vital public service. To ensure the security and quality of provision of this key service, the award of public compensation is often required to guarantee its delivery. Regulation 1370/2007<sup>5</sup> on public passenger transport services by rail and by road (hereinafter regulation on public service obligation, or PSO regulation), adopted on 23 October 2007, allows the competent authority to award exclusive rights to transport service operators and/or to grant financial compensation under a legal framework of general rules applicable to all operators providing public transport services. This Regulation, which came into force in December 2009, not only provides the possibility (in specified situations) to use either direct award or tender processes to award rights to deliver the public rail passenger transport service, but also sets out (in Articles 4(5) and 4(6)<sup>6</sup> the possibility for competent authorities to specify certain social and quality standards to be respected by all public service operators, or for the staff of transferor to transfer to the transferee in case of a change of operator (for more detail see section 2.2).

Even though EU legislation does not impose the opening of the domestic passenger rail market to competition, many EU countries have indeed done so. In some countries (Sweden and the UK being the prime examples) these developments date back several decades, in others they are much more recent.

In light of this developing competition, and with an increasing number of public service contracts being tendered out in passenger rail transport, the European social partners in the sector, ETF and CER, expressed their concern about the question of fair competition (creating a level playing field with regard to social conditions) and the consequences of lost tendering procedures or change of operator for the employees who performed the service before (protection of staff in the case of a change of operator).

A joint project was therefore commissioned<sup>7</sup> to:

- Establish the extent to which competitive tendering is used in the selection of passenger rail transport PSO providers<sup>8</sup>;
- Provide an overview about the existence of rules dealing with social standards and the transfer of staff in case of change of operator;
- Assess whether social criteria are included in tenders and the extent to which the provisions or the spirit<sup>9</sup> of EU Regulation 1370/2007 on Public Services Obligations (Articles 4(5) and 4(6) read in conjunction with Recitals 16 and 17) is used in this context;
- Show which social criteria and social standards are used;
- Assess the protections applied (if any) to safeguard social standards for staff in the case of a change of operator and in the case of a transfer of staff when there is a change of operator.

<sup>4</sup> European Commission (2013); The Fourth Railway Package – Completing the Single European Railway Area to Foster European Competitiveness and Growth; p.2; <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2013:0025:FIN:EN:PDF>

<sup>5</sup> OJ L31 5/2, 03.12.2007

<sup>6</sup> And under consideration of Recital 16 and 17.

<sup>7</sup> With co-financing from the European Commission.

<sup>8</sup> The experience of the urban transport sector was to be examined in countries where there currently is no tendering in rail sector.

<sup>9</sup> The spirit of the Regulation included in European or national legislation, collective agreements, or rules existing even before the Regulation came into force.

## Study countries

The study covers 27 countries which are the following: Austria, Belgium, Bulgaria, Czech Republic, Denmark, Estonia, Finland, France, Germany, Greece, Hungary, Italy, Ireland, Latvia, Lithuania, Luxemburg, Netherlands, Norway, Poland, Portugal, Romania, Slovakia, Slovenia, Spain, Sweden, Switzerland and United Kingdom.

Cyprus and Malta<sup>10</sup> has been excluded from the scope of the study due to the fact that both countries do not have rail passenger services.

This document summarises the main findings of this study. It provides a comparative overview of the current situation in public tendering in passenger rail transport, the use of social criteria in tendering and the transfer of staff in cases of change of operator. Furthermore, it presents 10 country case studies, giving a more detailed insight into the use of tendering and the inclusion (or otherwise) of social criteria in tenders; the industrial relations system underpinning the setting of wages and terms and conditions in the sector; provisions regarding the transfer of staff and seeks to illustrate the implication for employees in the sector of such process on the basis of completed cases of tendering.

Based on a background literature review, a survey of social partner organisations and interviews at national level (for further information on the methodology employed for this study, see section 1.2 below), this report provides an assessment of the current situation of tendering and direct award for PSO contracts and the implication of increasing competition for social standards and the protections available for the 463,000 workers in the sector.

For countries without examples of tendering in the passenger rail sector, the study looked at the experience accumulated in the urban public transport sector, to assess which potential lessons could be drawn from developments in this sector.

## 1.2 Study method

This study was delivered over a period of nearly 12 months, between December 2012 and November 2013, in close co-operation with the European social partners CER and ETF, the supporting organisation, EVA Akademie, as well as a steering group composed of representatives of national member organisations of CER and ETF. Study tools and intermediate outputs were validated by the steering group at every step of the research process and our thanks go to the members of this steering group for their invaluable comments and inputs.

The core elements of the research involved:

- Desk research on EU policy literature and transnational research on the liberalisation of the passenger rail market, the implementation of the relevant EU legislative framework and on industrial relations structures in the sector in order to get the big picture;
- Desk research at national level on relevant national legislation, its implementation, industrial relations and collective bargaining in the sector and the experience of tendering in the passenger rail and/or urban transport sector in order to get the big picture;
- A survey of member organisation of CER and ETF. The aim of this survey was to establish the 'big picture' in relation to the current situation of tendering, the use of social criteria and the transfer of staff in the railway and urban public transport sectors (see Annex 2 for a copy of the survey tool). This survey was issued electronically and where no answers were

<sup>10</sup> In Malta the PSO Regulation has been applied nevertheless for the urban transport sector. In 2009 the Maltese Public Transport Authority launched a competitive tendering procedure for the bus services in the country. A consortium led by the operator Arriva won the contract for a period of 10 years. It started to fully operate in 2011.

received within the given timescale or answers required further clarification, telephone interviews were also carried out.<sup>11</sup>

- Based on the survey findings, 10 case study countries were selected for more detailed research. The aim of the case studies from the outset was to focus on countries with experience of staff transfer as part of the tender and award process of a PSO contract. The survey findings made clear that the number of countries with experience of the use of staff transfer in the passenger rail sector remains limited in all countries studied – including in many countries where the market is open. Relevant and completed cases in this sector only exist in Denmark, the Netherlands, Poland, Sweden and the UK. Furthermore, a number of cases where staff transfer is being required in the local and regional passenger rail sector for the first time are under way in Germany and the most progressed of these cases was therefore selected as a case study. The other case study countries were chosen from among those Member States with experience of tendering and transfer of staff in the urban public transport sector: Austria<sup>12</sup>, France and Italy. Furthermore, one country was selected from among the EU10 (the Czech Republic), where a pilot project is currently under way to issue tender procedures in the passenger rail sector for the first time. The case studies involved not only a literature review, but also interviews with tendering authorities, operators and social partner organisations in the case being assessed. Approximately 30 interviews were carried out to support the preparation of the case study reports, which are presented as Annex 1. Key information and examples from the case studies were integrated into the overview report.
- Two seminars were organised by CER and ETF in collaboration with EVA Akademie during the project phase, providing an opportunity to discuss the emerging study findings. In addition, specific country experiences were presented at each seminar which further contributed to the evidence collection for this study.<sup>13</sup>

A high level closing conference was organised on 24 of September 2013 to present the findings of this study and to discuss the European social partners' assessment of the results with a wider policy audience at the EU level.

The subsequent sections are organised as follows:

- Section 2 provides an introduction to the core legislative framework which underpins the award of contracts in the passenger rail and urban public transport sector in the European Union. Specially, it offers an overview of the provisions of Regulation 1370/2007, in particular insofar as they pertain to the possibility of the integration of social criteria and the requirements for staff transfer in the tendering of public services contracts in public passenger transport services. It also sets this into the context of the wider legislative framework for public tendering in the EU (Directives 2004/17/EC and 2004/18/EC), as well as rules on the acquired rights of staff in the case of a Transfer of Undertakings (Directive 2001/23/EC).
- Section 3 gives a basic overview of the structure of employment and collective bargaining in the passenger rail transport sector. This contextual information is primarily important to highlight the distinction between – and impact of – the persistence of different types of employment contract among staff in the sector in many countries. This is linked to important role played by state owned, or majority state-owned companies in many Member States. In these companies, many employees are civil servants or have a special employment status. In order to grasp the implications of the use of different social criteria or the requirement for transfer of staff in tendering processes, it is also important to understand the basic picture regarding different levels of collective bargaining and the standards agreed at various levels. This section is not intended to be exhaustive but merely summarises the key features of employment relationships and industrial relations in the sector.

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<sup>11</sup> Replies to the questionnaire were received from 23 countries (either from the employer or the trade union side or from both sides): Austria, Belgium, Bulgaria, Czech Republic, Denmark, Finland, France, Germany, Hungary, Italy, Ireland, Latvia, Luxemburg, The Netherlands, Norway, Poland, Portugal, Romania, Slovakia, Spain, Sweden, Switzerland and UK. In addition, 40 interviews with trade unions and employers' organisation and national rail providers were carried out to complete this 'big picture' overview. See Annex 2 for more information.

<sup>12</sup> The experience of the regional bus transport sector.

<sup>13</sup> Seminars were held in Berlin on 13/14 March 2013 and in Paris on 16/17 May 2013.

- Section 4 delivers a comparative overview of the current situation in relation to the use of competitive tendering in the passenger rail and urban transport sectors in the European Union. It discusses where tendering is currently in evidence in both sectors at Member State level and where direct award is used.
- Section 5 expands this comparative picture to look at the use of social criteria in public tendering in the passenger rail and urban public transport sectors. It is explored whether, where this option is used, this is done with direct reference to Articles 4(5) and 4(6) of the PSO Regulation and/or whether other national provisions come into play. This section discusses, in turn, the regulation and inclusion or otherwise in tendering for PSO contracts of minimum requirements regarding wages, other wage components, working hours, training, health and safety, the protection against dismissal and pension rights. These are necessarily analysed in the context of different national situations with regarding to collective bargaining in the sector(s).
- Section 6 assesses in more detail the provisions regarding the transfer of staff in the tendering of public service contracts for the delivery of passenger rail and urban transport services in the study countries.<sup>14</sup> In this context, it is important to discuss the legal basis upon which staff transfer is carried out (e.g. is the change of operator considered to be a transfer of undertakings under the national rules, does transfer of staff rely on collective agreements or established practice, or is it specifically required with reference to Regulation 1370/2007, Article 4(5)). The specific position of staff on civil service type contracts is discussed in this context.
- Section 7 concludes the main body of this report with an assessment of the impact of current trends in tendering in the passenger rail sector on social standards and the protection of employees in the sector.
- This is followed by a Bibliography of relevant sources.
- Annex 1 contains the 10 full case study reports have also been used to inform the main body of the report.
- Annex 2 provides the survey distributed to gather information from member organisations of CER and ETF

Because of the complexity of the subject matter and the terminology applied, the following glossary shows how key terms have been used and interpreted for the purposes of this study:

## Glossary of key terms

**Bundesländer** is the term describing the sub-national federal states in Germany. 16 such Bundesländer make up the Federal Republic of Germany (singular form of the word is Bundesland).

**Competent authority** means any public authority or group of public authorities of a Member State or Member States which has the power to intervene in public passenger transport in a given geographical area or anybody vested with such authority. In many countries there are several levels of competent authorities for the rail sector, with the national level often defining the legal framework, whereas local and regional authorities directly responsible for tendering can, in some cases, also make decisions over the specific nature of the award process. Throughout this report, the word competent authority is generally used to denote the authority directly responsible for a specific tender procedure.

**Direct award** means the award of a public service contract to a given public service operator without any prior competitive tendering procedure<sup>15</sup>.

**Exclusive right** means a right entitling a public service operator to operate certain public passenger transport services on a particular route or network or in a particular area, to the exclusion of any other such operator.

**Incumbent** is a term to denote the dominant operator in a sector in any given country. In most Member

<sup>14</sup> Urban transport is only assessed for countries where there is not relevant experience in the passenger rail sector.

<sup>15</sup> In the bus and tram sector direct award is only possible to in-house providers.

States this will be fully, semi- or formerly state owned operator in the passenger rail sector.

**Public procurement** is the process whereby public service organisations acquire goods, services and works from suppliers.

**Passenger rail transport** for the purposes of this study is used to denote national and regional transportation of passengers by rail (with the exclusion of wholly urban rail, tram or metro systems)

**Public service compensation** means any benefit, particularly financial, granted directly or indirectly by a competent authority from public funds during the period of implementation of a public service obligation or in connection with that period.

**Public service contract** means one or more legally binding acts confirming the agreement between a competent authority and a public service operator to entrust to that public service operator the management and operation of public passenger transport services subject to public service obligations.

**Public service obligation** means a requirement defined or determined by a competent authority in order to ensure public passenger transport services in the general interest that an operator, if it were considering its own commercial interests, would not assume or would not assume to the same extent or under the same conditions without reward.

**Urban public transport** for the purposes of this study denotes the transport of passengers by rail or bus in urban conurbations. Where so defined at national level, it can also include regional rail or bus services. For example regional bus services in Austria are defined as urban public transport whereas local and regional rail services (*Schienerpersonennahverkehr*) in Germany would fall under the definition of passenger rail transport. Inter-urban transport services in France denotes the transport by bus between different cities within a county (department).

**Social criteria** are criteria used in tendering to require bidding companies to meet certain minimum standards in relation to wages and non-wage terms and conditions of employment, pension, health and safety or training requirements.

**Social standards** is a term used in this study to denote employee rights linked to wages, non-wage terms and conditions of employment, pension entitlements, health and safety standards or training entitlements.

**Transferor** refers to the previous operator of a public service contract.

**Transferee** refers to the new operator of a public service contract.

**Transfer of staff** means the compulsory transfer to the transferee of the transferor's rights and obligations arising from a contract of employment or from an employment relationship existing on the date of a transfer. The transferee shall continue to observe the terms and conditions agreed in any collective agreement on the same terms applicable to the transferor under that agreement, until the date of termination or expiry or the entry into force or application of another collective agreement.

**Transfer of undertakings/transfer of business** for the purposes of this study means a transfer of staff as well as other tangible and intangible assets in the case of a change of operator. In this report, the term transfer of undertakings is used.

#### Frequently used acronyms

CBA – Collective bargaining agreement

ITT – Invitation to tender

PSO – Public Service Obligation

PTA – Public Transport Authority

SPNV – Regional passenger rail transport (*Schienerpersonennahverkehr*)

TOR – Terms of Reference

TTG – Tarifvertragsgesetz (law on the respect of a collective agreement)

## 2 The PSO Regulation and the wider regulatory framework impacting on tendering, social aspects and the protection of staff in the award of public service contracts for passenger rail and urban public transport services

### 2.1 Introduction

The main focus of this study is on the implementation and impact at national level of the provisions contained in the PSO Regulation. However, in seeking to assess the impact of tendering and increased competition in the passenger rail sector on social aspects and the protection of staff in the case of a change of operator, it was clear from the beginning that the Regulation must be viewed within a wider legislative and policy framework in order to understand the current situation. In at least three countries where examples of staff transfer exist in the rail sector, a change of operator is generally considered to amount to a transfer of business and the requirements regarding staff transfer set down in Directive 2001/23/EC therefore inevitably apply. However, it should be mentioned that article 4(5) of the PSO-Regulation allows the application of the rules of Directive 2001/23/EC even if the conditions of this Directive are not fulfilled.

This section begins with a précis of the respective application of Regulation 1370/2007 and the subsequent section discusses the applicability of Directive 2001/23/EC on the Transfer of Undertakings in cases of tendering for passenger rail services. The intention is to provide the relevant context rather than to be exhaustive.

### 2.2 The PSO Regulation

Regulation 1370/2007 on public passenger transport services by rail and by road and repealing Council Regulations (EEC) 1191/69 and 1107/70 was adopted on 23 October 2007 and came into force in December 2009. This Regulation formed part of the objectives in the Commission's White Paper of 12 September 2001 entitled "European transport policy for 2010: time to decide" to guarantee for a safe, efficient and high quality passenger transport services through regulated competition, guaranteeing also transparency and performance of public passenger services.

Due to the fact that public passenger transport services are required in the general economic interest, and that many of these services cannot be provided on a commercial basis, the PSO Regulation allows that the competent authority awards exclusive rights to transport service operators and/or grants financial compensation under a legal framework of general rules applicable to all operators providing public transport services. A public service contract determines the public service obligations and the conditions of the agreed award.

#### **Distinction between public service contracts and open access passenger rail services providers**

Rail services provided under a public service obligation contract are all those services/lines determined by the competent authority as a service necessary for general public interest but the service would not be viable within a competitive commercial market. Therefore the competent authority will pay compensation to the selected operator and/or determine an exclusive operation right. On the other hand, there are services/lines that are economically viable and can be operated without a public compensation. Commercial rail operators will still need a national operating licence for passenger rail services and a safety certificate and they have to apply at the infrastructure manager for time slots to operate the service. In most cases, commercial rail operators are allowed to operate on the same line as those that operate under a public service obligation contract if that operator does not have exclusive rights. The PSO Regulation applies only to those services operated under a public service obligation contract.

Member States can determine freely the nature of the competent awarding authorities – whether they be national, regional or local. Similarly, the competent authorities can freely determine the scope of the services of general interest that are to be provided and, at least in the rail sector,

chose the public service operator and the procedure of award. In addition to that, even for urban public transport services, local authorities can directly award public service contracts to an internal operator (a legally distinct operator where the competent local authority or the public service operator exercises control as if an own department) or they can use a competitive tender procedure open to all operators.

Article 4 of the PSO regulation determines mandatory content of public service contracts and general rules. This includes the definition of public service obligations and the transparent establishment of the parameters of compensation for PSOs, and the nature and extent of any exclusive right granted. The contract has to stipulate its length which needs to be limited (for rail and track based modes of transport no longer than 15 years and bus and coach services no longer than 10 years<sup>16</sup> and determines the allocation of revenue from the sale of tickets and costs connected to the provision of services. Furthermore, paragraph 5 leaves it open to the competent authority to decide whether to require the chosen operator to grant staff previously taken on to provide the services the rights to which they would have been entitled to if there had been a transfer within the meaning of Directive 2001/23/EC of 12 March 2001 on the approximation of the laws of the Member States relating to the safeguarding of employees' rights in the event of transfer of undertakings, business or parts of undertakings or businesses<sup>17</sup> and hence to require the transfer of staff from the previous operator even if the conditions of Directive 2001/23 are not fulfilled. In this case the competent tendering authority shall list in the tender documents and the public service contract the staff concerned and give transparent details of their contractual rights and conditions. The competent authority can also require standards other than those covered by Directive 2001/23/EC by taking into account social standards established by national laws, regulations or administrative provisions, collective agreements or agreements concluded between social partners. Paragraph 6 provides the competent authority with the choice whether to require service operators to comply with certain quality standards (here recital 17 of the PSO regulation mentions social criteria such as minimal working conditions and social protection or obligations arising from collective agreements). Paragraph 7 of Article 4 indicates that the contract should provide information on the extent to which the awarded operator may subcontract specific services.

## Regulation 1370/2007

### Recital 16

Where the conclusion of a public service contract may entail a change of public service operator, it should be possible for the competent authorities to ask the chosen public service operator to apply the provisions of Council Directive 2001/23/EC of 12 March 2001 on the approximation of the laws of the Member States relating to the safeguarding of employees' rights in the event of transfer of undertakings, businesses or parts of undertakings or businesses [5]. This Directive does not preclude Member States from safeguarding transfer conditions of employees' rights other than those covered by Directive 2001/23/EC and thereby, if appropriate, taking into account social standards established by national laws, regulations or administrative provisions or collective agreements or agreements concluded between social partners.

### Recital 17

In keeping with the principle of subsidiarity, competent authorities are free to establish social and qualitative criteria in order to maintain and raise quality standards for public service obligations, for instance with regard to minimal working conditions, passenger rights, the needs of persons with reduced mobility, environmental protection, the security of passengers and employees as well as collective agreement obligations and other rules and agreements concerning workplaces and social protection at the place where the service is provided. In order to ensure transparent and comparable terms of competition between operators and to avert the risk of social dumping, competent authorities should be free to impose specific social and service quality standards.

### Article 4(5)

Without prejudice to national and Community law, including collective agreements between social

<sup>16</sup> Specific exceptions are possible as determined under paragraph 4.

<sup>17</sup> OJ L 82, 22.03.2001

partners, competent authorities may require the selected public service operator to grant staff previously taken on to provide services the rights to which they would have been entitled if there had been a transfer within the meaning of Directive 2001/23/EC. Where competent authorities require public service operators to comply with certain social standards, tender documents and public service contracts shall list the staff concerned and give transparent details of their contractual rights and the conditions under which employees are deemed to be linked to the services.

#### Article 4(6)

Where competent authorities, in accordance with national law, require public service operators to comply with certain quality standards, these standards shall be included in the tender documents and in the public service contracts.

The PSO Regulation stipulates rules of award and that competent authorities need to publish an annual report on public service obligations, as well as details on financing and quality of the public transport network to be monitored. The public service compensation has to comply with the rules laid down by the Regulation, otherwise it would be considered as state aid (which would fall under the requirements of separate EU regulation and is tightly controlled).

Member States need to comply with the rules on the award procedures as set out under Article 5 of the PSO Regulation by 3 December 2019. Contracts that have been awarded before the PSO Regulation came into force may continue until they expire (if awarded on the basis of a fair competitive procedure no longer than 30 years, and if awarded otherwise no longer than 15 years). The consequence of the transition period is that after 2019 national legislation can no longer exclude the award of public service contracts by competitive tendering. Overall, an ongoing trend towards the regionalisation of the organisation for public transport can be observed. In those countries using competitive tendering, it is often a regional, or even local authority (or indeed a separate body set up by these authorities) that is competent to award all services for urban transport and passenger rail services with exception of the UK where it is the Secretary of Transport<sup>18</sup> (for England and Wales), and of Denmark where it is the Ministry of Transport and the National Transport Authority which act as competent awarding authorities for passenger rail services. This leads to the conclusion that it is in particular regional rail lines that receive a public compensation while long distance travel is often left to open access and provided on a commercial basis.

## 2.3 EU legislation on staff transfer in cases of transfer of business

The EU Directive on the Transfer of Undertakings (Directive 2001/23/EC), also known as the 'acquired rights directive' sets out that rights and obligations relating to terms and conditions of the contract of employment including terms and conditions agreed in collective bargaining agreements should be transferred to the new employer in the process of transfers or mergers. All Member States have implemented this rule.<sup>19</sup>

Under Article 1, the Directive states that it applies 'to any transfer of an undertaking, business, or part of an undertaking or business to another employer as a result of a legal transfer or merger' or in case of tendering. A first consideration is thus whether the transfer event may be classed as a 'legal transfer or merger'; this is then followed by a consideration of whether, given the circumstances of the case, an undertaking has in fact been transferred.

These two considerations have led to quite a substantial amount of case law at the national courts and the Court of Justice of the European Union (CJEU). In general, the contractual relations between the transferor and the transferee are analysed to establish whether there has been a change of identity of the employer. Direct contractual relationships between the transferor and the transferee are not necessary in order for the Directive to be applicable. However, there has to be a transfer of "undertaking" which means in principle a transfer of assets. This point is

<sup>18</sup> Since 2005.

<sup>19</sup> Sargeant, M (2006); Human European Consultancy, Middlesex University Business School, Implementation Report Directive 2001/23/EC on the approximation of laws of the Member States relating to the safeguarding of employees' rights in the event of transfers of undertakings, businesses or parts of businesses, European Commission

particular delicate when the transfer concerns services, as by definition, only the service will be contracted out not implying a transfer of tangible and intangible assets. Therefore there wouldn't be a transfer of an autonomous economic entity within the meaning of Directive 2001/23 and that can be transferred excluding the applicability of the Directive.

In principle the Acquired Rights Directive (2001/23) is applicable to all employees, notwithstanding their sector of employment. However, the implementation report delivered to the European Commission in 2006<sup>20</sup> reveals that in some Member States employees from the public sector - civil servants and/or those with a specific employment status - can be excluded from the scope of the Directive, as they are not classified as 'workers'.

In relation to the railway sector, two key considerations apply when assessing whether this directive applies: whether the tender involves a transfer of materials and assets (as well as personnel) and the status of the individuals to be transferred. For example civil servants or staff with a specific employment status are not classified as 'workers' and cannot be transferred by application of the Directive. It must, however, be noted that some countries (e.g. the UK, the Netherlands and Denmark) chose to apply the transfer of undertakings rules to the railway sector, even if there is no transfer of tangible assets.

In cases where no transfer of business is taking place, Article 4(5) of the PSO Regulation therefore provides the only grounds in EU law to require a transfer of staff within the meaning of Directive 2001/23/EC.

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<sup>20</sup> Sargeant, M., *ibid.*

### 3 Collective bargaining and specific elements regarding employment in the passenger rail sector

This section aims to provide a basic overview of the structure of employment and collective bargaining in the passenger rail transport sector. As indicated above, this contextual information is primarily important to highlight different national baseline positions in relation to the setting of a social level playing field through collective bargaining and the distinction between – and impact of – the persistence of different types of employment contract among staff in the sector in many countries. This is linked to important role played by state owned, or majority state-owned companies in many Member States. In these companies many employees have a ‘civil service type’, special employment status. It has implications for the setting of social standards and more importantly for the transfer of staff in the case of a change of operator.

In order to interpret the implications of the use of different social criteria or challenges arising relating to the requirement for transfer of staff in tendering processes, a basic understanding of these different types of employment contracts, as well as key structures for collective bargaining is important.

#### 3.1 Collective bargaining in the passenger rail sector

The structure of collective bargaining in the sector is also influenced by the relative dominance of incumbents and the special status a significant number of individuals active in the sector still retain. This has led to the following picture of different levels of bargaining as presented by Eurofound is a recent study on industrial relations in the railway sector<sup>21</sup>. Our research has shown that the picture presented in this report needs to be nuanced, particularly in relation to the negotiation of terms and conditions for staff without special status in incumbents and regarding the different levels of bargaining responsible for setting core employment standards.

The extent to which national statutory minimum provisions (e.g. on wages etc) impact on collectively agreed standards should also be borne in mind. Similarly, the extent to which collective agreements can be rendered universally applicable and can be imposed on employers and employees who are not members of the negotiating parties also impacts on the setting and protection of social standards in the sector.

Generally speaking, in countries where this is sectoral (multi-employer) bargaining, this sets a floor of rights which can be enhanced (but usually not reduced) through company level bargaining. Both for bargaining at company and sectoral level, different levels of pay (or even non-wage benefits) can be negotiated at regional or service specific level, leading to a complex patchwork of provisions.

**Table 3.1 Collective bargaining in the EU passenger railway sector**

Level(s) of bargaining	Countries
Company level only (often with regional or service specific variations)	Belgium, Bulgaria, Czech Republic, Estonia, France, Finland, Greece, Hungary, Ireland, Latvia, Lithuania, Luxemburg <sup>22</sup> , Portugal, Poland, Romania, Slovakia, Slovenia, Spain, UK
Sectoral level bargaining enhanced by specific company level	Austria, Denmark,

<sup>21</sup> Ibid, page 34.

<sup>22</sup> Statut du personnel de la Société nationale (Commission paritaire preside par un représentant du ministère competent.

Level(s) of bargaining	Countries
agreements (often at regional/specific service level)	Germany, Italy, Netherlands, Norway, Sweden

Source, Eurofound (2012), amended by ICF GHK based on research carried out for this study

### 3.2 Employment status of staff in the passenger rail sector

In many European countries, the national rail operator which was, or remains, majority owned by the state remains the dominant (or sole) supplier of domestic passenger rail services. As a result of the restructuring and change in status of these companies, there has been an evolution in the nature of the employment contracts concluded with staff in these companies. Generally speaking, individuals employed prior to the restructuring, which usually occurred in the 1990s, have special employment status/civil service type status. This means that they tend to be covered by more favourable terms and conditions, special pension arrangements and in many cases benefit from protected employment status (and cannot be made redundant for operational reasons). Workers recruited by these incumbents after the 1990s are generally hired on ordinary private law employment contracts and are often covered by different collective agreements. This has led to different terms and conditions and levels of protection applying to employees within the same company. A recent Eurofound study<sup>23</sup>, as well as research carried out for this study paint the following picture: in most of the European countries, the majority of staff employed in the passenger rail sector is now employed under private law employment contracts. However, among incumbents a significant proportion of staff has a special status.

In Austria, Germany and Denmark, between 25-60% of staff working for the incumbent remain employed under a specific status and are granted different employment conditions than newly hired staff (hired after restructuring of the national rail company) who are employed under private law employment contracts. For instance in Denmark, staff with a particular employment status and working conditions were hired until 1993 and still represent approximately 50% in the overall staff employed by DSB. In Germany, the share of civil servants at Deutsche Bahn has declined significantly since 1994 and today only makes up around 25% of staff. The remaining share of employees with special status remains very high in Austria at around 60% in the national rail operator ÖBB. This number is expected to drop to 50% by 2020 after a wave of retirement of long-standing staff in the coming years.

In Belgium, France and Luxemburg staff employed by the national passenger rail operator is granted a specific employment status similar to civil servants applying company specific employment conditions.

The status of staff needs to be taken into account when analysing applicable social criteria in the passenger rail services sector as different rules tend to apply to staff with special employment status. This can lead to differences in the financial value of salaries and benefits enjoyed by these types of employees of around 20% when compared to workers relying on national sectoral agreements (or some company level agreements). Furthermore, it is also of particular relevance – and poses specific challenges – in relation to the transfer of staff, as well be elaborated in section 6.

<sup>23</sup> European Foundation for the Improvement of Living and Working Conditions, Employment conditions and industrial relations in the railway sector, Dublin, May 2012 available at the following website: <http://www.eurofound.europa.eu/docs/eiro/tn1109030s/tn1109030s.pdf> accessed on: 04.03. 2013

## 4 Comparative Overview: The current situation in tendering for public service contracts in passenger rail transport and urban public transport

### Key findings on the current situation

#### Tendering in passenger rail transport

- Two EU countries award public service contracts for passenger rail services only through competitive tenders (Sweden, UK)

In these countries, tendering already began in the 1990s. In Sweden competent authorities are located at the regional and municipal level where as in the UK the Department for Transport is (since 2005 again) responsible for awarding passenger rail franchises. In Sweden, the restructured incumbent, SJ continues to play a significant role in the market, although many private, including many foreign owned, operators are also active on this mature market. In the UK, British Rail was privatised in 1993 and only private or foreign majority state owned operators are now active on the market.

- In six countries (Czech Republic, Denmark, Germany, the Netherlands, Poland and Italy) it is left to the competent authorities to decide on the method of award chosen

In Germany, competitive tendering is the main mode of award for the regional and local rail sector (*Schienepersonennahverkehr*). In Denmark and the Netherlands, competitive tenders have been used on a number of occasions, but direct award continues to be significantly used for certain services. In the Netherlands, for example, national railway services and transport concession for the big urban conurbations of Amsterdam, Rotterdam and the Hague continue to be awarded directly while most regional lines tendered. National legislation calls for competitive tendering in Italy and decision making has been decentralised to the regional level since 1997. Then, a number of “transition periods” has been introduced over the years. This means that few competitive tenders have been issued and most of these have either been withdrawn/postponed or awarded to the national operator. This situation arises partly from the fact that the public services are often undercompensated, considering low subsidies and tariffs and, in the meanwhile, the services need, in particular, not only at the beginning, high investments. As a consequence, new-entrants choose to operate services only on profitable rail routes.. In Poland the national intercity network was let through direct award in 2010 for a 10 year period. Regional lines are the responsibility of the regions. The first such competitive tenders have been launched since 2007, some of which have been won by private operators. Decisions are currently being made on whether further tender processes will be launched in 2014. In the Czech Republic, a first pilot tender project was launched in 2013.

- In the majority of study countries most passenger rail services are awarded through direct award only (19 countries)

This reflects current practice rather than the legislative situation in these countries.

As a result, the experience of tendering for PSO contracts in the passenger rail sector remains relatively limited.

#### Tendering in urban public transport

The urban public transport sector was primarily studied for the countries where there is currently no experience of tendering in the passenger rail sector and conclusions can therefore give an indication for the rail sector. In this sector, competitive tendering is more widespread. Four countries use this form of award only. In 18 countries competent authorities have a choice between awarding to an internal operator and awarding by competitive tendering but competitive tendering is frequently used. A further 4 countries use only awarding to an internal operator.

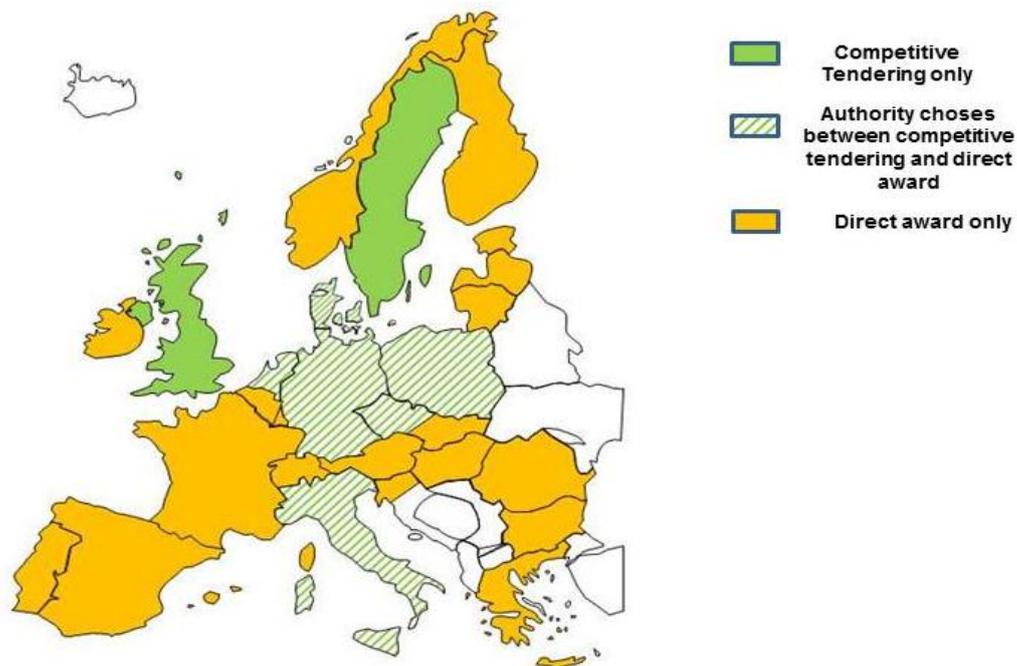
### 4.1 Introduction

This section provides an overview of the current situation regarding the use of tendering for public services contracts in the passenger rail and urban public transport sectors. It is based on a review of the literature as well as replies to the survey of CER and ETF members carried out as part of this project. It is worth noting that no scientifically peer reviewed or European comparative literature exists on this particular topic. Therefore, the literature review primarily covered various

commissioned reports that touch upon some aspects of the topic (e.g. the liberalisation of the railway sector;) and a review of material accessed through the websites of national ministries, regional and local competent authorities, national publicly owned operators, private operators and online railway journals.

## 4.2 Use of tendering for public service contracts in passenger rail transport

The map below shows the current actual use of type of tendering for public service contracts in the passenger rail sector in practice and not what is stipulated in legislation.



*\*For countries Bulgaria and Romania mixed sources exist – both countries seem to have legislation in place that allows for competitive tenders*

*Source: ICF GHK based on questionnaires, Rail liberalisation Index 2011, Transport websites*

The countries highlighted in green on the map (Sweden and UK) denote the Member States where competitive tendering is obligatory for public service contracts in the passenger rail transport sector.

### Sweden

In Sweden regional and inter-regional passenger rail transport services have been open to public tender since the 1990s. Regional competent authorities were also established in the 1990s. A new Act of 2012 does not allow for exclusive rights meaning commercial services can be provided at the same time next to the operator providing services under a public service contract (with obvious limitations imposed through track availability and operating timetables).

### UK

In the UK open tendering from railway franchises began in 1994 following the 1993 Railways Act. The first franchises were awarded in 1995 and the first privatised services have been running since 1996. Since 2005, responsibility for tendering and overseeing the performance of private operators has been with the Secretary of State for Transport (previously the Franchising Director from 1993 to 2000 and subsequently the Strategic Rail Authority from 2000 to 2005). There are currently 15 franchises operating in England and Wales, involving 10 different train operating companies. Only one franchise is currently in public ownership after the private operator handed the operation of the East Coast mainline back to the government as they were unable to meet the terms of their franchise. A new tender process of this

particular franchise is foreseen to be issued in 2014.

The countries presented in green/white shading (Czech Republic, Denmark, Germany, Italy, Netherlands and Poland) have regionalised their markets and competent authorities are often attached to a specific region (transport regions). In these countries competent authorities may choose between direct award or competitive tendering. It should be noted that the intercity connections or long distance travel is often directly awarded by competent authorities. This concerns the Czech Republic, Netherlands and Poland. In countries like Germany, and Italy long distance travel is carried out on a commercial basis (open access) and the PSO regulation is therefore not applied in these cases. Among these countries, competitive tendering is so far only used in Denmark, Germany (in the local and regional rail sector – *Schiene-personenverkehr* or SPNV) the Netherlands and Poland, with the Czech Republic currently running pilot schemes. National legislation calls for competitive tendering in Italy and decision making has been decentralised to the regional level since 1997. Then, a number of “transition periods” has been introduced over the years. This means that few competitive tenders have been issued and most of these have either been withdrawn/postponed or awarded to the national operator. This situation arises partly from the fact that the public services are often undercompensated, considering low subsidies and tariffs and, in the meanwhile, the services need, in particular, not only at the beginning, high investments. As a consequence, new-entrants choose to operate services only on profitable rail routes.

## Czech Republic

In the Czech Republic passenger rail services are divided between regional, inter-regional and intercity transport. Regional transport is under the authority of the regions and they can choose to have a competitive tender or award directly. Inter-regional, intercity and high speed trains are compensated by the central state under a public service contract and awarded directly to the incumbent CD (České dráhy). However, the regionalisation of the rail organisation is not yet entirely established. Within these services only one pilot project is currently tested – a call for tender has been launched in 2012 and just recently awarded to a Czech private operator (April 2013)<sup>24</sup>. In addition, operators have open track access and can provide commercial service lines after application to the Infrastructure manager establishing the annual timetables.

## Denmark

The Ministry of Transport is concluding public service obligation contracts with rail operators and the National Transport Authority follows up and controls the application of these contracts. Yet, the municipalities and counties do determine their needs for public transport services, ticketing and tariffs. They are determining the costs for services, tariffs and pay the compensation for the public service contract. According to the 2010 Transportation Act<sup>25</sup>, municipalities and counties can be a shareholder in a rail operator or can own a rail operator. In general the Ministry of Transport uses competitive tendering procedures for all railway services involving a public service obligation, but has to a limited extent the opportunity to award a contract directly. In terms of the timescale and re-tendering of franchises (and therefore the potential for a transfer of staff to take place), it should be noted that since the original tender processes in the early 2000s, only the contract for the Western region Jutland has been re-tendered in 2009 after a first tender in 2003. Another tender was launched in 2009 for the coastal Northern region which borders Sweden. Before 2010, the Ministry has directly awarded all other services to DSB – the national rail operator. The current contract was awarded for a period from 2005 to 2014.

## Germany

The use of competitive tendering in the SPNV sector in Germany began in the mid- to late 1990s, but has considerably picked up momentum over the last decade, in line with the emphasis on liberalisation in EU legislation and the desire to reduce costs and improve customer service. PSO contracts generally have a

<sup>24</sup> See webpage <http://www.railwaygazette.com/news/passenger/single-view/view/regiojet-awarded-pilot-czech-operating-contract.html> accessed 10.04.2013.

<sup>25</sup> See webpage <https://www.retsinformation.dk/Forms/R0710.aspx?id=131257> consulted on the 23.04.2013

duration of around 15 years, but can be concluded for up to 20 years (and further extended to up to 22.5 years).

EU rules on tendering (Directives 2004/17/EC and 2004/18/EC) and their national implementation are considered to be of primary importance in the award of contracts for the delivery of goods and services, including for service in the field of SPNV. The fact that competition is paramount in SPNV was further underpinned with a judgement of the Federal Court of Justice of 8 February 2011 which ruled that all SPNV services in principle should be let through competitive tenders.<sup>26</sup>

The use of direct award is therefore now restricted to certain situations. Among the most important of these are<sup>27</sup>:

- Where the risk of operating the service lies (mainly) with the provider (net contract);
- Award is for a short period of time (no more than three years) as an extension of an existing services contract, if there is subsequently an intention to merge existing lines (bridging contract);
- Special themes such as the tendering of special vehicles or for special tracks. This can also only be utilised for short term contracts.

As a result, the use of direct award processes in SPNV has become very restricted and competitive tenders are now the norm. Tenders can be organised with and without pre-qualification stages. Pre-qualification is mainly used for complex tenders and where new vehicles are to be provided. This is mainly to ensure that there is sufficient interest in the tender procedure.

## Italy

In Italy the liberalization of the Local Public Transport (Railway and Urban Transport) started in 1997 with the decree n. 422/1997 that regionalized the competence of public authorities (the regions became the competent authorities) and established to award public services by tendering procedures. During the years many changes have been made to the legislation to reach the current situation: a “transitional period”, was established by law (law n. 99/2009) with a direct reference to the Regulation 1370/2007 that expires on 3 December 2019. During this period, Regions can also extend the duration of current contracts with the operators but no longer than the so-called “6+6” formula.

## The Netherlands

The Passenger Transport Act 2000 (hereafter PTA 2000) - which applies to all public transport public services (bus, tram, metro, fast ferry and railway lines) (cf. article 2 PTA 2000) - requires public transport authorities to set public transport policy goals, to define concession areas and to organise competitive tendering procedures with the aim of awarding exclusive rights to deliver a service. The obligation for the transport authorities to submit the award of a concession with respect to railway lines to competitive tendering was introduced gradually after 2001 to reach currently almost all public transport services, with the exception of the national railways and public transport in the main cities.

Today, only the Transport Ministry, who can award concessions related to national railway lines, and the tendering authorities of Amsterdam, Rotterdam and The Hague (largest cities of the Netherlands) can choose to submit public transport service to competitive tendering or to directly grant a concession. Local transport tendering authorities in the Dutch provinces, as well as in the cities and city regions – who (only) have the authority to provide concessions with respect to railway lines (or public transport other than by train) - must tender out via a competitive procedure (cf. article 1, m *in*cto 20 PTA 2000).

## Poland

It is the 16 Polish regions (voivodships) that organise regional passenger rail services and that are the competent authorities to launch a competitive tender. The first such competitive tenders have been launched since 2007. The intention is to further divide the national rail operator PKP into 13 regional operating companies. Currently, three operating companies already exist in 3 regions. In one region a private operator (Arriva) has been awarded a number of lines. Legislative reforms are still needed to regulate and entirely regionalise the transport administration. Long distance or intercity travel had been awarded to the incumbent PKP by the Ministry of Transport in 2010 for a 10 year contract.

<sup>26</sup> [http://www.bbgundpartner.de/files/110208\\_bgh.pdf](http://www.bbgundpartner.de/files/110208_bgh.pdf)

<sup>27</sup> See <http://www.forschungsinformationssystem.de/servlet/is/369945/> and information provided in an interview with BAGSPNV.

Countries coloured in orange make use of direct award only. Here there is in general a national authority responsible for the direct award to the national passenger rail operator. In Latvia the current government made a political agreement to launch competitive tenders in the rail sector in the coming 5-10 years. In Portugal competitive tendering could be used for concessions under PSO contracts but so far this option was not further explored. Greece is a particular case as currently the law would allow for a choice in tendering between competitive tendering and direct award. In September 2013 the Greek Government had launched a call for competitive tender to sell 100% of the incumbent TrainOSE to entirely privatise the ownership<sup>28</sup>. This will allow for further competition through tendering in the future. In countries such as Finland, Norway, Spain and Slovakia a political agreement exists that in the near future the passenger rail services could be awarded by competitive tendering, most probably starting with some regional passenger transport services. In Norway a pilot project for a regional tender had been carried out in 2005 which was awarded to the national provider over competition from the private sector. Currently, there is no private operator providing public passenger rail services in Norway. Also in Spain a process of regionalisation had been launched at least regarding the Catalan region which has since 2007 the authority to tender out regional passenger rail services. The Generalitat de Catalunya firstly awarded directly to the incumbent RENFE (2006 – 2013) but is currently preparing a competitive tendering process<sup>29</sup>. Furthermore Spain prepares a law based on Royal Decrees 22/2012 and 04/2013 to divide RENFE in four entities and to provide for a choice of tendering procedure. The RENFE board of management approved the separation of the company into four entities: passenger operations, freight, rolling stock maintenance and train leasing. The Government has approved the separation in late September 2013. The Government is preparing the first call of competitive tenders for end of 2013.<sup>30</sup>

The box below provides just some examples of direct award processes in the countries mentioned above.

### Portugal

In Portugal the public service contract (concession) is awarded directly to the national passenger rail transport operator CP - Comboios do Portugal. However, there has been one competitive tender in 1999 for a regional passenger rail service in the Lisbon region. This was an entirely new line that was built and afterwards awarded to a private operator – Fertagus. The line is operated under exclusive rights.

### Slovakia

In Slovakia the public service contract for passenger rail transport is awarded directly to the incumbent ZSSK. The last renewal was made in 2010 for a 10 year period. However the Ministry of Transport had made plans to regionalise passenger rail services and use competitive tendering to award regional rail public obligation contracts. In 2011 a pilot project was launched in which the Ministry has awarded, after competitive tendering (the national provider was excluded from the bidding), some lines in the region of Bratislava. This has however remained the sole project to award lines using competitive tendering procedure.

## 4.3 Use of tendering for public service contracts in urban public transport

The following map shows the current use of type of tendering for public service contracts in the urban and interregional public transport, including buses, tram, metro and light rail as currently practiced and not as stipulated in legislation.

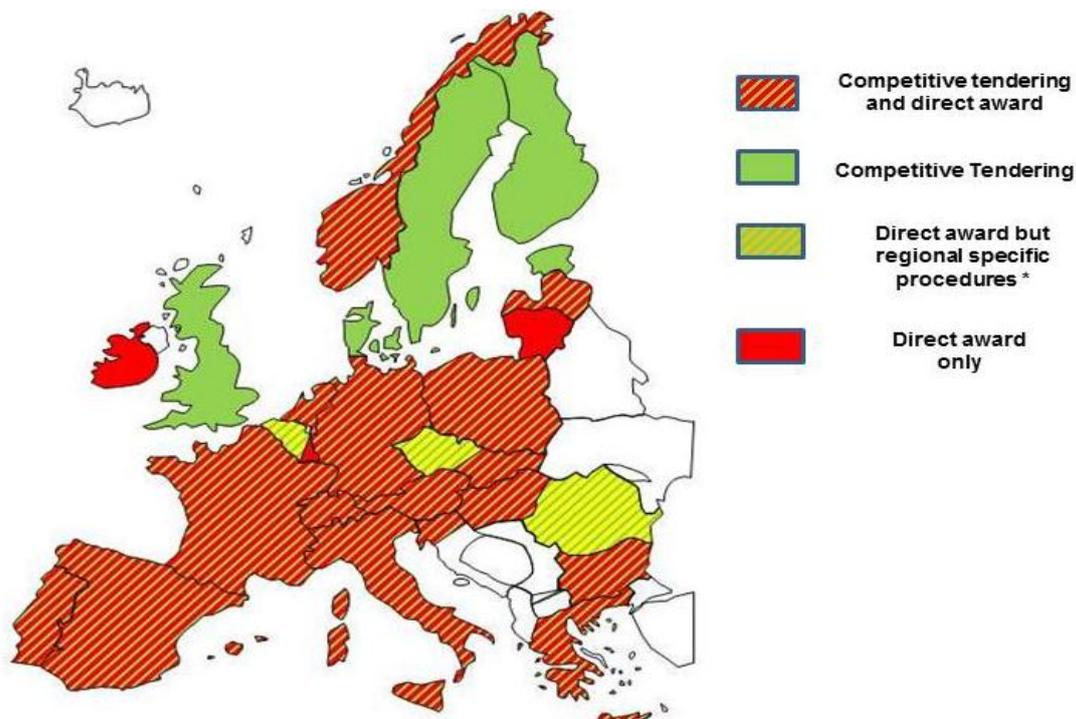
<sup>28</sup> <http://www.railwaygazette.com/news/news/europe/single-view/view/three-expressions-of-interest-in-greek-rail-privatisation.html>

<sup>29</sup> European Metropolitan Transport Authorities Association EMTA, briefing note to its members, November 2010, available at: <http://www.emta.com/spip.php?rubrique46> accessed 04.04. 2013.

<sup>30</sup> <http://www.railwaygazette.com/news/freight/single-view/view/government-approves-renfe-restructuring.html>

It should be noted that this map should be seen as indicative as the urban transport sector is not the primary target of this study and questions on the operation of this sector have been answered by stakeholder for all countries. It must also be borne in mind that this might not represent the situation for tendering of all types of urban transport services in one country, as the situation can differ from locality to locality. The presentation is therefore based on limited stakeholder information and a review of the literature.

Countries that are highlighted in green – Denmark, Estonia, Finland, Malta, Sweden and the UK – are those in which tendering for urban transport services is carried out under competitive tendering procedures. In Sweden award to an internal operator is not possible anymore whereas in the other countries exceptional cases might exist such as UK where underground services in London are awarded to a internal public operator. It should be noted the UK has a very unique system for the award of urban bus services (see box below). Malta is also particular case due to fact that it is a small country and that the Transport Ministry awarded one single public service contract for the entire urban transport service.



\* The competent authorities award the contract to an operator (internal operator) who then can launch further competitive procedures to select small local operators (having often historic operations rights) these procedures do not follow the same rules as under competitive tendering.

To note: In the case of public urban transport direct award means awarding to an internal operator ("inhouse").

Source: ICF GHK based on questionnaires, EU Commission study (2008), national transport websites

In the majority of the countries, public authorities dispose of a choice regarding the use of award to an internal operator or competitive tendering. These countries are coloured in a green/red pattern – Austria, Bulgaria, France, Germany, Greece, Hungary, Ireland, Latvia, Netherlands, Norway, Slovenia, Slovakia, Spain, Switzerland and Portugal. In countries such as Greece, Hungary, Italy, Slovenia, Slovakia and Spain, in the majority of cases, urban public transport services provided under a public service contract are carried out by the publicly owned internal operator. In Poland the situation is similar where most of the regions opt for award of urban transport services to an internal operator. In Hungary, the bus service operators are all state owned and public services contracts were protected until the end of 2012. A political agreement foresees to launch competitive tenders for 66% of the urban transport market. It can be estimated that in the next years private operators will enter the market. Currently, social standards in urban transport in Hungary are only protected under law and company level. There is no transfer of staff regulation that ensures workers will transfer to a new operator.

In the Czech Republic, Belgium and Romania urban and inter-urban transport services are awarded to a publicly owned internal operator however the operator can sub-contract services to other operators.

## Belgium

In Belgium urban transport is regulated by each of the three regions (Brussels, Flanders, Wallonia). Since the early 1990s, each of the regions awards all urban passenger transport services to each of their respective in-house operators. The region and the operator determine in their contract all objectives and services to be delivered in the public interest. The negotiation of the contract has to follow transparency criteria. Until recently, social criteria have not been particularly mentioned in the contract. For the new contract in Wallonia, the regional Transport Minister announced that for the next contractual period, staff should be further involved and consulted on quality delivery and decisions on the execution of services.

The incumbent operator is technically the sole operator in each region. However, in Flanders and Wallonia the incumbent makes use of sub-contracting. This means that other companies can run passenger services but under the visual identity of the incumbent. In Flanders, approximately 45% of services are run by private operators. There is a political desire to attain an even 50-50% share between the incumbent and private operators. In Wallonia, the share depends on the region with variations from 11 to 41%. School bus services have to be sub-contracted to private operators. Yet, private operators are chosen with the discretion of the incumbent. So in Wallonia, there is no competitive tender procedure for these services. In Flanders a change was introduced in 2002 after a political discussion. As a result, at the start of each framework contract, the incumbent has to launch a call for tender and as a result concluded 79 separate contracts. The call of competition has caused a restructuring of the market of private operators. At this stage no-transfer of staff has occurred. Workers are employed under different company level collective agreements resulting in slightly different employment conditions.

In Lithuania, Luxemburg and Ireland the competent authority awards public service contracts for urban transport services always to an internal operator.

There is a tendency that in most of the European capitals and bigger cities urban transport services are awarded by the competent authority to an internal operator.

## UK

Urban transport services are mainly carried out on a commercial basis, except for the London area where public service contracts are awarded by competitive tendering to operators on a route-by route basis (bus services). In order to commercially operate a line in the UK, an operator would need to get an operating licence from the UK Traffic Commissioners and register the operating lines and timetables. Operators can determine charges and do not have public service obligations or exclusive rights. There are only few cases of public tendering for local bus services on a route by route basis. Some cities/towns in the UK have of a municipal bus operator (for ex. Edinburgh).

## Ireland

Urban transport bus services can be provided on a commercial basis but their services form part of the public transport system. These small, local privately owned operators have generally held their licence for a long time. In general, an operator needs to apply for a licence with the National Transport Authority. This licence is granted on the condition that the operator is operating under current employment and health and safety conditions and needs to demonstrate compliance (Public Transport Regulation Act 2009). The licence is given out in connection with a particular distance/ line that will be operated. Furthermore, the Irish National Transport Authority awards a public service obligation contract to Bus Eireann, the incumbent for some city/town services, regional services and school transport services. The Dublin Bus services are also operated via award of a public service contract to an internal operator. Recently, the Irish government launched a public consultation procedure on the future of handling of tenders for public urban transport services. The Public Transportation Regulation Act and the Dublin Transport Authority Act

2008 could therefore be amended in the years to come to change the system of using award to an internal operator only.

## France

The French municipalities (“communes”) are the competent authorities to organise urban public transportation services. Yet, in 80% of the cases a specific public transport association is set up – regrouping different municipal actors of one county (‘département’) it can be even international in the case of frontier regions and counties). They dispose of a choice to award a public service contract either to an internal operator or by competitive tender. For inter-regional bus services (“transport inter-urbain”) it is the regional administration (‘département’) that will award this type of transport services but it can also be the specific association that can be vested with this power. It can be noted that 90% of the market is actually awarded by competitive tender. Around 87% of all public urban transport services are provided under a public service contract.

## 5 Comparative Overview: The current situation regarding the use of social criteria in tendering for public service contracts in passenger rail and urban public transport

### Key findings

#### Social standards in passenger rail and urban public transport

Articles 4(5) and 4(6) of the PSO Regulation allow competent authorities to require public service operators to meet certain social standards in relation to the employment of staff to deliver the service. It is entirely within the remit of the competent authority whether or not to make use of this possibility offered by the Regulation; there is no legal requirement to use this possibility.

When looking at the application in practice of these articles of the Regulation, it is important to note that:

- There are core social standards in relation to the criteria which are either prescribed by national legislation or in collective agreements which cover the majority of the sector. Although some competent authorities do mention the need to respect these standards in tender documents for public service contracts in the sector, this is not strictly necessary because any operator not applying these standards would be subject to legal sanction and could be excluded from future tendering processes. Minimum wages, working hours and health and safety provisions tend to be subject to such legislation, although collective agreements at different levels play a significant role on improving on these standards. In Denmark, Germany, Italy, the Netherlands and Sweden sectoral collective agreements play an important role in securing social standards and apply to all or most operators even if they are only binding on signatory parties. However, company level agreements (particularly for incumbents) can make a difference of up to 20% in the financial value of higher wages and benefits in these companies.
- There are also social standards which apply in the case of a change of operator by virtue of requirements being set down by competent authorities (based on relevant regulations) to transfer staff. These relate to maintaining the wages and terms and conditions of employment in applying to the previous operator, thus offering not only employment protection but also security regarding terms and conditions of employment. This situation particularly applies in examples in Germany and Italy.
- Finally, there are social standards specifically set down in tender documents by competent authorities, which can make reference to existing norms and collective agreements which would otherwise not be binding on all operators. The standards chosen are increasingly pointing to the use of sectoral collective agreements as a minimum standard. As mentioned above, the difference in the provisions set at this level and those available in some companies can be significant. The setting of social standards beyond certain international and national minima is used, for example, in Germany and Italy.

At least one country (Poland) currently sets no standards beyond the statutory minimum. The Labour Code in principle allows for transferor or and transferee to negotiate staff transfer, but is not required by competent authorities.

Only one country (Germany) has provisions at the level of the Bundesländer (in 13 out of the 16 Bundesländer) which enshrine respect for minimum social standards by virtue of the determination of these criteria. In three other countries, the maintenance of social standards arises only from the application of national legislation on the transfer of undertakings (Denmark, the Netherlands, UK). In Sweden social standards are optional and rarely used, but transfer of staff is practiced *de facto* in all cases and thus secures employment and minimum standards. Italy requires the transfer of staff as well as the observance of social standards, but there are few examples of the application of these provisions. Standards beyond the legislative minimum in relation to training were stipulated in tender documents in Denmark, Germany, the Netherlands and in some cases the UK (relating to customer service training). In relation to health and safety standards, this can be ensured in tender in Denmark, Italy and the Netherlands. Specific reference to Regulation 1370/2007, Articles 4(5) and 4(6) in tender documents can sometimes be found in at the level of the Bundesländer in Germany, Italy and the Netherlands.

As a result, it can be argued that the impact of the relevant articles of the PSO Regulation on the maintenance of social standards in the passenger rail sector is so far limited in practice, with the exception of Germany (where the use of social standards pre-dates the Regulation). In other countries provisions on transfer of staff are more important in guaranteeing standards.

Sectoral collective agreements play an important role in securing minima, but at a relatively low level, which can be around 20% below the standard of the best provision in a company collective agreement.

The impact of the absence of such sectoral agreements is demonstrated in the case of Poland where no minimum social standards beyond statutory minima apply to workers affected by changes of operator.

## 5.1 Introduction

Articles 4(5) and 4(6) of the PSO Regulation allow competent authorities to require public service operators to meet certain social standards in relation to the employment of staff to deliver the service. It is entirely within the remit of the competent authority whether or not to make use of this possibility offered by the Regulation; there is no legal requirement to use this possibility.

One of the core goals of this study was to establish the extent to which competent authorities currently make use of the relevant clauses (and recitals) of the Regulation or its spirit<sup>31</sup> to create a level playing field for public service operators in relation to the observance of such minimum social standards.

As indicated in the glossary of terms above, the term 'social criteria' used in tendering denotes minimum requirements placed on all bidders with regard to the payment of minimum wages (or wages above the minimum), non-wage terms and conditions, training, health and safety and pension rights (as well as other basic employment rights, such as freedom of association, equal pay etc.).

The analysis of the use of different social criteria contained within the following sections of this report focuses only on countries which have made use - or are preparing to make use - of tendering in the award of public service contracts in the passenger rail sector and the urban public transport services<sup>32</sup>. In cases where direct award is used, this has not led to a change of social standards in employment as generally incumbents have retained the right to deliver services (see also section 5.5).

When seeking to obtain a clear picture of the application of (or the spirit of<sup>33</sup>) Articles 4(5) and 4(6) of Regulation 1370/2007, two important factors must be borne in mind:

- There are core social standards in relation to the criteria which are either prescribed by national legislation or in collective agreements which cover the majority of the sector.<sup>34</sup> Although some competent authorities do mention the need to respect these standards in tender documents for public service contracts in the sector, this is not strictly necessary because any operator not applying these standards would be subject to legal sanction and could be excluded from future tendering processes. Table 5.1 presents an overview of where such minimum standards apply, in the countries using (or preparing to use) tendering. Table 5.2 which specifically looks at social criteria used in tender documents therefore excludes these provisions which bind all operators. Table 5.3 gives an overview for the urban transport sector.
- There are some social standards which apply in the case of a change of operator by virtue of requirements being set down by competent authorities to transfer staff. These relate to maintaining the wages and terms and conditions of employment in applying to the previous operator<sup>35</sup>, thus offering not only employment protection but also security regarding terms and conditions of employment. For the purposes of the presentation in Table 5.2, these 'social

<sup>31</sup> The spirit of the Regulation included in European or national legislation, collective agreements, or rules existing even before the Regulation came into force.

<sup>32</sup> Notably the Czech Republic, Denmark, Germany, the Netherlands, Poland, Sweden and the UK. Italy is also included in this analysis as competitive tendering is, in principle, required by national legislation, but has in effect never yet taken place.

<sup>33</sup> Where competent authorities make use of social criteria, this is not always with direct reference to the PSO Regulation.

<sup>34</sup> In some countries this is because they are (or can be declared) universally applicable, in other countries this is because membership of employers' and trade union organisations negotiating these agreements is high and coverage is therefore close to 100%.

<sup>35</sup> At the point of transfer and/or for a set period of time thereafter.

criteria' have been included but should be read in conjunction with requirements for the protection of staff against dismissal in the case of change of operator (further elaborated in section 6).

## 5.2 Setting of minimum social standards in the passenger rail sector

Table 5.1 provides an overview of the social standards applying to all staff in the passenger rail sector, either as a result of national legislation or sectoral collective agreement. The sub-sections below provide further information regarding each of the criteria set out in this table.

### 5.2.1 Minimum wages

In 2013, 20 of the EU's 27 Member States (Belgium, Bulgaria, the Czech Republic, Estonia, Ireland, Greece, Spain, France, Latvia, Lithuania, Luxembourg, Hungary, Malta, the Netherlands, Poland, Portugal, Romania, Slovenia, Slovakia, and the United Kingdom) had provision on a statutory minimum wage or set such standards by universally applicable national cross-sector collective agreement.<sup>36</sup>

Wage minima set in this way apply to all operators in the rail sector regardless of the method of tendering and irrespective of any social criteria being included in tender processes. As a result, these minimum provisions should, strictly speaking, not be taken into account when assessing social standards in public tendering. It is nonetheless important to bear in mind that some countries have no such regulations (or setting of minima by collective agreement), which would allow competing companies to gain a competitive advantage by undercutting wage rates.

When discussing minimum wage levels, it should be noted that statutory minimum wages are of little relevance to core staff in the passenger rail transport sector as most individuals in this sector earn more than the legally set minimum. This is, however, not necessarily the case for ancillary workers active in the sector, who are increasingly working for sub-contractors and are often employed on temporary contracts (e.g. cleaners, catering staff etc.).

### 5.2.2 Wages beyond the minimum

As statutory minimum wages and national minima set in cross-sectoral agreements tend to have limited relevance for core staff in the passenger rail sector, it is important to establish the extent to which there are national or sectoral provisions regarding wage levels beyond the minimum, which could in turn be protected through the use of social criteria in tendering.

As illustrated in Table 5.1 below, Denmark, Germany, Italy and Sweden, who do not have a statutory minimum wage, or a minimum wage set by cross-sectoral agreement, do however have a sectoral minimum wage set in sectoral collective agreement (which can be enhanced through company level agreements). Although in all four countries, sector level agreements do not necessarily cover all companies and workers, as agreements are binding only between those that have signed the agreement, nevertheless, the existing sector level collective agreements (or more advantageous company agreements for incumbents) *de facto* cover almost the entire railway sector as the concluding employers and employees associations represent almost all workers and rail operators.

The Netherlands also have a sector level agreement but this applies only to private operators as the national rail operator NS has its company specific collective agreement. In the Czech Republic, Poland and the UK there are only company level collective agreements setting wages beyond the statutory minima.

Wages agreed at the sectoral level have an important role to play as they represent the "minimum" that avoids unfair competition and social dumping. Furthermore, as sectoral agreements tend to offer a floor of rights which can be enhanced at company level. The extent to

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<sup>36</sup> Denmark, Germany, Italy and Sweden which do not have such minima, however, have minimum wages set in sectoral collective agreements – see section 5.2.2 below.

which this is true varies from country to country. Incumbents in particular often pay wages (significantly) beyond the minimum provided in sectoral collective agreements. This is particularly true for staff on special employment contracts (who are in any case generally covered by separate collective bargaining arrangements – see sections 3.1 and 3.2 above). These differences to play a role with regard to social criteria determined by tendering authorities, as these can be linked to the standards set in specific (representative) collective agreements.

### 5.2.3 Additional wage components and non-wage benefits

Non-wage benefits include provisions regarding holidays, wage supplements for night work, shift work, work on Sundays or public holidays. The situation here generally reflects that pertaining to wages above the minimum wage, in that such minimum standards are negotiated, and generally binding (because of the high degree of collective bargaining coverage and the important role played by incumbents and the company level agreements pertaining to them) at the sectoral level. In Denmark, Germany, Italy, the Netherlands and Sweden there are sectoral agreements applying to most (if not all employees) which can be enhanced at company level. Thus standards beyond legal minima<sup>37</sup> are set at the company level in the Czech Republic, Poland and the UK.

### 5.2.4 Working Hours

Minimum standards for working time are generally provided for by law (in accordance with EU working time regulations) and many countries also have specific legislative provisions regarding working hours - particularly for drivers – in the passenger rail transport sector. Such legislation also sets minimum standards for rest times between shifts. The Czech Republic and Poland only have additional statutory provisions applying to the sector, whereas standards agreed in sectoral collective agreements apply in Denmark, Germany, Italy, the Netherlands and Sweden. In these countries, as well as in the UK, Poland and the Czech Republic, additional working time rules can be included in company level agreements.

### 5.2.5 Training

Because of the specific nature of the sector and the responsibilities staff have for the health and wellbeing of passengers, some statutory minima are set for training provision. For instance, due to EU Directive 2007/59 on the certification of train drivers, EU Member States have transposed the Directive by additional laws determining national procedures to obtain train driver certifications including specific rules on continuous training. Many countries also provide for other professional training and regular compulsory training on health and safety. Sectoral collective agreements contain additional details and rights to training in Denmark, Italy and the Netherlands. Company level agreements also play a role in these countries, as well as in Poland and the UK.

### 5.2.6 Health and Safety

Respect for basic health and safety provisions is required in national legislation in all countries with reference to the EU legal acquis on occupational safety and health. Rail specific regulation is in place in the Czech Republic, Denmark, Italy, Poland and the UK. Beyond this, company level agreements can contain additional provisions in the Czech Republic, Denmark, Germany and Sweden.

### 5.2.7 Pension Rights

Basic pension rights (unconnected to sector and occupation) are determined within national legislation and apply to all citizen. Specific pension rights are also in place for individuals with specific employment status in most countries where a significant part of employees in the sector have this status. Schemes negotiated at sectoral level only play a significant role in Sweden and the UK and contributions and schemes can vary between operators.

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<sup>37</sup> These exist in all countries at least in relation to minimum holiday entitlements as regulated by the Working Time Directive.

**Table 5.1 Social standards applying to all staff in the passenger railway sector by virtue of national legislation or sectoral collective agreement**

Social standards	CZ	DE	DK	IT	NL	PL	SE	UK
<b>Minimum wage</b>								
<i>General</i> <sup>38</sup>	✓			✓	✓	✓		✓
<i>Sector specific</i>		✓	✓	✓			✓	
<b>Wage beyond minimum</b>								
<i>General</i>						✓		
<i>Sector specific</i>		✓	✓	✓	✓ <sup>39</sup>		✓	
<b>Non-wage benefits</b>								
<i>General</i>	✓	✓	✓	✓	✓	✓	✓	✓
<i>Sector specific</i>	✓	✓	✓	✓	✓ <sup>40</sup>		✓	
<b>Working hours</b>								
<i>General</i>	✓	✓	✓	✓	✓	✓	✓	✓
<i>Sector specific</i>	✓ (s)	✓	✓	✓	✓ <sup>41</sup>		✓	✓
<b>Training</b>								
<i>General</i>								
<i>Sector specific</i>	✓	✓	✓	✓	✓	✓	✓	✓
<b>Health and safety</b>								
<i>General</i>	✓	✓	✓	✓	✓	✓	✓	✓
<i>Sector specific</i>	✓	✓				✓	✓	✓
<b>Pension rights</b>								
<i>General</i>	✓	✓	✓	✓	✓	✓	✓	✓
<i>Sector specific</i>			✓				✓	✓

Source: ICF GHK based on survey carried out for this study. (s) = statutory

<sup>38</sup> General refers to statutory as well as collectively agreed provisions at cross-industry level.

<sup>39</sup> Sectoral collective agreement only applies to companies other than national operator, national operator (NS) has own collective agreement)

<sup>40</sup> See footnote 36

<sup>41</sup> See footnote 36

## 5.3 Current use of social criteria in tendering for public service contracts in the passenger rail sector

Having established which countries have minimum social standards (either in law or collective agreement) which are binding to all operators in the sector, Table 5.2 provides information on the social criteria used by competent authorities in tendering public service contracts to deliver passenger rail services. This table should be read in conjunction with the bullet points below:

- The table appears to indicate that 5 countries (Germany, Denmark, Italy, the Netherlands and the UK) use social criteria in tendering to protect (at least) wages, non-wage benefits and working hours.<sup>42</sup> In Sweden, wages and terms and conditions, as well as training and pension rights are also, de facto, protected. Four things must be borne in mind in interpreting this:
  - In Denmark, the Netherlands and the UK this protection arises solely from the requirement to transfer staff to the new operator, thus protecting not only employment, but also existing social standards at the point of transfer and for a period beyond (this will be discussed in more detail in section 6).
  - In Sweden, competent authorities (with the exception of the competent authority responsible for tendering passenger transport for the city of Stockholm) only stipulate the requirement to respect existing social standards set out in legislation and binding collective agreements and do not mandate the transfer of staff. However, staff transfer is de facto practiced in all cases as a result of negotiations between transferor, transferee and the relevant trade unions.
  - In Italy, national legislation requires staff to be transferred. Responsibility for tendering is devolved to the regional level, which can set its own rules. The sector wide collective agreement of Mobility/Railway Activities Area applied by FS Group also provides for staff transfer..
  - Germany is therefore the only country which currently makes use of the possibility to set social criteria in tendering which go beyond legal or collectively agreed minima and does not solely rely on the transfer of staff.
  - Although the Polish Labour Code offers the opportunity (but not the requirement) for transferor and transferee to reach agreement on the transfer of staff following a tender process, this option has not been used in practice.

It is therefore worth exploring these provisions in Germany, which are not determined at the national level but are legislated at the Land level and are then binding on competent authorities, in more detail. The protection of minimum social standards (and employment) through the use of provisions on transfer of staff will be discussed in more detail in section 6.

### 5.3.1 Setting minimum social standards by legislating the observance of standards set in 'representative' collective agreements: the example of 'Tarifreuegesetze' at the Land level in Germany

In Germany, the use of social aspects in tendering for regional and local rail services (*Schiene**personennahverkehr* or *SPNV*) services pre-dates the entry into force of Regulation 1370/2007, but Articles 4(5) and 4(6) and Recitals 16 and 17 of the regulation are now often quoted in tender processes with reference to the use of social criteria (or the requirement for staff transfer). Albeit pre-dating the Regulation in many Bundesländer, its provisions have since been used as the rationale behind the conclusion of laws on compliance with collective agreements (*Tarifreuegesetze*, henceforth TFGs). These laws intend to set a level playing field for social aspects among all bidders in public tendering procedures, in particular regarding wage standards, and thus prevent the risk of social and wage dumping.<sup>43</sup> While social dumping has been a key

<sup>42</sup> In Denmark protections also cover training and health and safety conditions and in the UK some pension rights are also protected.

<sup>43</sup> The risk of wage dumping resulting from liberalisation was specifically referred to in the proposals for the state TFG proposed by the CDU and SPD at state level in Saarland; (DS 15/96 of 23.08.2012).

concern among trade unions for some time, most recently, the Association of German Transport Companies, VDV<sup>44</sup> (the largest association of companies in the transport sector), also pronounced its concern about this and spoke out in favour of provisions regarding the compliance with collective agreements.<sup>45</sup>

TTGs can also refer to other aspects such as the application of international labour standards; include temporary agency workers and subcontractors in the framework of applicability of sectoral wage agreements that are determined as a reference.

Although it is also possible (and is often the case) for tenders to make specific provisions regarding staffing levels, qualifications required and training to be provided to staff, the most important way in which social criteria are integrated into competitive tenders in the SPNV sector in Germany is through TTGs.

### What is 'Tariftreue'

The basic idea behind the concept of 'Tariftreue' is to inform and require all potential bidders – and eventually the successful contractor – in a tendering process to respect certain minimum social standards with regards to wages (and working conditions) for staff in the context of the delivery of the contract. TTGs are agreed at Bundesland level, with 13 of the 16 Bundesländer current having such legislation. They not only cover the SPNV sector but all sectors subject to public tenders. The applicable social standards to be used are determined in relation to the specific sector – in this case of course the SPNV.

The minimum social standards to be respected are determined with reference to one (or several) collective agreements pertinent to the sector. Because different collective agreements can be found in the SPNV sector<sup>46</sup>, a relevant or representative collective agreement is determined at state (or in some cases PTA) level– often in consultation with a committee of representative bodies including the social partners. This does not mean that a (new) operator has to adopt a particular collective agreement<sup>47</sup> but means that it has to abide by a predetermined minimum standard set in the representative collective agreement, which can of course be exceeded.

The 'representative' collective agreement is usually determined with reference to its geographical application and the number of employees in the sector covered by this agreement. Another criterion is the number of employees who are members of the relevant trade union in the sector. In practice, the framework collective agreement for the SPNV sector (Branchentarifvertrag SPNV<sup>48</sup>) increasingly acts as the reference agreement in this respect.

Successful bidders not respecting the minimum social standards required by TTGs are subject to financial sanctions; existing contracts can be terminated and companies could be excluded from further bidding processes.

*Source: Matthias Rohrmann (2013); Wird Deutschland Tariftreu?; Arbeit und Arbeitsrecht, Sonderausgabe 2013, "Human Resources - Trends 2014", page 48 - 51<sup>49</sup>; for more information see [www.agv-move.de](http://www.agv-move.de)*

Initially, there were efforts to establish a TTG for the whole country, particularly given the background of wage regulation in Germany. However, this attempt failed<sup>50</sup> and currently TTGs only exist at Land level.

Each Land can therefore take the initiative to regulate the inclusion of social aspects in public tendering procedures and public service contracts. This resulted in a patchwork of TTGs laying down different requirements at the state level. Currently, there are 13 Bundesländer with TTGs in

<sup>44</sup> VDV = Verband deutscher Verkehrsunternehmen (Association of German Transport Companies)

<sup>45</sup> VDV Presseinformation; 14.5.2013; Kein Sozial- und Lohndumping im deutschen ÖPNV

<sup>46</sup> See also section on industrial relation in the sector.

<sup>47</sup> In the context of the principle of the autonomy of collective bargaining, this would not be possible.

<sup>48</sup> [http://www.evg-wrb.de/1pdf/03\\_11/04\\_03anl.pdf](http://www.evg-wrb.de/1pdf/03_11/04_03anl.pdf)

<sup>49</sup> <http://www.sozialpsychologie.uni-frankfurt.de/team/assozierte-mitglieder/ra-matthias-rohrmann/>

<sup>50</sup> Further efforts to achieve this at federal level are considered to be subject to the outcomes of general elections in October 2013.

place. This also shows that twelve states (Hamburg is the exception) additionally have specific provisions on respect for collective agreement in the urban public transport sector (Öffentlicher Personennahverkehr, ÖPNV).

The remaining states (Bayern, Hessen, Sachsen) do not currently have laws on compliance with collective agreements (even as a proposal) for public service contracts or any other specific legislation that regulates social aspects for public tendering procedures. However, competent authorities are free to choose to adopt similar rules as in the laws of compliance with collective agreements, which has indeed been the case in the Land of Hessen in the past.

As indicated in the box above, in principle, the representative collective agreement selected is increasingly the framework collective agreement for the SPNV sector, which was first negotiated in 2011, but additional provisions, with reference to other relevant collective agreements can also be included to enhance these framework provisions<sup>51</sup>. As a minimum, bidders are required to respect the wages and connected working time provisions set out in the framework collective agreement. In addition, other stipulations can also be included (for example in relation to holidays, training and other terms and conditions).

This means that in the majority of Bundesländer, competition in the SPNV sector is now linked to a set of minimum social standards. However, it should be noted that the differences in wages and linked terms and conditions between the sectoral collective agreement and some company agreements can be as high as 20%, thus still providing for significant room for competition on the basis of personnel costs among the different operators. Similarly, the German case study included in Annex 1 of this report highlights the differences in the provisions and implementation of TTGs in individual cases of tendering, particularly in so far as they involve – and help to regulate – the transfer of staff.

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<sup>51</sup> For more information on the sectoral collective agreement for the SPNV sector, see [www.agv-move.de](http://www.agv-move.de)

**Table 5.2 Social criteria used in tendering for public service contracts for passenger rail services<sup>52</sup>**

Social standards	CZ	DE	DK	IT	NL	PL	SE <sup>53</sup>	UK
<b>Wage beyond minimum</b>		✓	✓		✓		(✓)	✓
<i>Comment</i>		Only in Bundesländer with Tarifreuegesetz <sup>54</sup> (TTG)	As a result of transfer of staff	In all tenders and as a result of transfer of staff	As a result of transfer of staff		(As a result of transfer of staff)	As a result of transfer of staff
<b>Non-wage benefits</b>		✓	✓		✓		(✓)	✓
<i>Comment</i>		Only in Bundesländer with Tarifreuegesetz <sup>55</sup> (TTG)	As a result of transfer of staff	In all tenders and as a result of transfer of staff	As a result of transfer of staff		(As a result of transfer of staff)	As a result of transfer of staff
<b>Working hours</b>		✓	✓		✓		(✓)	✓
<i>Comment</i>		Only in Bundesländer with Tarifreuegesetz <sup>56</sup> (TTG)	As a result of transfer of staff	In all tenders and as a result of transfer of staff	As a result of transfer of staff		(As a result of transfer of staff)	As a result of transfer of staff
<b>Training</b>			✓				(✓)	
<i>Comment</i>			As a result of transfer of staff				(As a result of transfer of staff)	As a result of transfer of staff
<b>Health and safety</b>			✓					
<i>Comment</i>			As a result of transfer of staff					
<b>Pension rights</b>					✓		(✓)	✓
<i>Comment</i>					As a result of transfer of staff		(As a result of transfer of staff)	As a result of transfer of staff – only for rights acquired under old British Rail Pension Scheme
<b>Protection against dismissal in case of change of operator</b>		✓	✓		✓	✓	(✓)	✓
<i>Comment</i>		This is optional and where supported by relevant provisions in TTG	Transfer of staff is required under the national act on transfer of undertakings ( <i>Virksomhedsoverdragelsesloven</i> )	Transfer of staff is required by national law but decisions on criteria in tendering are devolved to the regional level. The sector wide collective of the Mobility/ Railway Activities Area provides such rules.	Transfer of staff is required under the Civil Code and the Public Transport Act	The requirement to transfer staff is temporary	Transfer of staff is not required by competent authorities, but is established standard practice between operators	Transfer of staff is required under Regulation on Transfer of Undertakings (Protection of Employment)

Source: ICF GHK based on survey carried out for this study

<sup>52</sup> This table only refers to requirements beyond the minimum set out in table 5.1.

<sup>53</sup> Sweden appears in brackets because transfer of staff is only compulsory in a very limited number of cases but is negotiated in practice between transferor, transferee and the trade unions.

<sup>54</sup> Law on maintenance of collective agreements.

<sup>55</sup> Law on maintenance of collective agreements.

<sup>56</sup> Law on maintenance of collective agreements.

## 5.4 Setting of minimum standards and use of social criteria in competitive tendering in the urban transport sector

The following section presents social standards and social criteria for countries that make use of competitive tendering for public urban transport services. The information is based on the questionnaire that has been distributed to the members of ETF and CER.

As in the section on the passenger rail section, the first table (table 5.3) sets out the minimum requirements in relation to social standards applying to all operators whereas section 5.4 looks at specific requirements on social criteria used in tendering.

Table 5.4 should be read in conjunction with the bullet points below:

- The table appears to indicate that 7 countries (Austria, Bulgaria, Germany, Finland, France, Norway and Spain) use social criteria in tendering to protect (at least) wages, non-wage benefits and working hours.<sup>57</sup> In Sweden, wages and terms and conditions, as well as training and pension rights are also, de facto, protected. Four things must be borne in mind in interpreting this:
  - In France (urban transport sector only), Norway and Spain this protection arises solely from the requirement to transfer staff to the new operator, thus protecting not only employment, but also existing social standards at the point of transfer and for a period beyond (this will be discussed in more detail in section 6).
  - In Austria rules on the transfer of undertakings also apply when there is a transfer of staff and assets. A first case is now under way prescribing transfer of staff in a case of the PSO contract in the regional bus sector.
  - In Bulgaria, the use of such social clauses is optional and in practice they are rarely used.
  - Germany is therefore the only country which currently makes use of the possibility to set social criteria in tendering which go beyond legal or collectively agreed minima and does not rely on the transfer of staff.

The following sections provide a brief summary of the way social standards are set and protected in the urban public transport sector.

### 5.4.1 Wages

Among the countries covered by this study with regard to the urban transport sector, Germany, Finland, Sweden and Switzerland have no legal statutory minimum wage and minimum wages are therefore determined by collective agreement at sector level or company level. In Finland there are three sector level agreements that cover almost all workers in the sector of urban transport – the agreements vary depending on whether the company is private or public. In Switzerland and Germany there are sector level agreements that are binding on signatory parties only. Switzerland has a system to declare an agreement universally binding at regional or national level. In Switzerland the law on public transport determines that if there is a universally binding regional or national or representative sector level agreement then all operators bidding need to comply with the collective agreements determined minimum wage (and other conditions). This is similar in Germany where the law on compliance with collective agreements that are applicable in some of the Bundesländer, the operators would have to comply with the established representative collective agreement. However, if the authority does not make reference to a collective agreement or minimum social standards then the level playing field would not be established. In Finland the situation is similar seeing that bidding operators will need to comply with minimum wages as established in sector level agreements. This is however not directly stipulated in tender documents. In all three countries the sector

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<sup>57</sup> In Denmark protections also cover training and health and safety conditions and in the UK some pension rights are also protected.

level agreements establish minimum standards and even if referred to by the competent tendering authority it would not go beyond the minimum but it establishes a level playing field for all bidders. In France and Austria the sector level agreement applies to all operators not withstanding if mentioned in the tender or not. In France the sector agreement is declared unilaterally binding and in Austria all operators are obliged to sign the agreement due to the fact that it is mandatory to register with the chamber of commerce for the sector which signs the agreement and can be compared to an employer association. Finally the Netherlands also have a sector level agreement that establishes a minimum wage for the sector (beyond statutory legal minimum wage) and bidding operators need to comply with this agreement.

It can be concluded that in Austria, Finland, France, Netherlands, Switzerland and to some extent Germany a level playing field regarding wages can be seen as established.

#### **5.4.2 Working Hours**

With regard to working hours the result is the same as for wages and a level playing field in most of the countries is established. In addition there is the Working Time Directive 2002/15/EC has set also minimum rules for bus drivers. However it should be kept in mind that the most important rules on working hours are established at company level and which cannot be referred to by the competent authorities and which would need to be renegotiated after a transfer.

#### **5.4.3 Training**

Rules on training seem to be established in most of the countries and are generally applicable to the profession of bus drivers. This needs to be seen as well in relation to the European Directive 2003/59/EC which determines rules on initial and period training for bus, truck and lorry drivers. More favourable or specific rules are set at company level and could vary to a certain extent.

#### **5.4.4 Health and Safety**

Health and Safety rules applicable to staff in urban public transport is in most of the countries determined by general health and safety laws in the labour code. Additional rules that are applicable to public transport operators are set as well under general laws that apply to all operators.

#### **5.4.5 Protection against dismissal**

In Switzerland the take-over of staff is required if the new operator does not have all the personnel available from the previous contractor. Any new post that will be created would also need to be offered to staff of the previous operator. This is determined under the transfer of undertaking rules in the Swiss obligations and liabilities law in conjunction with the public transport law. The operators can also negotiate about the transfer and take over more staff if they cannot be redeployed by the previous operator. In Germany the authorities have a choice to insert a clause that staff has to be taken over by the new operator. The authority has to determine beforehand the number of staff concerned. In Finland workers and employers have reached an agreement for the Helsinki area that the new operator has to take over staff. However it will not be for the same working conditions and workers could lose acquired rights. In Austria, Netherlands and France (urban public transport sector but not inter-regional public transport sector) the general rules on transfer of undertaking are applicable where there is a transfer of staff and material/assets. However, for the inter-regional public transport sector in France, transfer of staff is required by the relevant collective agreement. In Austria a first case of requiring transfer of staff for a PSO contract not involving transfer of vehicles has now been issued.

#### **5.4.6 Pension Rights**

In most of the countries statutory pension rights are regulated by regulations and national pension schemes apply to all workers. In countries such as Finland, Netherlands and Switzerland occupational or private schemes can play a more important role and contributions to these schemes are negotiated at company level. These rights might be lost in a case of transfer or change of operator after a tendering procedure.

**Table 5.3 Social standards applying to all staff in the urban transport sector by virtue of national legislation or sectoral collective agreement**

Social standards	AT	BG	DE	FI	FR	NL	NO	ES	CH
<b>Minimum wage</b>									
General		✓			✓	✓			
Sector specific	✓		✓	✓	✓	✓	✓	✓	(✓ <sup>58</sup> )
<b>Wage beyond minimum</b>									
General									
Sector specific	✓		✓	✓	✓	✓	✓	✓	(✓)
<b>Non-wage benefits</b>									
General									
Sector specific	✓		✓		✓	✓	✓	✓	(✓)
<b>Working hours</b>									
General	✓	✓	✓	✓	✓	✓	✓	✓	✓
Sector specific	✓		✓		✓	✓	✓	✓	(✓)
<b>Training</b>									
General					✓				
Sector specific	✓	✓	✓	✓	✓	✓	✓	✓	✓
<b>Health and safety</b>									
General	✓	✓	✓	✓	✓	✓	✓	✓	✓
Sector specific	✓			✓	✓			✓	
<b>Pension rights</b>									
General	✓	✓	✓	✓	✓	✓	✓	✓	✓
Sector specific					✓	✓	✓		

Source: ICF GHK based on survey carried out for this study. (s)= statutory

<sup>58</sup> Regional agreements

Table 5.4 Social criteria used in tendering for public service contracts for urban public transport services<sup>59</sup>

Social standards	AT	BG	DE	FI	FR	NL	NO	ES	CH
<b>Wage beyond minimum</b>	(✓)	✓	✓		✓	✓	✓	✓	
<b>Comment</b>	(Only as a result of staff transfer – first pilot case presently under way)	Optional	Only in Bundesländer with Tariffreuegesetz <sup>60</sup> (TTG)		As a result of transfer of staff compulsory by law in urban public transport as required in sectoral collective agreement in inter-urban public transport	(As a result of transfer of staff)	(As a result of transfer of staff)	(As a result of transfer of staff)	
<b>Non-wage benefits</b>	(✓)	✓	✓		✓	✓	✓	✓	
<b>Comment</b>	(Only as a result of staff transfer – first pilot case presently under way)	Optional	Only in Bundesländer with Tariffreuegesetz (TTG)		As a result of transfer of staff compulsory by law in urban public transport as required in sectoral collective	(As a result of transfer of staff)	(As a result of transfer of staff)	(As a result of transfer of staff)	

<sup>59</sup> This table only refers to requirements beyond the minimum set out in table 5.3.

<sup>60</sup> Law on maintenance of collective agreements.

Social standards	AT	BG	DE	FI	FR	NL	NO	ES	CH
					agreement in inter-urban public transport				
<b>Working hours</b>	(✓)	✓	✓	✓	✓	✓	✓	✓	
Comment	(Only as a result of staff transfer – first pilot case presently under way)	Optional	Only in Bundesländer with Tariffreugesetz (TTG)		As a result of transfer of staff compulsory by law in urban public transport an as required in sectoral collective agreement in inter-urban public transport	(As a result of transfer of staff)	(As a result of transfer of staff)	(As a result of transfer of staff)	
<b>Training</b>	(✓)	✓	✓	✓	✓	(✓)	✓		
Comment	(Only as a result of staff transfer – first pilot case presently under way)	Optional	Only in Bundesländer with Tariffreugesetz (TTG)			(As a result of transfer of staff)	(As a result of transfer of staff)		
<b>Health and safety</b>		✓			✓				
Comment		Optional				As a result of transfer of staff			

Social standards	AT	BG	DE	FI	FR	NL	NO	ES	CH
<b>Pension rights</b>					✓	✓			
Comment					As a result of transfer of staff	As a result of transfer of staff			
<b>Protection against dismissal in case of change of operator</b>	✓	✓	✓		✓	✓			
Comment	Optional	Optional	Optional		Required by law for urban public transport and required in collective agreement for inter-urban public transport	As a result of transfer of undertakings			

Source: ICF GHK based on survey carried out for this study

## 5.5 Social criteria in direct award in the passenger rail sector

In countries with direct award it is the national passenger rail transport operator that provides all public passenger rail services that are provided under a public service contract. In these countries other operators sometimes provide passenger rail services on a commercial basis which concern mainly international routes or specific internal profitable lines. Research for this study found no specific conditions regarding social standards had been required in the award procedure by the competent authority in these cases.

In the respective countries, the national passenger rail transport operator generally has a company level collective agreement which regulates most of the employment conditions. This often includes specific provisions for individuals with a specific employment status. In countries such as Bulgaria, Hungary, Latvia, Portugal, Romania, Slovakia and Spain where workers are employed under private law contracts, minimum employment conditions are regulated by legislation and supplemented by the national sector level agreement and/or company level collective agreement.

### Austria

At the Austrian national passenger rail transport operator ÖBB, almost 60% of staff is subject to a specific employment status similar to civil servants. Their employment conditions are regulated by decrees and company specific rules regulating all aspects of employment. The other 40% of staff engaged since 1995 do not benefit from the particular status and are employed under general labour laws. There is a sector specific collective agreement for rail undertakings and sector collective agreements for some particular professions such as IT for example. Only working time is regulated at ÖBB level for all employees. In 2011 the latest public service award was signed with ÖBB via direct award. It was a negotiated procedure which respects transparency provisions. The Ministry of Transport is the competent authority. The Ministry negotiated in particular specific quality criteria but no specific social aspects. The public service contract was concluded until 2019 but leaves the state an option to re-attribute or exclude distances because they became profitable every two years. The regional transport associations –competent for urban transport compensate regional rail distances. At the moment, there is only one operator that provides on a commercial basis passenger rail services.

### Belgium

The labour rules applicable to the staff employed by the incumbent operator SNCB (wholly State owned) are, for the large majority of this staff, fixed in the “Statut du Personnel”, SNCB’s specific public law set of rules. These rules are negotiated, voted and amended by a Committee whose competence is limited to SNCB (and other public law companies members of the SNCB group), in which the Unions and the employers are equally represented and which decides at a qualified majority of two third of the cast votes. One of the main characteristics of this Statut is to warrant a permanent employment, with the exception of disciplinary matters.

### France

The staff employed by the incumbent operator SNCF (100% owned by the French State) is subject to a specific employment status which is mainly regulated by law or regulations and very different from general law. The rules of this status (“Statut du personnel”) are developed by a specific joint (union-employer) committee and approved by the Ministry. A specific social security and pension system is attached to this status. In the public service contracts between SNCF and the public transport authorities (French regions for the regional passenger transport “TER”, the French State for certain national services “Intercités”) there are no social criteria, because SNCF’s social standards are applied.

### Luxemburg

The staff employed by the national passenger rail transport operator CFL is subject to specific employment conditions which are all regulated by law. Consequently, the direct award procedure will take directly into account this particular legislation and could only request social criteria above what is regulated. At the moment some international travel distances are provided by other open track rail operators.

## 6 Comparative overview: The current situation regarding the transfer of staff in tendering for public service contracts in the passenger rail and urban public transport sectors

### Key findings

#### Transfer of staff in public service contracts in the passenger rail and urban public transport sector

Articles 4(5) of the PSO Regulation allow competent authorities to require the transfer of staff in cases of change of public service operator. It is entirely within the remit of the competent authority whether or not to make use of this possibility offered by the Regulation; there is no legal requirement to use this possibility.

There are five basic situations in which a transfer of staff currently takes place within the context of a change of public service operator in the rail and urban transport sectors:

- Tenders with the rail and/or urban transport sector are interpreted in national law as falling under national regulations regarding the transfer of undertakings and / or can be specified as situations staff transfer should also apply. Protection of employment is therefore required by law (e.g. Denmark, Italy, Netherlands, UK). In some countries in these situations (except Denmark and Italy), there is no specific reference made to transfer of staff in the tender documents as all operators are aware of the application of these rules. Transfer of staff is required by sectoral collective agreements and competent authorities refer to these agreements in mandating this take place in the case of a change of operator (e.g. France for inter-urban public transport).
- Tender documents require a transfer of staff as well as materials and assets. As a result, a change of operator is considered to amount to a transfer of undertakings under Directive 2001/23/EC and rules regarding staff transfer set out in the Directive apply (e.g. Czech Republic).
- Competent authorities rely on Article 4(5) – either explicitly or implicitly – to require a transfer of staff in the case of a change of operator (e.g. Germany and in very few cases in Sweden). This option is rarely used in practice.
- Transfer of staff is optional and even if not required by the competent authority, is in practice negotiated between transferor, transferee and relevant trade unions (usual situation in Sweden). This relies on transfer being mutually beneficial for both parties and requires the presence of strong trade unions. In Poland, the Labour Code allows transferor and transferee to negotiate the transfer of staff and sets some basic rules for this, but it is not a legal requirement.
- Very few countries make no provisions at all for the possibility of a transfer of staff.

The actual experience of transfer of staff in the case of a change of operator in the transport sector is, overall, relatively limited in the EU (with the exception of the UK, Netherlands, Denmark and Sweden in the railway passenger sector and France in the urban public transport sector) .

Based on this limited experience, it appears that a number of key factors determine the outcome of a staff transfer process and its implications for social standards:

- The nature of the legislative framework being applied (national implementation of Directive 2001/23/EC or application of the PSO Regulation);
- The precise detail of the legislation relied upon;
- The recognition and strength of trade union organisations in the sector; and
- In cases where there is no provisions in principle by the competent authority to require staff transfer, the level of commonality of interest between transferor and transferee.

On the whole it appears that the application of national provisions on the transfer of undertakings and protection of employment provides greater legal certainty than the direct application of Article 4(5) to require staff transfer within the meaning of Directive 2001/23/EC.

Where Article 4(5) is relied upon it is often the shape of the national or indeed regional legislation providing for the possibility of staff transfer which is the determining factor. As the German example and the situation in Italy demonstrates, there can be significant differences in the detail of this legislation at the level of Bundesländer and what it means in practice for who transfers and under which conditions.

Both in relation to negotiations surrounding the transfer (particularly where, as in Sweden, transfer is

practice de facto rather than being required by competent authorities), and in the subsequent re-negotiation of collective agreements, the presence of strong trade unions plays a key role as demonstrated by the case study examples in the UK and Sweden.

The Polish case demonstrates the impact of the absence of binding rules regarding the transfer of staff where a legislative option provided for the transferor and transferee to negotiate staff transfer is not used in practice. This can lead to large scale redundancies in the case of a loss of a contract in a tendering process, with employees subject to market forces in seeking new employment. In the absence of a sectoral collective agreement this means that no social standards are guaranteed beyond statutory minima.

Section 5 has demonstrated that the use of Article 4(5) and 4(6) of the PSO Regulation to set explicit social criteria, beyond the minima required in legislation or widely applicable sectoral collective agreements is currently very limited. This section assess whether any more use is being made of the specific possibility to '*grant staff previously taken on to provide services the rights to which they would have been entitled if there had been a transfer within the meaning of Directive 2001/23/EC*'.<sup>61</sup> Table 6.1 below seeks to provide an overview regarding the extent to which a transfer of staff is foreseen for passenger rail and urban transport services.

This table should be read in the context of the descriptions and comments provided in the final column as well as the following considerations:

- There are five basic situations in which a transfer of staff currently takes place within the context of a change of public service operator in the rail and urban transport sectors:
  - Tenders with the rail and/or urban transport sector are interpreted in national law as falling under national regulations regarding the transfer of undertakings and a transfer of staff is therefore required by law (e.g. Denmark, Italy, Netherlands, UK or France for the urban public transport) or by collective agreement (France for inter-urban public transport). In some countries in these situations (except Italy), there is no specific reference made to transfer of staff in the tender documents as all operators are aware of the application of these rules. Exceptions are Denmark and Italy where specific reference is made to transfer of staff under national rules (or collective agreements).<sup>62</sup>
  - Tender documents require a transfer of staff as well as materials and assets. As a result, a change of operator is considered to amount to a transfer of undertakings under Directive 2001/23/EC and rules regarding staff transfer set out in the Directive apply. This can, in principle, be the case in all countries, but is only mentioned below where national implementation of Directive 2001/23/EC is in practice used as the main grounds to require staff transfer (e.g. Czech Republic, Norway, Spain). This can, in practice, be difficult to distinguish for the situation mentioned in the next bullet point. Transfer of staff is required by sectoral collective agreements and competent authorities refer to these agreements in mandating this take place in the case of a change of operator (e.g. France for inter-urban public transport).
  - Competent authorities rely on Article 4(5) – either explicitly or implicitly – to require a transfer of staff in the case of a change of operator (e.g. Austria, Bulgaria, Germany and Sweden). In Poland, the Labour Code allows transferor and transferee to negotiate the transfer of staff and sets some basic rules for this, but it is not a legal requirement.
  - Transfer of staff is optional and even if not required by the competent authority, is in practice negotiated between transferor, transferee and relevant trade unions (Sweden<sup>63</sup>).

This complex picture can briefly be summarised as follows:

<sup>61</sup> Quoted from Article 4(5) of the PSO Regulation.

<sup>62</sup> This is denoted in the table as 'tou' (or transfer of undertakings), whereas in other countries, where no reference to the requirement is included in the tender documents, but rules on transfer of undertakings apply in all cases, reference is made to 'tou only'.

<sup>63</sup> In Germany, it is also possible to conclude such agreements between operators.

- Of 20 EU countries where information was available for the rail and the urban public transport sector, only five make no provisions regarding the transfer of staff in the case of a change of operator (and these situations are not considered to be transfers of undertakings). It should be noted that in Belgium and Luxembourg this is the case because no tendering takes place in the rail sector in Belgium and Luxembourg (as well as in France, but in France tendering takes place in the urban and inter-urban public transport sector). The other countries are Hungary, Latvia and Lithuania.
- In six countries (and Norway), a change of public service operator is considered to be a transfer of undertakings according to national legislation<sup>64</sup> and a transfer of staff is therefore required by law. Specific reference to this fact in the tender documents is only included in Denmark. The other countries are the Czech Republic, France (urban transport sector only), the Netherlands, Spain and the UK.<sup>65</sup>
- Six further EU countries (and Switzerland) provide the option for operators to require a transfer for staff in tender documents. These countries are Austria (urban and regional public transport), Bulgaria, Germany, Ireland (urban bus transport) Italy and Sweden. In practice this option is rarely or never used. In Austria, a first example of staff transfer being required in the regional bus transport sector is now under way (only at pre-qualification stage). In Bulgaria, the option has not been used. In Italy, there is no completed example of a transfer of staff (procedures have either been withdrawn or postponed). In Sweden, only one authority regularly makes use of the option to require staff transfer in the tender documents (Stockholm transport authority) and in Germany there have been 5 cases of tenders requiring staff transfer, but none are completed.
- In Poland, the Labour Code sets a legal framework for transferor and transferee to negotiate a transfer of staff, but this is not mandatory and has not happened in practice.

Where transfer of staff is required in law or by the tender documents, it is mandatory for the transferee to offer employment to specified staff on the basis of their terms and conditions in place at the transferor. For employees, however, the transfer is voluntary, but this is at their own risk. Refusing to be transferred is either considered as a resignation or might lead to a dismissal. The transferor can offer continued employment elsewhere in the company, but is not required in law to do so. If such alternative employment cannot be found, the worker is therefore considered redundant.

Employment and the terms and conditions of transferring staff are guaranteed at the point of transfer and in principle for the subsequent 12 months. However, there are some differences in regard to this from country to country.

The box below provides an example of a transfer under the UK Transfer of Undertakings (Protection of Employment) Regulations 2006. It illustrates some of the challenges involved in selecting the staff affected and the terms and conditions to be transferred, as well as the process of negotiations between transferor, transferee and trade unions. These challenges will be discussed in more detail in section 6.2.

By contrast, the box on the Polish case study demonstrates the position of workers in a situation where transfer of staff is not required either in law or by the competent authority. This is the only case identified in our study where no protections apply and the impact on employees is clear: where operators are not able to co-operate to negotiate a transfer (which is in principle possible under the Polish Labour Code), redundancies will result and those workers who are able to find re-employment with the new operator are not guaranteed to maintain their terms and conditions and are likely to lose out financially.

## Case study UK: Greater Anglia rail franchise

The Greater Anglia rail franchise is the most recent UK passenger rail franchise to be awarded and provides passenger rail services primarily from London Liverpool Street to the east and north (e.g. Cambridge, Great Yarmouth, Ipswich and Norwich).

Between 2002 and 2012, the franchise was operated by National Express, but since February 2012 has been taken over by Abellio (part of Nederlandse Spoorwegen). It was let as a short-term franchise (28 months) as part of the wider review of franchises under the McNulty Review on Rail Value for Money.<sup>66</sup> However, within the context of the current review of franchising processes (the Brown Review), this franchise has now been extended until 2016.<sup>67</sup>

The invitation to tender did not contain any specific social criteria (e.g. regarding the training of staff), but did make specific reference to the application of TUPE to staff operating part of the line (and up to then employed by London Eastern Railways Limited) not currently part of the services provided by the incumbent operator. It is stated that details of the relevant employees of London Eastern Railway Limited, who will transfer to the Greater Anglia franchise would also be made available. No specific mention was made of the application of TUPE to staff operating Greater Anglia services under the incumbent at the time, as this is taken as a given for all franchising processes.

In order to allow bidders (selected post pre-qualification stage) to make a clear assessment of personnel cost commitments, the Department for Transport operates a database which holds organisation charts, staffing details (anonymised), associated rates of pay as well as terms and conditions which it makes available to all bidding companies. This allows bidders to use these details for the financial modelling of their bid.

As required by the TUPE Regulations, the 2,862 employees previously providing services on the transferred lines (primarily former National Express employees, but also some London Eastern Railways employees) saw their contracts of employment transfer across to Abellio as of 5 February 2012. This number includes permanent and fixed-term staff. In the case of the latter, this includes those in contract on the date of the TUPE transfer. In this case, the incumbent had taken the decision to recruit only fixed-term (and temporary agency) staff from the time that the new invitation to tender for the franchise was issued. For around 50 staff members, these fixed-term contracts had been concluded to end on or before the franchise start date. Abellio were then told that if they wished to retain these staff, they would have to cover the cost of employing these frontline staff between the end of the fixed term contract and the actual transfer date of the franchise on 5 February 2011. Upon request, this was challenged by the Department for Transport and the staff affected subsequently remained in post until the TUPE transfer deadline<sup>68</sup> and transferred across with all other staff.

The incumbent is required to provide the new franchise holder with full details of all staff (identity, age, terms, collective agreements in force, ongoing grievance procedures etc) no less than 14 days in advance of the transfer. Until then, Abellio only had the information contained in the Department for Transport database (which is anonymised). Keen to make early contact with transferring staff, Abellio sought to obtain employee details in a timely fashion, but a full list was only transmitted on the deadline day. As the incumbent denied Abellio access to staff, the company held a number of road shows, set up a helpline and provided access to a specific area of their website to communicate with affected workers and to seek to allay any concerns they might have. Around 1,000 individuals attended the road shows which could not be held at their workplaces (or during working hours). Communication also started with the trade unions (ASLEF, RMT, TSSA and Unite) who also assisted in passing information on the road shows, website and helpline on to employees. Once the full list of affected staff had been furnished, Abellio wrote to all employees and communicated the details of their (unchanged) terms and conditions within two weeks of taking up the franchise.

## Case study Poland: Kujawsko-Pomorskie region

The tender for the 3 railway lines operated in the Kujawsko-Pomorskie Voivodeship was announced in 2012. The tender covered public transport services on railway lines within the Kujawsko-Pomorskie region over the period of 2013-2015. It consisted of 3 lots: Lot A: Toruń - Kutno (109 km), Toruń - Łąka (95 km), Lot B: Bydgoszcz - Tczew (128 km), Bydgoszcz - Wyrzysk Osiek (48 km) and Lot C: Gniezno - Toruń (91 km), Inowrocław - Bydgoszcz (45 km). Until 2012, these lines were operated by Przewozy Regionalne S. A..

In invitation to tender, open to all bidders that are able to meet the formal requirements, was issued in 2012. Offers were received from only two bidders – Przewozy Regionalne S. A. and Arriva RP. The choice of the best offer was determined by two criteria - the lowest price (weight of this criterion was 90%) and transport punctuality. In terms of social criteria, employers only had to show that they were compliant with statutory requirements. The competent authority (Marshal Office of Kujawsko-Pomorskie Region) neither provided any requirements concerning transfer of employees, nor stipulated any extra requirements concerning employee benefits.

The successful bidder to operate the service for the period starting from 15 December 2013 until 12 December 2015 was announced in September 2012. Lots A and B were awarded to Arriva. Lot C was awarded to Przewozy Regionalne. On January 25, 2013, after the protest made by Przewozy Regionalne, whole tender procedure was cancelled by the Marshal Office. The official reason given was that the tenders submitted exceed the financial capacity of the region. On February 4, 2013, Arriva RP submitted a request to the National Appeal Chamber to override the cancellation of the tender by the Marshal Office. According to Arriva, the prices offered by the competitors were in line with the budget set by the local government for this purpose, and in fact, accepting offers would mean substantial savings in the budget of the province. On February 18, 2013, the National Appeal Chamber decided, that the cancellation of the tender had been unlawful. On 1 July 2013 the Marshal Office of Kujawsko-Pomorskie Voivodeship signed a contract with Arriva to operate railway transport services in packages A and B. Package C will be transferred in the so-called freehand order (without tendering procedure) to the Przewozy Regionalne. However this has not been officially done so far.

After winning the tender Arriva has made several attempts to establish cooperation with Przewozy Regionalne, aimed at ensuring the smooth transition of the lines, as well as the transfer of key staff, needed to provide an extended range of services (under the possibilities offered by the Labour Code to negotiate such a transfer). However, this offer has not been accepted by the Przewozy Regionalne. Instead, Przewozy Regionalne decided to carry out redundancies. With over 700 staff, redundancies will likely involve around 400 employees. Nearly 250 employees have a chance to keep jobs with Przewozy Regionalne related to carrying out other operations in the Kujawsko-Pomorskie region. It is estimated that out of the redundant employees more than 200 people will have a chance to find employment in other branches of the company, outside the Voivodeship.

For any former Przewozy Regionalne staff recruited by Arriva, this could result in lower wages and terms and condition. This dependent on the market position of different types of staff, with drivers more likely to find re-employment and commanding similar (or even higher) salaries, because of a shortage of trained personnel. This is significantly less likely for other redundant workers. In the absence of a sectoral collective agreement, no minimum floor of rights is set (beyond statutory requirements) for workers in the sector.

**Table 6.1 Provisions on transfer of staff in case of change of operator in the passenger rail and urban public transport sector**

Country	Transfer foreseen		Sector concerned		Legal basis	Description and comment
	Yes	No	Rail	Urban		
<b>Austria</b>	✓ (o)		✓ (o)		If transfer of staff and assets: Employment Contract Law Adjustment Act ( <i>Arbeitsvertragsrechtsanpassungsgesetz</i> ) and Labour Relations Act, ( <i>Arbeitsverfassungsgesetz</i> ) Otherwise Article 4(5) Regulation 1370/2006	If there is considered to be a transfer of undertakings, Austrian legislation implementing Directive 2001/23/EC applies. A first tender requiring transfer of assets under the PSO Regulation has just been issued in the regional bus service sector. This makes direct reference to Article 4(5) of the PSO Regulation.
<b>Belgium</b>		✓				
<b>Bulgaria</b>	✓ (o)		✓ (o)	✓ (o)		In Bulgaria tendering authorities can include transfer of staff and social criteria in the tendering documents on the basis of Regulation 1370/2007 but this is not generally used.
<b>Czech Republic</b>	✓ (tou only)		✓	✓	Act No. 262/2006 Coll. – Labour Code	General labour law applies - All rights and obligations arising from an employment relationship are transferred under Transfer of undertakings rules
<b>Denmark</b>	✓ (tou)		✓	✓	Act No 111 1979 amended 2001 and 2002 Tender authority can refer to transfer in the tender documents	Law provides that in cases of tendering – staff has to be transferred - the employees are protected for one year after transfer, then collective negotiations take place. Number of staff to be transferred and term and conditions mentioned in tender documents.
<b>Estonia</b>		No information				
<b>France</b>	✓		✓		Labour Code L1224-1	Transfer of all staff is required by Labour Code in urban public transport. In inter-urban public transport national collective agreement provides for transfer of staff.
<b>Finland</b>		No information				
<b>Germany</b>	✓ (o)		✓	✓	Law on respect for collective agreements ( <i>Tariffreuegesetz, TTG</i> ). Different in each Bundesland (13 of 16 Bundesländer have TTGs); Law on market competition ( <i>Gesetz gegen Wettbewerbsbeschränkungen</i> )	TTGs set representative collective agreement or allow competent authorities to select relevant collective agreement (depending on the law of each Bundesland). TTGs can also determine rules on transfers of staff. This is optional. TTGs often make specific reference to the PSO Regulation.

Country	Transfer foreseen		Sector concerned		Legal basis	Description and comment
	Yes	No	Rail	Urban		
Greece	No information					
Hungary	✓					
Ireland	✓ (o)		✓		Dublin Transport Act	Reference made to Article 4(6) on the requirements to mention social criteria
Italy	✓ (tou)		✓	✓	Decree n. 422/1997 Regional legislation Tender documents	National legislation requires transfer of staff. At regional level legislation has to grant the transfer of staff. Regions mainly use three options: - they make reference to the legislation on transfer of undertakings (article 2112 Civil Code); - they expressly establish the transfer of staff; - they expressly establish the transfer of staff, also (but not only) making generally reference to the provisions of collective agreements
Latvia		✓				
Lithuania		✓				
Luxembourg		✓				
Netherlands	✓ (tou only)		✓		Wet Personenvervoer 2000, Civil Code	Generally, rules on transfer of undertakings apply.
Norway	✓ (tou only)		✓		Bus and Road transport Act §8	Change of operator is considered to be a transfer of undertakings
Poland	✓ (o)		✓		Art. 231 and 2418 Labour Code	Labour Code provides the opportunity for transferor and transferee to negotiate staff transfer after award
Portugal	No information					
Romania	No information					
Slovenia	No information					
Slovakia	No					

Country	Transfer foreseen		Sector concerned		Legal basis	Description and comment
	Yes	No	Rail	Urban		
	information					
Spain	✓ (tou only)		✓		Workers Statute Art. 44; Royal Decree 4/2013	General transfer of undertaking rules apply in case of change of operator New law makes choice of tendering possible for rail sector with reference to PSO Regulation.
Sweden	✓ (o)		✓		1 January 1995 in the Employment Protection Act (1982:80) and the Employment (Co-determination in the Workplace) Act (1976:580)	Only one competent authority is known to require transfer of staff as part of the tender documents. In other cases however, transferor, transferee and trade union in practice always negotiate a transfer of staff.
UK	✓ (tou only)		✓		Transfer of Undertakings (and Protection of Employment ) Regulations 2006	All staff (and sub-contractors) transferred under TUPE with terms and conditions protected at point of transfer (and in practice beyond).
CH	✓ (o)		✓		Art. 333 Transfer of Undertaking law, Art 170 ff collective agreements	In case of a general binding collective agreement for the region/canton – staff will be transferred to the new operator, in some cases it can be considered as transfer of undertaking according to the law; in some cases the authority has the option to insert an obligation for takeover of specific staff

Source: ICF GHK based on survey, literature review and interviews carried out for this study.

O= optional

Tou= transfer occurs on basis of national transfer of undertakings rules (even where there is no transfer of assets) and is not specifically mentioned in tender documents

Tou only = same as tou but rules are mentioned in tender documents

## 6.1 Challenges relating to the practice of staff transfer

The following sections go on to discuss some of the challenges arising from provisions regarding the transfer of staff. The main questions to be discussed relate to:

- Who is transferred?
- Which terms and conditions transfer and at what level?
- How long do transferred conditions remain in place?
- What are the main factors determining the outcomes of a staff transfer process?

This is illustrated using some examples from existing practices in the passenger rail transport sector.

### 6.1.1 Who is transferred in the case of a change of operator

In the case of passenger rail and urban public transport services, the decision on which staff are affected by a transfer of the operation of certain lines to a new operator is not always straightforward. Particularly in the case of local bus services, drivers can often be working on many different routes and therefore only part of their workload may be affected by the transfer of a particular part of the service. This can also be the case in passenger rail transport in general and in particular where there is a re-mapping of the franchise or licence system. Particular challenges can also be faced in apportioning administrative and head office staff to defined aspects of the operation affected by a tender (and change of operator).

Experience shows that the rule generally applied is that any staff working more than 50-60% on the affected service are included in the transfer and will be offered a move to the new operator (in cases where transfer of staff is provided). The determination of who falls into this bracket with reference to work schedules and job descriptions can be a difficult and time consuming process.

It is usually the responsibility of the incumbent operator to furnish the relevant information in line with what is required by the competent authority to allow it to make a transparent declaration to all bidders.

In France in the urban public transport, all staff is transferred except the top management. Information about the staff has to be provided from the old operator to competitors. This is an anonymous list of employees concerned by the transfer (no name but birth date, seniority, wage composition etc.).

In Germany, it is considered that it would not be possible to require a transfer of staff under the PSO Regulation in practice without specific provisions (usually laid down in TTGs) requiring operators to deliver this information according to a set timetable. As this process is considered to be very complex, some Bundesländer have made specific guidance available, as well as providing access to a dedicated team of staff which can assist in the determination of relevant personnel to be transferred.

All case studies conducted for this project make it clear that national rules and practices provide for specific processes for such information to be furnished in a way which will allow operators to incorporate this into the financial modelling of their personnel costs at the bidding stage. In the UK, for example, incumbent operators provide this information to the Department for Transport, where it is entered onto a database which all bidders can subsequently access. At the pre-qualification stage, there is also the opportunity to ask additional questions which can serve to clarify the potential costs involved of taking on such staff (e.g. in relation to the weighting of numbers of staff in different salary brackets; entitlements to different types of pension benefits etc.).

It is important to note that in situations where the transfer of staff is not required by national rules regarding the transfer of undertakings, the selection of staff to be transferred (and the conditions under which they are transferred) is in some cases defined rather broadly and sometimes indeed left up to the competent authority to frame – and the new operator to finally determine. This was found to be the case in the award process selected for case study in Germany.

As the determination of the precise shape and content of the law on respective for collective agreements (Tarifreuegesetz, TTG) is determine at the level of the Land, different rules apply here from Bundesland to Bundesland <sup>69</sup>. The TTG applicable in Berlin stipulates that the selection of the collective agreement, whose standards are to be respected by all operators is to be determined by the competent authority (in this case the relevant public transport authority). It is also left to the PTA to determine whether to require staff transfer and who is to be transferred. As the box below illustrates, in this case a number of key limitations are stipulated to apply to the transfer of staff:

- Only operational personnel (drivers, service personnel etc) are to transfer across
- Only wage conditions are to be protected
- The new operator only has to take on as many staff as they require for their operation. These staff have to be selected from the list provided while respecting some key parameters (proportionality in terms of seniority, age, salary etc).

There are no other existing experiences of the determination of the selection of staff to be transferred across in countries where transfer of staff is linked to reference to the PSO Regulation rather than the national regulations on transfer of undertakings. This demonstrates the difference between applying the latter legal framework compared to the requirements of the Regulation to implement staff transfer '*within the meaning of Directive 2001/23/EC*'.

In Germany, the legitimacy of such arguably selective provisions has been assessed by legal experts and considered to be within the meaning of Article 4(5).

In the UK, Denmark and the Netherlands all staff linked to the delivery of the respective service (and in some cases sub-contractors) are offered to transfer to the new operator. In Sweden this is only required by very few competent authorities but does in fact take place through negotiations between transferor, transferee and trade unions.

In Denmark, this process is impacted by the fact that some affected staff – where there is a transfer from the incumbent to a private company - have special employment status. This generally means that different rules and requirements apply to their transfer as they are not covered by Directive 2001/23/EC.

In Italy, national legislation provides transfer of staff in relation to the scope and/or volume of activities pertaining the new service.

This will be discussed in more detail in section 6.1.1.1.

### Case study Germany: Netz Ostbrandenburg

On 15 December 2011, the PTA for Berlin and Brandenburg (Verkehrsverbund Berlin Brandenburg, henceforth VBB) issued a competitive tender for the regional passenger rail network for Ostbrandenburg in the official journal of the European Union. The tender consisted of two Lots. The new contract for Lot 1 is due to start in December 2014 with the contract for Lot 2 starting in December 2015. The tender made use of Article 4(5) of EU Regulation 1370/2007 and required the new operator to grant operational personnel (train drivers, conductors, staff responsible for the availability of trains) a transfer to the new operator.

In accordance with the TTG applicable in Berlin and under use of Regulation 1370/2007 Article 4(5), the tender set down a set of minimum social criteria and required a transfer of staff under the following conditions:

- The PTA requires the successful contractor on the basis of Article 4(5) of Regulation 1370/2007 to offer operational personnel (train drivers, service personnel and those responsible for moving trains into location [Zugbereitsteller]) a transfer to the new operator and to guarantee their wage conditions (*Entgeltregelungen*), which they would have been entitled to, had a transfer of undertakings within the sense of Directive 2001/23/EC taken place. This does not include other rights of these employees.
- Should the operator consider that fewer staff will be required to deliver the new operations as a

<sup>69</sup> 13 out of the 16 German Bundesländer have such laws.

result of the use of sub-contractors, the details of these contractors have to be provided and the requirements of the TTG have to be respected in relation to their staff.

- An Annex to the tender documents contains the anonymised details of affected staff. As well as the details of the collective agreements applying to these staff in order to allow bidding company to calculate the required personnel costs.
- No less than three months after the award of the new contract, the new contractor will receive an updated list of the relevant staff to be transferred. No less than 21 months before the staff of the new operations, the new operator has to write to affected staff to assess their willingness to transfer and to provide them with details of the modalities of the transfer. The relevant workers have to inform the new operator no less than 18 months prior to the kick off of the new contract whether they wish to take up this offer.
- The new contract will then select from those employees of the incumbent, expressing an interest to transfer across, the staff member to whom they wish to offer a contract of employment. In doing so, the selected group of staff should be reflective of the make up of the full list of individuals expressing an interest to transfer in terms of their age, seniority in the company and salary.
- Contacts of employment with transferring staff must be concluded no less than 15 months prior to the start of operators under the new provider.

The new provider is only required to conclude employment contracts with staff of the former incumbent to the extent that they require under their own staffing concept. Should insufficient staff express an interest to transfer across, the new supplier is free to recruit additional staff. This and all sub-contracted staff have to be compensated in line with the requirements of the applicable TTG. As a result, the new operator only has to take on the operational staff (expressing an interest in transferring) that it requires to deliver its own staffing concept and only wage and associated conditions are guaranteed (which in principle includes working time), but none of the other existing an acquired employment rights.

All lots were awarded to NEB (Niederbarnimer Eisenbahn). In line with the provisions of the tender, NEB was provided with details of the operational staff assigned to the respective lines and their existing terms and conditions. The rule was applied that if an individual was considered to work 50% or more on one of the affected lines, they were placed on the list of staff to be transferred (in line with the provisos of the tender). It is the responsibility of the incumbent operator to draw up these lists. As a result of this exercise, it was determined that 84 of current staff at incumbent operators DB Regio and 107 staff at ODEG would be affected. Given the required timeframes to information to be provided, at least the workers affected on the lines tendered in Lot 1 have now received their letter detailing the conditions of their potential transfer. Those affected by Lot 2 will receive this information by mid-2014 at the latest. This means that affected workers for Lot 1 are now considering their offers and need to respond to the new operator by October 2013. It is therefore currently unknown how many individuals will ultimately transfer across.

#### **6.1.1.1 Staff transfer in situations where staff with special employment status are involved**

As indicated above, different rules and regulations generally apply to the transfer of staff with civil service type, special employment status. As section 3.1 above illustrated, a relatively high number of individuals working for national rail operators continue to hold such status. It is therefore surprising to find that many countries have not yet assessed and determined in detail which rules and provisions will apply to such staff in situations where a tender foresees a transfer of staff.

In Austria, for example, this issue has been debated as there is now the possibility of staff of Postbus being offered a transfer to a new operator (depending on the outcome of a tender currently at the pre-qualification stage). Also this particularly tender is very small scale and would only require the transfer of a couple of staff, Postbus nonetheless consider it to be important for the government to determine what would happen to staff with special status in such situations.

This is particularly important as these individuals, as mentioned above, tend to benefit from better wages and terms and conditions, as well as in some cases employment protections, thus making them more expensive for a new operator to employ.

In some countries, where the state maintains a significant involvement or has indeed made financial provisions for such situations (for example by covering any additional costs arising

from such contracts), this is not the case for incumbents with fully independent status and no such legacy provisions.

It is notable that there is currently little practical experience of individuals with such contracts transferring to a new operator. There are a number of reasons for this:

- Staff are, on the whole (whether or not they have special status) often reluctant to transfer to a new provider, particularly if the existing employer can provide with other (relatively local) employment opportunities.
- As mentioned above, individuals with special status are particularly concerned about losing their specific entitlements to higher wages, terms and benefits and better conditions.
- In many cases, e.g. in Germany and Austria, individuals with this status cannot be made redundant, either by virtue of this status alone or because of specific collective agreements in force, as is the case at DB in Germany. They therefore tend to prefer not to move across.
- Coupled with this is the generally rather ageing age pyramid among such operators. This leads some individuals to decide to remain with their current employer and somehow bridge the gap to retirement rather than taking on the uncertainty and financial risk of moving to a new operator.
- There remains a shortage of skilled staff (particularly among drivers) in many countries which means that transferors are often able to offer alternative employment. Some additionally offer mobility support, if this new employment requires a relocation.

The box below provides an example from Denmark, where a significant number of individuals with special employment status were affected by a change of operator and where offered to transfer across. In the case of Denmark, staff with special status must be offered three options: a secondment to the new operator; leave of absence from the national rail company and temporary employment with new operator; or transfer of employment to new operator. Less than 15% of the individuals affected in this case opted to move across and most did so on secondments. Most of those that opted to stay with their old employers were redeployed (with a few opting for early retirement). Individuals with special employment status who would have transferred across would have relinquished some of their particular pension entitlements in exchange for a one-off compensation payment.

### Case study Denmark: Central and Western Jutland (Midt- og Vestjylland)

This was the first license for passenger rail service to be let by competitive tender in 2001. Arriva Danmark A/S won the competition and took over the operation of the affected lines from the incumbent DSB in January 2003. The tender was structured in two parts: the northern package (Aarhus-Langå-Struer, Struer-Thisted and Struer-Skjern) and the southern package (Tønder-Esbjerg, Esbjerg-Skjern, Skjern-Herning, Herning-Aarhus).

Both tendering procedures were concluded before prior to the adoption of Regulation 1370/2007. Nonetheless, the invitation to tender and the subsequent contract included social criteria. For example, in the contract between Arriva and the Danish Transport Authority for the central and western Jutland service, a clause was included setting out the requirements in relation to working conditions ('Arbejdsklausul', section 7.2). The document stipulates that:

*'The Danish Transport Authority is under ILO Convention 94 on labour clauses in public contracts required to ensure that the operator and any subcontractors ensures that workers' salary (including benefits), working hours and other working conditions are not less favourable than those under an existing collective agreements, arbitration awards, national legislation or regulation that are applicable to the work of the same kind within the trade or industry in the district where the work is performed. There should ideally be a collective agreement that is representative for the sector in Denmark as a whole. The operator undertakes to secure agreed pay and working conditions for employees that work on the task in Denmark and is committed to inform employees about the current working conditions. If the operator does not meet the set requirements, and if this results in a valid claim for additional wages from employees, the Danish Transport Authority can withhold payment to the operator in order to secure staff's terms of employment.'*

As the change of operator was considered to be a transfer of undertaking, the transfer of staff was

required. As some of the staff of DSB have special employment status the transfer of staff, this was regulated by the Act on Transfer of Undertakings and the Act on Statutory Civil Servants. With the exception of train drivers there were no real issues in relation to the transfer of staff. From the outset, it was not fully clear how many drivers would be required for the transferred services, with Arriva's estimates being higher than those provided by the incumbent DSB. As only a small proportion of train drivers elected to transfer (56 out of 376, with remaining staff choosing to remain with alternative employment in DSB), the company therefore had to train a significant number of drivers. A large share of these drivers were employed on civil service type contracts and thus were not covered by the Act of Transfer of Undertakings. Consequently, the transfer could only be by means of secondment to new operator; leave of absence from DSB and temporary employment with new operator; or transfer of employment to new operator. According to the contract between the Ministry of Transport and Arriva, train drivers had to reveal their plans nine months before the transfer of services and then enter a binding contract four months before the start of operations. However, out of consideration for the training requirements by Arriva, this was moved forward by a month and a half (which the company still considered to be insufficient). Eventually, around 56 train drivers did transfer to ARRIVA. The preferred option for those deciding to transfer to the new operator was to be seconded from DSB. At present staff are still being seconded from the old operator.

The training of sufficient drivers in time for the take-over of operations proved a challenge. According to the contract with the Ministry of Transport, Arriva had to use the training provision supplied by DSB and 'privatbanerna' (municipal train operators). Whilst it was assumed in the ITT that DSB would be able to train 75 drivers during 2002, it transpired that DSB were only able to train 20 drivers before the transfer of operations. Arriva were therefore allowed by the Ministry of Transport to train the other 60 drivers through 'privatbanerna'. However, the Danish Railway Union expressed a concern that the training provided by 'privatbanerna' would represent a security risk and hence Arriva was not able to train any drivers through this provider. Consequently, it was decided to train all drivers through DSB, although this meant that Arriva would not have a sufficient number of drivers available at the transfer of operations. The upshot of this was that DSB eventually continued the running of some of the lines for an additional period of time until further drivers could be trained.

The Danish National Audit Office concluded that Arriva were not given a reasonable opportunity to recruit and train a sufficient number of train drivers before the transfer of operations. As a result, subsequent tender processes allowed a longer mobilisation phase between contract award and start up.

### **6.1.2 Which terms and conditions transfer, at what level and how long are these conditions protected**

The question of which terms and conditions transfer, at which level and how these are protected depends on the basis on which the transfer takes place and specific national provisions in place.

When a transfer takes place under the provisions of national legislation governing the transfer of undertakings or similar regulations which consider that transfer of staff should apply in cases of a change of public service operator in the rail sector, all staff recruited by the transferor to operate the service transfer across. Different national rules apply as regards to outsourced workers or individuals on fixed-term contracts. In the UK, for example, these individuals also transfer across if they are in contract on the date of the transfer, but this is not the case in all other countries where staff transfer is required under these rules. Similarly, there are differences regarding the specific terms and conditions which transfer across and how long these are protected.

In the UK, TUPE Regulations stipulate that the transfer includes all terms and conditions of employment, e.g. salary, sick pay, holidays; hours and place of work; notice provisions; duties; continuous service entitlements etc. In addition, transferor's liabilities such as personal injury claims, tribunal cases; ongoing grievance issues pass on to the transferee.

TUPE protects these terms and conditions 'at the point of transfer'. Following a transfer, the new operator is subsequently entitled to re-negotiate terms and conditions. However, this rarely leads to a significant change in provisions as trade unions in this sector are traditionally strong and changes to terms and conditions have to be negotiated and agreed and cannot be unilaterally imposed. It is considered that workers on precarious contracts

tend to be in the most difficult position as their terms can be reviewed when their contracts come to an end after a transfer.

Dismissals following a TUPE transfer are allowed for economic, technical and organisation (ETO) reasons, which have been variously interpreted by the courts and are a significant source of case law. Valid economic reasons have been considered to be, among other things, reduced demand for services; technical reasons include the introduction of new technologies which limits staffing requirements; and organisational reasons include restructuring (but not directly resulting from the transfer). In theory, it could be considered easy to re-badge a change in conditions are resulting from restructuring rather than a TUPE transfer, but case law has shown that because of full disclosure requirements, the courts are usually able to see if the underpinning reason for a change is the transfer and will consider changes to conditions to be unlawful.

For example, a significant worsening of terms and conditions and a location change has been considered as significant detriment to workers which means that they can consider themselves to be constructively dismissed and therefore entitled to damages.

ETO reasons primarily play a role for the restructuring of management teams in the case of a change of operator. The new operator generally wishes to bring in its own management team at the highest level and although it is generally the case that the old contractor also wishes to retain their management staff, this is not always the case where a new position cannot be found for them. In such cases ETO reasons are often used to lay off managerial staff from the previous operator unless they can be otherwise deployed.

As a result of these provisions, it is argued, including by trade union representatives in the sector, that *'the only thing that changes when the new operator takes over is the uniform'*.

In Denmark, the transfer of staff is generally regulated by the Act on Transfer of Undertakings (Virksomhedsoverdragelsesloven). The Act states that the new operator immediately enters into the rights and obligations that are existing at the time of the transfer, including in relation to:

- collective agreements;
- rules on pay and working conditions that have been determined or approved by public agencies; and/or
- individual agreements on pay and working conditions.

The obligations, in terms of pay and working conditions, remain in place until the relevant collective agreements expire or new collective agreements are signed.

In Italy, in case of transfer of staff, national legislation provides that the new operator has to grant a treatment not inferior to the previous operator. This does not necessarily mean that the exact terms and conditions of the transferor are maintained. The goal of 'no inferior treatment' is reached in different ways at the level of each Bundesland, making compulsory the application of a collective agreement and protecting the acquired rights.

In the Netherlands, although a transfer of a transport concession is not necessarily regarded as a transfer of undertakings, paragraph 4 of the PTA 2000 (articles 36-43 c) stipulates that a transfer which mainly involves a transfer of staff can also fall within the application of the rules on transfer of undertakings and therefore require a transfer of staff. Employees considered to be working on the affected lines can therefore be offered a transfer to the new operator. All existing wages, terms and conditions and entitlements transfer to the new operator for the period of at least one year. After this, new conditions can be negotiated, but these are generally those applying in the relevant sectoral collective agreement. In cases where this collective agreement exceeds the standards of the transferred terms, the improved standards come into force. In situations where this is not the case, specific provision can be made for supplementary payments to be made to transferred staff to continue to protect their conditions. This is, however, not mandatory (see box below).

In the urban transport sector in France, protection of existing terms and conditions of employment is considered to be significantly strong in the urban transport, compared to the inter-urban public transport sector. In relation to the former, national legislation on the

transfer of undertakings applies, whereas with regard to the latter, a relevant collective agreement for the sector comes into force.

As has previously been mentioned, transfer of staff in Sweden is only in a few cases based on a requirement set out in tender documents. The box below highlights the case of the tender for the Stockholm metro system, where the competent authority required such as staff transfer to ensure the speedy and reliable start-up of operations. Despite the fact that the incumbent operator sought to challenge the award decision initially, close co-operation between transferor, transferee and the relevant trade unions meant that all staff were effectively transferred on existing terms and conditions. This included the transfer of the personnel employed at a sub-contractor.

The second Swedish case provides an interesting illustration of what can happen in a case where there is a repeat tender for the same line in which a service is returned to the original operator. In this case, the successful operator in the first award process, the Danish incumbent DSB, offered higher wages and terms and conditions than the incumbent incumbent SJ. Most of the staff selected to transfer across in a negotiated transfer and came into the benefit of the improved terms and conditions. When DSB found itself unable to deliver the service within budget and withdrew from the market, the competent authority made a direct award to a daughter company of SJ under transfer of undertakings regulations. This meant that although staff had only been on their new terms with the new company for 17 months, they now retained these new entitlements for 12 months. When the company subsequently sought to renegotiate the collective agreement to return them (more or less) to their previous conditions which would have matched those with other employees in the company, the trade unions opposed this. Following an industrial dispute a new collective agreement was reached which retained the improved standards brought in by the transfer to DSB (see box on west coast commuter traffic case study below for more details).

In Germany, where the transfer of staff is optional and can be required by a competent authority, it is the competent authority (on the basis of the TTG of each Bundesland) which decides not only which categories of employees are to transfer, but also which terms and conditions are protected and for how long (see also section 6.1.1 above). In the limited examples which are available, these are either the terms and conditions of the transferor or the nominated representative collective agreement(s). In at least one case, the definition of 'terms and conditions' has been limited to wages and working hours. Protection usually applies for the term of the contract or until the relevant sectoral collective agreement is re-negotiated.

### **Case study Netherlands: Transport services in Achterhoek and Vechtdallijnen**

In the Achterhoek case, the competent authority (Province Gelderland) first awarded a concession for the provision of regional passenger rail services to Synthus in a direct award process, after the incumbent NS withdrew from the line. Following this award process in 1999, all 47 former NS workers transferred to Synthus. Transfer was voluntary for NS employees. Prior to the transfer, employees worked under the terms and conditions laid down in the NS company agreement. These terms were subsequently protected for 12 months. After the expiry of this period, the sectoral collective agreement Multimodaal became applicable to their employment. An explicit arrangement was reached with the trade union that in cases where staff incomes were to decline as a result of the application of this sectoral collective agreement, Synthus would offer them a supplementary award by way of compensation for a period of three years. This was finally not necessary because the terms of the collective agreement Multimodaal were equal to (or more favourable in some respects) than the NS collective agreement.

When the concession was re-tendered in 2010, it was awarded to Arriva and Hermes (Connexion). The 47 employees which had previously moved from NS to Synthus were now transferred to Arriva. In this case, employment conditions remained the same under the sectoral agreement. In this case, some office staff which had transferred from Synthus to Arriva eventually left because the administrative facilities had moved to a new location involving longer travel to work.

In the case of Vechtdalijnen, the procedure applied was similar, but only 3 of the 40 NS employees

who were offered a transfer selected to move to the new operator who had been granted the concession in 2010. Most the staff who did not wish to move where granted continued alternative employment at NS. The transferred employees benefited from protection of their wages and terms and conditions for 12 months and subsequently transferred to the terms laid down in the Multimodaal agreement. In this case, there was no continued guaranteed protection on any aspects where new conditions might have been below those enjoyed in NS, as no such agreement was reached with the trade unions.

### 6.1.3 What are the main factors determining the outcome of a staff transfer process

Based on the (limited) existing experience of staff transfer in the passenger rail sector, it appears that a number of key factors determine the outcome of a staff transfer process and its implications for social standards:

- The nature of the legislative framework being applied (national implementation of Directive 2001/23/EC or application of the PSO Regulation);
- The precise detail of the legislation relied upon;
- The recognition and strength of trade union organisations in the sector; and
- In cases where there is no provisions in principle by the competent authority to require staff transfer, the level of commonality of interest between transferor and transferee.

On the whole it appears that the application of national provisions on the transfer of undertakings and protection of employment provides greater legal certainty than the direct application of Article 4(5) to require staff transfer within the meaning of Directive 2001/23/EC.

Where Article 4(5) is relied upon it is often the shape of the national or indeed regional legislation providing for the possibility of staff transfer which is the determining factor. As the German example and the situation in Italy (see case study in Annex 1) demonstrates, there can be significant differences in the detail of this legislation at the level of each Bundesland and what it means in practice for who transfers and under which conditions.

Both in relation to negotiations surrounding the transfer (particularly where, as in Sweden, transfer is practice de facto rather than being required by competent authorities), and in the subsequent re-negotiation of collective agreements, the presence of strong trade unions plays a key role as demonstrated by the case study examples in the UK and Sweden.

Where there is no requirement to transfer staff, examples from Sweden (and indeed in Germany) show that where it is in the interest of the transferor to shed staff no longer required whereas the transferee requires skilled workers to be able to rapidly take up a service, it is still possible to arrive at agreements which protect employment and terms and conditions. However, without a legislative basis, this arguably provides a much lower level of security to employees in the sector.

#### Case study Sweden: SL Tunnelbanan (Stockholm metro)

This tender involved the delivery of the operation of the Stockholm metro system. This complex tender process took 3.5 years and ended with the incumbent operator, Veolia, handing over the operation to Hong Kong based provider MTR in November 2009. The competent authority Storstockholms Lokaltrafik (SL) required that the new *'operator shall, in conjunction with the start of the operation, take over the prior operator's employees who to a majority of the time were conducting work under the tender. LAS and the rules on co-participation shall be respected by the operator. The two operators shall collaborate to the degree necessary for the transfer of the personnel and the new operator shall inform and collaborate with the relevant trade union'*. The transfer involved around 2,000 employees.

During the period following the award, MTR was already in contact and collaborated with Veolia to find out exactly who was employed in the operation and how an eventual transfer could take place. They had also spoken to the trade union on the details for a possible transfer. MTR (as well as other competitors) were given information on relevant Veolia employees including salaries, age, position, and working experience.

Employees were informed about the tendering process (once the bid has gone in) via their intranet and through the company journal which was sent home to all employees. MTR sent brochures to

employees to present themselves and arranged drop-in sessions where employees could come in to talk to MTRs HR personnel and where they were given uniforms and information. The necessary forms that employees would need to sign in order not to be automatically transferred to MTR were also sent to all relevant employees. Veolia organised a project group that would deal with all the details for the transfer as well as department representatives who participated in the project group meetings and were informed about the details of the transfer and relevant discussions. These representatives were then responsible for answering questions or forwarding issues to the project group which had a counterpart project group at MTR. The trade union was also involved in the discussions relating to the salary administration and the commissioning transport authority was engaged to see that everything was running smoothly. Veolia and MTR and the client had weekly meetings. In addition to the initial information distributed by the incumbent operator to potential new operators (on employees and working conditions), other relevant information was shared such as overtime and holiday entitlements, the Christmas schedule, uniform sizes, cash registers, etc. The only information that was not shared were personal details that could not be shared such as sick leaves, mismanagement, and security neglect. 2,468 staff were eventually transferred from Veolia to MTR. The tender also requested that Tågja, a sub-contractor of Veolia, responsible for the train maintenance such as technical maintenance and cleaning was split in two companies where the part of the company that was operating the metro was transferred to Mantera, the maintenance company mandated by MTR.

### Case study Sweden: West coast commuter traffic

This case study involves the delivery of rail services handling west coast commuter traffic in Sweden. Until 2010 the passenger rail operator on these lines was SJ AB, the state owned and largest railway operator in Sweden. In 2008, a new open tender was issued for the operation of the regional commuter traffic which was won by the Danish state railway operator DSB. In 2010 it became apparent that DSB was facing financial difficulties leading them to exit the market. After some initial inquiries the traffic authority settled a direct tendering agreement with SJ Götalandståg AB for the operation of the same network. The first tender process followed a normal tendering procedure. As is practice in the sector, the tender process is based on a two-step approach with a first expression of interest and then an invitation to tender for the eligible operators who had declared their interest in participating in the bid. The whole tendering process took about 3 years including about 1 year to prepare the tender documents, 6 months to 1 year for applicants to prepare a bid, and one year for consultations and negotiations with the winning operator. The second tendering process was far shorter. When DSB difficulties in running the operation became evident, the national traffic operator was warranted to do a direct procurement without preparing an open tender since a new operator would need to take over the business in only 3 months. The traffic office spoke with two operators who they thought had the resources to take over the operation and settled on SJ who was the only one who felt that it could take over the operation in such a short time. After the negotiation was done, SJ had 1 month to take over the operation from DSB.

Västtrafik generally does not require a change of operator to be considered to be a transfer of business since it considers that the market can regulate itself and therefore it is better for the incoming and outgoing operator to settle the question with the employees and to decide whether the transition should be performed as a transport for business. When the contract was originally transferred from SJ to DSB in 2010, the outgoing and incoming operator started to make the necessary arrangements about the transition. SJ and DSB calculated the staff necessary to run the operation and then offered the employees that fully belonged<sup>70</sup> to the operation a transfer in order of seniority. Around 100 train drivers were needed for the new operation however less than this number agreed to move to the new operator. In addition to this, there were on board personnel and station staff, meaning that eventually around 600 individuals transferred to the new employer. Notably, the salary conditions offered by DSB were more favourable than those offered by SJ. The larger part of the employees moved to the new operator, however, despite the more advantageous salary conditions, a small percentage of people, mainly employees close to retirement age, decided to stay

<sup>70</sup> There were stations where other lines were operating and lines that did not belong to the contract where SJ employees were working full or part time. Stations where employees were not asked to move was Göteborg, Falköping, and people operating on SJs own traffic (where they were operating their own trains and just paying for the use of the track)

with SJ although this involved the risk of being given notice due to lack of work. This was mainly due to advantageous pension conditions at SJ which allowed an early retirement at 60.

When DSB ran into difficulties in delivering the service, the competent authority decided to directly award the contract at short notice to SJ Götalandståg AB, 100% owned daughter company of SJ AB. SJ Götalandståg only had 1 month to prepare the takeover of the operation and DSB and SJ underwent a period of transition where DSB helped SJ to pay the salaries the first month since SJs system was not ready for the payment. SJ took over almost everything necessary for the running of the operation from DSB including uniforms, premises, and sub-contractor contracts (on the same conditions) since it did not have time to prepare new contracts. SJ decided to incorporate the operations into their new dormant daughter company instead of into SJ since the traffic authority had asked the transition to be considered a transfer of business and SJ did not wish to blend DSB personnel with its SJ personnel since this would change the levels of seniority within SJ<sup>71</sup>. As a result of the transfer of business, employment and working conditions were transferred for a period of one year. When the company subsequently sought to renegotiate the terms and conditions, this was opposed by the trade unions. Following the threat of industrial action this led to a new agreement which retained the conditions put in place by DSB.

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<sup>71</sup> Levels of seniority is very important in railway operators because employees are usually given the right to choose their shifts in order of seniority;

## 7 Summary of findings and conclusions

### Background and aims and objectives of the study

Even though current EU legislation does not impose the opening of the domestic passenger rail market to competition, some EU countries have indeed done so, either wholly or partially. In some countries (Sweden and the UK being the prime examples) these developments date back several decades, in others they are much more recent. In light of the developing competition, and with an increasing number of public service contracts being tendered out in passenger rail transport, the **European social partners in the sector, ETF and CER, have expressed their concern about the impact of competition and the consequences of lost tender bid for the employees who performed the service before (protection of staff in the case of a change of operator and creating a level playing field with regard to social conditions).**

Articles 4(5) and 4(6) and Recitals 16 and 17 of the PSO Regulation allow competent authorities to require public service operators to meet certain minimum social standards in relation to the employment of staff to deliver the service or to require a transfer of staff to the new operator within the meaning of Directive 2001/23/EC even if the conditions of the Directive are not fulfilled. It is within the remit of the competent authority whether or not to make use of these possibilities offered by the Regulation; there is no legal requirement to use one or both possibilities.

The goals of this study carried out on behalf of CER and ETF were essentially fourfold. It aimed to:

- Obtain a broad overview about the existing rules dealing with social standards and transfer of staff and determine the extent to which they set a binding frame of reference applying to all potential operators;
- Establish the extent to which competitive tendering is used in the selection of passenger rail transport PSO providers;
- Assess whether social criteria are included in tender criteria; which social criteria are used and the extent to which the provisions or the spirit of EU Regulation 1370/2007 (Articles 4(5) and 4(6) read in conjunction with Recitals 16 and 17) on Public Services Obligations are used in this context<sup>72</sup>;
- Establish the protections applied (if any) to safeguard social standards for staff in the case of a change of operator and in the case of a transfer of staff when there is a change of operator.

Based on a review of the (limited) scientific literature and other documents at national and transnational level, a survey of members of CER and ETF and interviews with trade unions, employers' organisations, industry representatives and experts, employers and competent authorities, the following core findings are presented.

### Current experience of tendering for the award of public service contracts in the passenger rail and urban public transport sectors

**The experience of competitive tendering in the award of public service contracts in the passenger rail sector in Europe remains limited, but has increased significantly in recent years and is likely to grow. The urban transport sector can provide some lessons as tendering has been more widespread here for a number of years.**

An assessment of the current situation of tendering for the award of public service contract in the passenger rail and urban public transport sectors provides the following picture:

<sup>72</sup> The spirit of the Regulation included in European or national legislation, collective agreements, or rules existing even before the Regulation come into force.

Only two EU countries award public service contracts for passenger rail services exclusively through competitive tenders (Sweden, UK). In these countries, tendering began in the 1990s.

In six countries (Czech Republic, Denmark, Germany, the Netherlands, Poland and Italy) mixed systems are in place which partly leave it to the competent authorities to decide on the method of award chosen. In Germany, competitive tendering is the main mode of award for the regional and local rail sector (*Schienerpersonennahverkehr*). In Denmark, competitive tenders have been used on a number of occasions, but direct award continues to be significantly used. In Italy the legislation has provided for competition since the 1990s. Since then, a number of “transition periods” were introduced over the years also to tackle the lack of competition resulting from the fact that local railway transport services are often undercompensated, considering low subsidies and tariffs, even if the services need investments by all the operators. As a consequence, few competitive tenders have been issued, most of these have either been withdrawn/postponed or awarded to the national operator. In the Netherlands, competitive tendering is the norm for regional rail services once the national level grants the region the right to do so, but national train services and mass urban public transport systems in the key cities continue to be awarded directly. In Poland competition is so far restricted to a small number of regional lines and in the Czech Republic, a first pilot tender project was launched in 2012.

In the majority of study countries most passenger rail services continue to be awarded through direct award only (19 countries).

In the urban public transport sector the experience of tendering is more extensive. Four countries use this form of award only. In 18 countries competent authorities have a choice but competitive tendering is frequently used. A further 4 countries allow direct award only.

### The determination of social standards and their impact for the creation of a social level playing field

Social standards set in legislation and – more importantly – in sectoral collective agreements can play a critical role in creating a social level playing field by securing employment conditions for staff in tendering processes.

However, the number of countries in which such sectoral agreements currently exist in the passenger rail sector is limited to five Member States. A particular concern is the absence of sectoral collective agreements (and the lack of traditions to negotiate such agreements) in countries where tendering is not yet widespread but will increase in the years to come. An example from Poland studied for this report shows the serious consequences for staff arising from tendering in the absence of such a social level playing field (a case which resulted in redundancies and reduced terms and conditions for those able to find re-employment with the new operator).

It must also be noted that where sectoral collective agreements are in place, it is possible that the provisions in some company level agreements are up to 20% higher than sectoral agreements and reference to sectoral standards alone in tender processes can therefore still lead to a lowering of terms and conditions for affected staff. Furthermore, even those sectoral collective agreements in place (in the passenger rail sector) are not universally binding, but only commit signatory parties. Albeit in practice this currently ensures an almost universal level of coverage, this situation is not guaranteed to be maintained in perpetuity.

Where such collectively agreed (and widely applicable) sectoral social standards are not in place, other measures are required to protect the social level playing field in the tendering of PSO contracts. Even where such agreements are in place, the use of social standards and social criteria can create greater certainty in situations where collective agreements are not universally binding.

In countries where a significant share of staff in the passenger rail sector are civil servants or staff with a specific employment status, specific provisions regulating

**social standards tend to be in place for these types of staff.**

Largely depending on national industrial relations traditions, binding minimum social standards in relation to minimum wages, wages beyond the minimum, non-wage benefits, working hours, training, health and safety and pension rights are either solely set in national legislation or are further enhanced through sectoral or company level collective agreements. Legal standards usually only set a minimum floor for employment rights which in many countries is exceeded through the application of collectively agreed standards in the passenger rail and urban transport sectors. Particularly in relation to core social standards (e.g. minimum wages, wages beyond the minimum, non-wage benefits and working hours), sectoral agreements – where they exist – play a particularly important role in creating a social level playing field. In relation to additional social conditions and benefits (e.g. training, health and safety and pension rights) sector-specific legislation (applying to all, or specific groups of workers in the sector) are more widespread, but are again enhanced in some countries by sectoral agreements. **In countries where transfer of staff is not compulsory in the case of a change of operator and no specific social standards and criteria are set in tendering, sectoral collective agreements (which must be universally binding or widely applicable in the sector) are the only way of ensuring a social level playing field.**

**However, sectoral agreements are in place in a limited number of Member States in the passenger rail sector** (Austria, Denmark, Germany, Italy, Netherlands and Sweden). In the presence of such a sectoral agreement it is not strictly necessary for a competent authority to prescribe social criteria in tender documents, as these standards would apply to any selected operator. It must be noted that this is only the case if such agreements are universally (for at least almost universally) applicable. At present, sectoral collective agreements in the passenger rail sector are **not generally universally binding**, but high membership rates among employers and trade unions in the sector ensure that their provisions are binding on virtually all operators. **This is, however, no guarantee that this situation will always be maintained and social standards in tendering can therefore play a role in ensuring that a social level playing field set in sectoral agreement binds all potential operators.**

**It is also worth noting that where sectoral collective agreements are in place, it is possible that the provisions in some company level agreements are up to 20% higher than sectoral agreements and reference to sectoral standards alone in tender processes can therefore still lead to a lowering of terms and conditions for affected staff.**

A striking illustration of the impact of a situation where there is no sectoral agreement (no social standards or criteria in tendering and no requirement for the transfer of staff) in force in the case of a change of operator is offered by the Polish example in the current study. Here, the transfer of operator did lead to redundancies and redundant employees had to rely on the desirability, of their skills and experience in the market to negotiate new terms and conditions. This case example therefore acts as an exemplar to demonstrate the impact of a lack of any of the forms of potential protections (sectoral agreements, social criteria in tendering, provisions on the transfer of staff) and thus highlights the importance of having suitable provisions in place to set a social level playing field.

**In countries where a significant share of staff in the passenger rail sector are civil servants or staff with a specific employment status similar to civil servants, specific provisions regulating social standards tend to be in place for these types of staff. The existence of such particular employment relationships in the sector also has an impact on the transfer of staff (see below).**

### **Current use of social standards and social criteria in tendering**

**Despite the possibilities offered by Articles 4(5) and 4(6) and Recitals 16 and 17 of the PSO Regulation, the use of social criteria in tenders (without the requirement to transfer staff as another way of ensuring social standards) is very limited and the**

impact of the regulation remains minimal.

In practice, **only one country (Germany) has provisions at the level of the Bundesland (in 13 out of the 16 Bundesländer) which enshrine respect for minimum social standards by virtue of the determination of social criteria.** This is done through legislation on respect for collective agreements (Tariftreuegesetze, TTG) which are individually legislated at Land level and differ in terms of their content and the standards set. Where a TTG is in force at the Bundesland level, it must be applied by competent authorities (provisions on transfer of staff remain optional).

In some other countries, reference is made to core social standards in tender documents (including international and national labour standards). These, however, do not impact on the protection of social standards in practice as they apply to all operators in any case. In a very limited number of cases specific requirements can be found in tender documents regarding training or health and safety, but these do not have an important impact on the assessment of quality criteria.

### **Provisions regarding the transfer of staff in cases of change of operator and their impact on the protection of staff**

**In the 18 EU countries for which information was made available for the study for the passenger rail and urban public transport sector, 5 currently have no provisions (either in law or collective agreement) to require the transfer of staff in the case of a change of operator (BE, HU, LT, LV, LU); in 6 countries transfer of staff is optional and depends on such requirements being specified by the competent authority (AT, BG, DE, IE, PL, SE) and in 7 countries transfer of staff is required and binding either in legislation or collective agreement (CZ, DK, ES, FR, IT, NL, UK) for certain types of staff. In the passenger rail sector this is only true for CZ, DK, IT, NL and UK (for ES and FR only in the urban public transport) and it is worth noting that there are no practical examples of this taking place so far in CZ and IT. This presents a picture of around half of Member States not offering any (binding) employment protection to staff when the contract to operate the service they deliver changes hands. . In some cases (IT) the collective agreement contains specific criteria to choose the employees.**

**In cases where staff transfer is optional, this possibility is currently rarely used by competent authorities (some limited examples are available in Germany and Sweden, as well as in the Austrian regional bus transport sector).**

**Even in countries where transfer of staff is binding, provisions regarding who is to be transferred, under which terms and conditions and how long these conditions are protected varies significantly from country to country.**

**At present, countries which require transfer of staff on the basis of the national implementation of transfer or undertakings legislation and/or who determine that the transfer of a PSO contract to a new operators classifies as a transfer of undertakings even where there is no transfer of assets offer the most 'reliable' and wide ranging protections for staff.**

There are **five basic situations in which a transfer of staff currently takes place** within the context of a change of public service operator in the rail and urban transport sectors:

- **Tender documents require a transfer of staff as well as materials and assets.** As a result, a transfer of operator is considered to amount to a transfer of undertakings under Directive 2001/23/EC and rules regarding staff transfer set out in the Directive apply.
- **Tenders in the rail and/or urban transport sector are interpreted in national law as falling under national regulations regarding the transfer of undertakings** and/or are interpreted as situations calling for a transfer of staff. In some countries in these situations, there is no specific reference made to transfer of staff in the tender documents as all operators are aware of the application of these rules.

- **Competent authorities rely on Article 4(5) – either explicitly or implicitly – to require a transfer of staff in the case of a change of operator.**
- **Transfer of staff is optional and even if not required by the competent authority, is in practice negotiated between transferor, transferee and relevant trade unions.** This relies on transfer being mutually beneficial for both parties and requires the presence of strong trade unions.
- **No provision is made for the transfer of staff, either in law or collective agreement.**

The study was able to collect information regarding provisions on the transfer of staff in the passenger rail and urban public transport sectors in 18 Member States (as well as Norway and Switzerland). This shows the following picture:

- 5 EU Countries without any provisions in law or collective agreement requiring the transfer of staff: Belgium, Hungary, Latvia, Lithuania and Luxembourg;
- 6 EU Countries where transfer of staff is optional and depends on such requirements (based on relevant legislation or collective agreement) being specified by competent authorities: Austria, Bulgaria, Germany, Ireland, Poland, Sweden (and Switzerland);
- 7 EU Countries where the transfer of staff is binding either in legislation or collective agreement: Czech Republic, Denmark, Spain, France, Italy, Netherlands, the UK (and Norway).

In the countries where transfer is optional, the possibility is currently rarely used by competent authorities. In Austria a first case requiring transfer of staff is now under way in the regional bus sector in Austria. In Germany, transfer of staff has only been prescribed in 5 out of 30 tendering processes. In Sweden, transfer of staff is only explicitly required in tender documents in very few cases but is in practice negotiated between transferor, transferee and trade union in each case of a transfer of operator.

In Denmark, the Netherlands and the UK, transfer of staff is required as a result of transfer of undertakings legislation which considers a transfer of operator in the passenger rail sector to be a transfer of staff even if there is no transfer of assets. In France in urban public transport sector transfer of staff is required by law, whereas in the inter-urban public transport sector it is required by the sectoral collective agreement and only if the conditions of the law are not fulfilled. In Italy, transfer of staff is prescribed in legislation as well as in sectoral collective agreements.

With the exception of the UK and Sweden and to a more limited extent the Netherlands and Denmark in the passenger rail and in France also in the urban public transport sector, current experience of the transfer of staff in the case of a change of operator is relatively limited in the EU. Based on existing experience, it appears that **a number of key factors determine the outcome of a staff transfer process and its implications for social standards:**

- The **nature of the legislative framework being applied** (national implementation of Directive 2001/23/EC or similar provisions on the transfer of staff in the case of changes of passenger rail operator or application of the PSO Regulation);
- The **precise detail of the legislation relied upon** (particularly where this relies on the PSO Regulation);
- The **recognition and strength of trade union organisations** in the sector; and
- In cases where there is no provisions in principle by the competent authority to require staff transfer, the **level of commonality of interest between transferor and transferee.**

On the whole it appears that the **application of national provisions on the transfer of undertakings and protection of employment<sup>73</sup> provides greater legal certainty** than the

<sup>73</sup> Whether through the direct implementation of Directive 2001/23/EC or other legislative texts considering changes of public service operator in the transport sector to fall within requirements for transfer of staff.

direct application of Article 4(5) to require staff transfer within the meaning of Directive 2001/23/EC.

Where Article 4(5) is relied upon it is often the shape of the national or indeed regional legislation providing for the possibility of staff transfer which is the determining factor. As the German example and the situation in Italy demonstrates, **there can be significant differences in the detail of this regional legislation and what it means in practice for who transfers and under which conditions.** For example, in a number of German cases where transfer for staff is required, this is limited to operational staff and wages and working hours only. The successful contractor retains the right to determine how many of the staff which have expressed an interest in transferring are needed to deliver their staffing concept.

In countries where transfer of staff is a possibility (in law), but is not required by the competent authority (e.g. Sweden and Poland), differences in practice can clearly demonstrate the **impact of an absence of provisions to fix minimum social standards as this not only means that employment for individuals providing the service in the incumbent company is not protected, but newly recruited staff do not benefit from minimum sectoral wage standards, terms and conditions and other social standards.** Therefore, as mentioned above, in the Polish example examined for this study, where there appeared to be no common interest between transferor and transferee to negotiate a transfer of staff, the absence of such a collective agreement meant that redundant employees had to rely on market forces to govern the terms of their future employment.

## Reasons for the limited use of the possibilities offered by the PSO Regulation and other challenges

**Economic considerations, the feeling of legal uncertainty, the lack of knowledge and guidance about the possibilities offered by the Regulation and its practical application play a role.**

It is clear that there are economic considerations which limit the application of the possibilities offered by the PSO Regulation.

Similarly, lack of knowledge and guidance and a concern about legal uncertainties are further reasons by the use of the possibilities provided by Articles 4(5) and 4(6) has so far been limited. Some of the recent jurisprudence of the ECJ pertaining to the use of social standards in tendering (e.g. Ruffert and Laval) has led to a degree of nervousness among tendering authorities.

In addition to this, there are also some **challenges associated with the practical planning and implementation of staff transfer.** The affected employees have to be identified and relevant information delivered to all bidders to allow them to include viable calculations on staffing costs in their bids. Furthermore, as in some cases transfer is voluntary for staff themselves, a reasonable lead-in time is needed to allow the new operator to determine how many new staff they will have to recruit and train (and to deliver this training). For staff who do not wish to move, this is either considered as a resignation or it might lead to dismissal, as there is no employment guarantee with their existing employer (unless there are collective agreements stipulating the contrary or staff enjoy a special status which means they cannot be made redundant for operational reasons).

**The position of staff with special employment status poses particular challenges for staff transfer, which in many countries remains unresolved.**

Staff with special employment status are generally covered by specific legislation which either means they cannot be transferred or different operations apply for their transfer. In the case of Denmark, these options include being loaned, signing a temporary contract or being permanently transferred to the new operator. The transfer of such staff is not only challenging because of the nature of their contracts, but also because they have a different pension scheme and might have higher wages, better benefits and employment protections.

New operators can therefore be reluctant to shoulder the additional cost. In some countries (e.g Austria, but also France, Belgium and Luxembourg where the market is not open) the question of how these costs are to be covered has not been finally resolved.

Another potential challenge which arises from the transfer of staff<sup>74</sup> is the introduction of different terms and conditions for different staff in the same company. While this is legally possible in most countries, it can pose difficulties for industrial relations and make collective bargaining more challenging. A Swedish case example examined for this study provides an interesting example where a transfer to a new operator (which turned out to be short-term) led to improvements in terms and conditions which the incumbent was unable to reverse when they took back the service.

Overall, the application of staff transfer has led to a complex patchwork of terms and conditions for staff delivering the same service in a number of countries.

**Sub-contractors and individuals on fixed-term contracts can be in a particularly weak position in the event of a change of operator**

It is worth mentioning the position of sub-contractors and individuals on fixed-term contracts. While core staff can be relatively well protected, this is not always the case for staff on temporary contracts and those working for sub-contractors. Cases explored in the UK and Sweden pointed to sub-contractors also being transferred. However, in Sweden, this lacks a firm legal basis, whereas in the UK, proposed changes to TUPE Regulations could put current provisions which require such a transfer in question. One could therefore also envisage a situation where operators, in an effort to reduce staffing costs, do not replace leaving or retiring core workers and replacing them with an ancillary workforce which benefits from fewer protections in the case of a change of operator.

**The presence of strong trade unions can play an important role to ensure social standards are respected in the case of a change of operator**

Current experience shows the importance of political commitment and strong trade unions in ensuring a willingness to accept negotiation and implementation of social standards in the tendering of passenger rail services. These have played a significant role in the formulation of regional legislation requiring the use of social standards, the negotiation of sectoral collective agreement and (in some countries) the inclusion of social standards in particular tender processes. The role of trade unions is equally important in the negotiations surrounding staff transfer and the re-negotiation of collective agreements following the expiry of protection periods. It is also important to note that in many countries employers and representatives of employers' organisations have also expressed their support for the use of social criteria in tendering to ensure fair competition in tendering processes.

## Conclusions

**Social standards (and employment) in tendering are most effectively protected in current practice through the application of the legislative provisions on the transfer of staff, particularly in the context of a transfer of undertakings (as defined in national legislation, even where there is no transfer of assets). In a limited number of cases this is achieved through the application of Article 4(5), but these cases tend to offer a lower standard of protection because of different regional and local interpretations.**

**In cases where staff transfer is not compulsory, the existence of a social level playing field set in sectoral collective agreements (whether or not they are mentioned in tender documents) can offer a certain level of protection, if such standards are (effectively) universally binding. However, it must be noted that the standards in such agreements can be around 20% lower than those set in the best company level**

<sup>74</sup> Particularly in the context of the re-mapping of service provision.

agreements.

Given that currently no collective agreements in the sector are universally binding, the setting of social standards and social criteria in tendering would arguably provide for greater certainty.

In addition, it must be noted that a combination of provisions on transfer of staff and social standards set in tendering is the best way to ensure that employment is protected and a social level playing field is achieved for all operators, transferred employees and staff newly recruited to deliver the service.

The fact that around half of Member States currently do not provide for the transfer of staff and only in a minority of Member States sectoral collective agreements are in place protecting a social level playing field must be a matter for concern as the use of tendering for the award of PSO contracts becomes more widespread.

The current experience shows that non-binding provisions in this area are not suited to provide adequate protections, particularly for many of the countries only beginning to open their markets. This creates a risk of social dumping and an associated lowering of the attractiveness of work in the sector at a time when skill shortages are likely to impact both service provision and service quality.

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Rail company ÖBB and inter urban transport company ÖBB Postbus  
Trade Union Vida

### **Belgium**

Rail company SNCB  
Trade Union CGSP Cheminots, CGSP ACOD urban

### **Bulgaria**

Executive Agency Railway Administration  
Trade Union - Federation of Transport Trade Unions

### **Czech Republic**

Rail company CD  
National Ministry of Transport

### **Denmark**

Rail company DK Arriva  
Trade Union – Dansk Jernbaneforbund

### **Finland**

Finnish Rail VR  
Finnish Employers' Federation of Road Transport

### **France**

Rail company SNCF  
Urban transport companies Keolis; Transdev Veolia  
Trade Union CGT Cheminots

### **Germany**

Agv MoVe - Employers' and Business' Association of mobility- and transport service companies in Germany  
Deutsche Bahn AG

### **Hungary**

Trade Union rail VDSZSZ; Budapest Urban Transport Union KSZOSZ

### **Italy**

Rail company FS Italiane S.p.A.

Trade Union Filt CGIL

### **Ireland**

Irish Rail

Trade Union Transport NBRU

### **Latvia**

Trade Union Urban Transport LAKRS

Trade Union Rail LDSZA

### **Luxemburg**

Rail company SNCFL

Trade Union FNCTTFEL

### **Netherlands**

Rail company Nederlandse Spoorwegen

Trade Union FNV

### **Norway**

Trade Union rail Lokmann

### **Poland**

National Transport Ministry

Trade Union rail FZZK

Rail operator PKP

Rail operator Arriva

### **Portugal**

Rail company CP

### **Romania**

Trade Union Drum de Fier CFR

### **Slovakia**

Rail company ZSR

### **Spain**

Rail company Renfe

Trade Union FSC-CC.OO

### **Sweden**

Swedish Rail Employers' Association Almega

Trade Union SEKO

### **Switzerland**

Rail company SBB

Trade Union SEV

### **List of interviews for case studies**

#### ***Austria***

ÖBB Postbus  
Trade Union Vida  
IVG

#### ***Czech Republic***

Rail company CD  
National Ministry of Transport  
Rail company GW Train Regio (via email)

#### ***Denmark***

Rail company DK Arriva  
Trade Union – Dansk Jernbaneforbund

#### ***France***

Urban transport companies Keolis  
Trade Union CGT Cheminots  
Trade Union SNTU CFTD  
Competent authority Boulogne sur Mer

#### ***Germany***

Employers' and Business Association Agv MoVe  
Deutsche Bahn/ DB Regio AG  
Trade Union EVG – rail, urban transport  
Representative of awarding organisations - BAG SPNV  
Awarding organisation –VBB

#### ***Italy***

Rail company FS Italiane S.p.A.  
Bus company FS Group Busitalia S.r.l.  
Trade Union Filt CGIL  
Employers' organisation AGENS  
Company – Arriva Italy  
Ministry of Infrastructures and Transport

#### ***Netherlands***

Rail company Nederlandse Spoorwegen  
Trade Union FNV  
Rail company Arriva  
Competent authority - De stadregio Arnhem-Nijmegen

#### ***Poland***

National Transport Ministry

Trade Union rail FZZK

### *Sweden*

Swedish Rail Employers' Association Almega

Trade Union SEKO

Stockholm local traffic (SL)

Veolia Transport Sverige AB

MTR Stockholm

Västtrafik AB

SJ Götalandståg AB

DSB

### *UK*

Abellio

ATOC

RMT (via email) Department for Transport (referred us to ATOC)

## Annex 1 Country case studies

# Austria

## Background

In Austria only direct award is currently used for contracts in the passenger rail transport sector. The national rail company, ÖBB, remains in a dominant positions with close to 100% of market share. Only around 2% of passenger rail services are delivered by private companies and these are not concerned with mainline services but on very limited, specific lines, largely operated for tourists. The contract on public service offers (*Vertrag über die Gemeinwirtschaftlichen Leistungen, GWL*) of 2011, provides that direct award is possible for 10 years, but the state retains the right to cancel lines every 2 years. The situation in the rail sector is therefore changing, but remains unclear.

This report therefore focuses on the position in the regional bus services sector, where competitive tendering has become more and more common on the last 2-3 years and a pilot case of tendering with a requirement for staff transfer is now under way. It should be noted from the outset that this case is not completed (tendering in this case is only at the pre-qualification stage). As a result, only trends and processes in relation to tendering and the use of social criteria in the sector can be discussed, together with an assessment by stakeholders as to the potential implications of a case of staff transfer.

## Use of tendering

Tendering for regional bus services has been used for 6 years, but it is only in the last 2-3 years that momentum has significantly picked up. Between 2006-2010, tendering was mainly used for new lines to be added to the existing offer, whereas more recently the stock of existing regional bus routes has also successively been opened up to public tender.

Local and regional public transport are primarily regulated by four key pieces of national legislation:

- The Local and Regional Transport Act (*Öffentlicher Personennah- und Regionalverkehrsgesetz, ÖPNRV-G*)<sup>75</sup>
- The Federal Public Procurement Act (*Österreichisches Vergaberecht*)<sup>76</sup>
- The Passenger Transport Routes Act; and in the case of rail transport,
- The Railways Act (*Eisenbahngesetz*)<sup>77</sup>

Under the ÖPNRV-G (with the exception of passenger rail traffic), the provinces and municipalities are responsible for the planning of local and regional transport<sup>78</sup>. Since the 1980s, Public Transport Associations (PTAs) founded by the provinces have been responsible for the planning and eventually the tendering of local and regional transport services. Today, there are nine PTAs, represented by the Association for Public Transport (*Interessengemeinschaft Verkehr*, henceforth IGV). A map of the PTA regions is presented in Figure A.1.1

Until the 2006 amendment of the Passenger Transport Routes Act, existing contractors had to be contracted for additional services, as long as they were willing to operate the additional route for 'economically reasonable' payment.<sup>79</sup> An amendment of the Act was passed following intervention from the European Commission, which had expressed concern about the preferential treatment of existing contractors. Since 2006, any new services (and indeed the renewal of existing concession) have to be awarded according to public procurement law.

<sup>75</sup> <http://www.bmvit.gv.at/verkehr/nahverkehr/recht/oeprnv1999.pdf>

<sup>76</sup> <http://www.bka.gv.at/site/5100/default.aspx>

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<sup>78</sup> Hermann, C (2006); Liberalisation, privatisation and regulation of the Austrian local public transport sector; Country report for the PIQUE project

<sup>79</sup> *ibid*

Figure A1.1 Map of the regions represented by the Austria Public Transport Associations



Source: IGV website (accessed July 2013)

There are two major exemptions from this rule. Local authorities still have the possibility to award contracts to internal contractors under certain terms. Furthermore, any services not requiring compensation beyond the basic rules for ticket price compensations also do not have to be awarded competitively.

Concessions generally last eight years (6 years, plus 2 years optional extension), but can also be awarded for shorter periods.

While all additional routes have been tendered competitively for a number of years, processes of competitive tendering for existing services are therefore a more recent phenomenon. Even to date, only 7 of the 9 PTAs have issued competitive tenders, although it is anticipated that the remaining two will follow. The speed at which tendering was introduced tends to be linked to political preferences at provincial level. While some provinces have embraced the perceived benefits of tendering early only, some are mainly using this process because they fear legal uncertainties in using other award processes.

Tenders for local and regional public transport services are often organised as two stage processes, with a pre-qualification stage which allows potential bidders to ask questions and PTAs to select the (five) companies it considers to be best qualified to participate in the full tender process.

### Social Aspects in tendering

Tenders for services in the local and regional public transport sector do not generally specify any additional social criteria. As highlighted in the box below, all bidders are of course required to respect the minimum standards on working hours, health and safety, training and other social criteria as set out in national legislation. Some tender documents make specific reference to key international labour standards (e.g. on equal pay, freedom of association, right to bargain collectively etc). As will be elaborated in section 1.2 below, all employers in the sector are bound by their respective sectoral collective agreements through their compulsory membership of their economic chamber (*Wirtschaftskammer*). This means that not only minimum legal standards but also minimum standards set out in sectoral bargaining have to be respected by all bidders.

These 'social criteria', do not impact on selection criteria. Quality criteria are elaborated in tender documents, but these tend to focus on the quality of vehicles, the speed of delivering replacement basis in case of a breakdown and other factors.

## Tender provisions regarding respect for minimum social standards

Social criteria beyond minimum requirements are generally not included in tenders for regional bus services. However, tender documents can make reference to the requirement to respect employment law and social protection norms and collective agreements in force. Reference is also often made to the need to respect key international labour standards (and relevant national legislation).

- Frequently mentioned are the following:
- Prohibition/abolition of forced labour
- Prohibition of child labour
- Setting of minimum working age
- Freedom of association and collective bargaining
- Equal pay
- Non discrimination in the workplace

The trade unions and chambers of labour (*Arbeiterkammern*) have for some years emphasised the importance of including social criteria as quality criteria (or in addition to quality criteria) in public tenders. In 2009, a joint document was published<sup>80</sup> seeking to provide guidance to PTAs when issuing tenders for public transport services. It delivers guiding questions to be asked when assessing tenders as well as guidance on acceptable standards in relation to working conditions. It also makes reference to the possibility of ordering staff transfer offered by the PSO-Regulation.

Given the different wages and terms and conditions apply to different types of staff (those with civil servant status and those on private law contracts subject to the sectoral collective agreement), this does, however, not mean that the employment standards applied in different companies do not impact on bidding processes. This will be discussed in the subsequent section.

## Industrial relations

A number of key factors influence industrial relations and collective bargaining in the passenger rail transport sector and the regional and local public transport sector:

- The distinction between bargaining processes and wages and terms and conditions for staff civil servant status and employees on private law contracts
- The existence of sectoral collective agreements for the rail and bus sectors
- Compulsory membership of employers in the economic chambers, which essentially means that collective agreements are universally binding

Employees of ÖBB and Postbus employed prior to 2005 and 1995 respectively hold civil servant status and are covered by civil service law (*Beamten dienstrecht*). Their wages and terms and conditions are therefore effectively directly determined by the government. Staff with civil servant status cannot be made redundant. Their terms and conditions and pension provisions are more favourable than those of their colleagues on standard private law employment contracts.

Individuals employed by private transport companies and employees of ÖBB and Postbus recruited after 2005/1995 are employed on standard private law contracts. Their terms and conditions are determined by their respective sectoral collective agreement. These sectoral collective agreements are significant in setting wage standards and terms and conditions, because although in some cases more favourable company level provisions exist (which are integrated into individual employment contracts), these tend not to have a significant impact on lifting wages and associated terms and conditions.

<sup>80</sup> AK Verkehr und Infrastruktur, ÖGB/vida (2009); Leitfaden für Ausschreibungen im öffentlichen Verkehr: Qualitäts- und Sozialkriterien

In what follows, we will only refer to the situation in the regional bus sector.

The collective agreement for the bus sector is negotiated between the relevant sectoral association within the economic chamber and the trade union *vida* and covers wages as well as working hours, working conditions, holidays, entitlements to training and provisions regarding dismissal.<sup>81</sup> This sectoral collective agreement was negotiated for the first time in 2007 and was last updated in 2013.

As well as covering wages and working conditions among all private providers, it estimated that around 40% of employees at Postbus are now governed by this collective agreement. The others retain their special employee status (around 24,000 individuals). Because of new provisions aiming at encouraging the extension of working lives, it is anticipated that a 50/50 between a workforce with and without special employment status will be achieved at Postbus around 2020.

### **Impact key features of the industrial relations framework on tendering**

The difference between the cost to the employer of an individual with special employment status and someone employed under the conditions of the sectoral collective agreement amounts to around 20-25%. This is significant when Postbus bids for competitive contracts, as it is estimated that staff costs make up 50-55% of the costs associated with delivering a contract.

The company has sought to remain competitive by not fully covering all staff costs in the bid price. This is considered justifiable because within a scenario where such workers have an employment guarantee it is more desirable to operate contracts on this basis than to lose out in too many bidding processes. Of the approximately 100 larger tender processes (262 individual lots) Postbus has participated in over the last 7 years, around 40% have been won.

### **Rules on transfer of staff**

There are no requirements for staff transfer in tenders for passenger rail or local and regional transport services (unless a transfer of undertakings in line with EU Directive 2001/23 is considered to have taken place).

There are only two isolated examples in passenger rail sector which could have led to a transfer of staff. Both were linked to situations where ÖBB was no longer in a position, or willing to operate a line (therefore not as a result of a tender process).

- As a result of significant flood damage to the track of the Pinzgaubahn (between Zell am See and Krimml), service ceased. In 2008, the province of Salzburg took on the repairs and undertook to restart the service. The provincial provider, *Salburger Lokalbahn* was asked to deliver the service (through a direct award). An offer was made to take on staff formerly operating the line on behalf of ÖBB, but all affected workers had in the meantime found alternative employment at ÖBB.
- In 2010, the province of Lower Austria (Land Niederösterreich) took over the operation of 620km of track from ÖBB. Operations ceased on part of this track but among the routes which were retained was the *Mariazellbahn* (from St Pölten to Mariazell). This line was significantly modernised. Former ÖBB staff were leased to the new provider, *NOVOG* (owned by the province) temporarily, but as new staff were trained by *NOVOG*, these employees returned to employment with ÖBB.

In the regional bus service there is also no completed example of a process of staff transfer. One province (Kärnten) is now starting a new tender process where transfer of staff will be required. The pre-qualification documents for this procedure have only just been issued<sup>82</sup>, so

<sup>81</sup> Bundeskollektivvertrag für Dienstnehmer in den privaten Autobusbetrieben; for most recent version see [http://portal.wko.at/wk/format\\_detail.wk?angid=1&stid=595885&dstid=1258](http://portal.wko.at/wk/format_detail.wk?angid=1&stid=595885&dstid=1258)

<sup>82</sup> <http://www.e-beschaffung.at/bekanntmachung/491176>

it is not yet specified how this should be done in practice in the case of a change of operator. The tender process in Kärnten could therefore become a test case. It is important to note that this is a very small lot which would likely only concern two drivers.

Although many stakeholders in principle support security of employment in such situations, the option offered by Regulation 1370/2007 has not yet been used. It can be speculated that there are a number of reasons for this:

- Without a precedent and clear guidance on how a staff transfer should operate, PTAs are nervous to enter into such a process, which they consider would be more difficult to manage;
- There are also concerns that prices might rise as a result of such provisions (particular where a transfer of staff with special employment status is required);
- No solution has so far been found on how a transfer involving such employees would be handled and how additional costs might be covered. In discussions on this issue, PTAs have argued that the state should cover these costs as the effective owner of Postbus. For Postbus, it is equally important that a solution be found, as no legacy funding has been provided by the state to (continue to) cover such costs. High level discussions have been held on this question, but so far, no solution has emerged.

## Conclusion

There has been an increasing momentum towards tendering in the local and regional passenger transport services over the last 5 years. Alongside increasing emphasis on the part of the Land to limit the subsidisation of public transport services, this has led to growing economic pressures in the sector. While such market pressures affect all actors in the sector, it arguably has a particular impact on those providers carrying a legacy of higher personnel costs, in Austria primarily because of the different salaries and terms and conditions applying to individuals with special employment status (civil service status). This not only means that operators with a high share of such employees have to find way of remaining competitive in a market where personnel costs play an important role in overall price determination, but also impacts on the processes and feasibility of staff transfer in the case of a change of operator.

At present, it appears that no solution has been found in relation to the latter and arguably requires the political momentum behind a test case (or test cases) to arrive at a solution.

Although respect for core labour standards is often stipulated in tender documents, this does not give significant weight to social criteria in tender processes (as all providers in any case have to abide by these standards). A minimum collectively agreed level of wages and terms and conditions is guaranteed as all employees (not those on civil service type contracts) are governed by these provisions.

Compared to a situation where public operator is more prominent, the increasing entry of private providers onto the market does, however, lead to a situation where average wage costs are lowered towards the level of the sectoral collective agreement.

In the urban public transport sector, where municipal companies also tend to pay better salaries and offer better terms and conditions for private providers, increasing competition (or in the absence of competition, increasing price pressures) have led to a situation where these providers contract out more and more lines (in turn to the lowest price competitor).

The application of opportunities offered by Regulation 1370/2007, Articles 4(5) and 4(6) therefore appears pertinent but is, at present, not really utilised.

## Czech Republic

### Background

The Czech Republic has been selected as a case study report due to the Czech government's plans to launch more competitive tenders for passenger rail services and a recent pilot project tendering the provision of an inter-city connection.

### Use of tendering

In 2009, the Czech government signed a plan for the regionalisation of passenger rail services with the 14 regional authorities enabling them to make use of competitive tendering procedures for regional passenger rail services.<sup>83</sup> The regional authorities are competent authorities for regional short distances. The Czech Transport Ministry remains the competent authority for inter-city connections (between 2 regions), long distance travel and international tenders.

The incumbent České dráhy (CD) still operates the majority of lines in the Czech Republic. In 2009 the Government had revealed a 10 to 15 year plan to launch competitive tenders for inter-city and long-distance travelling. However, apart from a pilot project that was to test competitive tendering for the sector, currently no further steps for implementation of this plan have been undertaken. In the county of Liberec the competent authority participated in a competitive tendering procedure with the neighbouring German competent authority to award a line that is trans-border. The region of Olomouc has directly awarded several lines to a small regional operator until 2019.

The Czech passenger rail market has recently seen new private operators enter the passenger rail market on a commercial basis. There are two operators that operate short lines in the Prague region. Finally two open access operators provide long distance travel from Prague to Ostrava on a commercial basis.<sup>84</sup>

As mentioned above, open access operators do not operate under a public service obligation contract meaning they do not receive any compensation from the state to operate a specific line, yet they remain possible future bidders in tendering procedures and are representatives of the industry.

### Industrial relations

There is no sectoral agreement for railway workers. Each company can conclude its own company level agreement. The incumbent CD has the most favourable and extensive (including rules on working time, health and safety and training) one. It should be noted that the incumbent CD Group is one of the biggest employers in the Czech Republic employing more than 30,000 full time employees. Smaller local operators often do not dispose of a company collective agreement. All employment relationships are governed by the general Labour Code. There is a law on working time for workers in the railway sector. Furthermore, there are several specific decrees that regulate health and safety provisions for railway workers.

At CD Group (which includes subsidiaries and infrastructure), nine representative trade unions have been concluding the most recent collective agreement for the year 2013: the Railway Trade Unions (OSŽ); the Engine Drivers' Federation of the Czech Republic (FSČR); the Federation of Train Crews (FVČ); the Union of Railway Employees (UŽZ); the Federation of Carriage Examiners (FV); the Federation of Railway Workers of the Czech Republic (FŽ

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<sup>83</sup> <http://www.railwaygazette.com/news/single-view/view/franchising-agreed.html>

<sup>84</sup> <http://www.railwaygazette.com/news/passenger/single-view/view/leo-express-carries-first-passengers.html>

ČR); the Guild of Engine Drivers (ČSCR); the Democratic Union of Trade Unionists (DUO); and the Trade Union of Employees in Network Sectors (OSZSO).<sup>85</sup>

### Rules on transfer of staff

The Labour Code (Act. No. 262/2006 Coll.) specifies under Article 338 that a transfer of business is considered under Czech Law that when the “task or activity” of the worker is transferred, regardless the ownership of the company or the assets. All rights and obligations are transferred and the worker has to be transferred or he can opt for voluntary dismissal stating the transfer as a reason.

The provisions of the Labour Code are quite difficult to interpret in relation to tendering procedures as the “activity or the task” of the employee would not change if a change of operator would occur. The Czech law should be interpreted as follows (mentioned in the explanation for Acquired Rights Directive): “a change of legal or natural person responsible in the legal sense for the activities for the present employer”. Within this explanation a “transfer” would occur between the old and new operator. Yet, the situation seems not entirely clear, as was shown in interviews with stakeholders. It all depends on the tendering process and documents. If the tender does not precisely mention anything regarding social criteria or staff transfer, the applicant could also propose to make use of their own staff or take over just a few workers from the incumbent if it was agreed in the procedure. It can even be agreed with the competent authority that the winning operator has to recruit new staff in the region. If the incumbent operator does not win the contract, and staff working on the tendered lines are not agreed to be transferred, they would need to be redeployed or could face dismissal.

Czech law on tendering foresees the option for transport authorities to include social criteria and to negotiate on transfer of staff during the application procedure with the bidders. However, at the time of writing the report this option has not been used and no transfer of staff in a case of tendering seems to have occurred.

## Case: Pilot Project Olomouc –Ostrava by the Czech Transport Ministry

### Background of the case

The line tendered (Olomouc-Ostrava) was previously operated by CD and remains operated by the incumbent. Originally the tender had two bidders, Arriva and RegioJet<sup>86</sup>. However Arriva was not considered to have met the specified requirements on qualifications of its senior management and was thus disqualified from the tender.<sup>87</sup> With RegioJet remaining as the only participant, the tender had to be cancelled because it no longer complied with the Act 137/2006 Coll. on Public Tenders.<sup>88</sup> This states that competitive tendering procedures need to involve more than one bidder. The Ministry of Transport considered the option of awarding the contract directly to RegioJet<sup>89</sup> and even made a preliminary announcement to this effect. However, due to recent government changes, the contract with RegioJet has not been signed. In fact it seems more likely that the line will remain under control of CD.<sup>90</sup>

<sup>85</sup> See further information: <http://www.eurofound.europa.eu/eiro/2013/01/articles/cz1301019i.htm>

<sup>86</sup> <http://zpravy.e15.cz/byznys/doprava-a-logistika/o-trat-ostrava-olomouc-maji-zajem-jen-jancura-a-arriva-923703>

<sup>87</sup> [http://byznys.lidovsky.cz/prvni-zeleznicni-tendr-zrejme-skonci-fiaskem-stat-vyradil-arrivu-1ca-doprava.aspx?c=A130213\\_104223\\_In-doprava\\_mev](http://byznys.lidovsky.cz/prvni-zeleznicni-tendr-zrejme-skonci-fiaskem-stat-vyradil-arrivu-1ca-doprava.aspx?c=A130213_104223_In-doprava_mev)

<sup>88</sup> <http://zpravy.e15.cz/byznys/doprava-a-logistika/o-trat-ostrava-olomouc-maji-zajem-jen-jancura-a-arriva-923703>, and

[http://www.mdcr.cz/cs/Media/Tiskove\\_zpravy/Vyloucení\\_uchazece\\_z\\_nabídkového\\_rizení\\_na\\_trati\\_Ostrava\\_Krno\\_v\\_Olomouc.html](http://www.mdcr.cz/cs/Media/Tiskove_zpravy/Vyloucení_uchazece_z_nabídkového_rizení_na_trati_Ostrava_Krno_v_Olomouc.html)

<sup>89</sup> <http://www.ceskatelevize.cz/ct24/regiony/220441-regiojet-bude-jezdit-z-ostravy-do-olomouce-zakazku-dostane-primo/>

<sup>90</sup> <http://www.magazin.firenet.cz/index.php/magaziny/doprava/1641-regiojet-prisel-o-moznost-provozovat-vlaky-z-olomouce-pres-krnov-do-ostravy>

CD wanted to bid for the tender but they were not able to acquire the trains specified in the tender bid in time. CD had issued a tender for the supply of the required trains, but had only one bidder so they had to cancel the procedure.<sup>91</sup>

### Details of tender documents

The call for the tender was issued on 27<sup>th</sup> of March 2012 and the deadline was 16 October 2012, with planned start under the successful on 14 December 2014. The duration of the contract was foreseen for 15 years.

Tender documentation directly mentions Regulation 1370/2007 in its preamble and the documents refer to article 4(7), stating that the contractor must provide the majority of services themselves (rather than sub-contracting their provision).

The particular qualitative tender specifications included:

- Walk through trains with maximal speed at least 100 km/h and capacity of 420 seats. Furthermore at least 20% of the train must be low-floor.
- Provision of several customer service centres in certain train stations

The requirements on qualifications of potential tenderers included:

- Successful provision of at least one important service (as defined in tender documentation) in transport in the last three years
- Proof about relevant qualifications and education of managers or employees in similar senior positions

### Selection Criteria of operator

The tender selection criteria and their weights were as follows:

1. The amount of compensation required from the state - 92 %
2. Variable part of compensation resulting from change in scope of transport service - 4 %
3. Supply trains with Wi-Fi connection - 1%
4. Ensuring sale of refreshments in the trains - 1%
5. Provision of ticket-sale points in additional stations - 2%

Whilst transfer of staff has not been explicitly mentioned in the tender documents, the winning operator and the incumbent could have entered into negotiations on this issue. The Ministry highlighted that prior to the launch of the call for tender the question of transfer of staff had been discussed with the incumbent. However, CD did not request any transfer of staff and therefore it has not been included in the tender documents.

### Conclusion

The situation regarding the tendering of passenger rail services remains fluid in the Czech Republic with no completed case of tendering (apart from in some cross border regions). Although the possibility for a transfer of staff is provided, if this is not specifically mentioned in the tender documents, it remains up to the incumbent and any new operator to enter into negotiations on this matter, thus not providing security or minimum social standards to staff either through staff transfer, social criteria or universally applicable collective agreements.

Existing experience also shows that a lack of competition remains a hurdle in many regards.

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<sup>91</sup> [http://byznys.ihned.cz/c1-57950680-mez-i-ostrovou-a-olomouci-chce-jezdit-regiojet-a-arriva-ceske-drahy-couvly-and-http://cs.wikipedia.org/wiki/V%C3%BDb%C4%9Brov%C3%A9\\_%C5%99%C3%ADzen%C3%AD\\_na\\_dopravce\\_n\\_a\\_rychl%C3%ADkov%C3%A9\\_lince\\_Olomouc\\_-\\_Krnov\\_-\\_Ostrava](http://byznys.ihned.cz/c1-57950680-mez-i-ostrovou-a-olomouci-chce-jezdit-regiojet-a-arriva-ceske-drahy-couvly-and-http://cs.wikipedia.org/wiki/V%C3%BDb%C4%9Brov%C3%A9_%C5%99%C3%ADzen%C3%AD_na_dopravce_n_a_rychl%C3%ADkov%C3%A9_lince_Olomouc_-_Krnov_-_Ostrava)

## Denmark

### Background

#### Use of tendering

Although the passenger rail traffic was opened up for competitive tendering on 1<sup>st</sup> January 2000, the sector is still dominated by the state-owned railway company Danske Statsbaner (DSB), which until 2000 had a monopoly on the provision of passenger rail services. Indeed, it is estimated that approximately 80% of contracts have been awarded directly to DSB, whilst some 19% of the contracts have been put out for competitive tender (Midt- og Vestjylland; Kystbanen and the Danish part of Øresundstrafikken).<sup>92</sup> Notwithstanding this, Denmark was ranked behind only Sweden, the United Kingdom and Germany in terms of market opening in the railway sector (freight and passenger) in the Rail Liberalisation Index 2011.<sup>93</sup>

Initially, the Ministry of Transport was the responsible body for competitive tendering the passenger rail sector, although following the first competitive tender the responsibility for planning and implementing procurement procedures for the operation of railway (and ferry) services, as well as the process of monitoring the performance of contractors, was transferred to the Danish Transport Authority (Trafikstyrelsen). From 1<sup>st</sup> September 2012, the responsibility for tendering and contract management was transferred back to the Ministry of Transport. The Danish Transport Authority, however, remains responsible for railway safety.

The opening up of passenger rail services to competitive tendering is ultimately a political decision. The first passenger rail services that were put up for competitive tender were the central and western Jutland services (Midt- og Vestjylland) in 2001. Whilst DSB offered the cheapest bid, the British company Arriva was selected as the preferred bidder. The contract was for the provision of passenger rail services over eight years (2003-2010). The services transferred to Arriva from DSB were as follows:

- Århus – Langå – Viborg – Struer
- Struer – Thisted
- Struer – Holstebro – Skjern
- Århus – Skanderborg – Silkeborg – Herning
- Herning – Skjern – Esbjerg
- Esbjerg – Bramming – Tønder

These services accounted for approximately 15% of the total passenger rail traffic (by kilometres) and 5% of passenger revenue<sup>94</sup>.

The background to the political decision to open up the market for railway services was the desire to promote the efficiency of DSB by exposing it to competition in terms of the provision of public transport services. Initially, a limit was set to open up only 15% of the market. This was because of a desire to implement a gradual process of market opening, which would allow learning from early experiences.

On 5 November 2003, the Government and the other political parties represented in the Danish Parliament agreed to extend the market opening process and set a target of at least a third of DSB's train operations (by kilometres), excluding long-distance services ('fjerntrafikken mellem landsdelene') and the S-train services (S-togtrafikken) being up for tendering during the period 2005-2014.

Consequently, a decision to put passenger rail services on the Eastern coast of Zealand (Kystbanen) and over the Øresunds bridge (Øresundstrafikken) up for competitive tender

<sup>92</sup> DI (2012) *Offentlig-privat samarbejde [Public-private partnership]*

<sup>93</sup> IBM (2011) *Rail Liberalisation Index 2011*

<sup>94</sup> DSB Annual Report 2011, as cited in Udliciteringsrådet (2005) *Udlicitering i krydsild*

was taken in November 2004. The tendering process was completed in 2007 and the contract was awarded to DSB First (a DSB affiliated company who have now ceased to exist - the operation of the service has been transferred to DSB Øresund). The contract was for the provision of train service over seven years (2009-2015), with the option to extend this for a further two years.

In 2009, the central and western Jutland service came up for re-tendering and was retained by Arriva for a further eight years (2010-2018), with the option of a two year extension.

In addition to the above, the service between Varde and Nørre Nebel in western Jutland (known as Vestbanen) was put up for competitive tendering by Sydtrafik in 2002. The contract was won by Arriva, who has since been retained to provide the service up until 2018 (following a re-tender which was cancelled and the existing contract was continued with the requirement to provide new trains).

The competitive tendering of passenger rail services below EU thresholds and above €67,060 is regulated by the Danish Tender Act (Tilbudsloven). In particular, this regulation sets out the rules for the advertising of public procurement contracts below EU thresholds. The Act does not make reference to Regulation 1370/2007 and its Articles 4(5) and 4(6). Above EU threshold public procurement is regulated by Directive 2004/18/EC and has been applicable in all the tendering procedures in Denmark relating to passenger rail services.

## Industrial relations

As noted above, the railway sector in Denmark is still primarily operated by the state-owned, but independently operated, railway company DSB. As such, most workers in the sector are still part of the collective bargaining system in the public sector. Indeed, the coverage rate of collective bargaining in terms of companies as well as employees in the railway sector is close to 100%<sup>95</sup>.

As a result, railway companies still have a significant number of employees with special status. Longer serving employees of DSB are employed on civil service type contracts that are governed by the Act on Statutory Civil Servants (Tjenestemandsloven). Since 2000, the company has ceased recruiting under this Act and new employees are hired on private law contracts. At present, around 40-50% of DSB staff are civil servants, although it varies from location to location.

Collective bargaining therefore either takes place at state level (for employees of DSB) or at national level between the relevant employers' organisation in the private sector, the Danish Railway Employers' Association (JA) and relevant trade unions, most importantly the Union of Danish Railway workers (DJ). With the exception of civil servants, pay and working conditions, as established through the collective agreements, do not generally vary significantly between DSB workers and private operator workers.

In the public sector at state level, four national trade union organisations – including the largest central organisation, the Association of Danish State Employees' Organisations (Statsansattes Kartel, StK) – together form the joint bargaining unit known as the Danish Central Federation of State Employees' Organisations (Centralorganisationernes Fællesudvalg, CFU). CFU negotiates the overall collective agreement covering all employees in the public sector at state level with the agency connected to the Ministry of Finance – the State Employer's Authority (Personalestyrelsen, Perst). In relation to the railways sector, StK subsequently negotiates a joint agreement for the trade union members working in DSB, DSB S-tog A/S and Rail Net Denmark (Banedanmark).

In the local government sector, the joint bargaining unit – the Association of Local Government Employees' Organisations (Kommunale Tjenestemænd og Overenskomstansatte, KTO) – negotiates a main agreement for all trade unions represented in local government, except for the Health Cartel. The employer counterpart is Danish

<sup>95</sup> <http://www.eurofound.europa.eu/eiro/studies/tn1109030s/dk1109039q.htm>

Regions (Danske Regioner). Regarding the railways sector, this agreement is relevant for employees at the existing seven local railways (Privatbanerne).<sup>96</sup>

### Rules on transfer of staff

The transfer of staff is generally regulated by the Act on Transfer of Undertakings (Virksomhedsoverdragelsesloven). The Act states that the new operator immediately enters into the rights and obligations that are existing at the time of the transfer, including in relation to:

- collective agreements;
- rules on pay and working conditions that have been determined or approved by public agencies; and/or
- individual agreements on pay and working conditions.

The obligations, in terms of pay and working conditions, remain in place until the relevant collective agreements expire or new collective agreements are agreed.

For station staff, rules on transfer of staff affect those that spend 50% or more of their time at one or more stations affected by the tendering procedure. Similarly, for train staff and drivers, the transfer will affect those that spend on average 50% or more of their time on the services affected by the tendering procedure. The Act does not guarantee that the staff will transfer to the new operator, however, refusal to transfer will be considered as resignation from the original operator. As such, the transfer of staff can be considered as voluntary.

The law requires that workers' representatives must be informed about any potential transfer and its consequences early on. Negotiations on the transfer of staff taken place between transferor, transferee and the trade unions.

In accordance with transfer of undertakings legislation, the transfer itself cannot be a reason to change terms and conditions, but other objective reasons must be provided.

The transferee is entitled to relinquish the collective agreement of the transferor within three weeks of the transfer. If this deadline is not observed the possibility to relinquish the collective agreement lapses. If the existing collective agreement is renounced, workers will retain their individual conditions of employment until the collective agreement expires (unless otherwise agreed). A new collective agreement is then negotiated. If the new operators already has a collective agreement in place for the existing staff offering better terms and conditions, transferring employees can ask to have the terms of this agreement applied to them.

The pay and working conditions of statutory civil servants, including long-serving train drivers, are, however, considered to be too specific to be regulated by the Act on Transfer of Undertakings (as they are not classified as workers). Indeed, the transfer of staff employed on civil servant contracts is regulated by the Act on Statutory Civil Servants. This Act states that any transfer of staff has to be agreed on a voluntary basis (by the employee as well as the transferee). There are effectively three options for such voluntary agreements:

- secondment to the new operator;
- leave of absence from DSB and temporary employment with new operator; or
- transfer of employment to new operator.

The new contractor then also takes on the specific additional pension liabilities for employing an individual with civil servant status. This was generally accepted in the past and drivers and other specialists in the field were in short supply. However, in recently years private companies have begun to train their own drivers and may in future be less willing to take on these additional cost liabilities.

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<sup>96</sup> *ibid*

## Outsourcing of train services in central and western Jutland (Midt- og Vestjylland)

### Background of the case

In 1996, the European Commission presented a White Paper on revitalising the Community's railways, which included proposals to open up passenger rail services to market forces. In the same year, it was decided that DSB should be split into three separate business units – an infrastructure unit, a transport operations unit and the rail inspectorate. It was also agreed that up to 15 per cent of DSB train service (measured in train km) in Denmark should be outsourced. All parties in the Danish Parliament, with the exception of Enhedslisten (Red-Green Alliance), were party to the settlement<sup>97</sup>. Against this background, passenger rail services in central and western Jutland were put out to competitive tender in 2001 by the Ministry of Transport (the Danish Transport Authority took over the follow up of the contract when it was established in 2003). Arriva Danmark A/S won the competition and took over the operation from January 2003.

### Tendering procedure and details of tender documents

The tender documentation was prepared by the Ministry of Transport, with external support from consultants, during 2000. During the preparation process a series of briefing meetings with potential suppliers were organised, which provided an opportunity to submit questions in relation to the tender.

The tender was structured in two parts: the northern package (Aarhus-Langå-Struer, Struer-Thisted and Struer-Skjern) and the southern package (Tønder-Esbjerg, Esbjerg-Skjern, Skjern-Herning, Herning-Aarhus).

In the first ITT, the number of staff that was identified to be affected by the competitive tender, and covered by the Act on Transfer of Undertakings, was estimated at 37, of whom 24 were train drivers. The number of statutory civil servants, covered by the Act on Statutory Civil Servants, was estimated at 268, including 177 train drivers. As such, there were a total of 305 employees identified for potential transfer to Arriva. The Ministry of Transport offered five options for those that were willing to transfer to Arriva, and thus relinquish their civil servant contract:

- 4 years revaluation of the pension age;
- 3 years revaluation of the pension age and a one-off payment representing 3.75 months' salary;
- 2 years revaluation of the pension age and a one-off payment representing 7.5 months' salary;
- 1 years revaluation of the pension age and a one-off payment representing 11.25 months' salary; or
- A one-off payment representing 15 months' salary.

However, despite these options very few of the civil servant workers actually transferred to Arriva. Some workers, particularly drivers, were seconded on a short-term basis in order to cover the lack of drivers at the early stages of the transfer of operations, although this was not considered a sustainable solution as Arriva had to pay VAT for such workers on top of their normal salary.

For the second competitive tender procedure, 334 staff were identified in the ITT as being covered by the Act on Transfer of Undertakings. Notably, as part of the second tendering procedure, no civil servants were identified for transfer, as Arriva are not able to employ workers on a civil servant contract.

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<sup>97</sup> Finansministeriet (Udlieferingsrådet), November 2005, Udliefering i krydsild [http://www.fm.dk/publikationer/2005/udliefiering-i-krydsild/download/~media/Files/Publikationer/2008/Download/Udliefiering\\_i\\_krydsild\\_rapport\\_web.ashx](http://www.fm.dk/publikationer/2005/udliefiering-i-krydsild/download/~media/Files/Publikationer/2008/Download/Udliefiering_i_krydsild_rapport_web.ashx)

All interested bidders went through a pre-qualification stage and subsequently six bidders were invited to tender for the first part – DSB, Deutsche Bahn, Arriva, Serco, the Swedish State Railways (SJ) and the Norwegian State Railways (NSB). For the second competitive tender procedure relating to the central and western Jutland services, five bidders were invited to tender – Arriva, Deutsche Bahn, DSB Midt Vest, First Rail Holdings and NSB – although only three (four) submitted a tender response – Arriva, Deutsche Bahn and First Jylland (formerly DSB Midt Vest, owned by First Rail Holdings and DSB).

In contrast to the first tendering procedure, there was more scope for negotiation during the second tendering procedure. For example, feedback meetings between the Danish Transport Authority and the bidders were held and the bidders were encouraged to alter their bids, including the price, on the basis of this feedback.

## Selection of operator

The evaluation of the tenders was organised so that the quality of the tenders were evaluated separately from the price. The Ministry of Transport selected Arriva as the preferred bidder, despite the fact that the offer from DSB was significantly cheaper (Arriva was the second cheapest bidder). The reason for not selecting DSB was a real suspicion that there could be a risk that they would show a deficit during the contract period, which would be contrary to the accounting regulations of DSB<sup>98</sup>. The decision not to select DSB came as a surprise to many stakeholders and gave rise to considerable debate in Parliament, the Traffic Committee and in the press.

The selection of Arriva as a supplier was completed by the end of December 2002 and the contract was signed in February 2003.

With regards to the second tendering procedure, the criteria for the selection of operator in the second tendering procedure were as follows: 50% on price, 30% on quality and 20% on the security of supply. Again, Arriva was selected as the preferred bidder.

In terms of the social criteria, both tendering procedures were concluded before the 1370/2007 regulation was adopted in December 2009 and it is understood that social criteria were not explicitly considered in terms of the selection of the operator, although both the ITT and the subsequent contract included social criteria. For example, in the contract between Arriva and the Danish Transport Authority for the central and western Jutland service, a clause was included setting out the requirements in relation to working conditions ('Arbejdsklausul', section 7.2). The document stipulates that:

*'The Danish Transport Authority is under ILO Convention 94 on labour clauses in public contracts required to ensure that the operator and any subcontractors ensures that workers' salary (including benefits), working hours and other working conditions are not less favourable than those under an existing collective agreements, arbitration awards, national legislation or regulation that are applicable to the work of the same kind within the trade or industry in the district where the work is performed. There should ideally be a collective agreement that is representative for the sector in Denmark as a whole. The operator undertakes to secure agreed pay and working conditions for employees that work on the task in Denmark and is committed to inform employees about the current working conditions. If the operator does not meet the set requirements, and if this results in a valid claim for additional wages from employees, the Danish Transport Authority can withhold payment to the operator in order to secure staff's terms of employment.'*

As the change of operator was considered to be a transfer of undertaking, the transfer of staff was required.

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<sup>98</sup> Finansministeriet (Udlciteringsrådet), November 2005, Udlcitering i krydsild [http://www.fm.dk/publikationer/2005/udlcitering-i-krydsild/download/~media/Files/Publikationer/2008/Download/Udlcitering\\_i\\_krydsild\\_rapport\\_web.ashx](http://www.fm.dk/publikationer/2005/udlcitering-i-krydsild/download/~media/Files/Publikationer/2008/Download/Udlcitering_i_krydsild_rapport_web.ashx)

## Transfer of staff

At the time of the first tendering procedure, Arriva in Denmark was primarily involved in public bus services but they were keen to diversify their business. The Arriva Group's branches in England and Holland were, however, already engaged in the operation of trains and Arriva Danmark A/S was therefore able to draw on their resources and expertise during the tendering procedure as well as the preparation phase. The take-over from DSB included the rolling stock, stations and staff. Notably, if the operator elected to operate with the existing rolling stock, the contract would be for five years. However, if the new operator elected to invest in new rolling stock as well, then the contract would be for eight years (i.e. up to and including 2010). As part of the second tendering procedure, the successful bidder was expected to take over the rolling stock as well as sourcing new rolling stock. With regards to the stations, the majority of the stations affected by the transfer of operations were taken over by Arriva, although some of the major stations, such as Aarhus and Esbjerg, were retained by DSB.

In terms of the transfer of staff, this was regulated by the Act on Transfer of Undertakings and the Act on Statutory Civil Servants. With the exception of train drivers there were no real issues in relation to the transfer of staff.

The problems in relation to train drivers were threefold. Firstly, there was no certainty regarding the number of train drivers required for the transferred services. The original estimate from the Ministry of Transport, through consultation with DSB, was that 120 train drivers were required. Arriva, however, estimated that 140 train drivers would be required. It was later revealed that the original estimate from the Ministry of Transport had not included drivers to cover sickness, time off in lieu, etc<sup>99</sup>. At the start of operations it was estimated by Arriva that a further 22 train drivers would be required (a total of 162). Clearly, this uncertainty about the actual number of drivers required made it difficult for Arriva to plan ahead for the transfer of operations.

**Table A1.2** Estimated number of train drivers required

Ministry of Transport estimate, 2002	Arriva estimate, February 2002	Arriva's estimation at the start of operations, January 2003
120	140	162

Source: Rigsrevisionen, February 2005

Secondly, a relatively small proportion of train drivers actually transferred to the new operator when passenger rail services were first outsourced. Notably, the proportion of train drivers that transferred were significantly higher from the more 'isolated' stations (or depots) than the more central and metropolitan locations (see table below).

**Table A1.3** Number of train drivers that transferred to Arriva

	Identified for transfer	Accepted transfer	Share
Nordjylland	6	0	0%
Århus	202	5	2%
Esbjerg	62	10	16%
Struer	106	41	39%

Source: Trafikstyrelsen, 2004

Rather than being influenced by any significant changes to pay and working conditions (which were protected through national legislation, e.g. Act on Transfer of Undertakings, and

<sup>99</sup> Rigsrevisionen, February 2005, Beretning om Trafikministeriets håndtering af kontrakten med Arriva <http://www.rigsrevisionen.dk/media/1855483/10-04.pdf>

collective agreements), it is believed that the limited supply of trained train drivers and opportunities for alternative employment (primarily at DSB) influenced the number of staff that actually wished to transfer to the new operator<sup>100</sup>. It was also the case that a large proportion of drivers were employed on civil service contracts and thus were not covered by the Act of Transfer of Undertakings<sup>101</sup>. Consequently, the transfer of these train drivers could only occur on a voluntary basis, including through secondment to new operator; leave of absence from DSB and temporary employment with new operator; or transfer of employment to new operator. The Ministry of Transport offered compensation (as set out above) to those willing to transfer to Arriva, but very few civil servants actually agreed to such a transfer. Instead, some train drivers were seconded from DSB on a short-term basis. According to the contract between the Ministry of Transport and Arriva, train drivers had to reveal their plans nine months before the transfer of services and then enter a binding contract four months before the start of operations. However, out of consideration for the training requirements by Arriva, this was moved forward by a month and a half (i.e. 5.5 months before the start of operations). This was, however, still considered to be too close to the transfer of operations, especially given the limited number of train drivers that were willing to transfer to Arriva. Clearly, the number of train drivers that were willing to transfer to Arriva had a significant impact on the number of train drivers that had to be trained before the transfer of operations.

This brings us on to the third and final issue – the training of drivers. When it became clear that the required number of train drivers would not transfer from DSB, Arriva had to look at the options available to them in terms of recruiting newly qualified drivers. Notably, in the ITT it was assumed that about 40 drivers from local private/municipal operators ('privatbanerne') and approximately 75 drivers at DSB could be trained in 2002 and thus be employed in time for the transfer of operations in January 2003. Arriva had during the spring of 2002 identified that around 80 train drivers would need to be trained before the transfer of operations.

According to the contract with the Ministry of Transport, Arriva had to use the training provision supplied by DSB and 'privatbanerne' (the cost of the training was reimbursed to Arriva by DSB). Whilst it was assumed in the ITT that DSB would be able to train 75 drivers during 2002, it transpired that DSB were only able to train 20 drivers before the transfer of operations. Arriva were therefore allowed by the Ministry of Transport to train the other 60 drivers through 'privatbanerne'. However, the Danish Railway Union expressed a concern that the training provided by 'privatbanerne' would represent a safety risk and hence Arriva was not able to train any drivers through this provider. Consequently, it was decided to train all drivers through DSB, although this meant that Arriva would not have a sufficient number of drivers available at the transfer of operations. Indeed, Arriva had around 140 train drivers at the transfer of operations in January 2003 (compared to the 162 estimated to be required) – some of which were on short-term loan from DSB - and thus had to cancel a significant number of departures during the first three months. The solution proposed by Arriva was to replace the cancelled departures by a bus service, however, that was not seen as satisfactory by the Ministry of Transport. As a result, an agreement was made for DSB to take over the running of the service between Aarhus and Struer up until the timetable change in December 2013. The value of this service for the specified period was subsequently taken off the overall fee paid to Arriva by the Ministry of Transport.

Whilst Arriva was ultimately responsible for ensuring that they had a sufficient number of train drivers to operate the transferred services, the Ministry of Transport specified in the ITT and the subsequent contract how the contractor should recruit and train drivers. The Danish National Audit Office concluded that Arriva were not given a reasonable opportunity to recruit and train a sufficient number of train drivers before the transfer of operations. The Ministry of Transport particularly failed in terms of ensuring sufficient training provision through DSB. Moreover, it should have ensured that the training provision from 'privatbanerna' was

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<sup>100</sup> Trafikstyrelsen, Juni 2004, Udbud af togtrafik – beslutningsgrundlag <http://www.trafikstyrelsen.dk/DA/Kollektiv-Trafik/Togtrafik/~media/22A0AD4D470B4E43BECFA5855F349120.ashx>

<sup>101</sup> Other staff may also be employed as civil servants but they are not in such short supply and thus did not pose the same problems as train drivers.

compliant with safety standards. It was also concluded by the Danish National Audit Office that the final confirmation by existing train drivers to transfer to Arriva was too close to the date for the transfer of operations to allow Arriva to train a sufficient number of drivers, particularly given that only a small proportion of drivers wished to transfer.

The lessons from the first competitive tender of train services in Denmark were collated and presented in a report by the Danish Transport Authority in 2004 based on interviews with key stakeholders<sup>102</sup>. In particular, the report states that:

*'For future competitive tendering of passenger rail services it must be ensured that the new operator has adequate opportunities to hire the required number of drivers by focusing on training capacity, transitional arrangements from the existing operator, and management of the preparation period for the new operator.'*

Notably, in this regard, the selection of the operator for the second tendering procedure was made earlier than for the first tendering procedure, allowing a longer mobilisation phase. However, this was partly due to the fact that the new operator was expected to buy new rolling stock.

### Impact analysis – transfer of staff

Based on the documentary review and consultations with the new operator, it is our understanding that there has generally not been an adverse impact on pay and working conditions for transferred staff. This can to a considerable extent be attributed to national legislation – Act on Transfer of Undertakings and Act on Statutory Civil Servants – as well as the extensive coverage of collective agreements. Indeed, transferred staff were protected from any changes to their pay and working conditions until the relevant collective agreements expired or new collective agreements were agreed (the exception being civil servants). Notably, even when collective agreements were renegotiated between Arriva and the relevant trade unions it is understood that there has not been any notable adverse changes to staff's pay and working conditions. Indeed, Arriva suggested that it was in their interest to secure a good deal for staff in order to avoid strikes and lock-outs. With regards to civil servants, transferred staff lost some of their preferential pension entitlements but were offered five options for compensation from the Ministry of Finance, including 15 months additional pay. In reality though, the number of civil servants that were willing to transfer to Arriva was very low and the impact relating to such workers can therefore be considered as negligible in relation to the overall impact of the transfer of staff.

Whilst social criteria has not explicitly been used for the selection of operators in the tendering procedures (note that the 1370/2007 regulation had not been adopted at the time of the two tendering procedures), both the ITT and subsequent contracts have included specific rules and clauses in relation to pay and working conditions, including reference to the ILO convention 94 on labour clauses and specific reference to the fact that a representative collective agreement in the sector should be applied.

Notwithstanding the rules and regulations on pay and working conditions, it is notable that a relatively small proportion of train drivers actually transferred to the new operator when the passenger rail services were first outsourced. It is believed that the limited supply of trained train drivers and opportunities for alternative employment (primarily at DSB) are likely to have influenced this<sup>103</sup>. The fact that many train drivers were also employed on civil servant contracts also meant that any transfer would have to be agreed on a voluntary basis. The preferred option for those deciding to transfer to the new operator was to be seconded from DSB. At present staff are still being seconded from the old operator.

In terms of newly qualified train drivers, negotiations between the new operator and the Danish Railway Union resulted in a 10% increase in pay compared to the initial offer. Again,

<sup>102</sup> Trafikstyrelsen (2004) *Erfaringer fra første udbud af totrafik – Opsamlinger fra interview m.m.*

<sup>103</sup> Trafikstyrelsen, Juni 2004, Udbud af togtrafik – beslutningsgrundlag <http://www.trafikstyrelsen.dk/DA/Kollektiv-Trafik/Togtrafik/~media/22A0AD4D470B4E43BECFA5855F349120.ashx>

this is likely to have been influenced by the difficulties by the new operator to find qualified train drivers<sup>104</sup>.

## Conclusion

To date, Denmark has undergone five competitive tendering procedures in relation to passenger rail services, as well as a tender process for the Metro in Copenhagen. This case study covers two of these procedures (both relating to central and western Jutland services) and thus can be considered as a representative example of how the transfer of staff in the railway sector works in Denmark.

The main issue in terms of the transfer of staff has been the fact that large proportions of staff, particularly train drivers, were on civil service contracts (at least during the first tendering procedure) and thus could only be transferred on a voluntary basis. During the first tendering procedure, there were also issues relating to the training of drivers and a lack of certainty regarding the actual number of train drivers required to operate the transferred services. Notably, following the first tendering procedure, and the problems encountered in terms of train drivers, it was recommended by the Danish Transport Authority that no further competitive tendering was undertaken until the public train driver training had been implemented and that the training has capacity to train a sufficient number of train drivers<sup>105</sup>. Importantly though, similar issues were not experienced during the second tendering procedure.

The opinion of the Danish National Audit Office (Rigsrevisionen) is that the Ministry of Transport did not handle the recruitment and training of train drivers for Arriva very well and that the number of train drivers required was based on insufficient evidence. In particular, the Danish National Audit Office also noted that the Ministry of Transport should have come up with a more detailed overview of how many train drivers were required. This would have allowed the Ministry of Transport to evaluate whether Arriva had a sufficient number of drivers at the start of operations<sup>106</sup>.

Notwithstanding the issues relating to the transfer of staff during the first tendering procedure, it is the case that pay and working conditions has generally been maintained or improved. To a considerable extent this can be attributed to the national legislation on the transfer of staff, as well as the fact that most workers are covered by collective agreements.

Whilst recognising the issues relating to the transfer and training of staff at the start of the transfer of operations, the Ministry of Transport generally feels that the first tendering procedure was a success.

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<sup>104</sup> Udlicitering i krydsild, November 2005

<sup>105</sup> Trafikstyrelsen, Juni 2004, Udbud af togtrafik – beslutningsgrundlag <http://www.trafikstyrelsen.dk/DA/Kollektiv-Trafik/Togtrafik/~media/22A0AD4D470B4E43BECFA5855F349120.ashx>

<sup>106</sup> Rigsrevisionen, February 2005, Beretning om Trafikministeriets håndtering af kontrakten med Arriva <http://www.rigsrevisionen.dk/media/1855483/10-04.pdf>

## France

### Background

This case study focuses exclusively on cases of tendering in urban public transport services and does not concern passenger rail transport services.

Passenger rail transport services in France are awarded directly to the incumbent SNCF by the competent authority.

The 'départements' are responsible for the organisation of interurban road passenger transport. The regions are responsible for the organisation of road and passenger rail transport of a "regional nature" (lines covering several 'départements' of a region).

### Use of tendering

The use of tendering is very widespread in urban public transport in France and occurs at the local level.

Since 1982-1983, the organisation of urban public transport is under the responsibility of municipalities, which are generally organised in groups of municipalities ("groupement intercommunaux") or in a joint association with the "département" ("syndicat mixte). Article L. 1221-3 of the transport code (*code des transports*) foresees that public passenger transport services by road can be operated in two ways:

- Services are provided by a *régie de transport* (public body) created by the competent public authority within the public authority (internal operator or in house operator)
- Services are provided by a company who has agreed a temporary contract with the competent public authority (CPA such as a town or département).

The opening of the market for urban public transport services is regulated by the law 93-122 of 29 January 1993 (so-called 'loi Sapin'), which amended the code of local public authorities (*Code général des collectivités territoriales*). The procedure of "delegation of public services" (DSP) is defined in Article L. 1411-1 of the code of local public authorities and occurs when the tendering authority (a legal public person) delegates the management and part of the organisation of a service to an operator (legal public or private company) via a contract, which is set for a delimited duration. Tendering authorities have to use competitive tenders, tacit renewal of contracts is forbidden.

In 2010, the code of local public authorities was amended to allow the creation by local authorities of *sociétés publiques locales* ('local public-owned companies') in particular to manage the delivery of public services (Art.L. 1531-1). These companies must be created by at least two shareholders (local public authorities) on behalf of which they operate the service on their territory.

Today, delegated management of services (which means not awarding the service to an in house or internal operator) with competitive tendering procedures is used in about 90% of the networks of urban public transport. UTP (Union des Transports Publics et ferroviaires) is the national association representing companies in the urban public transport sector. According to a note prepared by the UTP in 2009, there is fierce competition among a few main operators in France. Between 2005 and 2009, 514 public tenders were issued as part of DSP and a change of operator occurred in 21 cases.

Award to an internal operator is mostly used in small transport networks; these are contracts awarded directly to an internal public-owned operator ("in house"). However there are examples of larger cities that rely on internal public-owned operators (Clermont-Ferrand, Marseille, Thionville and Toulouse).

Local authorities do not have to make a definitive choice between award to an internal operator or delegation of public service (DSP); indeed, in the last decade both cases of transitions from award to an internal operator to DSP, and from DSP to award to an internal

operator have occurred across France. In recent years, there seems to be a trend towards the use of award to an internal operator: since 2010, 10 urban transport networks have moved from DSP to direct award (*régies* or *sociétés publiques locales*); in interurban transport, 2 *régies* and 3 *sociétés publiques locales* have been created<sup>107</sup>.

#### **The specific case of urban public transport in the region of Ile-de-France (Paris area)**

Urban public transport in Ile de France is organised differently as in the rest of France as a single structure (Syndicat des Transports d'Ile-de- France, STIF) assumes the role of organising authority for public transport in the entire region, in application of Decree n° 2005-664 and article L. 1241-5 of the Transport Code.

This competent authority will also have a choice between direct award or award by competitive tender starting from 2024 for bus services, 2029 for tram services and 2039 for metro and light rail services.

### **Industrial relations**

In the field of urban public transport, employment conditions are regulated by general legislation on the one hand (e.g. concerning minimum wages), as well as sectoral collective agreements (also affecting minimum wages levels).

Two national sectoral agreements are relevant for the sector:

- A national sectoral collective agreement for urban public transport (*Convention collective nationale des réseaux de transports publics urbains de voyageurs du 11 avril 1986. Etendue par arrêté du 25 janvier 1993 JORF 30 janvier 1993*) and its annexes, including *Accord du 17 mai 2011 relatif au salaire national minimum et aux salaires minima mensuels forfaitisés*. This agreement regulates the following aspects: trade union organisation, minimum wage and wage components, working conditions, vacation, sick leave and sick pay, protection against collective dismissal and other dismissal, additional pension rights.
- A national agreement on road transport and auxiliary activities (*Convention collective nationale 3085 transports routiers et activités auxiliaires de transport*). This agreement applies to inter-urban public transport.

These sectoral agreements regulate minimum standards and company-level collective agreements can be more favourable. Based on available evidence, it is not possible to assess whether there are strong disparities regarding to working conditions in the sector, but according to anecdotal evidence, there is significant variation between company-level agreements even within the local branch of the same group for the large operators.

### **Rules on transfer of staff**

Rules on the transfer of staff in case of change of operator are set by the legislation and by sectoral collective agreements. Applicable rules depend on whether the tendered service is carried by a single autonomous entity (which is the case in urban public transport) or not.

### **Urban public transport: automatic transfer of all staff**

Since the tendered service is carried by a single autonomous entity, Article L1224-1 of the Labour Code (which implements as well the Transfer of Undertaking Directive) applies and the transfer of staff (transfer and continuation of individual employment contracts) is

<sup>107</sup> AGIR (2013) Transports publics: la gestion directe gagne encore du terrain

<http://www.agir-transport.org/ImgPDF/201-cpmodesgestion.pdf>

automatic and compulsory for everyone: the previous operator, the new operator and the employees. An employee who refuses to be transferred is considered as having resigned.

The information concerning the transfer of staff is included in the tender documents (information provided by the incumbent operator includes an anonymous list of employees concerned by the transfer including their birth date, seniority, wage composition etc., and the communication of every collective agreement binding for the company).

In the case of a transfer of staff of individuals employed under private law contracts into a public entity: the new employer must offer to all employees a public law contract (either fixed-term or open-ended). The new contract must contain the same 'substantial clauses' of the previous contracts, except in case that it is not compatible with legal provisions or general conditions of work and remuneration applicable to employees of public entities who are not civil servants.

In the case of a transfer of staff of individuals employed under public law into a private entity, the new employer must offer to all employees a private law contract (either fixed-term or open-ended). The new contract must contain the same 'substantial clauses' of their former contract.

There are no specific provisions in place regarding protection from dismissal after the transfer.

After the transfer of staff, elected staff representatives and work committees remain in place (Article L2324-28, Article L2143-10).

There is an obligation to negotiate a new collective agreement at the company level. Previous company-level collective agreements remain applicable during a total period of 15 months, including a 3-months transition period and a 12-months period of negotiation of a new collective agreement. At the end of this period, either the new company-level collective agreement enters into force or, if negotiations failed, no company-level collective agreement applies. This means in practice in the hypothesis of failure of negotiation that employees do not retain collective benefits acquired under the former agreement. Unilateral commitments from the employer remain valid<sup>108</sup>, and individual rights from the former company-level collective agreement are also incorporated into the employment contract (and can therefore only be changed with the agreement of each employee).

#### **Inter-urban transport: transfer of staff working fully or mostly on the tendered service**

In the case of inter-urban transport (between different cities), a call for tenders can be issued for a specific line/routes, group of lines or in different lots.

Since the tendered service is not carried by a single autonomous entity, Article L1224-1 of the Labour Code is not applicable. In the case when legal provisions of article L1224-1 may not be applicable, collective agreements may set up a specific framework. This is what happens in the interurban transport sector. Therefore, provisions of the national collective agreement for interurban transport concerning the transfer of staff in case of change of operator apply.

The transfer concerns employees exclusively working on the transferred line, or for drivers, those who spend at least 65% of their working time on the transferred line.

Unless the incumbent operator decides to keep staff, it has to provide a list of the employees concerned and justify that the employee works at least 65% on his working time on the service which is the object of the call for tender.

The new operator cannot refuse the transfer of staff. However, an individual employee can refuse to be transferred in order to remain with the incumbent operator. (and the incumbent

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<sup>108</sup> Source: Presentation from Dominique Thal, Director of Social Affairs, Keolis, 'Protection of workers and transfer of staff in case of change of operator in public passenger transport (PSO market) – The French situation', Paris, 16-17 May 2013.

is obliged to guarantee a job, although this may be on a different line/in a different region). In practice, most employees will transfer.

As part of the transfer of staff, existing provisions guarantee that the wage of the transferred staff is maintained (amendments can be made to the make of the variable compensations, but the overall amount needs to be maintained, if necessary through special permanent bonuses).

## Case 1: Marinéo network, Communauté d'agglomération du Boulonnais

### Background of the case

This case focuses on the delivery of urban public transport services in the city of Boulogne-sur-Mer and its surroundings, located in the *département* of Pas-de-Calais on the North sea coast. Boulogne-sur-Mer and the 21 neighbouring municipalities are grouped within the 'Communauté d'agglomération du Boulonnais' (CAB) which has 120,000 inhabitants. The CAB is the local authority in charge of defining public urban transport policies in the area.

The creation of the network of public transport in the area, originally called TRCB, dates back to 1970. Since 29 April 2013, the network has changed name and is now called Marinéo. It covers 2.9 millions of km, with 9.1 million users per year in 2012. The network also includes school buses, on-demand transport and transports for users with special needs.

The restructuring of the network followed the change of operator which occurred on the 1<sup>st</sup> of January 2013. The new network operator is RATP DEV, a branch of the RATP group (in charge of public transport in Paris). From 1989 until 2012 however, the network was operated by KÉOLIS; the last contract awarded by the CAB to KÉOLIS ran from the 1st of January 2006 until the 31 December 2012.

In June 2011, the CAB decided to launch a new public tendering procedure to ensure the provision of the service in the coming years<sup>109</sup>. This choice of competitive tendering was motivated by specificities of the service to be delivered and the fact that only a few large companies have the logistical capacity to organise and manage the network of urban public transport over the territory concerned. The CAB concluded that a competitive tendering procedure remained the most advantageous option for local authorities.

**Key facts: Marinéo network (ex- TRCB)**

**Sector: Urban public transport**

**Procedure: Delegation of public service (competitive tendering)**

**Competent authority: Communauté d'agglomération du Boulonnais (CAB)**

**Incumbent operator: KÉOLIS**

**New operator: RATP DEV**

**Data of change of operator: 1 January 2013**

**Duration of the contract: 8 years**

**Transfer of staff: All staff (Article L1224-1 of the Labour Code)**

### Tendering procedure and details of tender documents

The CAB, as the competent authority, was exclusively in charge of the procedure and prepared the call for tender and Terms of Reference (ToR) for the new contract (Cahier des

<sup>109</sup> [http://www.agglo-boulonnais.fr/uploads/tx\\_abdownloads/files/Proces\\_verbal\\_du\\_27-06-11.pdf](http://www.agglo-boulonnais.fr/uploads/tx_abdownloads/files/Proces_verbal_du_27-06-11.pdf)

charges), including social criteria<sup>110</sup>. According to the information available so far, the main emphasis of the ToR is on the technical characteristics on the services. Staff from the previous operator was not consulted in the process of elaboration of the tender documents.

Different criteria were taken into account for the selection of the contractor (without any ranking or weighting):

- o Price
- o Technical value of the proposal, including
  - Modification and changes made to the contract
  - Sustainable development
  - Proposals to encourage use of public transport
  - Optimisation of the rolling stock
  - Relevance of the organisation of public transport (maintaining the same number of km than in the existing network)
  - Quality of services proposed to users
  - Human resources used to perform the service

The only explicit social criteria included in the tender are those linked to human resources. These criteria actually did not refer to the protection of the standards for the transferred staff, but was related to the provisions made by the bidder to foster the insertion of disadvantaged groups, either via direct recruitment or via cooperation with existing actors in the field of social insertion.

### **Selection of operator**

Three companies submitted a bid: Kéolis (the incumbent operator), RATP DEV and Véolia-Transdev.

The selection procedure was organised in line with the provisions set by Article L. 1411-5 of the code of local public authorities. First, a commission selects the list of candidates authorised to submit an offer (based on eligibility criteria) and then sends them a document specifying the qualitative and quantitative characteristics of the service to be provided.

The selection was based on a thorough assessment and comparison of the offers (no quantitative criteria were used for the assessment). The selection procedure included the analysis of the offers according to the evaluation criteria as well as several rounds of interviews with representatives of each of the bidders (only short-listed bidders were invited to the last round of interviews).

The selection procedure was managed by the CAB, which was assisted from July 2011 by a specialised consultancy in the analysis of the offers. Once the different steps of the selection procedure were completed, the competent authority awarded the contract to RATP DEV. In practice the criteria that played a key role in the selection was the price of their proposal, as well as some technical aspects of the offer. Indeed, the RATP DEV bid was selected as it offered the best quality/price ratio, the most relevant approach in terms of network structure and services to users, higher provisions in terms of profits and lower costs for local authorities.

### **Transfer of business**

The new contract with RATP DEV was established for an eight year period from the 1<sup>st</sup> of January 2013 until the 31<sup>st</sup> of December 2020. At the start of the contract, RATP DEV created a new branch Compagnie des Transports du Boulonnais (CTP) and all staff of the previous operator was automatically transferred to this branch, in accordance with legal requirements (Article L1224-1 of the Labour Code).

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<sup>110</sup> The Terms of Reference of the tender are not in the public domain.

The contract signed by the competent authority and RATP DEV states that the new operator can recruit additional staff to fulfil its mission and that the recruitment and the elaboration of work contracts should be done in compliance with labour law. Concerning the staff working on the service before the change of contract, the contract does not contain detailed provisions as it simply refers to the existing legislation. Individuals previously delivering a service on the affected line (for more than 65% of their time) transfer to the new operator.

### Impact analysis – transfer of staff

Currently, as part of a 15-month transition period, employment conditions for transferred staff have not changed and the previous collective agreement in place at KÉOLIS still remains in force. The process of negotiation of a new company collective agreement is now on-going.

Therefore, the full impact of the transfer of staff cannot be analysed at this stage.

One of the changes linked to new contract is that it allows up to 20% of the entire service to be carried out by sub-contractors. Outsourced staff is covered by the sectoral collective agreement on road transport. According to a trade union representative, this agreement offers a less generous level of protection than the agreement for urban public transport.

### Case Study 2: TBC network, Communauté urbaine de Bordeaux

#### Background of the case

This case focuses on the urban public transport network in Bordeaux and its surrounding area. The urban public transport network, called TBC since 2004, includes trams and buses.

The Communauté urbaine de Bordeaux (CUB), which was created in 1968 and currently groups 28 municipalities with more than 700,000 inhabitants, is the local authority responsible for the development of urban public transport on this territory and is the competent authority in charge of the TBC network.

Before 1951, public transport in Bordeaux was operated by a *régie*, and then since 1951, it was delegated to an operator. From 2001 to the end of 2008, the company Véolia Transport, a branch of the Véolia Environnement group, was in charge of the network, as part of an 8-year contract with the CUB.

In 2008, the CUB launched a procedure of delegation of public service to select an operator for the 2009-2014 period. The company Kéolis (whose main shareholder is SNCF), was awarded the new contract. Its contract however, only started on the 1<sup>st</sup> of May 2009 as Véolia's contract was temporarily extended. The total value of the five-year contract is 750 million euros.

#### Key facts

**Sector:** Urban public transport

**Procedure:** Delegation of public service (competitive tendering)

**Competent authority:** Communauté Urbaine de Bordeaux (CUB)

**Incumbent operator:** Véolia Transport

**New operator:** Kéolis

**Date of change of operator:** 1 May 2009

**Duration of the contract:** 5 years

**Transfer of staff:** All staff (Article L1224-1 of the Labour Code)

#### Tendering procedure and details of tender documents

During the preparation of the tendering procedure, one of the trade unions (SSE CFDT Véolia Bordeaux) representing staff from the previous operator contacted the CUB in order

to be involved in the discussion and preparation of social criteria to be included in the Terms of References of the call for tender. For trade unions, the section of the tender on social criteria should have included a reference to the social standards agreed at the company level with Véolia Transport Bordeaux, that the new operator would be expected to respect. According to the trade union representative, however, the competent authority did not reply to these requests. Tender documents were prepared by the CUB without consulting staff of the previous operator or trade union representatives.

The selection procedure was organised in line with the provisions set by Article L. 1411-5 of the code of local public authorities. First, a commission selects the list of candidates authorised to submit an offer (based on eligibility criteria) and then sends them a document specifying the qualitative and quantitative characteristics of the service to be provided.

Representatives of trade unions also unsuccessfully asked the competent authority to have access the ToR later on, during the selection procedure. However, following the advice of the specialised commission on access to administrative documents (CADA), the CUB considered that until the signature of the contract with the selected operator, only the bidders could have access to the ToR.

### **Selection of operator**

The selection procedure lasted several months, from the spring to the autumn of 2008. The CUB was supported by two external experts for the assessment of the offers.

In the summer of 2008, the different trade unions in place at Véolia Transport Bordeaux created a common platform to voice their concerns to the competent authority and to request updated information of the selection procedure and the status of the negotiations with the bidders.

The announcement of the choice of the new operator by the CUB was made in October 2008. It can be considered that social criteria did not play a role in the selection of the operator. Indeed, Kéolis' offer was selected as it was considered to be the most ambitious in terms of development of public transport and also included higher revenue forecasts. However, the award of the contract to Kéolis was only confirmed in April 2009 after a long legal controversy<sup>111</sup>.

### **Transfer of business**

The new contract between the CUB and Kéolis came into effect on 1<sup>st</sup> of May 2009. At the start of the contract, all staff were automatically transferred to the new branch Kéolis Bordeaux, in line with legal requirements (Article L1224-1 of the Labour Code).

Only a few employees decided to stay within the Véolia group as this option had been offered by the incumbent operator.

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<sup>111</sup> When the contract was awarded to Keolis, Deutsche Bahn Mobility Logistik (DBLM), a branch of the Deutsche Bahn group filed a complaint to the administrative tribunal of Bordeaux on the ground that the competent authority had not published the call for tender in the Official Journal of the European Community. The administrative tribunal ruled in favour of DBLM and cancelled the procedure. The CUB hence decided to temporarily extend Veolia's contract for a year with a view to have the time to prepare a new competitive procedure. As the CUB and Keolis appealed against this judgment, and the ruling of the second court (Conseil d'Etat) in April 2009 finally confirmed the award of the contract to Keolis. Source: <http://www.conseil-etat.fr/fr/selection-de-decisions-du-conseil-d-etat/section-du-contentieux-7eme-et-2eme-kw0.html>

## Impact analysis – transfer of staff

Even before the transfer took place, trade unions from Véolia Transport Bordeaux (CFDT, SNTU, CFE-CGC, CFTC, and FO) reacted to the announcement of a change of operator with extreme caution, as they had not been involved in the drafting of the ToR. In addition, trade unions were aware that the previous operator had signed a formal commitment to maintain existing collective rights linked to the previous company level agreement in case they were to retain the contract, while Kéolis had not. The trade unions organised two strikes in November 2008 mobilising almost the whole of the workforce to obtain a guarantee from the competent authority and the new operator that their collectively acquired rights would be maintained.

In May 2010, the management of Kéolis signed an agreement with the trade unions to maintain the collective agreements in force at Véolia Transport Bordeaux for the entire duration of the new contract.

From the point of view of the consulted trade union representative, there was no significant impact for the transferred staff of the change of operator, insofar as the new operator agreed to maintain the previous company-level agreement. However, as mentioned above, in the union's view, this was only achieved thanks to a strong mobilisation of staff and coordination between trade unions. Otherwise, it is likely that the change of operator would have had some kind of impact for transferred staff in terms of working hours, as the offer from Kéolis was not judged compatible with existing company-level agreements on working time.

## Conclusions

***These conclusions only concern the sector of urban public transport.***

### **Use of social criteria in tender documents:**

- Based on available evidence, there is no uniform view on the use of social criteria in tender documents for delegation of public service in urban public transport. However, this is also due to the fact that there are legal provisions in place that foresee an automatic transfer of staff in case of change of operator.
- In both cases considered, no process of consultation of trade unions on the formulation of social criteria in the Terms of References took place.
- Social criteria do not appear to be the most determining factor in the selection of the new operator.

### **Transfer of staff (urban public transport):**

- The national legislation (automatic transfer of staff foreseen by the Labour Code when the tendered service is carried by a single autonomous entity) as well as sectoral level agreements guarantee a social level playing field. This legislation offers a strong guarantee for employees but also for operators - as they do not have to assume the costs of relocating, hiring or training qualified staff when they are awarded a new contract.
- In practice, the role of trade unions is also key to ensure a respect of social standards (company-level agreements) during the transfer of staff, as shown by the example of the change of operator in Bordeaux; trade unions also participate to the compulsory negotiation of a new collective agreement at company level.
- There are no specific provisions in place regarding protection from dismissal after the transfer of staff, however the French labour code contains very specific provisions on dismissals in general.

# Germany

## Background

The German market for passenger rail services is characterised by the co-existence of long distance (high speed) transport services operated on a non-subsidised, for profit basis and regional and short-distance rail services subsidised by the Bundesländer out of funds provided by the federal government (in the case of regional services).<sup>112</sup>

The current nature of competition and operations in the German passenger rail sector is the result of significant legislative reforms in the mid-1990s, which were inspired by EU Directive 91/440 on the *Development of the Community's Railways*.<sup>113</sup> This legislative frame includes:

- The federal law on the new regulation of the railways (*Eisenbahnneuordnungsgesetz*) of December 1993<sup>114</sup>, which entered into force in January 1994;
- The law on the regionalisation of passenger transport (*Gesetz zur Regionalisierung des öffentlichen Personennahverkehrs*) of December 1993, also entering into force in 1994<sup>115</sup>;
- The law on the transportation of passengers (*Personenbeförderungsgesetz*)<sup>116</sup> from 1961, last amended in 2013.

This case study will only focus on regional and short-distance rail services (*Schienepersonennahverkehr*, henceforth SPNV), which falls within the framework of the PSO-Regulation 1370/2007. The tendering of SPNV services falls in the remit of the regulation on the tendering of public services (*Verordnung zur Vergabe öffentlicher Aufträge*) of 2010.<sup>117</sup>

The responsibility for the tendering of such services formally lies with the 16 Bundesländer. They have created specific agencies (*Aufgabenträger*) to function as public transport authorities (PTAs). As well as tendering, they carry out contract management activities. Since 2009, 27 such bodies have been in existence, which are represented by BAG SPNV (*Bundesarbeitsgemeinschaft Schienenpersonennahverkehr*) at federal level.

Separate procedures are usually in place for tendering of SPNV and other (urban) public transport services.

## Use of tendering

The use of competitive tendering in the SPNV sector in Germany began in the mid- to late 1990s, but has considerably picked up momentum over the last decade, in line with the emphasis on liberalisation in EU legislation and the desire to reduce costs and improve customer service. PSO contracts generally have a duration of around 15 years, but can be concluded for up to 20 years (and further extended for up to 22.5 years).

EU rules on public procurement (Directives 2004/17/EC and 2004/18/EC) and their national implementation are considered to be of primary importance in the award of contracts for the delivery of goods and services, including for service in the field of SPNV. The fact that competition is paramount in SPNV was further underpinned with a judgement of the Federal Court of Justice of 8 February 2011 which ruled that all SPNV services in principle should be let through competitive tenders.<sup>118</sup>

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<sup>112</sup> Beck, Arne (2011); Barriers to Entry in Rail Passenger Services: Empirical Evidence for Tendering Procedures in Germany; *European Journal of Transport and Infrastructure Research*; Issue 11(1); January 2011; pp 20-41

<sup>113</sup> <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:31991L0440:en:HTML>

<sup>114</sup> <http://www.gesetze-im-internet.de/bundesrecht/eneuog/gesamt.pdf>

<sup>115</sup> <http://www.gesetze-im-internet.de/regg/>

<sup>116</sup> <http://www.gesetze-im-internet.de/pbefg/>

<sup>117</sup> [http://www.gesetze-im-internet.de/vgv\\_2001/index.html](http://www.gesetze-im-internet.de/vgv_2001/index.html)

<sup>118</sup> [http://www.bbgundpartner.de/files/110208\\_bgh.pdf](http://www.bbgundpartner.de/files/110208_bgh.pdf)

The use of direct award is therefore now restricted to certain situations. Among the most important of these are<sup>119</sup>:

- Where the risk of operating the service lies (mainly) with the provider (net contract);
- Award is for a short period of time (no more than three years) as an extension of an existing services contract, if there is subsequently an intention to merge existing lines (bridging contract);
- Special themes such as the tendering of special vehicles or for special tracks. This can also only be utilised for short term contracts.

As a result, the use of direct award processes in SPNV has become very restricted and competitive tenders are now the norm. Tenders can be organised with and without pre-qualification stages. Pre-qualification is mainly used for complex tenders and where new vehicles are to be provided. This is mainly to ensure that there is sufficient interest in the tender procedure.

Research has been carried out to assess the extent to which competition exists in the passenger rail market.<sup>120</sup> A study examining tender procedures issued between 1997 and 2007 found that for each tender procedure, an average of 11 providers requested tender documents, but only four train operating companies subsequently submitted bids. The study concludes that there are two interlinked factors influencing the number of bidders:

- The percentage of risk assumed by the PTA for the price increases and input factors like personnel or fuel (the most risk assumed by the PTA, the more bidders)<sup>121</sup>;
- Level of revenue risk assumed by the operator (the more risk, the lower the number of bidders).

The use of social criteria in tendering (and its potential impact on personnel costs) was therefore arguably indirectly included in this research, but no specific analysis of this factor on the level of competition observed is possible. It is notable for this study that both research on the rail and the bus sector concluded that one of the consequences of the use of competitive tendering has been the lowering of average salaries and terms and conditions towards the standards set in framework collective agreements. Similarly, it observes a worsening of working conditions for employees in the sector. This will be discussed in more detail below. Firstly, we will look at the use of social aspects in tendering in Germany which has an important impact on this discussion. This section should be read in the context of the description, in section 1.2 of the industrial relations framework in the German SPNV sector.

### Social Aspects in tendering

The use of social aspects in tendering for SPNV services pre-dates the entry into force of Regulation 1370/2007, but Articles 4(5) and 4(6) and Recitals 16 and 17 of the regulation are now often quoted in tender processes with reference to the use of social criteria (or the requirement for staff transfer). In the last three years, social criteria have been used in tendering in 50% of tender processes.

Albeit pre-dating the Regulation in many Bundesländer, its provisions have since been used as the rationale behind the conclusion of laws on compliance with collective agreements (*Tariftreuegesetze*, henceforth TTGs). These laws intend to set a level playing field for social aspects among all bidders in public tendering procedures, in particular regarding wage

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<sup>119</sup> See <http://www.forschungsinformationssystem.de/servlet/is/369945/> and information provided in an interview with BAGSPNV.

<sup>120</sup> See also Beck, Arne (2011) referenced in footnote 1. KCW GmbH carried out similar research in relation to the bus sector. KCW GmbH (2007); *Der Busverkehr im Wettbewerb: Zwischenfazit nach 10 Jahren*.

<sup>121</sup> In recent years, BAG SPNV considers that the main cost factors in the sector are increasing prices for track and station access and rising fuel costs.

standards, and thus prevent the risk of social and wage dumping.<sup>122</sup> While social dumping has been a key concern among trade unions for some time, most recently, the Association of German Transport Companies, VDV<sup>123</sup>, also pronounced its concern about this and spoke out in favour of provisions regarding the compliance with collective agreements.<sup>124</sup>

TTGs can also refer to other aspects such as the application of international labour standards; include temporary agency workers and subcontractors in the framework of applicability of sectoral wage agreements that are determined as a reference.

Although it is also possible (and is often the case) for tenders to make specific provisions regarding staffing levels, qualifications required and training to be provided to staff, the most important way in which social criteria are integrated into competitive tenders in the SPNV sector in Germany is through TTGs.

### What is 'Tariftreue'

The basic idea behind the concept of 'Tariftreue' is to inform and require all potential bidders – and eventually the successful contractor – in a tendering process to respect certain adequate minimum social standards with regards to wages (and working conditions) for staff in the context of the delivery of the contract. TTGs are agreed at level of the Bundesländer, with 13 of the 16 Bundesländer having such legislation at the end of 2013. They not only cover the SPNV sector but all sectors subject to public tenders (such as the bus sector for example). The applicable social standards to be used are determined in relation to the specific sector – in this case of course the SPNV.

The minimum social standards to be respected are determined with reference to one (or several) collective agreements pertinent to the sector. Because different collective agreements can be found in the SPNV sector<sup>125</sup>, a relevant or representative collective agreement is determined at state (or in some cases PTA) level – often in consultation with a committee of representative bodies including the social partners. This does not mean that a (new) operator has to adopt a particular collective agreement<sup>126</sup> but means that it has to abide by a predetermined minimum standard set in the representative collective agreement, which can of course be exceeded.

The 'representative' collective agreement is usually determined with reference to its geographical application and the number of employees in the sector covered by this agreement. Another criterion is the number of employees who are members of the relevant trade union in the sector. In practice, the framework collective agreement for the SPNV sector (Branchentarifvertrag SPNV<sup>127</sup> increasingly acts as the reference agreement in this respect. This is the only sector wide collective agreement for the whole SPNV railway sector applicable in all the Bundesländer.

Successful bidders not respecting the minimum social standards required by TTGs are subject to financial sanctions; existing contracts can be terminated and companies could be excluded from further bidding processes.

*Source: Rohrmann, M; (2013); Wird Deutschland Tariftreu?; Arbeit und Arbeitsrecht, Sonderausgabe 2013 "Human Resources - Trends 2014", page 48 - 51<sup>128</sup>; for further information see also [www.agv-move.de](http://www.agv-move.de).*

Initially, there were efforts to establish a TTG for the whole of the country, particularly given the background of wage regulation in Germany. However, this attempt failed<sup>129</sup> and currently TTGs only exist at Land level.

<sup>122</sup> The risk of wage dumping resulting from liberalisation was specifically referred to in the proposals for the state TTG proposed by the CDU and SPD at state level in Saarland; (DS 15/96 of 23.08.2012).

<sup>123</sup> VDV organises around 600 companies active in the rail goods and passenger transport sectors. It is the largest lobby organisation of the transport sector in Germany.

<sup>124</sup> VDV Presseinformation; 14.5.2013; Kein Sozial- und Lohndumping im deutschen ÖPNV

<sup>125</sup> See also section on industrial relation in the sector.

<sup>126</sup> In the context of the principle of the autonomy of collective bargaining, this would not be possible.

<sup>127</sup> [http://www.evg-wrb.de/1pdf/03\\_11/04\\_03anl.pdf](http://www.evg-wrb.de/1pdf/03_11/04_03anl.pdf)

<sup>128</sup> <http://www.sozialpsychologie.uni-frankfurt.de/team/assoziierte-mitglieder/ra-matthias-rohrmann/>

Each Land can therefore take the initiative to regulate the inclusion of social aspects in public tendering procedures and public service contracts. This resulted in a patchwork of TTGs laying down different requirements at the state level. Currently, there are 13 Bundesländer with TTGs in place (see Table below). This also shows that twelve states (Hamburg is the exception) additionally have specific provisions on respect for collective agreement in the urban public transport sector (Öffentlicher Personennahverkehr, ÖPNV).

The remaining states (Bayern, Hessen, Sachsen) do not currently have laws on compliance with collective agreements (even as a proposal) for public service contracts or any other specific legislation that regulates social aspects for public tendering procedures. However, competent authorities are free to choose to adopt similar rules as in the laws of compliance with collective agreements, which has indeed been the case in the Land of Hessen in the past. The table highlights certain qualitative differences in the provisions stipulated in TTGs<sup>130</sup>, including in relation to the selection of representative collective agreement which would apply to tenders in the SPNV sector.

**Table A1.4 Bundesländer with provisions regarding Tariftreue (position as of November 2012)**

State	Relevant legislation	Comment
Baden-Württemberg	Landestariftreue- und Mindestlohngesetz (LTMG) of 10.04.2013	Applies to all public tendering; sets minimum wage of €8.50; selection of representative collective agreement in ÖPNV
Berlin	Berliner Ausschreibungs- und Vergabegesetz (BerlAVG) of 08.07.2010 (most recent amendment 05.06.2012)	Applies to all public tendering; sets minimum wage of €8.50; includes key ILO conventions on worker protection; selection of relevant collective agreement by tendering authority in ÖPNV; provision of additional social criteria <sup>131</sup>
Brandenburg	Brandenburgisches Vergabegesetz (BbgVergG) of 21.09.2011	Applies to all public tendering; sets minimum wage of €8.00 <sup>132</sup> ; selection of representative collective agreement in ÖPNV
Bremen	Tariftreue- und Vergabegesetz Bremen (TtVG) Bremen of 24.11.2009 (most recent amendment 01.09.2012)	Applies to all public tendering; sets minimum wage of €8.50; includes key ILO conventions on worker protection; selection of representative collective agreement in ÖPNV; provision of additional social criteria
Hamburg	Hamburgisches Vergabegesetz (HmbVgG) of 13.02.2006 (most recent amendment 27.04.2009, currently under review)	Applies to all public tendering; sets minimum wage of €8.50; includes key ILO conventions on worker protection; no specific provisions for ÖPNV; provision of additional social criteria

<sup>129</sup> Further efforts to achieve this at federal level are considered to be subject to the outcomes of general elections in October 2013.

<sup>130</sup> The trade union EVG, in its overview of existing TTGs seeks to rank these provisions with the allocation of stars (for more information see [http://www.evg-online.org/Arbeitswelt/Personenverkehr/Landestariftreuegesetze/11\\_09\\_01\\_Vergleich\\_Landestariftreuegesetze/](http://www.evg-online.org/Arbeitswelt/Personenverkehr/Landestariftreuegesetze/11_09_01_Vergleich_Landestariftreuegesetze/))

<sup>131</sup> These can be elements such as promotion of women; provisions for apprenticeship placements etc

<sup>132</sup> Minimum wage will rise to €8.50 from 1.1.2014)

State	Relevant legislation	Comment
Mecklenburg-Vorpommern	Vergabegesetz Mecklenburg-Vorpommern (VgG M-V) of 7.07.2011 (most recent amendment 25.06.2012)	Applies to all public tendering; sets minimum wage of €8.50; includes key ILO conventions on worker protection; selection of representative collective agreement in ÖPNV
Niedersachsen	Niedersächsisches Landesvergabegesetz (LVergabeG) of 15.12.2008 (most recent amendment 19.01.2012; time limited to 31.12.2013)	Applies to all public tendering; sets minimum wage of €8.50; includes key ILO conventions on worker protection; selection of representative collective agreement in ÖPNV; provision of additional social criteria
Nordrhein-Westfalen	Tariftreue- und Vergabegesetz Nordrhein-Westfalen (TVgG-NRW) of 10.01.2012	Applies to all public tendering; sets minimum wage of €8.62; includes key ILO conventions on worker protection; selection of representative collective agreement in ÖPNV; provision of additional social criteria
Rheinland-Pfalz	Landestariftreuegesetz (LTTG RLP) of 1.12.2010	Applies to all public tendering; sets minimum wage of €8.70; includes key ILO conventions on worker protection; selection of representative collective agreement in ÖPNV; provision of additional social criteria
Saarland	Saarländisches Tariftreuegesetz (STTG) of February 2013	Applies to all public tendering; sets minimum wage of €8.50; includes key ILO conventions on worker protection; allows for several collective agreements to be selected in ÖPNV; provision of additional social criteria
Sachsen-Anhalt	Landesvergabegesetz (LVG-LSA) of 10.11.2012	Applies to all public tendering; no minimum wage set; includes key ILO conventions on worker protection; selection of representative collective agreement in ÖPNV; provision of additional social criteria
Schleswig-Holstein	Tariftreue- und Vergabegesetz Schleswig-Holstein (TTG) of 25.4.2013	Applies to all public tendering; sets minimum wage of €9.18; includes key ILO conventions on worker protection; selection of representative collective agreement in ÖPNV; provision of additional social criteria
Thüringen	Thüringer Vergabegesetz (ThürVgG) of 18.04.2011	Applies to all public tendering; no minimum wage set; includes key ILO conventions on worker protection; selection of representative collective agreement in ÖPNV; provision of additional social criteria

Source: Prepared by ICF GHK based on Matthias Rohrmann; Agv MoVe (2012), <http://agv-move.net/index.php/14-tariftreue-uebersichten-zur-aktuellen-gesetzgebung>, and Schulten, Thorsten; *Tariftreue Regelungen in Deutschland*; WSI; July 2013

As indicated in the box above, in principle, the representative collective agreement selected is increasingly the framework collective agreement for the SPNV sector, which was first negotiated in 2011, but additional provisions, with reference to other relevant collective agreements can also be included to enhance these framework provisions. As a minimum, bidders are required to respect the wages and connected working time provisions set out in the framework collective agreement. In addition, other stipulations can also be included (for example in relation to holidays, training and other terms and conditions).

This means that in the majority of Bundesländer, competition in the SPNV sector is now linked to a set of minimum social standards. However, it should be noted that the differences in wages and linked terms and conditions between the sectoral collective agreement and some company agreements can be as high as 20%, thus still providing for significant room for competition on the basis of personnel costs among the different operators.

As indicated above, despite the importance of the PSO Regulation as a rationale for TTGs, it should be noted that the application of social criteria in tenders for passenger rail services was already possible prior to the PSO regulation. What is new as result of the Regulation is the possibility to require the transfer of staff in the case of a change of railway operator.

## Industrial relations

The general framework for employment conditions in the passenger rail sector is regulated by general labour laws and collective bargaining agreements. For example, the German federal labour laws regarding working time and holiday benefits can be regarded as providing for minimum social standards, with the possibility for collective bargaining agreements to establish more favourable conditions. It should be noted that general labour laws do not provide for specific social standards for employees in the railway sector.

Currently, Germany does not have statutory minimum wage, although minimum wage levels are set (with regional variations) in a number of sectors (e.g. construction, industrial cleaning, certain care sectors etc). Minimum wages are also included at the level of the Bundesland in a number of TTG. However, for core staff in the SPNV sector, minimum wage levels tend not to be particularly relevant as collectively agreed wages generally exceed such minimum wage levels, although this is not necessarily the case for some sub-contracted services such as cleaning. Collective agreements negotiated by relevant social partner organisations (in the SPNV sector Agv MoVe on the employer side and EVG on the trade union side) are only binding on the negotiating parties and are not generally applicable.

For the SPNV sector, since 2011, the framework agreement SPNV determines a minimum wage level and the agreement is applicable to almost 98% of railway operators. Furthermore, more favourable wage levels and conditions can be set in company collective agreements or in-house agreements, by corporate collective agreements (taking into account all the company subsidiaries and branches) and in the individual labour contract. This creates a patchwork of provisions with very different wage standards and conditions in different companies, which are, however, delimited by the minimum standards set in the framework collective agreement. The negotiation of this agreement was considered to be an important step in preventing social and wage dumping which, it was feared by some, might result from liberalisation in the sector<sup>133</sup>.

As noted above, however, significant differences still prevail in the wages and terms and conditions in different operating companies with the best paid employees (generally those of the incumbent Deutsche Bahn, henceforth DB) earning up to 20% more than their worst paid counterparts (who rely on the provisions of the framework collective agreement).<sup>134</sup> The

<sup>133</sup> Gewerkschaft GDBA und Transnet (2011); Für einen Branchentarifvertrag SPNV.

<sup>134</sup> The wages and employment conditions of DB group companies are regulated by collective bargaining agreements between the employers and business Association Agv MoVe for DB as employer and with the two

situation is similar for urban transport bus service providers in relation to their sectoral collective agreement.

## The sectoral framework collective agreement SPNV (BranchenTV SPNV)

The framework collective agreement for the whole of the German SPNV sector contains six elements:

- Framework conditions: This lays down, among other things, some key provisions in relation to the portability of certain seniority provisions when moving between companies in the sector.
- Working time: This sets a maximum number of weekly working hours and ensures a link between wages and working time.
- Wages: Provision of minimum salaries in the sector for different occupational profiles.
- Definition of occupational profiles: This section defines the occupational profiles in the sector (linked to wage provisions)

Sections 5 and 6 set out some final provisions regarding how collective agreement might diverge from this framework collective agreement and the date of applicability.

The partners of the “BranchenTV SPNV” are Agv MoVe (for DB companies) and the six biggest private railway companies in Germany on the employers side and the railway union EVG on the employees’ side.

It is also worth noting that DB has several internal collective agreement negotiated by Agv MoVe (where the DB group of companies is in membership). For example there is the so-called ‘demographic collective agreement (*Demographietarifvertrag*) which provides an employment guarantee to its employees and sets down provisions regarding support for mobility and other aspects. These specificities are particularly relevant in the case of a change of operator.

## Rules on transfer of staff

Regarding rules on the transfer of staff two situations have to be distinguished:

- The tendering of a contract which involves the transfer not only of personnel, but also of ‘material’, including vehicles, workshop facilities and machines etc.
- Tenders which only essentially involve a transfer of staff as rolling stock is either to be leased or – as has increasingly been the case – the provision of new rolling stock is part of the tender specification.

Generally speaking, in the first case, a transfer of undertakings within the meaning of EU Directive 2001/23 is considered to have taken place. In Germany, the relevant legislation is laid down in Article 613(a) of the German Civil Code. However, normally, the change of a railway operator is not considered to a transfer of undertakings in Germany.

In the second case, Regulation 1370/2007, Article 4(5) provides the opportunity to grant employees the rights to which they would have been entitled if a transfer within the meaning of Directive 2001/23 had taken place.

Here it is important to re-iterate that Regulation 1370/2007 does not in itself lay down any obligation on PTAs to apply social standards or to require the transfer of staff in the case of a change of operator. Only in Bundesländer with TTGs is the inclusion of minimum social standards legally provided and all PTAs must abide by these provisions when issuing tenders. TTGs at Land level can contain provisions to ensure that incumbent providers can be required to provide details of the staff to be transferred across and their existing terms

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German railway unions EVG (biggest railway union for all staff) and GDL (train drivers’ union). Agv MoVe (*Arbeitgeber- und Wirtschaftsverband der Mobilitäts- und Verkehrsdienstleister*; Employers and Business Organisation of mobility- and transport service companies in Germany) has 61 members with around 200,000 employees and is the largest employers’ organisation in the railway sector in Germany. The DB group of companies are the largest single member of Agv MoVe.

and conditions. However, staff transfer is not required (only enabled) through provisions in TTGs or other Land level regulations. It is therefore entirely within the remit of the PTA (albeit arguably influenced by political priorities and requirements at regional level) whether or not to include provisions regarding the transfer of staff in their tenders for SPNV services.

The possibility to require a staff transfer in the case of a change of operator has become possible for the first time as a result of the PSO Regulation, although it is considered that in Germany in Regulation in and of itself is insufficient grounds to allow for the requirement of a staff transfer. As a result, the requirements for the incumbent to provide details of the staff to be transferred across as set out in TTGs is considered to be vital.

So yet again, the laws on compliance with collective agreements can play a determining role in the cases of tendering and transfer of staff. Some of the laws in the above named Bundesländer allow the competent tendering authority to stipulate in the tender documents that staff has to be taken over in case of change of operator. However, this option has so far only rarely been used and, as will be elaborated in the case description below, none of the cases where transfer was required are yet completed in the SPNV sector.

Before going into more detail on the actual use and detail of provisions on transfer of staff, it is also important to note that in such cases relevant employees have to be offered a transfer, but they are free to decide whether or not to accept this offer. A refusal to do so is, however, at their own risk. Generally speaking, if they decline the offer to transfer and their existing employer cannot offer them alternative employment (which, with the exception of DB, due to its specific collective agreement mentioned above, they are not required to do), they will be considered to be redundant and will lose their job.

#### **Current experience on provisions regarding transfer of staff**

Between 2010 and 2012, social conditions have been specified in 30 tender processes as part of 15 procurement procedures in regional passenger rail transport. In only 5 of these procedures staff transfer was prescribed. Various reasons can be considered why transfer of staff has not frequently been required:

- Bundesländer with comprehensive TTGs may not consider it to be necessary to order a transfer of staff if existing regulations on compliance with collective agreements are seen to offer sufficient protection of social standards;
- Transfer of staff could potentially be considered to be too costly. Particularly in cases where DB is the incumbent, transfer of staff regulation could place obligations on a new operator (if other than DB) to pay the affected staff significantly higher wages than other staff on their payroll on other lines. This is of course more costly for them, but ultimately more costly to the PTA because such costs are generally passed on the overall cost of the contract;
- The use of otherwise of tenders requiring the transfer of staff can be 'politically' motivated – to send a signal that social standards and the protection of staff play an important role in public tenders. Where no such political motivations exist, a transfer of staff is less likely to be ordered.

Stakeholders interviewed for this study underline that requirements for the transfer of staff do have a role to play in restricting the freedom of the market and some PTAs may not be keen on this.

Whatever the rationale behind the use (or lack of use) of these provisions, what appears clear is that the PSO Regulation provides a rather broad scope of the interpretation of Article 4(5). In Germany, this means that where transfer of staff is compulsory, this can take many different forms and ultimately provides a relatively moderate level of protection (to selected staff). Legal assessments of how the provisions of 1370/2007 in this regard are to be interpreted have been carried out and support this rather broad interpretation of clause

4(5).<sup>135</sup> The application of the Article does therefore not mean a replication of the requirements set out in Article 613(a), this allowing for a more 'limited transfer of staff'.

Table A1.4 shows that in at least two of the cases where Regulation 1370/2007 has been quoted as a rationale for the requirement to transfer staff, the situation is in fact likely to be one falling under the requirements of the Directive on the transfer of undertakings (or 613(a) BGB). This appears to be the case for the tender processes Netz Bayerisches Oberland and S-Bahn Hamburg as a transfer of rolling stock is also foreseen. It is not unusual in cases of tenders for SPNV services to leave the assessment of whether there is likely to be a transfer of undertakings (within the sense of Article 613(a) BGB) to the bidding companies. As mentioned above, there can be a legal 'grey area' as that what constitutes a transfer of undertakings (depending on what transfers to the new operator) and PTAs therefore often externalise the cost of a legal assessment to the train operating companies. This explains the wording for instance in the case of the tender Netz Bayerisches Oberland.

**Table A1.5 Examples of competitive tenders in the SPNV sector between 2010 – 2012 where transfer of staff has been foreseen**

Date	Procedure	Remarks
2011	Netz Ostbrandenburg	Transfer of staff ordered but only within the frame of the staffing requirements of the new operator. Only wage provisions to be transferred.
2012	Netz Bayerisches Oberland	Transfer of rolling stock and staff ordered. New operator to determine whether a transfer of undertakings has taken place
2012	S-Bahn Hamburg	Transfer of some rolling stock and personnel under the rules of Transfer of undertakings
2012	Netz Nordwest-Brandenburg	Operational personnel (train drivers, service personnel and those responsible for moving trains into location [Zugbereitsteller] to be transferred. Only wage provisions to be transferred.
2012	Teilnetz Ring S-Bahn Berlin	Transfer of staff ordered as within the meaning of 613(a) of the German Civil Code

Source: Presentation Matthias Rohrmann, Agv MoVe; Project seminar in Paris

In the two cases tendered by the PTA for Berlin-Brandenburg (Verkehrsverbund Berlin-Brandenburg) only operational staff are to be offered a transfer, with only general wage conditions (rather than full terms and conditions) being protected. The case of the tender for Netz Ostbrandenburg will be explored in more detail in the case study in section 2 of this report.

Under Article 613(a) BGB existing terms and conditions are only protected for a period of one year. It is likely that the same period applies in the case of the application of Regulation 1370/2007, but in the absence of a test case, it is not possible to say how this will be interpreted.

It is also worth noting that even in cases where transfer of staff is not ordered, specific collective agreements between the incumbent providers and the new operator are sometimes used to enable a transfer of staff (*Betreiberwechseltarifvertrag*). Such collective agreements are entered into entirely at the initiative of the two relevant undertakings and the respective trade unions and there is no requirement in law to enter such an agreement. Arguably the conclusions of such collective agreements is most likely where a transfer of staff is in the interest of both companies, e.g. because the new operators requires the skilled

<sup>135</sup> See for example <http://www.lsjv.rlp.de/arbeit-und-qualifizierung/landestariftrreugesetz-lttg/handlungsleitfaden-art-4-abs-5-vo-eg-nr-13702007/>

personnel and the incumbent is unable to offer them alternative employment. No detailed review of the frequency or content of such agreements was possible as part of this study.

In the absence of a completed case in relation to the transfer of staff in the SPNV sector, it is not possible to assess to what extent affected employees will be willing to transfer, their currently employers will be able and willing to offer them alternative employment and the overall impact of such provisions on social standards. The following can be speculated:

- In cases where DB Regio is the losing contractor<sup>136</sup>, employees are arguably unlikely to wish to move to the new operator. There are a number of reasons for this, as indicated above
  - DB Regio generally pays higher salaries and offers better terms and conditions than other operators. Some staff retain historical civil service status (although no new civil service contracts have been concluded since the 1990s) and it would therefore not only be difficult, but also unattractive to move to a private operator.<sup>137</sup>
  - A company collective agreement provides an effective job guarantee, with staff not losing out even if no equivalent alternative employment can be found for them, for a significant number of years. Even when small salary and benefit reductions eventually kick in, their overall package still tends to be better than among competing operators.
  - Despite losing some market share in recent years, DB Regio still remains the dominant operator in the field of SPNV. In the context of an ageing workforce it is usually possible to find alternative employment for staff. Provisions are in place regarding the level of mobility which can be required and mobility packages are in place to support staff who have to move location.
- Some staff will be less likely to be willing to move for alternative employment with their current operator and may therefore be more likely to accept a transfer to a new employer. However, as tenders often do not guarantee full terms and conditions (and pensions are often not portable) and existing entitlements are in principle only guarantees for 12 months; terms and conditions and working conditions with the new operator have to be very clearly assessed (often taking legal advice) prior to taking such a decision.
- Germany is experiencing a shortage of skilled staff in some occupations in the sector (particularly train drivers), and the likelihood to be offered a comparable position with the old employer is therefore relatively good (if some mobility is possible).
- Similarly, staff whose skills are in demand may already chose to look for alternative employment with an alternative operator because the contract with the incumbent comes to an end as there is usually around 12-18 months between the award of a contract and the new contractor starting their operations.

### **Experience of the use of social criteria in ÖPNV and of transfers in the bus sector: Rheinland-Pfalz**

The Land law on compliance with collective agreements has been in force in this region since March 2011 and applies to all public service contracts starting at a sum of to €20,000. Competition has been growing in the local passenger rail sector since 1996, when the law handed over responsibility for this sector to the Bundesländer. In accordance with the Local Passenger Transport Regionalisation Act, the central government provides the Bundesländer with approximately €7,191,000 billion in funding for local passenger rail transport per annum (2013 figures).

In Rheinland Pfalz there are approximately 10,000 workers in the urban public transport sector and around 200,000 passengers use local trains every day. A commission is in place at the Ministry of Social Affairs, Labour, Health and Demographics in which representatives of trade unions, employers' associations and employers are determine the reference

<sup>136</sup> Existing data show that DB Regio has lost contracts in around 41% cases of competitive tenders.

<sup>137</sup> There are no examples of this, so the potential implications have not been assessed in detail.

collective agreement to be used in cases of tendering. The collective agreements have to be representative which is determined according to either the number of employees in companies covered by the collective agreement or the number of members of the trade union party to the collective agreement.

The law on compliance of collective agreements in Rheinland Pfalz also leaves the option for the competent tendering authority to oblige the operator to take over current staff working on tendered lines; however it was reported that this had been used until now only one time in a tender for urban transport bus services and concerned only 15 people. The reason for this is seen in the legal complexity when making such a stipulation. The procedure needs to be transparent and the competent tendering authority needs to dispose of a quite substantial knowledge on labour laws and collective agreements. Specific agreements need to be made with the bidding operators so that staff will be taken over under the working conditions of the previous (current) operator.

In order to assist the local competent authorities in tendering procedures and the application of the law on compliance with collective agreements the Ministry has set up a special inquiry service/ helpline responding to the specific questions that competent authorities may have. Furthermore, the Ministry has published a guideline on the laws application and steps to undertake when opting for inserting an obligation of transfer of staff in the tender documents.

In 2010 the option was used for a tender for the city bus service in Zweibrücken. In the Pirmasens District a medium-sized company won the public tender for a bus service in 2012. A process took place for the new company to take over the fifteen employees from the former concession holder in accordance with Article 4 paragraph 5 of regulation (EC) 1370/2007. The medium-sized company began operation in December 2012.

In 2013 it is planned to apply this option (to require the transfer of staff) for tenders for bus services in Worms (24 employees plus 15 temporary workers), Wonnegau-Altrhein (District near Worms) (27 employees) and in the District of Zweibrücken.

For Worms and Wonnegau-Altrhein the responsible contracting municipal authorities have also decided to require the transfer of staff in accordance with Article 4, paragraph 5 of regulation (EC)1370/2007. This tender will start in 2013.

One of the difficulties in applying these rules is that in practice it is difficult to identify the drivers and employees, which are affected of the actual tender procedure. They have to be individuals who spend the majority of their time working on the effected route. Indeed in a case in 2012 the local public transport authority demanded at least a work of 70 percent for the affected line. Similarly, the affected workers have to be employed by the transferor. This means that the rules cannot be applied for sub-contractors.

In the practical application of the transfer of staff option the contracting authority is faced with the difficulty of not knowing the necessary information of the current operator to inform details of their bid in relation to staffing costs. To meet the obligations in accordance with Art.4, paragraph 5 of regulation (EC) No 1370/2007 the competent authority is dependent on the information supplied by the previous operator which has to be made available within six weeks to allow for the transfer of staff to be managed.

After the previous operator has fulfilled his obligation to provide the public transport authority with the necessary information on the number of employees to be transferred and the existing working conditions the Guidelines of the Service Center help the contracting authority to prepare the tender documents:

- A list of the number of workers to be transferred, a list of occupations, previously employing companies, the date of birth of the previous period of employment, the law applicable to the employment relationship, collective agreements as well as major operating agreements, a listing of current personnel costs, a list of demands on a company pension schemes and other significant information's concerning the individual employment contracts (e.g. temporary, part-time employment, severe disability) must be known by the bidders.
- In practice the public transport authority can potentially get a list with many different tariff levels and working conditions of the employees of the former operator. For new

employees for the line the bidder has to accept the minimum level defined under the LTTG-Act.

The respective bidders are then bound in advance to the contracting authority in the event of an award during the whole duration of the contract for the public service. This can lead to a situation for the new operator that different wages and conditions apply to different staff in their company. This is compatible with the national labour law in Germany, which generally protects vested rights.

### Case: Netz Ostbrandenburg

This section provides information on a case of public tendering in the SPNV sector where a transfer of staff is foreseen: the case of the tender for the network Ostbrandenburg. It should be noted that although the contract has been awarded (in the case of most affected lines to a new operator), the process is still ongoing and no staff have as yet transferred, nor is it known how many will transfer. As there is no completed case available in this sector, as the end of section two a box provides some details of the processes in completed cases in the urban bus transport sector which is subject to similar rules.

### Background of the case

On 15 December 2011, the PTA for Berlin and Brandenburg (Verkehrsverbund Berlin Brandenburg, henceforth VBB) issued a competitive tender for the regional passenger rail network for Ostbrandenburg in the official journal of the European Union. The tender consisted of two Lots, made up of the following regional lines, shown below with their current operators, as well as the winning operator (see Table A1.4).

**Table A1.6 Tender for the network Ostbrandenburg: lines with incumbent and new operators**

Line	Current operator	New operator
Lot 1		
RB (regional train) 35 Fürstenwalde (Spree) – Bad Saarow	ODEG	NEB
RB 36 (Berlin - ) Königs Wusterhausen – Beeskow – Frankfurt (Oder)	ODEG	NEB
RB 60 Eberswalde – Frankfurt (Oder)	ODEG	NEB
RB 61 (Prenzlau - ) Angermünde – Schwedt	DB Regio	NEB
RB 63 Eberswalde – Joachimsthal	ODEG	NEB
Lot 2		
RB 12 Berlin – Templin	DB Regio	NEB
RB 25 Berlin – Werneuchen	ODEG	NEB
RB 26 Berlin – Küstrin-Kiez – (Kostrzyn)	NEB	NEB
RB 54 Berlin – Löwenberg – Rheinsberg	DB Regio	NEB

Source: Press release VBB, February 2013

The new contract for Lot 1 is due to start in December 2014 with the contract for Lot 2 starting in December 2015. On 12.2.2013 the award of both lots to the operator NEB was officially announced. Lot 1 is awarded for 10 years whereas the contract for Lot two is concluded for 9 years. Annual traffic on both lots with account for 5 million km of railway operation.

The tender involved the provision of new rolling stock and also specified some key provisions, for example in relation to the 100% staffing of all trains with service personnel and better equipment for the new train carriages.

The tender made use of Article 4(5) of EU Regulation 1370/2007 and required the new operator to grant operational personnel (train drivers, conductors, staff responsible for the availability of trains) a transfer to the new operator.

## Tendering procedure and details of tender documents

A one-stage tender process was organised (not including a pre-qualification stage). A number of companies expressed an interest in the tender<sup>138</sup>. At least one company elected not to submit a tender because of the uncertainties surrounding the issue of the transfer of staff. On the whole, while provisions regarding the transfer of staff have some obvious benefits, the PTA considers that this process does render tendering processes more complex and fraught with more uncertainties for bidding companies. Despite the information provided on the staff to be transferred and their conditions, it becomes more difficult for them to establish likely costs and their staffing concept (legal uncertainties perceived by providers in a field where there is no precedent in the field of SPNV could also be considered to be an issue).

The use of this procedure is therefore considered to make it somewhat more difficult to generate competition among suppliers and the incumbent could be considered to be placed at an advantage as it holds more information on the available staff (beyond what needs to be disclosed<sup>139</sup>). Some companies who train their own staff are also keen to use their own personnel whom they know and the quality of whose training and qualifications they can assess. On the other hand, operators may also not be keen to see staff that they have trained and invested in move to a new operator.

## Selection of operator

In accordance with the TTG applicable in Berlin and under use of Regulation 1370/2007 Article 4(5), the tender set down a set of minimum social criteria and required a transfer of staff under the following conditions:

### Key tender requirements in relation to transfer of staff: Netz Ostbrandenburg

The following provides a translation of core extracts of the tender announcement in so far as it pertains to the transfer of staff:

- The PTA requires the successful contractor on the basis of Article 4(5) of Regulation 1370/2007 to offer operational personnel (train drivers, service personnel and those responsible for moving trains into location [Zugbereitsteller]) a transfer to the new operator and to guarantee their wage conditions (*Entgeltregelungen*), which they would have been entitled to, had a transfer of undertakings within the sense of Directive 2001/23/EC taken place. This does not include other rights of these employees.
- Should the operator consider that fewer staff will be required to deliver the new operations as a result of the use of sub-contractors, the details of these contractors have to be provided and the requirements of the TTG have to be respected in relation to their staff.
- An Annex to the tender documents contains the anonymised details of affected staff. As well as the details of the collective agreements applying to these staff in order to allow bidding company to calculate the required personnel costs.
- No less than three months after the award of the new contract, the new contractor will receive an updated list of the relevant staff to be transferred. No less than 21 months before the staff of the new operations, the new operator has to write to affected staff to assess their willingness to transfer and to provide them with details of the modalities of the transfer. The relevant workers have to inform the new operator no less than 18 months prior to the kick off of the new contract whether they wish to take up this offer.
- The new contract will then select from those employees of the incumbent, expressing an interest

<sup>138</sup> Exact figures were not provided.

<sup>139</sup> For example, do certain staff have a high level of sick leave etc.

to transfer across, the staff member to whom they wish to offer a contract of employment. In doing so, the selected group of staff should be reflective of the make up of the full list of individuals expressing an interest to transfer in terms of their age, seniority in the company and salary.

- Contacts of employment with transferring staff must be concluded no less than 15 months prior to the start of operators under the new provider.
- The new provider is only required to conclude employment contracts with staff of the former incumbent to the extent that they require under their own staffing concept. Should insufficient staff express an interest to transfer across, the new supplier is free to recruit additional staff. This and all sub-contracted staff have to be compensated in line with the requirements of the applicable TTG.

As a result, the new operator only has to take on the operational staff (expressing an interest in transferring) that it requires to deliver its own staffing concept and only wage and associated conditions are guaranteed (which in principle includes working time), but none of the other existing an acquired employment rights.

Social criteria make up a small, but not insignificant part of the selection criteria. It is estimated that personnel costs account for around 20% of the final cost of the tender and differences in staffing costs between operators therefore do have a role to play in a tender selection where price plays an important part in the selection criteria.

PTAs are not required to announce the specific balance of price and other criteria in their bid assessment criteria. In this case, however, the balance between price and quality was in the region of 70% (price) to 30% (quality). Quality criteria clearly encompass more than social criteria and also include the quality of new vehicles and other considerations.

According to the legal interpretation of Article 4(5) of the Regulation, the provisions set out in the tender are fully in line with its requirements. It was considered important that the new operator is not required to take on more obligations or staff than they require for their service offer, while at the same time offering employment stability and guaranteeing key wage conditions. The PTA worked with a labour lawyer to develop these stipulations to ensure they could be considered conform.

## Transfer of staff

All lots were awarded to NEB (Niederbarnimer Eisenbahn). The company was originally established in 1900 (under the name Reinickendorf-Liebenwalde-Groß Schönebecker Eisenbahn AG) and has been operating under its current name since 1927. The company has essentially remained a regional operator with mixed ownership, including from among local authorities. The main shareholder (with 66%) is the Industriebahn-Gesellschaft Berlin mbH (Captrain Deutschland). However, since 2009, the company has also been operating a line between Berlin and Kostrzyn in Poland. In 2008, the company had around 70 staff and a turnover of €19 million.

NEB did not take on any existing rolling stock, but was responsible to source new rolling stock and negotiate station and track access. In line with the provisions of the tender, NEB was provided with details of the operational staff assigned to the respective lines and their existing terms and conditions.

The PTA considered that the process of selecting relevant staff was challenging, as it can be difficult to judge which staff primarily work on the affected lines. The rule was applied that if an individual was considered to work 50% or more on one of the affected lines, they were placed on the list of staff to be transferred (in line with the provisos of the tender). It is the responsibility of the incumbent operator to draw up these lists and provide the required information in line with the deadlines mentioned in section 2.3 above. As a result of this exercise, it was determined that 84 of current staff at DB Regio, 107 staff at ODEG and 34 NEB staff (obviously less relevant for them as they can remain with the same employer) would be affected. Given the required timeframes to information to be provided, at least the workers affected on the lines tendered in Lot 1 have now received their letter detailing the conditions of their potential transfer. Those affected by Lot 2 will receive this information by

mid-2014 at the latest. This means that affected workers for Lot 1 are now considering their offers and need to respond to the new operator by October 2013.

It is therefore currently unknown how many individuals will ultimately transfer across.

### Impact analysis – transfer of staff

Given the lack of experience of a completed case of a change of operator in the SPNV sector where a transfer of staff was foreseen it is not possible to draw any conclusions regarding the impact of the ability provided by Regulation 1370/2007 to foresee this possibility.

However, a number of things can be remarked on the basis of use of this possibility in tender processes and existing experience regarding the transfer of staff in the bus sector:

- First, it is notable that the ***use of the possibility to order a transfer of staff as foreseen in Article 4(5) of the Regulation is very limited indeed*** at present. Between 2010 and 2013, reference to it has only been made in just over 15% of cases of tendering in the SPNV sector (5 out of 30 cases). In 2 of these cases, it could be argued that, while a transfer of staff is foreseen and Article 4(5) is referred to in the tender documents, tender provisions are more likely to indicate a transfer under the rules of the Transfer of Undertakings Directive (Article 613(a) BGB as the invitation to tender also foresees the transfer of vehicles. This leaves 3 cases where a transfer which effectively take place within the meaning of Article 4(5) of the Regulation.
- Second, because the change of railway operator is not a transfer of business (so the national law of the transfer of business directive, the paragraph §613a BGB, is not applicable) there is a need for further regulations like “Tariftreue” or the direct application of the PSO regulation to ensure the protection of the staff concerned.
- Third, the ***interpretation of a transfer of staff with reference to this Article is very broad*** and could not be considered to amount to a transfer of staff within the meaning of Directive 2001/23 if this was applied within its full legal meaning. At least two procedures currently still ongoing a) limit provisions on transfer to certain groups of staff only (operational personnel); b) leave it up to the new operator to select (within certain limitations) from those expressing an interest in transferring after having received their offer, only those it requires to staff their own personnel concept; only provide for the transfer staff on current wages (with reference to working hours), but not including other rights. This effectively means that not all employees are protected and a transfer of staff can still lead to job losses and /or reductions in wages, terms and conditions. It has been indicated that the effective financial loss associated with provisions which only protect wages (and liked working hours) can still be as high as around 10-15%.
- Fourth, the ***Regulation itself, without further provisions in existing Land level legislation (most likely TTGs) requiring current operators to provide the relevant data on affected workers and their conditions, is considered insufficient*** to implement the transfer of staff in the SPNV sector.
- Fifth, both unions, politicians but also the employer’s side jointly support the necessity of the social protection of staff and the application of the social options of the PSO Regulation (statement VDV and Agv MoVe for example). For an existing determination of adequate social conditions in the SPNV sector, the sectoral collective agreement (BranchenTV SPNV) is the only representative and useful source.
- The current practical application of Article 4(5) is criticised from all sides for different reasons:
  - Even those PTAs that support provisions regarding the transfer of staff in principle consider its implementation to be cumbersome but also potentially restrictive of greater competition. The experience of the bus sector shows that associated administrative requirements are high, even in cases were a very low number of staff are concerned (specific guidance has to be developed and bodies set up to help advise PTAs and bidding companies). This is arguably more significant in the bus sector, where the identification of staff which primarily work on affected routes can be more difficult. However, the identification of relevant staff was also mentioned as a challenging issue in the SPNV sector.

- There is also some anecdotal evidence that concern over the uncertainties associated with a staff transfer is leading some *transport companies* to withdraw from competitions. There is also a concern that a transfer of staff can lead to companies having to take on workers they have not been able to select and train themselves under conditions which may be more favourable than those enjoyed by other staff in the company.
- Trade unions consider the current protections foreseen in tender processes involving staff transfer to be insufficient to protect employees and their terms and conditions and therefore not suited to act effectiveness against wage and social dumping.

## Conclusion

Existing research on the impact of tendering in the public transport sector<sup>140</sup> indicates that despite some challenges (leading to a decline in competition) during the period of the peak of the economic crisis, there is significant competition in the sector. Although not all companies that request tender documents eventually place a bid (only on average 4 out of 11 do so), existing competition is considered to be sufficient to prove that there is an effective market in the sector. The same studies argued that on the whole competition is considered to have improved quality, particularly in relation to the improvement of rolling stock, service and competitive pricing for customers. However, one area where issues are acknowledged to have arising is in relation to the impact of tendering on staff wages and terms and conditions.

As indicated in section 3 above, the absence of a completed case of staff transfer in the SPNV sector and the very limited use of this possibility in the tenders in the past three years, together with the concerns highlighted about the limitations of the interpretation of provisions on the transfer of staff, means that the implementation of Article 4(5) of Regulation 1370/2007 in Germany has thus far been of limited relevance in the protection of social standards for workers in the sector.

Much more significant is the implementation of Article 4(6) under consideration of Recitals 16 and 17 on the use of social standards in tendering processes. In Germany, this has largely been achieved through the formulation, at Land level (in all but 3 of the Bundesländer) of TTGs. Although qualitatively different, TTGs require PTAs to include minimum social standards in tenders for public transport services with reference to a selected, and in most cases a representative collective agreement.

Particularly in the context of the conclusion, in 2011, of a sectoral collective agreement in the SPNV sector, this generally guarantees wages and social standards at the level set in this collective agreement (or higher). However, the standards set in the sectoral collective agreement are in some cases significantly below those agreed in company level collective agreements which can make a difference of up to 20% in relation to the highest terms and conditions. There is therefore the potential over time of a successive lowering of social standards closer to this level.

In relation to provisions on staff transfer, unlike in the bus sector, it is possible that the number of staff willing to transfer to a new operator is likely to be lower, partly because of the significant role played in the market by DB, which not only generally provides better terms and conditions to staff, but also retains a collective agreement effectively providing an employment guarantee in such situations.

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<sup>140</sup> Beck, Arne (2011); Barriers to Entry in Rail Passenger Services: Empirical Evidence for Tendering Procedures in Germany; *European Journal of Transport and Infrastructure Research*; Issue 11(1); January 2011; pp 20-41.  
 KCW GmbH (2007); *Der Busverkehr im Wettbewerb: Zwischenfazit nach 10 Jahren*

# Italy

## Background

The current level of tendering and competition in Italy is the result of a multifaceted regulatory framework and a system of multi-level governance implemented in the last 15 years in both the passenger rail domestic market and the local transport sector (*Trasporto Pubblico Locale* hereafter TPL). The protection of employment relationships and working conditions depends on a number of interlinked factors including regulations, the development of genuine competitive tendering procedures and the structure of the bargaining system in the country.

This report focuses on providing an overview of the situation in relation to the current state of the relevant regulations, collective bargaining structures, tendering processes in both the passenger rail and TPL sectors, and how this impacts on working conditions and the level of staff protection.

In Italy the first step towards the liberalization of the passenger rail and the TPL sectors goes back to 1997 and the Legislative Decree (*Decreto Legislativo* hereafter D.Lgs) 422/1997<sup>141</sup> which completed the deregulation process of the market for local and regional rail and TPL services by attributing operational functions to the regions and provinces. The three main principles of this regulation were:

- Decentralisation of programming responsibilities to local authorities through the Regional Transport Plans and administrative powers with financial and control responsibilities;
- Separation between regulator and service suppliers
- Compulsory competitive tendering in the selection of service suppliers

The maximum period for contract services was also fixed to 9 years.

The aim of the regulation was to provide a tool to modernise local and regional public transport and open the sector to competitive mechanisms by providing local authorities with greater administrative powers. However, a plethora of subsequent regulations slowed down this process, starting with the devolution to regional government of legislative powers which created a multi-level regulatory framework<sup>142</sup>.

Additionally, to ensure a smooth transition, an initial transitional period was introduced until 2003, allowing regions to use direct award procedures to ensure the provision of local transport services. At the end of 2003 and in subsequent years, a number of decrees and laws introduced further amendments and extensions until December 2007<sup>143</sup>.

Regulation 1370/2007 which came to force in December 2009, did not lead to any change in the Italian legislation as competitive tendering was already, in principle, compulsory. However, it served to validate certain existing practices, such as the use of direct award in certain situations.

In 2008 a national law<sup>144</sup>, which applied to all types of local transport, introduced a situation where competitive tendering was to be the norm unless exceptional circumstances (e.g. economic, social or geographical conditions, etc.) do not allow for effective use of tendering. In these cases services can be awarded according to Regulation 1370/2007. For all other cases, where a tendering procedure was possible, local authorities were required to proceed on the basis of competitive tenders not later than December 2010.

<sup>141</sup> <http://www.parlamento.it/parlam/leggi/deleghe/97422dl.htm> The actual text of the decree, after modifications/integration, can be found on [www.normattiva.it](http://www.normattiva.it).

<sup>142</sup> Amendment to the written constitution with introduction of "Titolo V of the Constitution", Corte Costituzionale sentence 222/2005

<sup>143</sup> D.Lgs. 400/1999, DL n. 355/2003, article 23, L. n. 266/2005, DL 28 n. 300/2006

<sup>144</sup> L. 133/2008

However, at the same time, other regulations again postponed in practice the mandatory tendering process. In 2009, amendments<sup>145</sup> to D.Lgs 422/97 established a duration of a minimum 6 years for rail services contracts, renewable for another 6 years, 'regardless the awarding procedure' ('*comunque affidati*'). A new "transitional period", established by law (law n. 99/2009) with a direct reference to the Regulation 1370/2007 will expire the 3 December 2019. During this period, Regions can extend the duration of current contracts but no longer than the "6+6" formula.

This complex scenario led to a situation where the use of competitive tendering in passenger rail services and TPL was rarely attempted while the extension of existing service contracts is a practice largely applied.

### Use of tendering in the passenger rail sector

Since the start of the deregulation process only few tenders have been issued in the regional passenger rail sector. Some of them were never concluded for a number of reasons, while those completed were awarded to consortia of companies already operating in the regional markets and always included the incumbent Trenitalia<sup>146</sup>:

- In 2004, the Lombardy Region launched a tender covering the provision of the S5 line, which accounted for approximately 6% of all regional railway services. The contract was awarded to a consortium of companies already operating in the regional market (Trenitalia, LENORD and ATM). This was also the only valid offer submitted; a second offer was never admitted to the full evaluation stage due to administrative formalities.
- In 2004, the Liguria Region launched a tender to cover the whole regional railway service, but it was withdrawn due to administrative issues and the contract was renewed with Trenitalia. It is worth noting that preliminary negotiations on the provision of rolling stock between the tender authority, Trenitalia and possible competitors failed to reach an agreement.
- In 2006, the Veneto Region launched a tender to cover 75% of the regional service, the only offer received was from a consortium between the incumbent Trenitalia and another small train operating company, owned by the Regional Government.
- In 2008, the Emilia-Romagna Region tendered out the whole regional railway service, it was awarded to a consortium of companies already operating in the regional market Trenitalia, FER, ACT and ATC<sup>147148</sup>.

The Emilia-Romagna Region is currently working on a new tender to be issued by the end of 2013.

The opening of the passenger rail market is hindered by strong natural barriers to entry which greatly impact on the efficiency of tendering procedures and subsequent outcomes. Acquisition of rolling stock and skilled staff has been identified by all interviewees as the main barrier to start a genuine competition in this market.

In 2011, in order to overcome the barrier of the sourcing of rolling stock a special clause was introduced at national level allowing a period of 24 months for competitors to acquire the rolling stock after the award of the service<sup>149</sup>. In the meantime some regional governments applied different strategies to encourage competition, in Lombardy the region bought rolling stock to pass on to the winner and reduced the size of the lots tendered thus making it more feasible for new operators to enter the market.

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<sup>145</sup> L. 33/2009

<sup>146</sup> Trenitalia S.P.A is the company operating railway transport services and is 100% controlled by FS

<sup>147</sup> [http://www.miol.it/stagniweb/riform\\_n.htm](http://www.miol.it/stagniweb/riform_n.htm)

<sup>148</sup> Stanta, F., Galli, M., Local railway tenders in Italy: the impossible competition, 9th Conference on competition and ownerships in land transport

<sup>149</sup> Decree Salvaitalia, 214/2011 implemented by L. n.201/2011

## Social Aspects in tendering

The requirement for staff transfer and social criteria are regulated by national legislation. In these texts, Regulation 1370/2007, and specifically Articles 4(5) and 4(6) of the regulation are not directly quoted or mentioned in neither national or regional legislations.

As far as social standards are concerned, national legislation makes reference to the application of sector wide collective agreement. Legislation also grants the transfer of staff from the transferor to the transferee. The staff concerned are those strictly connected to the scope and/or volume of activities pertaining the new service.

Since most passenger rail services have always been delivered by the national rail operator Trenitalia, the issue of employment protection through staff transfer has never arisen in the past. Social standards and employment conditions are mostly regulated via sectoral collective agreements, which enhance minimum provisions laid down in legislation. These can be further enhanced by company level collective agreements. In all cases of competitive tendering the services have been re-confirmed to the incumbent rail company or awarded to consortia with the incumbent company as the main partner. Therefore, there has never been a real issue in relation to the protection of staff, as this was naturally guaranteed through continuity of the employment contract with the same operator.

As a general rule, social aspects related to wages, working conditions, training and health and safety are indirectly regulated by the national collective agreement, as they fall under the generic obligation for companies to *'apply the sectoral collective agreement according to type of transport sector'*<sup>150</sup> of the national regulation D.Lgs. 422/1997 article 19. Therefore, the minimum social standards are determined by the sectoral collective agreement.

The generic approach of the national legislation gives local authorities a certain degree of flexibility in defining the extent to which social aspects and the requirement for staff transfer are considered in tender procedures and in choosing the most appropriate methods for protection. Regional governments decide how to regulate the inclusion of social aspects in public tendering procedures. The result is a patchy and heterogeneous scenario of regulations and practices across 20 regions.

In all regions where a tender has been issued for passenger rail services, requirements have been included in the tender to guarantee, at least, the level of employment at the point of transfer. In Liguria the new operator was required to guarantee the level of employment for all staff, keep the employment contract in force for train operators and guarantee all other contracts in force with the operator (e.g. staff operating on trains etc.). In Veneto, the tender authority asked to guarantee the level of employment of all staff transferred from the incumbent operator considering the scope and/or volume of activities pertaining the new service, ensuring requalification and training when needed. In Emilia-Romagna, the tender authority included in the tender a list of staff to be transferred to ensure continuity of service<sup>151</sup>.

## Industrial relations

Employment conditions in the passenger rail sector are regulated by general labour laws and collective agreements.

No statutory minimum wage is in place in Italy and collective bargaining has a central role in wage setting. Wage bargaining occurs primarily at sectoral level. The Italian wage-setting system is characterised by nation-wide collective agreements which establish sectoral wage levels according to occupations and skill levels. Additionally, collective bargaining at company level may introduce higher pay levels and improved terms and conditions. Thus all

<sup>150</sup> D. Lgs. N. 422/1997, art 19 Comma 3l): "l'obbligo dell'applicazione, per le singole tipologie del comparto dei trasporti, dei rispettivi contratti collettivi di lavoro, così come sottoscritti dalle organizzazioni sindacali nazionali maggiormente rappresentative e dalle associazioni datoriali di categoria"

<sup>151</sup> Carlo Cambini, C., Buzzo, B., (2005) Le gare nelle ferrovie locali, Rapporto III – Ottobre 2005, Documento di ricerca HERMES

workers in a given sector are covered by national agreements but not all workers will be simultaneously covered by national and company agreements. Higher levels of decentralisation have been associated with a greater variation of pay schemes and increasing importance of company or local<sup>152</sup> level bargaining in wage setting<sup>153</sup>.

As described in the next section, this complexity of bargaining levels and wage setting is also significant in the rail sector. Some interviewees highlighted the fact that the presence of a state-owned company which dominated the sector for many years, has resulted in a company level agreement with particularly favourable conditions that will be difficult to meet when there is a change of operator, thus increasing the possibility of social tensions during negotiations. One example has been the inclusion of the social clause (article 16ter) in the sector-wide collective agreement of Mobility/Railway Activities Area.

### Bargaining structure in the rail and local transport sectors

The two main employers' associations in the sector are AGENS and ASSTRA. FS Group<sup>154</sup> is part of AGENS which represents employers in the railway sector, beverage/restaurant services on board and air-traffic controllers. The TPL sector, which includes rail and road transport is represented by ASSTRA, the association of local road transport and rail transport which are not part of Trenitalia, and ANAV only for road transport. Companies apply the nation-wide sector agreement signed by their own association, in case a company is not part of any association it has the freedom to choose which sector-wide agreement to apply. The applicability of the nation-wide sector agreement for companies which are not part of any association is a complex legislative issue, since there is no law that enforces the application of a specific national agreement, this is an area mainly regulated by the case law<sup>155156</sup>.

The transport sector is characterised by a multi-level bargaining structure:

- Rail and road transport are covered by the National Collective Agreement of Mobility (*Contratto Collettivo Nazionale della Mobilità*, CCNL). This is an umbrella agreement between all main stakeholders in those sectors. It was designed as a basis to develop the sector-wide collective agreement for rail and road transport;
- The rail sector is covered by the national sector-wide Collective Agreement of Mobility/Railway Activities Area (*CCNL della Mobilità/Area contrattuale Attività Ferroviarie*) signed by AGENS. While the local transport sector is covered by the Collective Agreement of Mobility/Local Transport Sector (*CCNL Mobilità/Trasporto Pubblico Locale*) signed by ASSTRA. The latter has not been renewed since 2007, therefore the terms and conditions are still those negotiated six years ago;
- Finally, there is the company and/or local/regional collective level agreement. FS signed the Company Agreement of FS Group (*Contratto Aziendale di Gruppo FS*) which integrates the Collective Agreement of Mobility/Railway Activities Area<sup>157</sup>. This level can also include local/regional agreements; in this case specific rules for each site are established.

Collective agreements at national or company/local level are binding only for the signatory parties and cannot be imposed on others. Therefore, local authorities willing to guarantee the

<sup>152</sup> On this matter the local level is very important for urban local transport sector, not for railway sector.

<sup>153</sup> Dell'Aringa, C., Lucifora, C., Orlando, N., Cottini E., (2008) Bargaining Structure and Intra-Establishment Pay Inequality in four European Countries: Evidence from Matched Employer-Employee Data, Pay Inequality and Economic Performance Paper (PIEP), <http://cep.lse.ac.uk/pep/query.asp?id=8>

<sup>154</sup> Ferrovie dello Stato Italiane Group (FS) is the Italian State-owned railway company

<sup>155</sup> Salta, G., Valcavi, G., (2011) L'efficacia erga omnes del contratto collettivo aziendale, [www.adapt.it](http://www.adapt.it)

<sup>156</sup> De Compadri, (2008) L., Contratti collettivi di diritto comune con efficacia vincolante limitata, Fondazione studi consulenti del lavoro

<sup>157</sup> <http://www.filtcgil.it/Documenti/ccnlsettore.pdf>

application of a sector-wide collective agreement will have to include a generic reference in the regional regulation and in competitive tenders.

### Social clause in the sector-wide agreement

The Collective Agreement of Mobility/Railway Activities Area introduced article 16 which sets the guidelines on the protection of staff in cases of a change of operator. Specifically, article 16bis deals with indirect staff (e.g. employees of contractors and sub-contractors) while article 16ter applies to staff directly employed by FS Group or by a new competitor that could decide to apply the Collective Agreement of Mobility/Railway Activities Area. Article 16ter establishes that the social partners, which signed the sector-wide collective agreement, the incumbent and the new operator will discuss the transfer of staff to the new operator, with regard to employees that have been working at the company for at least 9 months and in relation to the scope and/or volume of activities pertaining to the new assignment. They also discuss the 'harmonisation'<sup>158</sup> of compensation and employment conditions, in accordance with the rights already acquired (e.g. working hours, shifts, etc...):

- "In case of assignment of transport services through tendering procedures, the personnel employed by the former contractor for at least 9 months in the same activities specified in the tender shall be transferred to the new contractor, in relation to the scope and/or volume of activities pertaining to the new assignment. The transfer of staff shall be discussed jointly by the competent trade union organisations (national/territorial/regional) stipulated in the Sector-Wide Collective Agreement, the transferor company and the transferee company. Said discussions shall also concern the harmonisation of compensation and contract terms in accordance with the acquired rights, as well as the application of the Sector-Wide Collective Agreement, according to the procedures and contents set forth in Points 6, 7 and 8 of the Preamble, in case of sub-contracting of parts of the service if specified in/authorised by the call for tender"<sup>159</sup>.

### Rules on transfer of staff

With reference to the rules on transfer of staff a clear distinction need to be made between transfer of business and transfer of staff, as different regulations apply:

- In the case of a transfer of business all staff employed in the related activities is always transferred from one company to the other, therefore the level of employment is guaranteed at the point of transfer. However, there are no legal provisions covering the period following to the transfer<sup>160</sup>.
- A transfer of staff would occur in the case of a competitive tender resulting in a change of operator. In this the level of employment would be consistent with the service tendered, while the boundaries of staff protection and application of collective agreements will depend on regional legislative frameworks<sup>161</sup>.

Local authorities are responsible for regulating the transfer of staff and identifying the best instruments, in all cases in which regulations of a transfer of business do not apply: "*local authorities are responsible for identifying the mode of transfer, in case of termination of activity, from the previous operator of goods functional to the delivery of the service and staff according to article 26 of the Royal Decree 1931, n. 148*"<sup>162,163</sup>.

<sup>158</sup> 'Armonizzazione' is the official term used in the original text, it is to be interpreted as willingness to 'match as much as possible' the terms and conditions of previous contract

<sup>159</sup> Non official translation provided by FS Group

<sup>160</sup> This is the case in which EU Directive 2001/32 applies

<sup>161</sup> This is the case in which Regulation 1370/2007 applies

<sup>162</sup> D. Lgs. 422/1997, art 18 comma 1 (e): "l'indicazione delle modalita' di trasferimento, in caso di cessazione dell'esercizio, dal precedente gestore all'impresa subentrante dei beni essenziali per l'effettuazione del servizio e

We can find three main different regulations:

- regional legislation establishes that transfer of the personnel from the former contractor to the new contractor is regulated by the article 2112 of the Civil Code (transfer of undertakings). It means that we have to apply the same rules but not that we have de facto a transfer of undertaking;
- regional legislation provides “directly” the transfer of staff;
- regional legislation makes reference to collective agreements (if they exist) and, consequently, to the clauses on protection of staff .

This legislative framework is arguably clear. The situation is made more complex due to the fact that there is also the Royal Decree<sup>164</sup> n. 148/1931 that for the road transport sector delegates the regulation of transfer of staff to local authorities. Additionally, the Royal Decree goes back to 1931: concerns have been expressed by some stakeholders on the extent to which this old instrument is transferable to another sector and is still appropriate after 80 years.

This legislative framework is arguably clear, but the situation is once rendered more complex by the fact that article 2112 of the civil code regulates the rights of staff in case of transfer of business, and the Royal Decree<sup>165</sup> delegates the regulation of transfer of staff to local authorities. Additionally, the Royal Decree goes back to 1931 and was intended to regulate the road transport. Concerns have been expressed by some stakeholders on the extent to which this old instrument is transferable to another sector and is still appropriate after 80 years.

The result is a complex system of regional regulatory frameworks with a variety of approaches to modes of staff transfers and a wide spectrum of what could be called a ‘level of guarantee or protection’. For example, the Emilia-Romagna Region, which is one of the regions with the highest level of protection, refers to article 2112 of the Civil Code and to sectoral agreements at national and company level in force in the area at the time of the transfer. The Liguria Region states that ‘*all employees have the right to be transferred*’ and the new organisation is compelled to guarantee the rights acquired with the old employer and to apply the national collective agreement within the legislative frame in force in the area. In Puglia and Calabria the legislation refers only to the Royal Decree 148/1931, in Piedmont it refers to the Royal decree plus the application of the relevant sectoral agreements in force, and in Campania the regulator mentions only D.Lgs 422/97<sup>166167</sup> .

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del personale dipendente con riferimento a quanto disposto all'articolo 26 del regio decreto 8 gennaio 1931, n.148”

<sup>163</sup> [http://www.sindacatofast.it/sites/default/files/doc\\_pdf\\_inf/regio%20decreto%20autoferro.pdf](http://www.sindacatofast.it/sites/default/files/doc_pdf_inf/regio%20decreto%20autoferro.pdf)

<sup>164</sup> Royal Decree n. 148/1931 article 26 "In case of sale of lines to another company, or the merge of companies, shall apply the requirements laid down by the government when approving the sale or merge for the transfer of the permanent staff to the new company while maintaining for as far as possible, staff treatment no lower than that previously enjoyed and ensuring the rights acquired."

<sup>165</sup> Royal Decree n. 148/1931 article 26 "In case of sale of lines to another company, or the merge of companies, shall apply the requirements laid down by the government when approving the sale or merge for the transfer of the permanent staff to the new company while maintaining for as far as possible, staff treatment no lower than that previously enjoyed and ensuring the rights acquired."

<sup>166</sup> For Camania, and the reference to the decree n. 422/1997, see the content of footnote n. 148.

<sup>167</sup> Regional legislation: Lombardia L. R. 4 aprile 2012, n. 6, article 35; Piemonte L. R. 4 gennaio 2000, n. 1, article 11; Liguria L. R. 9 settembre 1998, n. 31, article 10; Veneto L. R. 30 ottobre 1998, n. 25, article 25; Emilia-Romagna L. R. 2 ottobre 1998, n. 30, article 14; Toscana L. R. 31 luglio 1998, n. 42, artt. 18-18bis; Marche L. R. 22 dicembre 2009, n. 31, article 46; Abruzzo L. R. 23 dicembre 1998, n. 152, article 24; Lazio L. R. 16 luglio 1998, n. 30, article 22; Puglia L. R. 31 ottobre 2002, n. 18, article 22; Campania L. R. 28 marzo 2002, n. 3, article 37; Calabria L. R. 7 agosto 1999, n. 23, article 17

## Case: Sale of a municipal transport provider in Tuscany

### Background of the case

In Italy there is no case of tendering procedure with change of operator and transfer of staff in either the passenger rail or the TPL sectors. The only attempts at tendering in the rail sector have been presented above and none of them led to a change of operator or involved a transfer of staff.

One of the guiding principles of the D.Lgs 422/1997 was the separation between regulatory authority and service suppliers. According to this all local operating companies owned by local municipalities had to be transformed in limited companies (*Societa' per Azioni*, SPA) through competitive tendering.

As in the rail sector, mandatory competitive tendering started in the TPL sector with D.Lgs 422/1997. However, at the end of the transitional period in 2003 only few regions had made preparatory steps to launch competitive tenders. These include Tuscany, Friuli-Venezia Giulia, Puglia and Lombardy. In all other cases a sequence of laws and postponements of the transitional period allowed local authorities to continue to use direct award procedures.

When tenders had been issued only the incumbent operators expressed an interest in the call and all tenders ended with the award of the service to the incumbent. Some of the barriers to the opening of the TPL sector include the asymmetry of information between the incomers and incumbents on the value of the assets and its management in previous years<sup>168</sup>, uncertainty of future profits and reduction of compensations by local authorities<sup>169</sup>.

This section provides information on a case of the privatisation of a municipal operator through public tendering in the TPL sector in the Tuscany region, where the public owned companies have been tendered to prepare the ground for the opening of the market. The case provides an interesting example to partially disentangle the difficult situation in the TPL sector, the barriers to the opening of the market and how local authorities and stakeholders are preparing to deal with the protection of staff.

### Tendering procedure and details of tender documents

In accordance with national legislation<sup>170</sup>, the Tuscany region started the process of selling of municipal public transport providers.

The regional government delegated the process to its provinces; the first step required provinces to sell of the local municipally owned companies and the second step would have been the competitive tendering of service provision and selection of new operators.

Accordingly to this process, between 2005 and 2010, the 10 local authorities issued 14 calls for tender to sell off the local municipally owned companies<sup>171</sup> and took preliminary steps for tendering the provision of services. But, in the meantime, the regional government withdrew the mandate for tendering and prepared to issue one single tender for the whole regional TPL sector.

To ensure the provision of the transport services, the regional government proceeded with direct awards for a transitional period of 24 months and granted a financial compensation to service operators, accordingly to article 5 of Regulation 1370/2007. This situation raised tensions with the operators which considered the financial resources granted insufficient to

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<sup>168</sup> Boitani, A., Cambini, C. (2001) La riforma del trasporto pubblico locale in Italia: problem e prospettive, Hermes Working paper n.4

<sup>169</sup> Nicotera, A., (2013) The case of Italy, presented at 3<sup>rd</sup> European Urban Transport Regulation Forum, Florence School of Regulation

<sup>170</sup> D.Lgs 422/1997

<sup>171</sup> The province of Florence issued 5 tenders, one for the urban district, one for services in the city and two for non-urban services.

guarantee continuity of service. Three years later and well beyond the end of the transitional period it is unclear how the impasse will be resolved.

### **Selection of operator and transfer of staff**

All cases of change of operator in the TPL sector are the result of the sell off of previously municipally owned operators, rather than a result of competitive tendering for supply of services.

This is also the case of ATAF SPA, the local public transport company, which was previously owned by the municipality of Florence (90%) and other neighbouring municipalities. When the municipality started the bidding process in 2009 to sell the company, only two competitors expressed an interest in the bid, these included a French-led consortium with other small Italian operators, and ATAF Gestioni an Italian-led consortium to whom the contract was finally awarded.

ATAF Gestioni is mainly controlled by Busitalia (a parent company of FS) with a minor participation of a local cooperative and a third small private company.

Following the outcome of the tender all staff was transferred from ATAF SPA to ATAF Gestioni. The process was treated as a transfer of business regulated by article 2112 of the civil code. Additionally, the regional legislation L.R. 42/1998 art 18 establishes that in case of competitive tendering in the TPL sector, the tender documents shall include the list of the staff employed by the incumbent company to be transferred to the new operator.

As discussed in paragraph 1.3 social conditions are guaranteed only at the point of transfer but not afterwards. In the case of ATAF Gestioni, the new owner considers current employment levels to be too high and a restructuring process will be very likely implemented.

### **Impact analysis – transfer of staff**

The lack of a complete case of competitive tendering and subsequent transfer of staff does not allow for measuring the full impact of Regulation 1370/2007. However, the regulation has been applied by the national legislator to validate the direct award practice in exceptional circumstances. In addition, in the limited cases of competitive tendering launched in the passenger rail sector, local authorities did include provisions for employment protection. Although it was not possible to establish a direct link between these provisions and Article 4(5), it appears that the spirit of the regulation is in principle taken into account in tendering procedures.

### **Conclusion**

In Italy the opening of the passenger rail and the TPL sectors started in the late 90s when a deregulation process was initiated in a number of areas including the local transports. The legislative milestone of this process the D.Lgs 422/1997 delegated programming responsibilities to local authorities, enforced the privatisation of the public-owned companies in the TPL sector and introduced the competitive tendering as a compulsory procedure in selecting service operators.

However, a complex system of multi-level governance and regulations at national and local level slowed down the opening of both the passenger rail and the TPL sectors, postponing in practice the use of competitive tendering. The main factors which impacted on the opening of these markets were the continuous extension of the transitional period (the period is the same of the Regulation 1370/2007) in which local authorities could use the direct award procedure and the validation of this practice in diverse circumstances.

Additionally, the opening of the passenger rail sector is hindered by strong natural barriers such as the acquisition of rolling stock, transfer of skilled workers and effective planning of service provisions. While in the TPL sector a privatisation process to sell off public-owned operators was first required to proceed with the competitive tendering of transport services. However, even in those regions where public companies were privatised, no tenders have ever been issued in relation to provision of services.

Despite these challenges, some cases of tendering have been attempted in the passenger rail sector. The unsuccessful outcomes of these tenders in awarding the services to a new operator confirm the difficulty of implementing a genuine degree of competition.

As a consequence of the difficulties mentioned, no case of transfer of staff to a new operator has ever occurred in the passenger rail sector. In the TPL section there have only been transfers within the same group.

The picture is of course complicated by the fact that local authorities have legislative and administrative responsibilities with a degree of flexibility. The result is a patchy scenario of regulations and procedures. Also the fact that from a juridical point of view the legislator cannot oblige a company to apply a specific collective agreement could represent a further element of complexity.

In case of a change of operator, local authorities are in charge of regulating the transfer of staff, as a result there are different regulations regarding protection across regions. All regional regulations include some provisions with regard to employment and working conditions, either by referring to national regulations on transfer of staff or to sector-wide collective agreements.

Trade associations have a crucial role in negotiating terms and conditions as well as levels of employment. However, provisions on transfer of staff only apply at the point of transfer as there is not national legislation setting a minimum period in which such provisions need to be maintained. In addition, other factors raise speculative concerns with regard to what would happen in practice after the workers are transferred. By law after the transfer of staff the new operator will apply national agreements that set a minimum level of employment conditions. Company agreement in force at the new operator will be applied too, in these case with different standards (in this context, FS Group standards are, probably, better than others).

# Netherlands

## Background

### Use of tendering

The Dutch public transport regime changed drastically in 2001 by introducing a competitive tendering regime<sup>172</sup>. The Passenger Transport Act 2000 (hereafter PTA 2000) - which applies to all public transport services (bus, tram, metro, fast ferry and regional railway lines) (cf. article 2 PTA 2000) - requires public transport authorities to set public transport policy goals, to define concession areas<sup>173</sup> and to organise competitive tendering procedures with the aim of awarding rights to deliver a service<sup>174</sup>. These concessions give a company the right to provide public transport for a particular period in a specific area to the exclusion of all other parties (cf. article 1, I PTA 2000). The aim of the PTA 2000 was twofold: to increase the attractiveness and usage of public transport (especially in urban areas) by professionalising the sector in such a way as to avoid excessive interventions based on short term political issues and problems that would only hamper the realisation of long term policy goals; and to reach a higher degree of cost coverage through passenger revenues (more exactly a cost coverage of approximately 50 % instead of 35% as in 2000)<sup>175</sup>.

In 2010 van de Velde, Eerdmans and Westerlink summarised the main features of the PTA 2000<sup>176</sup>:

- Decentralisation: 12 provinces and 7 city regions were appointed as public transport authorities
- From 2001: mandatory contracting of public transport by these authorities
- Gradually: mandatory competitive tendering of public transport<sup>177</sup>
- The new operator selected has to take over the operational staff from the former operator
- Legal advisory position for passenger representative organizations
- The Ministry of Transport pays provinces and city regions instead of funding the operators. These transport authorities are then free to decide the way in which they pay their operators.

The obligation for the transport authorities to submit the award of a concession with respect to railway lines to competitive tendering was introduced gradually after 2001 to reach currently almost all public transport services, with the exception of the national railways and public transport in the main cities.

Today, only the Transport Ministry, who can award concessions related to national railway lines<sup>178</sup>, and the tendering authorities of Amsterdam, Rotterdam and The Hague (largest cities of the Netherlands)<sup>179</sup> can choose to submit public transport service to competitive tendering or to directly grant a concession. Local transport tendering authorities in the Dutch

<sup>172</sup> R. van het Kaar, 'Nieuwe wettelijke regeling inzake de overgang van ondernemingen', *Europese waarnemingspost arbeidsverhoudingen (EIRO)*, 2003, [www.eurofound.europa.eu/eiro/2003/01/feature/nl0301106f.htm](http://www.eurofound.europa.eu/eiro/2003/01/feature/nl0301106f.htm).

<sup>173</sup> Nowadays, the Netherlands is divided into about 70 concession areas, i.e. areas in which a public transport operator has a monopoly right for usually 6 to 8 years. As regards the railway transport PTA 2000 allows, however, concessions up to 20 years (D. van de Velde, D. Eerdmans and H. Westerlink, *Public transport tendering in the Netherlands*, PTEG, Amsterdam, 2010, 22).

<sup>174</sup> H. Eerdmans, S. van Kooij, D. van de Velde and H. Westerlink, 'Are we doing it wrong or do we expect too much? Forces that push authorities to become public transport designers', *11<sup>th</sup> Conference on competition and ownership in land passenger transport*, 20-25 September 2009, Delft University of Technology, 2-3; [www.innov.nl/Portals/0/publicaties/are\\_we\\_doing\\_it\\_wrong\\_or\\_do\\_we\\_expect\\_too\\_much.pdf](http://www.innov.nl/Portals/0/publicaties/are_we_doing_it_wrong_or_do_we_expect_too_much.pdf).

<sup>175</sup> D. van de Velde, a.o., *Public transport tendering in the Netherlands*, 21.

<sup>176</sup> *Ibid*, 21-22.

<sup>177</sup> An exception is made for the three largest cities and the national railway network (*infra*). The exemption with regard to the three largest cities is justified by amongst other things problems of adaptation; organisational difficulties in transferring the ownership of the municipal operators involved (GVB, RET and HTM) and the larger complexity of public transport in these cities. The national network was not submitted to competitive tendering for it had to find a new equilibrium without competition.

<sup>178</sup> Cf. article 61, first paragraph PTA 2000 *iuncto* article 64, first paragraph PTA 2000.

<sup>179</sup> With the enactment of EU Regulation 1370/2007 allowing in-house operations in public transport, the cities of Amsterdam, Rotterdam and The Hague have the option to submit their public transport services to competitive tendering or to grant a directly awarded concession to their municipal operators (cf D. van de Velde, a.o., *Public transport tendering in the Netherlands*, 22).

provinces<sup>180</sup>, as well as in the cities and city regions – who (only) have the authority to provide concessions with respect to railway lines (or public transport other than by train) - must tender out via a competitive procedure (cf. article 1, m *iuncto* 20 PTA 2000).

In practice the Transport Ministry has granted the incumbent, *Nederlandse Spoorwegen* (NS), directly the exclusive right to operate the whole national railway network until 2015<sup>181</sup>. Once this ends, the government might submit the transport services now operated by the NS to competitive tendering.

Also the cities of Amsterdam, Rotterdam and The Hague prefer to directly award a concession to their municipal operators instead of submitting their public transport services to competitive tendering. Consequently, their municipal operators (GVB, RET and HTM respectively) remain in charge of public transport, albeit under stricter contracting conditions<sup>182</sup>.

**Table A1.7 Overview of tender processes in the railway sector in the Netherlands<sup>183</sup>**

Starting year of the concession	Lines tendered out	Former operator	New operator
1999/2001 2010 en 2012	“Achterhoek” <sup>184</sup>	NS Syntus	Syntus Arriva
1999 2005	Noordelijke Nevenlijnen <sup>185</sup>	NS	Noordned Arriva
2006	Zuid Limburg <sup>186</sup>	NS	Veolia
2006	Nijmegen-Roermond	NS	Veolia
2006	Valleilijn <sup>187</sup>	NS	Connexion
2007	Merwede-Lingelijn <sup>188</sup>	NS	Arriva
2012	Vechtdallijnen <sup>189</sup>	NS	Arriva
2012	Zutphen-Apeldoorn (ZAP)	NS	Arriva
2012	Arnhem-Doetinchem Arnhem-Winterswijk (Achterhoek)	Syntus	Hermes Arriva

PTA 2000 (as revised) mentions Regulation 1370/2007 several times<sup>190</sup>. More precisely, article 24 PTA 2000 refers to article 4.3 (and 4.4) of this Regulation according to which the duration of public service contracts must be limited and may not exceed 10 years for coach and bus services and 15 years for passenger transport services by rail. The concession period is always limited in time and determined by the tendering authorities in the tender

<sup>180</sup> Within the Provinces, the so-called “Provincial Executives” (*Gedeputeerde Staten*), as the executive committee of a Province, has the authority to launch a public tender.

<sup>181</sup> D. van de Velde, a.o., *Public transport tendering in the Netherlands*, 23.

<sup>182</sup> Cf D. van de Velde, a.o., *Public transport tendering in the Netherlands*, 22.

<sup>183</sup> B. Geene, ‘Change of operator in the Netherlands’, presentation Paris 16<sup>th</sup> May 2013, slide 18.

<sup>184</sup> “Achterhoek” refers to an area in the east of the Netherlands (Province Gelderland). This ‘line’ includes the regional bus lines, and the railway lines Zutphen-Winterwijk and Doetinchem-Winterswijk.

<sup>185</sup> The “Noordelijke Nevenlijnen” consist of seven railway lines for passenger transport, namely Groningen-Delfzijl; Groningen-Roodeschol; Leeuwarden-Stavoren; Zuidbroek-Veendam; Harlingen Haven (Port)-Leeuwarden; Leeuwarden-Groningen and Groningen-Nieuweschans. These lines run through the Provinces Groningen and Friesland.

<sup>186</sup> This concession concerns the railway lines Nijmegen-Roermond (“Maaslijn”) and Maastricht-Kerkrade (“Heuvellandlijn”).

<sup>187</sup> De Valleilijn runs through the Provincie Gelderland. This concession includes the lines Amersfoort-Ede and Ede-Wageningen.

<sup>188</sup> This is the railway line Dordrecht-Geldermalsen in the Province South-Holland.

<sup>189</sup> The “Vechtdallijnen” concerns the railway line Zwolle-Emmen and Almelo-Marienberg. These lines run through the Province Overijssel and (partly) through the Province Drenthe and the Region Twente.

<sup>190</sup> The PTA 2000 had to be adapted in this respect, because Regulation 1370/2007 was only enacted in 2007. This is done by the Act of 5 November 2012 amending the Act of 2000 in order to create a plus region plus that includes the city of Amsterdam, The Hague, Rotterdam and Utrecht (Stb. 2012-556).

documents to which different candidate-operators could subscribe. In the public railway sector there is a tendency to award concessions for up to 15 (or even 20) years.

In addition, article 25 PTA 2000 regarding the content of a public service contract affirms the application of article 4 of Regulation 1370/2007 on the “mandatory content” of such a public contract. This implies amongst other things that, in conformity with articles 4(5)-4(6) of Regulation 1370/2007, the competent authorities may require the selected public service operator to consider the award of the concession as a transfer of undertakings within the meaning of Directive 2001/23/EC and consequently, to grant staff previously taken on to provide operating services the corresponding rights. Besides, in case the authorities require the operator selected to comply with certain social standards, the tender documents and public service contracts must list the staff concerned and give clear details of their contractual rights and the conditions under which they are deemed to be linked to the services. In practice, these “details” remain however limited to rather general information or anonymised data, such as average pay, average age and seniority of the employees involved and the relevant positions. Moreover, where compliance with certain quality standards is required, these must also be included in the tender documents and in the public service contract. In reality, however, social aspects or criteria, such as wage level or working time, are never included in the tender documents and specifications. This is due to the simple fact that articles 36-39 PTA 2000 (already) urge the new operator to respect the rights and the obligations following from the private or the public employment relationship between the former operator and the employees acquired. Hence, in the Netherlands, the tender documents include a provision obliging the new operator to respect the employment conditions of the transferred staff, as determined in the applicable company or sector level agreement and in company rules.

## Industrial relations

In the Netherlands, employees in the railway sector have private labour law contract. Their general employment conditions are regulated by different collective bargaining agreements (hereafter cba).

First, there is a company level agreement for the (15500) employees of the NS Group<sup>191</sup>. This Group is a holding with several subsidiary companies<sup>192</sup>, including *NS Reizigers* (10000 employees)<sup>193</sup>, *NedTrain* (3000 employees)<sup>194</sup>, *NS Stations* (500 employees)<sup>195</sup> and *NS Hispeed* (600 employees)<sup>196</sup>. Secondly, with respect to the terms and the employment conditions of other employees in the railway sector there are two sector level agreements: one for public transport in general, titled “cba Public Transport”, and one, called “cba Multimodaal”, for operators in railway and urban transport.

Comparison of the general employment conditions:

- As regards wages, the company level agreement for the NS-employees seems most favourable. But, it is difficult to explain in detail the differences between the agreements as regards wages, since many factors, such as different wage scales and one’s affiliation to a certain pension fund (*infra*), influence the employee’s total income or financial situation.
- As regards pension plans, the NS agreement provides that every NS employee participates in the pension plan of the Railway Pension Fund (*Spoorwegpensioenfond*s),

<sup>191</sup> This collective agreement did enter into force for the period starting from 1 februari 2013 to 31 march 2015.

<sup>192</sup> The Dutch government is for 100% shareholder of the NS Group (cf. the Eurofound study from 2012 on employment and industrial relations in the Dutch railways sector ([www.eurofound.europa.eu/eiro/studies/tn1109030s/nl1109039q.htm](http://www.eurofound.europa.eu/eiro/studies/tn1109030s/nl1109039q.htm))).

<sup>193</sup> *NS Reizigers BV* is a subsidiary of NS that, since NS’ split up in 1995, is charged with passenger transport for the main railway network and some decentralised railway lines (*infra*).

<sup>194</sup> *NedTrain* (formerly *NS Equipment*) is a railway maintenance company. It has ten offices throughout the Netherlands and maintains and overhauls not only material from NS, but also from other railway undertakings.

<sup>195</sup> *NS Stations* operates more than 390 stations in the Netherlands. Since NS’ split up in 1995 (*infra*), this activity has been greatly expanded. *NS Stations* aims to offer services and facilities to station areas and to ensure social security. *NS Stations’* core activity is the management and the cleaning of the stations.

<sup>196</sup> Besides the passenger transport for the main Dutch railway network, the NS is - on certain routes - also responsible for the Dutch part of international connections. These are carried out by the *NS Hispeed* (formerly *NS International*).

SPF). On the basis of this Fund he then obtains pension rights. Of the total pension contribution paid yearly by the employer one third is funded by the employee and two thirds by the employer (cf. chapter 10.26 cba NS). Secondly, the cba Public Transport stipulates that the employer must register each employee as a participant in the Foundation Pension Fund Public Transport (*Stichting Pensioenfonds Openbaar Vervoer*, SPOV). The employer's and employee's share in the total pension contribution is determined annually by the cba parties (cf. article 18.2 and article 18.5a cba Public Transport). This share appears to be more than the contribution that SPF-members have to pay the latter. Finally, the cba Multimodaal determines that employees employed on or after June 1, 1999 participate in the SPF-pension plan. For these employees the retirement age is set at 62 years. For employees employed earlier, specific rules are made (cf. article 13 cba Multimodaal).

- Next, where according to the NS agreement the contractually agreed working hours do not exceed 36 hours per week, the two sector agreements stipulate a five-day working week of 40 hours. However, after the legal introduction of shorter working hours, the cba Public Transport provides for a normal timetable of 37 or 38 hours a week, and the cba Multimodaal offers the employee the option to choose between 36, 38 or 40 hours per week.
- The same is true with respect to the rule applicable within the NS that, besides the driver, there must be a conductor present on the train. If the line is, however, operated by a regional operator, such as Arriva, the presence of a conductor (*steward*), besides the driver, is not always obligatory. This depends of the tender documents and offer: some specifications at all times request the presence of a conductor (*steward*) next to the driver (100% control); others make his presence optional and provide for *ad random* ticket controls. In the latter case the line is operated by only one main employee, the driver. This reduces the labour costs, and hence gives regional operators a competitive advantage in tendering procedures.
- All agreements contain provisions with respect to training and study facilities. The NS agreement (and its annexes) remains however vague as regards the right of employees to paid training leave. On the contrary, the sector agreements explicitly provide the employee who has to follow courses with two respectively three days paid training leave per year (cf. article 51, 3, a cba Multimodaal and article 50, 3, a) cba Public Transport).
- All agreements contain provisions concerning health and safety. These provisions remain however vague and are rather limited to "declarations of intent" or "effort - instead of result - commitments".

In case the tendering authority requires the operator selected to comply with certain social standards, it is the respective sectoral cba's and the terms and conditions stipulated therein that the new operator must respect.

### **The safeguarding of the employees' rights, including the applicable employment conditions**

As mentioned above, articles 36-39 PTA 2000 urge the new operator to respect the rights and obligations arising from the employment relationship between the former operator and the employees transferred. Hence, in the Netherlands, the tender documents always include a provision obliging the new operator to respect the terms and employment conditions of the staff acquired, as determined in the applicable company or sector level agreement as well as in company rules. This excludes any competition between the various operators in terms of employment conditions.

Once the competent authority has selected an operator, the latter has to consult the former operator and the unions involved on how the actual transfer of staff will take place. Indeed, article 40 PTA 2000 prescribes that, within one month after the decision of the tendering authority, the old and new concession-holder (operator) have to consult each other and the associations of workers according to the procedure of article 3, fourth paragraph of the Collective Redundancy Notification Act. The aim of this consultation process is to promote and stimulate the proper implementation of the articles 37-38 PTA that guarantee the preservation of the rights and obligations of the transferred staff. The winning bidder has to take over the employees involved at their current employment conditions, and for one year

after the transition, the former operator remains liable for the compliance with the obligations derived from the employment agreement between him and the employees transferred.

In practice there is little discussion on the consequences of the transfer in terms of the employment conditions of the staff acquired. Indeed, in the Netherlands the employment conditions of employees in the railway sector are largely determined by the cba Public Transport and by the cba Multimodaal. These agreements are generally binding, so much is already pre-negotiated and decided collectively. One of the few “residual” things to be discussed, are the so-called “business rules”. These are rules that are not included in collective agreements, but are typically being negotiated with the works council, such as dress code, free transport arrangements.

## Rules on transfer of staff

Articles 7:662-7:666 of the Dutch Civil Code concern the rights of employees in case of a transfer of undertakings. The main rule in this event is expressed by article 7:663 of the Civil code. According to this provision, in case of a transfer, existing employees transfer on their current terms and conditions or a new collective agreement of the transferee. Terms and conditions are protected for at least one year following the transfer<sup>197</sup>.

However, the articles 7:662-7:666 of the Dutch Civil Code do not automatically apply in case of a transfer of staff resulting from the transition of a concession from one transport company to another. Indeed, such a transition is not automatically regarded as a “transfer of undertakings” in the meaning of the EU Directive 2001/23/EC. It is only considered in light of this meaning and hence, makes the relevant provisions of the EU Directive applicable, if the transport equipment is transferred as well<sup>198</sup>. However, if the transfer relates only to the concession, but not to the transport equipment, application is made of chapter II, § 4 of the PTA 2000 (articles 36 – 43.c)<sup>199</sup>. This chapter deals with the “transition, termination and transfer of a concession” for public transport and regulates the rights and obligations of the new operator regarding the employees who are transferred from the old to the new operator<sup>200</sup>. Article 36.1 PTA 2000 defines “transition” as “the complete or partial termination of a concession followed by the start of all or part of the same concession as a result of granting this concession to another operator”.

Therefore, in case of a transfer of regional passenger rail operators, a transfer of staff must take place in accordance with the PTA 2000.

More precisely, in accordance with article 37, second paragraph PTA 2000, the number of employees that must be transferred is decided on the basis of the ratio between the (due to the transition of the concession) reduced return from public transport services and the total return of the former operator, calculated over the last closed financial year prior to the year of the transfer<sup>201</sup>. Next, article 39, first paragraph, *in fine* PTA 2000 urges the former (losing) operator to determine the number of employees that are directly or indirectly related to the relevant railway lines and hence, are eligible for transfer<sup>202</sup>. This number includes outsourced employees, provided they are related to the relevant railway lines<sup>203</sup>. But, it excludes employees that are outsourced for other activities, and employees of

<sup>197</sup> For one year after the transfer, the former employer will remain jointly liable - in addition to the acquiring party - for the compliance with the obligations derived from his employment agreement with the transferred employees as far as these obligations had already come to existence before the transfer.

<sup>198</sup> Cf. ECJ 25 January 2001, *Oy Liikenne v Finland* (Case C-172/99).

<sup>199</sup> The application of these articles is, however, not without difficulties. For example, in 2002, the Arnhem Court (*LJN AF2758*) obliged the new concession-holder, Arriva, to uphold the employment conditions of the transferred employees in all respects except those not arising out of the collective agreement or (supplementary) company schemes in force at the former employer.

<sup>200</sup> R. van het Kaar, ‘Nieuwe wettelijke regeling inzake de overgang van ondernemingen’.

<sup>201</sup> In practice, this phrase could lead to discussions about when the last financial year was closed.

<sup>202</sup> The consultation process between the old and new operator, prescribed by article 40 PTA 2000, is also relevant in this regard. In practice, this process always provokes discussions with respect to the calculation of the number of transferable employees or the reliability of the list of staff selected.

<sup>203</sup> If the old operator does not want to include outsourced employees in the number of employees eligible for the transfer, he can end the agreement with the latter before the expiration (or transition) of the concession, determine the number of employees and then - after the transfer - outsource that employee again.

subcontractors whose activities are linked to the lines transferred, but who are not employed by the former operator. The new operator must then take over all operational staff directly involved in the operations of the concession (mostly drivers), and a certain percentage of regional office staff (such as planners, etc.)<sup>204</sup>. For overhead staff (managers/assistants), only those involved in the operation of the concession have to transfer to the new operator.

For employees, transfers are voluntary, but the current employer can make them redundant if there is no alternative employment for them. In practice, the majority of the staff do not mind to transfer to the new operator.

Although it is not legally the same, a transition of a concession follows similar rules as regards the selection of the staff transferred as in case of a reorganisation on economic grounds. Hence, to determine the persons who are eligible for transfer, the former operator will apply the so-called “principle of proportionality” (*afspiegelingsbeginsel*), a mandatory prescribed selection method that applies in case of economic dismissals and resumes in a way the earlier “last in, first out principle”. Nevertheless, it must be emphasised that within the NS this selection process will only take place if there are not enough (competent) employees that want to transfer voluntarily to the new operator. Hence, within the NS, the “principle of proportionality” only applies to NS-employees who refuse to transfer and for whom no alternative employment can be found within the internal organisation. Regional operators, however, do not select transferable staff on the basis of voluntariness.

To select the employees that are eligible for the transfer, the former operator will have to “map” which positions he will still need and which positions will disappear due to the transition of the concession. Here, a distinction is made between unique positions and interchangeable positions:

- If the employee holds a unique position that is directly related to the operation of the concession and hence, expires after the transition of the concession, he must transfer to the new operator and continue his position there.
- If, however, the employee holds an interchangeable position, the former operator will decide whether or not he is still needed after the transition of the concession.
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- Imagine, for example, that ten people are working in the administration, but that after the transition the old operator only needs three. Seven of them are then eligible for transfer to the new operator. To select these seven employees, the former operator will apply the “principle of proportionality”. Indeed, the staff selected “should” represent all age as well as all seniority groups in order to exclude any form of discrimination. Hence, first, the ten people are divided into age groups and then, within each age group, there are divided proportionally among different seniority groups. Once this is done, the former operator will look which employee in every age group has the least seniority, for it is this employee who will have to transfer to the new operator<sup>205</sup>.

In any case the staff eligible for the transfer may not be selected on the basis of “subjective” criteria. Van de Velde a.o. notice, however, that transfers are frequently used to organise an internal reshuffle and to pass less productive personnel to the winning operator. Hence, especially with respect to staff at the central office, it appears that transfers often result in a reassignment to another office location.<sup>206</sup>

## The Netherlands: cases *Achterhoek & Vechtdallijnen*

### Tendering and relevant general procedures for transfer of staff applying in both cases

Article 25 PTA 2000 regarding the content of a public service contract affirms the application of article 4 of Regulation 1370/2007 with regard to the “mandatory content” of such a public

<sup>204</sup> Cf. D. van de Velde, a.o., *Public transport tendering in the Netherlands*, 22.

<sup>205</sup> In practice, it is hence possible that a 25-year-old employee with one year of service can stay with the old operator and hold his position, but that an employee of 45 years with 10 years of service has to transfer to the new operator.

<sup>206</sup> Cf. D. van de Velde, a.o., *Public transport tendering in the Netherlands*, 22.

contract. This implies amongst other things that in case the authorities require the selected operator to comply with certain social standards, the tender documents and public service contracts must list the staff concerned and give clear details of their contractual rights and the conditions under which they are deemed to be linked to the services. As noticed, these “details” remain however limited to rather general information, such as average pay, age and seniority of the employees involved and the relevant positions. Moreover, where compliance with certain quality standards is required, also these must be included in the tender documents and in the public service contract. In reality, however, social criteria, such as wage level or working time, are never included in the tender offer. This is due to the fact that article 36-39 PTA 2000 prescribes that the rights and obligations arising from the employment relationship between the former operator and the transferred employees are automatically passed on to the new operator.

As emphasised above, in the Netherlands the tender documents always contain some provision that the operator selected must respect the PTA 2000 with respect to the employment conditions of the transferred staff as they are determined in the applicable company or sector level agreement as well as in the company rules. This excludes any competition between the various candidate-operators in terms of employment conditions.

Article 40 PTA 2000 prescribes that, within one month after the tendering authority has selected a new operator, the former and new operator have to consult each other and the associations of workers according to the procedure of article 3, fourth paragraph of the Collective Redundancy Notification Act. This consultation process aims at the proper implementation of articles 37 and 38 PTA 2000, that guarantee the preservation of the rights and the obligations of the transferred staff. The new operator must take over the employees involved at their current employment conditions or a new collective agreement of the transferee. Moreover, for at least one year after the transition, the former operator will remain jointly liable for the compliance with the obligations derived from the employment agreement between him and the employees transferred.

There is in fact little discussion on the consequences of the transfer in terms of employment conditions of the staff acquired. This is because in the Netherlands the employment conditions of employees in the railway sector are largely determined by the cba Public Transport and by the cba Multimodaal. These agreements are generally binding, so that many issues are already pre-negotiated and decided collectively. One of the few “residual” things to be discussed, are the so-called “business rules”, that are not included in collective agreements, but are typically being negotiated with the works council, such as dress code and free transport arrangements.

As explained above, the former operator must determine the number of employees that are (in)directly related to the railway lines tendered out and hence, that are eligible for the transfer<sup>207</sup>. This corresponds to article 39, first paragraph PTA 2000, according to which the old concession-holder must offer the competent authority - at their request and within a certain period - a written statement of the rights and obligations of the staff transferred (cf. articles 37-38 PTA 2000), including a reasoned explanation of how the labour costs are compiled and how the (number of) employees eligible for the transfer is selected. This statement allows the tendering authority to draft the tender documents, because if the authority wants to impose certain social standards on the operator selected, these documents must list the staff concerned and give information about their contractual rights and the conditions under which they are deemed to be linked to the services<sup>208</sup>.

Once the tendering authority has selected an operator and has granted the concession, the former operator is required to communicate this decision to his staff and to inform them on the concrete legal and practical consequences of this new employment situation. Once this

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<sup>207</sup> The consultation process between the old and new operator, prescribed by article 40 PTA 2000, is also relevant in this regard. In practice, this process always provokes discussions with respect to the calculation of the number of transferable employees or the reliability of the list of staff selected.

<sup>208</sup> The tender documents only contain rather general information, such as average pay, average age and seniority of the employees involved and the relevant positions (*supra*).

is done, the consultation process between the former and the new operator and the associations of workers, as prescribed by article 40 PTA 2000, will take place.

As explained earlier, article 40 PTA 2000 urges the old and the new concession-holder to consult with each other and with the trade unions (within one month after the decision of the tendering authority) to promote the smooth transfer of the staff involved.

Moreover, the different collective agreements studied also oblige the employer to consult the associations of workers or works council in case of a “reorganisation”. In case of change of operator, this obligation to consult is, however, only relevant with regard to head office staff. Head office/administrative staff, however, mainly remain employed by the former operator, who – after the transition of the concession - has to reorganise his business. This reorganisation, which usually takes place at the headquarters of the former operator, is, however, a purely internal matter, and not a concern of the new operator. Hence, it is not a subject of the consultation process between the former and new operator and the associations of workers, meant in article 40 PTA 2000. Indeed, article 40 PTA 2000 concerns general matters relating to the transfer of direct and region staff. The employment situation of overhead staff is not really discussed.

- First, in case of a reorganisation<sup>209</sup>, a change of the place of business, a transfer of the control and authority over the company, or any other structural change article 6.1. of cba Public Transport obliges the employer to seek advice from the works council and to consult the trade unions in such a way that this can still have a substantial influence on the decision that has to be made.
- Next, article 6.1. of cba Multimodaal imposes a duty on the employer that is identical to that imposed by article 6.1. of cba Public Transport. Moreover, article 2 of annex 16 to cba Multimodaal confirms the involvement of the trade unions – next to the works council - in case of a reorganisation<sup>210</sup>, a change of the place of business, a transfer of the control and authority over the company, or any other structural change<sup>211</sup>.

Article 43a, first paragraph PTA 2000 states that, unless the former and the new concession-holder agree otherwise, the former operator must transfer the rights and obligations - as defined in the concession - regarding the means of production and the associated business knowledge. According to article 43b, first paragraph PTA 2000 these rights and obligations are transferred at the moment of the transfer of the concession.

### **Description of the different operators involved**

*Nederlandse Spoorwegen NV* (NS) is the former semi-state (public) company that split up in 1995 into a number of companies. These companies separate NS' commercial activities (such as passenger transport and the exploitation of railway stations) from its infrastructure activities (development and maintenance) – which have been transferred to *ProRail* since 2000 - in order to give NS more freedom to make its own commercial decisions.

*Syntus BV* (Syntus) is a Dutch transport company which is located in Doetinchem since 2012. Syntus arose as “a result” from *Integratie Gelderland Oost* (IGO) a regional transport integration project between the *Gelderse Streekvervoer Maatschappij* (GSM) and the NS, launched in 1991. The aim of the project was to improve transport quality and financial efficiency in the transport area around the railway lines Zutphen - Winterswijk and Arnhem - Doetinchem – Winterswijk by integrating the relevant bus and railway lines. For a long time, Syntus' shares were owned jointly by the NS, *Connexion* (a Dutch bus transport company) and by the French company *Keolis* (formerly *Cariane Multimodal International*). However,

<sup>209</sup> Article 2.b) of annex 15 to cba Public Transport defines “reorganisation” as any change in the organisation with consequences for a major part of the operational staff.

<sup>210</sup> Article 2.b) of annex 16 to cba Multimodaal (also) defines “reorganisation” as any change in the organisation with consequences for a major part of the operational staff.

<sup>211</sup> This involvement of the trade unions is an exception to the rule that matters that are being negotiated by the Works Council (in application of the Act on Works Council) remain the exclusive responsibility of the latter, so that in principle these matters can no longer be subject to consultation between the employer and the trade unions (cf. article 2.a. of annex 16 to cba Multimodaal). Of course, on the ground of article 2.c. of annex 16, the trade unions can always raise issues that they consider important to be discussed in the periodic consultation between the employer and the regional director.

since 2003, Connexxion left Syntus, and in 2012, the NS offered its shares to *Keolis*, who is now Synthus' only owner.

*Arriva Personenvervoer Nederland (Arriva)* is a Dutch transport company, located in Heerenveen. It provides urban and regional bus services in different regions in the Netherlands and operates a number of regional trains. *Arriva* is a subsidiary company of the British company, *Arriva plc*, which is one of the largest transport companies providing bus, water bus and train services in various European countries, including the Netherlands. In 2010 *Arriva plc* was taken over by Deutsche Bahn AG and continued as *DB UK Holding Ltd*. *Arriva* remains, however, the "working name".

*Connexxion* is a Dutch transport company in the field of regional passenger railway/bus services<sup>212</sup>. It arose in May 1999, as a result of the merger of the former transport companies Midnet, NZH, Oostnet and the ZWN-Group. As a result of this, *Connexxion* owned 65% of the regional transport services. In recent years it has, however, lost a large part of its transport services to other operators.

### Case Achterhoek

The "case Achterhoek" concerns different regional railway lines within an area in the east of the Netherlands in the Province Gelderland. Until now, these lines were already tendered out twice. In 1999 the concession to operate the railway lines Zutphen-Winterwijk and Doetinchem-Winterswijk was first being transferred from NS to Syntus. This transition did, however, not take place as a result of a competitive tendering procedure. Instead, the Province Gelderland – being the competent authority – awarded the concession directly to Syntus. The reason for this direct award can be found in the need to merge the bus- and railway transport in the Gelderland, and the fact that Syntus offered a good company plan. Since 30 May 1999, Syntus operated the bus lines in "Achterhoek" as well as the railway lines Zutphen-Winterwijk and Doetinchem-Winterswijk. In 2001 the railway line Arnhem-Doetinchem was added.

In 2010, because the concession granted to Syntus had come to an end, so that there was a legal obligation to select a new operator. The Province Gelderland submitted the regional railway lines Arnhem-Tiel, Arnhem-Winterswijk and Zutphen-Winterswijk to competitive tendering. Arriva won this concession<sup>213</sup>. It is granted for a period of 15 years, starting from 9 December 2012 until 11 December 2027. This concession did, however, not include the line Arnhem-Doetinchem in the Region Arnhem. The exclusive rights to operate this line were only transferred in 2012 and granted to Hermes (Connexxion) by the Region Arnhem after a process of competitive tendering. This concession is granted for the period of ten years.

### Transfer from NS to the new concession-holder, Syntus

All the 47 NS-employees (20 conductors, 25 drivers and 2 'other' employees), that were allocated to the Achterhoek-lines, were transferred to Syntus. The transfer took place with the approval of the staff involved, so on a voluntary basis (as in all cases where NS transfers transport activities to a regional transport company). To obtain this approval, the employees had to put their name on a list in 1998. There were no dismissals due to the transfer.

Before the transfer the transferred employees worked under the employment conditions and terms laid down in the NS-company agreement. Moreover, in a first period after the transfer, until 2001, they continued to work under the same terms and.

In 2001, when the employees were "formally adopted" by Syntus, the sector level agreement Multimodaal was agreed and immediately applied to these employees. However, Syntus made an explicit arrangement with the trade unions that in case the individual income of the transferred employees - as defined by the cba Multimodaal - would be lower than that agreed in the NS-agreement, that Syntus would offer them some sort of supplement in terms

<sup>212</sup> Besides, Connexxion also operates the regional ambulance services.

<sup>213</sup> This concession also involves the regional bus lines in the Province Gelderland. In this respect, it is awarded for 10 years, more precisely for the period between 12 December 2010 and 1 January 2012.

of compensation during a period of three years after the transfer. In practice, this supplement was not necessary, because the terms of the cba Multimodaal were equal to or better than those applicable under the NS-agreement. Moreover, there was an explicit agreement with the unions that the transferred employees would remain their pension agreements and acquired pension rights.

#### ***Transfer from the Syntus to the new concession-holders, Arriva - Hermes (Connexion)***

All workers employed by Syntus to operate the bus and regional railway lines in Gelderland were transferred to Arriva<sup>214</sup>. 15 drivers and 2 conductors were transferred To Connexion, but no office or (in)direct overhead staff joined the transfer. Some administrative employees that had been transferred from Syntus to Arriva, but were used to live and work in "Achterhoek", finally terminated their employment agreement with Arriva (with a favourable termination agreement). The travel distance to their work at Arriva, whose administrative department is located in Heerenveen, became too long.

The employment conditions of the transferred employees remained the same before and after the transfer and are those laid down in the sector level agreement Multimodaal.

#### **Case Vechtdallijnen**

The "Case Vechtdallijnen" concerns the railway lines Zwolle-Emmen and Almelo-Marienberg. These lines run through the Province Overijssel and (partly) through the Province Drenthe and the Region Twente, which are (hence) the competent authorities for these tenders. In May 2010, after a process of tendering, the exclusive rights to operate these lines were transferred from NS to Arriva. The concession is awarded for 15 years, starting from 9 December 2012. Nevertheless, because the Almelo-Marienberg-line belongs to the concession Twente (that runs until December 2013), this line will only be operated by Arriva from 8 December 2013. The concession ends on 11 December 2027.

Of the total of 40 NS-employees that were allocated to the "Vechtdallijnen", only three have been transferred to Arriva. The transfer occurred with the approval of the staff involved, so on a voluntary basis (as in all cases where NS transfers its transport activities to a regional operator). Most of the other, non-transferred NS-employees were offered a new post in NS. For a change of post (work place), the employer needs the approval from the works council, but not from each individual employee separately. Finally, a 'residual' employee retired. There were no dismissals due to the transfer.

Before the transfer, the three transferred employees worked under the terms and employment conditions laid down in the company agreement of the NS. After the transfer, following the 12 months protection period, the cba Multimodaal was applied to these three employees. Contrary to the case Achterhoek, there was, however, no explicit arrangement with the trade unions that in case the individual income of the three transferred employees as defined by the cba Multimodaal would be lower than that agreed in the NS-agreement, that Arriva would temporarily offer them some sort of supplement in terms of compensation.

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<sup>214</sup> This number probably exceeds 47 (which is the number of employees transferred from NS to Syntus in 1999), because Syntus also employs people to operate the bus lines.

# Poland

## Background

Tendering for regional railway lines in Poland began in isolated cases in 2007, with few existing examples of completed tenders. In the absence of sectoral collective agreements, the use of social criteria in tendering and the lack of application of possibility to organise staff transfer, the impact of tendering on employees in the sector has been significant, with redundancies among state owned operators resulting from the loss of contracts.

## Use of tendering

In Poland the public transport market should in principle be fully subject to tendering by 2019, however the government wants to postpone the full opening of the market beyond 2019. Passenger railway transport is dominated by two public companies – the state owned Polskie Koleje Państwowe (PKP) and Przewozy Regionalne owned by local governments. The rail network is administered by state owned Polskie Linie Kolejowe.

The passenger transport market consists of international transport, domestic long-distance transport and regional public transport. International transport falls under the responsibility of the Ministry of Transport which concludes annual contracts for the provision of public services in international passenger rail transport. The Ministry of Transport is also responsible for domestic long-distance transport. Here, the Ministry has signed a long-term contract for the provision of public services with PKP Intercity (10 years). In case of regional public transport, Przewozy Regionalne is the biggest provider of urban and inter-urban transport services. It is owned by the regional governments (16 Voivodeships), Contracts for service are concluded between the voivodeships (the competent authorities in this case) and PR (the competent authority). This is done on the basis of direct award or competitive tender. Municipal transport companies such as Koleje Mazowieckie, Koleje Śląskie and Koleje Wielkopolskie usually provide services at regional level on the basis of direct awards. Currently there is one independent operator, Arriva RP (owned by Deutsche Bahn). Arriva provides services in the Kujawsko-Pomorskie and Pomorskie regions which were let as competitive tenders. In 2013 Arriva tried to extend their services for some lines in Podlaskie voivodship . The tender was won by Arriva but was subsequently cancelled.

As mentioned above, both competitive tendering and direct award is used by competent authorities to award passenger rail transport and urban public transport. In most cases however, direct award is used. The only completed cases of tendering have taken place in the Kujawsko-Pomorskie region. There were two tenders – one in 2007 for the operation of diesel traction trains on rural lines and a second one for operating trains on the main electrical lines in the region. This tender started in 2012 and was concluded in July 2013. Further competitive awards could be initiated for 2013. In 2013 long time expected tender in Pomorskie was published. This tender has been published late (5 months before start-up) and consisted multiple criteria that excluded real competition on its biggest part.

Tender procedures are regulated by the Public Procurement Act. There are no specific provisions in Polish law to require the use of social criteria in tendering. However, on the basis of Regulation 1370/2007, competent authorities may include social aspects as criteria to select the most advantageous offer. So far, in tendering procedures three main criteria have been used – possession of a license issued by the Ministry of Transport (obligatory), price and punctuality.

There are, however, some several social criteria set in legislation, which all employers have to fulfill. These criteria are related to a minimum wage, wage components associated with night work, shift work, work on Sundays or public holidays, working hours, training, health and safety at work and pension rights. These rules are set by the Labour Code. The Railway Transport Act contains regulations and instructions defining standards for training in the sector. Minimum rules on pensions from the Social Insurance Fund also exist.

## Industrial relations

There are around 100,000 workers in the railway sector in Poland. Most of them are employees on private law contracts, working under provisions of Labour Code. Since 1990 Polish national railways had undergone significant changes in terms of reduction of staff and reorganisation. The reduction of staff was accomplished mainly through retirement and voluntary exit facilitated by redundancy packages. Comparing the level of employment in 1993 and 2009 shows that the number of employees fell by 58% (this can primarily be attributed to staff reductions in the cargo sector). There are several trade unions in the sector, which have signed collective agreements with employers at company level. The most important are:

- The National Railway Workers' Section (Sekcja Krajowa Kolejarzy) of the Solidarity ("Solidarność");
- The Federation of PKP Employees' Trade Unions (Federacja Związków Zawodowych Pracowników PKP);
- The Trade Union of Locomotive Engine Drivers in Poland (Związek Zawodowy Maszynistów Kolejowych w Polsce, ZZMK);
- PKP Train Dispatchers' Labour Union (Związek Zawodowy Dyżurnych Ruchu PKP);
- Federation of Control Engineering and Telecommunications Workers' Labour Unions (Federacja Związków Zawodowych Pracowników Automatyki i Telekomunikacji);
- Locomotive Drivers' Trade Unions Federation (Federacja Związków Zawodowych Maszynistów Kolejowych);
- Autonomous Trade Unions of the Railway Transport (Autonomiczne Związki Zawodowe Transportu Kolejowego);
- Trade Union of Travel Inspector Teams in the Republic of Poland (Związek Zawodowy Drużyn Konduktorskich w Rzeczypospolitej Polskiej);
- Trade Union of PKP Administrative Staff (Związek Zawodowy Administracji PKP);
- Traffic Controllers Labour Union (Związek Zawodowy Dyżurnych Ruchu);
- National Railway Workers' Section (Sekcja Krajowa Kolejarzy) of the Solidarity'80 ("Solidarność'80");
- Trade Union of Technical Maintenance Workers (Związek Zawodowy Pracowników Warsztatowych);
- All-Poland Multi-Entity Trade Union of the Railway Security Service (Ogólnopolski Międzyzakładowy Związek Zawodowy Służby Ochrony Kolei);
- Multi-Entity Trade Union of the Rolling Stock Auditors (Międzyzakładowy Związek Zawodowy Rewidentów Taboru);
- Trade Union of PKP Dispatchers (Związek Zawodowy Dyspozytorów PKP).

Until 2011 collective agreements in the railway sector had a two-tier structure. There were company-level agreements and a sector, multi-employer agreement. The sectoral collective agreement was not renewed in 2011, because the negotiating parties were not able to find agreement on the amendment of provisions related to reduced fares for railway workers and their families. As a result, from 2012 only single-employer agreements remained in place. All trade unions listed above have their own, company-level collective agreement. It is estimated, that roughly 90% of the railway workers are covered by the collective agreements, which in the context of Polish industrial relations is exceptionally high level. One employer can sign the collective agreement with one or more trade union established within company.

In terms of protection against dismissals in case of a change of operator there are no permanent solutions so far. For example, in the case of the change of operator in Śląskie Voivodeship, the employees of former operator (Przewozy Regionalne) were partly covered

by the programme “Adapting to change”, which however gave no guarantee of having permanent job after its completion. In the Kujawsko-Pomorskie region, employees of former operator have been simply dismissed, and the new operator recruited employees on the open labour market.

### **Rules on transfer of staff**

Transfer of staff is regulated in Art. 23 of the Labour Code. Under the law, if the takeover of whole business or part of it takes place, the new employer has to maintain all term and condition of employment agreed by the former employer. If such a takeover takes place, employees shall be informed at least 30 days in advance about this situation. The new employer must also inform transferred employees about possible future changes in employment conditions. If the transferred employees do not agree with the new provisions, they can leave their job with 7 day notice. Only when this is justified by the financial situation of an new employer who does not have a collective agreement with the workers or employs fewer than 20 employees, an agreement may quote less favourable employment conditions than those resulting from contracts of employment with the previous employer.

These principles are universal, so are used in all situations in which there has been a transfer of a business or its part, regardless of the way in which the acquisition takes place (tendering process, merger, acquisition etc.). These rules, however do not include subcontractors. In the event of transfers of passenger railway services, these rules can be applied in a situation where the incumbent and the new operator make an agreement to acquire the operations. Where tendering procedures in Poland are concerned, this solution has never been used in the railway sector.

## **Case study – Kujawsko-Pomorskie region**

### **Background of the case**

The tender for the 3 railway lines operated in the Kujawsko-Pomorskie Voivodeship was announced in 2012. The main factor that led the competent authority to decide to organised a competitive tender was the desire to reduce the costs of transport services while improving the quality of services.

The tender covered public transport services on railway lines within the Kujawsko-Pomorskie region over the period of 2013-2015. It consisted of 3 lots: Lot A: Toruń - Kutno (109 km), Torun - Iława (95 km), Lot B: Bydgoszcz - Tczew (128 km), Bydgoszcz - Wyrzysk Osiek (48 km) and Lot C: Gniezno - Torun (91 km), Inowrocław - Bydgoszcz (45 km). Until 2012, these lines were operated by Przewozy Regionalne S. A..

### **Tendering procedure and details of tender documents**

In invitation to tender, open to all bidders that are able to meet the formal requirements, was issued in 2012. Offers were received from only two bidders – Przewozy Regionalne S. A. and Arriva RP. The choice of the best offer was determined by two criteria - the lowest price (weight of this criterion was 90%) and transport punctuality. The punctuality criterion was evaluated on the basis of a report published by the Office of Rail Transportation.

In terms of social criteria, employers only had to show that they were compliant with statutory requirements. The competent authority (Marshal Office of Kujawsko-Pomorskie Region) neither provided any requirements concerning transfer of employees, nor put any extra requirements concerning employee benefits.

### **Selection of operator**

Choosing the best offer in accordance with the Polish law is two-step procedure. In the first stage the extent to which companies met the formal requirements is evaluated. This step is mandatory for all entities submitting an offer. Bidders, who have passed this formal assessment are evaluated in terms of qualitative criteria (see above).

The successful bidder to operate the service for the period starting from 15 December 2013 until 12 December 2015 was announced in September 2012. Offers were made on October

30 by two companies – Przewozy Regionalne and Arriva RP. The assessment of the offers was concluded in January 2013. Lots A and B were awarded to Arriva. Lot C was awarded to Przewozy Regionalne. Within each of the packages bidders offered the following prices: package A: Arriva 10,38 zł for each kilometre, Przewozy Regionalne 13,29 zł, package B: Arriva 11,82 zł, Przewozy Regionalne 12,49 zł, in package C Arriva offered the price of 16,18 zł for each kilometre., while Przewozy Regionalne 13,49 zł (Arriva). Transport punctuality of the Arriva has been assessed as higher than that ensured by Przewozy Regionalne. On January 25, 2013, after the protest made by Przewozy Regionalne, whole tender procedure was cancelled by the Marshall Office. The official reason given was that the tenders submitted exceed the financial capacity of the region. On February 4, 2013, Arriva RP submitted a request to the National Appeal Chamber to override the cancellation of the tender by the Marshall Office. According to Arriva, the prices offered by the competitors were in line with the budget set by the local government for this purpose, and in fact, accepting offers would mean substantial savings in the budget of the province. On February 18, 2013, the National Appeal Chamber decided, that the cancellation of the tender had been unlawful. However, the National Appeal Chamber could not identify and select the winner of the proceedings, so the competent authority has been ordered to continue with the tendering process, evaluate the offers and select the most advantageous bid. On March 26 2013, the Marshal Office concluded the proceedings, and announced Arriva as the winning bidder for Lots A and B. This decision caused further protests by Przewozy Regionalne, who submitted a request to the National Appeal Chamber for the cancellation of the tender. This request has been dismissed by the National Appeal Chamber. Finally, on 1 July 2013 the Marshal Office of Kujawsko-Pomorskie Voivodeship signed a contract with Arriva to operate railway transport services in packages A and B. Package C will be transferred in the so-called freehand order (without tendering procedure) to the Przewozy Regionalne. However, this has not been officially done so far. In addition, the Marshal office plans to order free-hand connections between Torun and Bydgoszcz at Przewozy Regionalne.

### Transfer of business

Arriva Poland Sp. z o.o. (limited) is part of the Arriva group, owned by Deutsche Bahn. Arriva is a pan-European operator in the market of transport services, employing around 47,000 employees and operating in 12 European countries (Czech Republic, Denmark, Hungary, Italy, Netherlands, Poland, Portugal, Slovakia, Spain, Sweden, Malta and the United Kingdom). Arriva RP is the first private passenger rail operator in Poland providing services on a large scale. The company has started providing public transport services in 2007, when it won the tender for the operating of rural passenger lines (lines with diesel traction) in the Kujawsko-Pomorskie region. This line represents nearly 40% of passenger services in the region. This tender was the first such situation in Poland. On December 10, 2010 the company has extended the contract with the regional government for another 10 years. This service covers about 100 stations and carries more than 2 million passengers a year.

As a result of winning the renewed tender which added the supply on a number of electrified lines in the region, Arriva will be operating on new passenger lines starting from December 15, 2013. The operator is going to use both its own rolling stock and rolling stock lent by the Marshall Office, this concerns mainly electric rolling stock units. Arriva does not take over the rolling stock of Przewozy Regionalne that will transfer redundant rolling stock to the other regional branches of the company. The railway infrastructure is owned by the Polskie Linie Kolejowe (Polish Railways).

After winning the tender Arriva has made several attempts to establish cooperation with Przewozy Regionalne, aimed at ensuring the smooth transition of the lines, as well as the transfer of key staff, needed to provide an extended range of services. However, this offer has not been accepted by the Przewozy Regionalne. Instead, Przewozy Regionalne decided to carry out redundancies. With over 700 staff, redundancies will likely involve around 400 employees. Nearly 250 employees have a chance to keep jobs with Przewozy Regionalne related to carrying out other operations in the Kujawsko-Pomorskie region. It is estimated that out of the redundant employees more than 200 people will have a chance to find employment in other branches of the company, outside the Voivodeship.

Arriva plans to hire 80 employees needed to handle the additional lines. This recruitment process has already started. It is assumed, that many of these workers will be recruited among former employees of Przewozy Regionalne, but at the moment this cannot be guaranteed. The successful recruitment of the former employees of Przewozy Regionalne by Arriva can be hindered by the different remuneration system used in Arriva than that used with the latter company. The companies derived from the former Polish State Railways (Polskie Koleje Państwowe) have a remuneration system primarily associated with seniority. In Arriva the remuneration system is based on working time, working conditions and efficiency. The result is that for the former employees of the Przewozy Regionalne, especially those with long years of service, the terms offered by Arriva may be less favourable. On the other hand, the remuneration system in Arriva may be more advantageous for the employers with professional experience, but with the short time of service. Arriva considers that pressure from trade unions and Przewozy Regionalne was one of the reasons why staff elected not to move to Arriva.

It should also be noted that the situation of both redundant and newly recruited employees depends primarily on the availability of specific skills and qualifications in the labour market. This is one of the main drivers of the situation on labour market of employees in Poland, affecting wages and the unemployment level. For example, in spite of the complex and lengthy process of qualifying the drivers and the possibility of early retirement (so called bridge pensions), representatives of this profession dismissed by Przewozy Regionalne will not have much trouble finding a new job (including finding job in Arriva) with working conditions at the same level or even better than with the previous employer. This is due to the current shortage of drivers. On the other hand, representatives of professions such as conductors, train managers and dispatchers it is relatively easy for employers to train or hire new employees, so potentially this group may suffer the most negative effects of a change of the railway operator.

When considering the negative effect of the tender on employees of the Przewozy Regionalne one must also pay attention to the significant overstaffing in the company. Although the company has already passed through a restructuring process involving the reduction of the staff, it is still considered to employ more staff than are needed to deliver the service. This is illustrated by the number of employees per every million kilometers driven by trains. In case of Arriva this indicator is 65 people, while in the case of Przewozy Regionalne it is 184 employees. It should however be noted, that in the case of Przewozy Regionalne the number of employees is increased by the staff of regional head offices located in 16 provinces and refit and repair plants held by the company in most Voivodeships.

### **Impact analysis – transfer of staff**

In the case of tenders for passenger rail services issued by Marshal Offices in Poland social criteria are not taken into account. Statutory social standards are a legal obligation for each bidder, and do not have any real effect on the outcome of tenders. From the point of view of tendering authorities, the only relevant criteria for selecting the most advantageous offer is the price and in some cases punctuality.

This situation has a negative impact on the situation of employees of operators, who do not benefit from any employment protection in the case of a change of operator. The lack of specific legislation (or requirements by the competent authority) on the transfer of staff means that transfer of staff would in practice rely on cooperation between operators to negotiate this, which was not in evidence in the case described. As there is no longer a sectoral collective agreement in place setting minimum standards, it is also likely that those seeking new employment with the successful operator will face a negative impact on their terms and conditions (with the possible exception of drivers). The possibility for agreements concerning transfer of staff is granted by the Polish Labour Code, but so far these provisions were never applied.

The observed effect of recent tenders, is a progressive restructuring of the various branches of Przewozy Regionalne, which has been forced to reduce its operational cost at least partly as a result of tendering processes. The best example illustrating this mechanism is tender

issued in 2012 by Podlaskie Voivodeship concerning the provision of public transport services for the years 2013-14. The tender procedure has been repeated, and the Przewozy Regionalne offered price 17% lower than in the first tender and 27% lower than the rate they received from the Marshall Office in 2011. This provides the rationale for the claim, that the tender has contributed to the restructuring of the company, in particular in regards of the effectiveness and human resource management. Such restructuring processes almost universally result in the reduction of staffing levels.

It should also be noted, that currently in Poland the greatest impact on passenger rail transport market is the trend by regional governments to create their own regional railway companies. Such companies are established by the Mazowieckie, Śląskie and Wielkopolskie Voivodeships. This companies are direct competitors to Przewozy Regionalne. Marshals Offices delegate the railway services in the region to their own companies in place of the Przewozy Regionalne, which is forced to seek other areas of operation. In order to keep the company from bankruptcy, Ministry of Transport decided to grant contracts to Przewozy Regionalne to deliver national railway transport. The unintended effect of this situation is creation of conditions for the emergence of real competition between the entities of Polskie Koleje Państwowe and Przewozy Regionalne.

## Conclusion

Although there is currently still limited experience of tendering, the featured case should be considered as representative of the implementation and impact of tendering in the Polish railway public transport market. At present in Poland public services are carried primarily by the entities of PKP, railway companies owned by provincial governments (Przewozy Regionalne S. A. and the companies belonging to the regional governments) and operators owned by the municipalities. Public transport services provided by these entities are implemented either on a commercial basis (the route network and schedules is determined in this case by the operator) or on the basis of PSO contracts. Only since 2012 have regional governments started to use the public procurement procedures on a larger scale when choosing an operator of railway lines. So far, with the exception of the Kujawsko-Pomorskie region, such tenders were resolved in favour of local government owned companies. This resulted largely from the specifications of the tenders, which favoured the incumbent (state owned companies), for example by including requirements that an operator has to have at least two years of experience of operating passenger rail transport services in the region.

In the case of tendering procedures a fundamental problem is caused by the criteria adopted for selection of the most advantageous offer. Tendering procedure consists of two stages - a formal evaluation, aimed at the identification of offers that meet legal requirements and tendering authority demands, and qualitative assessment, aimed at the comparison of the price offered by the bidders. At the moment, all tenders use the lowest price as the primary criterion for selecting the most advantageous offer. The criteria concerning social protection of staff are limited essentially to the obligation to comply with the Labour Code.

Employees of the company, which ceased to operate transport services as a result of the tender, are either transferred to another branch of the previous operator, or dismissed through collective redundancies. The successful bidder may employ redundant workers of the previous operator, but it is not obliged to do so, neither by law or nor provisions in the tender documents. This often means that drivers can easily find reemployment while other workers struggle to be redeployed. In the absence of a sectoral collective agreement, re-employment would occur on revised terms and conditions, which are often less favourable (unless the group of employees affected has a strong market position). Private operators consider that significant restructuring is still required in the incumbent, making compulsory transfer for all staff more difficult to implement in practice, whereas partial transfer would be a possibility.

## Sweden

### Background

Sweden was the first EU country to implement the vertical separation of aspects of the delivery of railway services. A two stage competitive tendering process is mandatory for traffic authorities and transfer of business is the norm in cases of change of railway operator, however, it is not a requirement. There is a market characterised by high efficiency and low profit margins and significant competition with frequent changes of operator.

### Use of tendering

Sweden was the first country to introduce the vertical separation of aspects of the delivery of railway services when, in 1988, the National Rail Administration split from the national rail services operator SJ. Sweden was a precursor of privatisation in passenger rail and urban transport services. This was mainly driven by national policy as it predated any European legislation. Liberalisation was pursued as a way of improving the quality of service and improving efficiency.

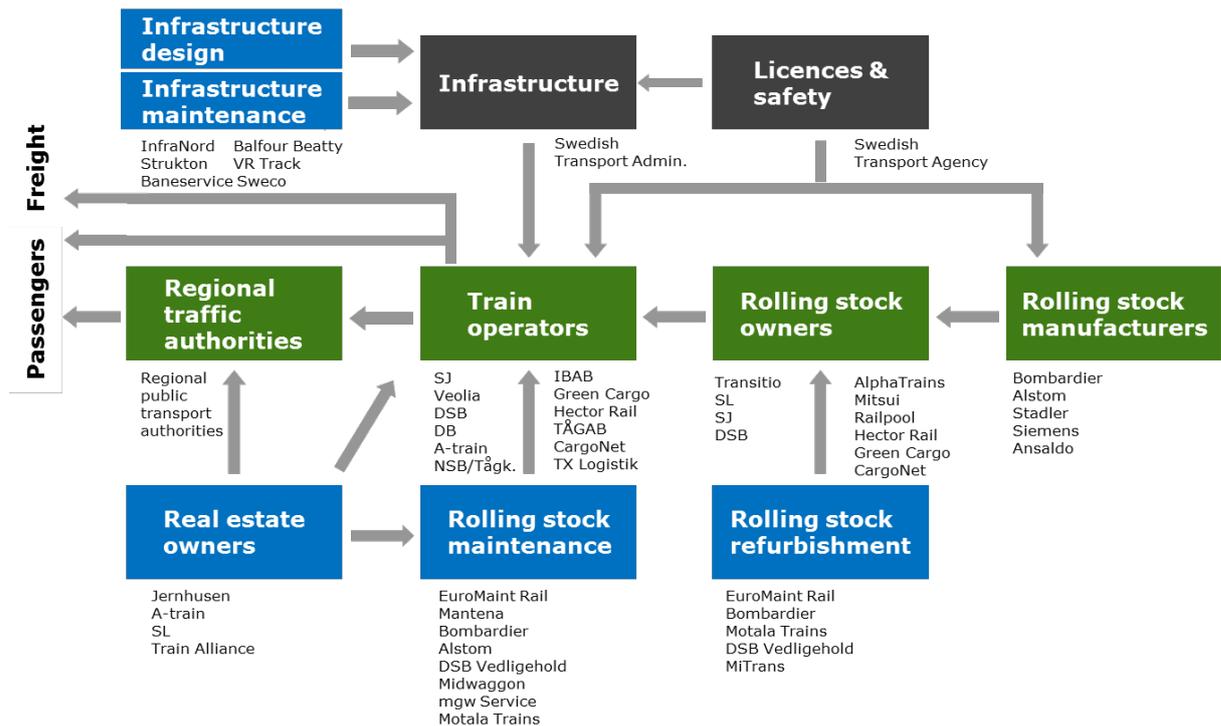
The network was split into primary (long distance) and secondary (county/regional) lines. Until 1994, SJ was the sole operator for long distance lines (if self-sustainable) and for local lines the local competent authority had the choice whether or not to tender out these services. The market has been completely deregulated since December 2011 for long distance lines and since January 2012 for regional lines. Today, public service contracts for local passenger rail transport have to be let via a competitive tender. Since 2010, SJ no longer has an exclusive right to operate self-sustaining local and long-distance lines when the heavy rail traffic became completely deregulated.

Similarly, around 98% of the bus market is subject to competitive tenders, with the remaining 2% operated by municipal companies.

The Swedish Transport Administration is responsible for allocating tracks and collective track charges while the Swedish Transport Agency awards operating and safety licences. Local and regional traffic authorities are responsible for the operation of the railway and public transportation system and therefore also for the tendering process while the railway system while the Swedish Transport Administration is responsible for the construction, operation and maintenance of all state owned roads and railways ((see Figure A1.5). Competitive use of the railway tracks is also possible where operators can rent a slot on the rails from the Swedish Transport Administration and use their own train.

The following image pictures Swedish railway organisation today in a simplified way:

Figure A1.2 The Swedish Railway market



Source: Presentation Almega – Employers' Association

### Rules on public tendering

Although competent authorities are required to issue competitive tenders, direct award is still possible under certain conditions stipulated in the law on public procurement within the areas of water, energy, transport, and post office services (LOU 2007:1092). A contract can be directly awarded if there are special extreme reasons (law LOU 2010:572)<sup>215</sup>. Case specific reasons include, for example, situations where no appropriate bid is submitted during a competitive tender or if it is absolutely necessary to assign a contract very quickly as a result of unforeseen circumstances which make it impossible to go through the complete competitive tendering process. For example if a contractor needs to terminate a contract unexpectedly and the competent authority needs to find a new operator at short notice.

The typical length of public service obligation (PSO) contracts is 8 years with possible extensions of a couple of years and a 12 months' notice period for the competent authority and 24 months' notice for the contractor after the 8 years period.

There is no reference to Regulation 1370/2007 in the law on public procurement. However, the law on employment security described later in the text makes extensive reference to Regulation 1370/2007.

In 2012, a new Transport Law came into force defining new competent authorities and placing rail and bus services under the same regulatory framework for tendering. The regional competent authority will first launch a request to operators providing passenger transport services and asking them which line they want to provide on a commercial basis. Only after this procedure, lines that are considered of socio-economic interest will be tendered out under a competitive tender procedure and provided under a contract of public services with an exclusive right. Current public service contracts continue to run under the

<sup>215</sup> Exceptions are listed in LOU 2007:1092 chapter 4 Article 2

old framework and commercial services can only be proposed in addition to those services offered under a public service contract.

### Social criteria in public tendering

The current national legislation does not mention the option for competent tendering authorities to include social criteria. However, the direct applicability of Regulation 1370/2007 means that such criteria can be stipulated where a contracting authority wishes to do so. Generally speaking, tendering authorities only stipulate that existing social norms set out in legislation and collective agreements in force need to be respected.

There is one public transport authority which has always made use of the provisions of the Regulation (Articles 4(5) ad 4(6) since the inception of tendering in the 1990s - the Stockholm local traffic authority. This includes the requirement to treat a change of operator as a transfer of business.

#### **Stockholm local traffic authority (SL) initial experience with competitive tendering and its impact on the staff protection**

In the '90, Stockholm prepared to open the operation of the capital city's metro system (the only one in Sweden) to an open tender. Before the issuing of the tender, SL was very worried whether a new operator would have the competence and resources to run the traffic and due to the shortage of train drivers they were afraid that the new operator might not have enough staff which would not enable an effective service and that people working in the sector (such as train drivers) might change sector. So in order to keep staff in the sector and ensure the best conditions for the new operator to have enough experienced staff, they included a clause in the tender stating that the change of operator should be treated as a "transfer of business". After this tender, most railway tenders in the railway sector issued by SL request eventual changes of operators to be treated as a transfer of business. Although not the main priority, the protection of staff was one of consequence of this decision.

### Impact of the liberalisation of the railway sector

Although there is said to be still a low margin of 2-3% for potential efficiency savings in the sector, industry representatives consider that there has been a large improvement in the terms of service and efficiency in the sector after the introduction of competitive tendering. Rail use has increased by 47% between 1998 and 2008, from 15m passengers to more than 22m passengers<sup>216</sup>. Passenger kilometres increased from 6.6 billion in 1990 to 11.1 billion in 2008. Sweden is a mature market with quite transparent market rules. There are around 12 large railway operators, 10 large bus operators and a large number of small operators. Due to the maturity of the market concerns have sometimes been expressed about low margins. However, there has been no bankruptcies (with the exception of the Danish operator who did not go out of business but exited from two major contracts before the end of the contract due to higher than predicted operating costs). Most of the larger operators are foreign owned.

The competitive tendering process has reduced costs for the responsible public transport authorities (reportedly by around 25%) and allowed a reduction in the share of state compensation of the public transport operation which has diminished from 60% to 50% where the remaining share is covered by the ticket price<sup>217</sup>. However, the process of tendering itself is very expensive both for the public authorities and for the operators. As can be seen from the case studies, the tendering process runs over 3 years including the preparation time and negotiations and incur cost of €1.2 million to €1.7 Million both for public traffic authority as well as for the bidding operators.<sup>218</sup>

There has also been a development in the tender evaluations during the last 25 years. While initially tendering parties were mainly interested in the gross contract (cost / km or

<sup>216</sup> Interview 1

<sup>217</sup> Interview 1

<sup>218</sup> Gunnar Schön, Veolia

/passenger) during the last 10 years there is more of a focus on net contracts and on the passengers and on the quality of the service (as can be seen in the decision to award MTR the contract of the Stockholm metro service in 2009).<sup>219</sup> The quality standards however do not include any social criteria for the staff which is usually not part of the tender evaluation.<sup>220</sup> As can be seen from the Veolia – MTR transfer and related tender process however, the start-up plan is important in the evaluation and where a transfer of business is requested (as from SL) the transfer of staff and related issues can be a relevant evaluation point.

## Industrial relations

A national sectoral collective agreement is in place for the rail sector providing minimum employment standards for almost all workers in the sector. However, since the agreement refer to such a broad group, the minimum working conditions in this collective agreement are not be suitable to everyone in the sector. The agreement is only valid for those companies that joined the Employers' Association Almega with is about 98% of all passenger rail operators and since it has been signed by the majority it applies as a norm to everyone in the sector<sup>221</sup>. Additionally, there is a sectoral model contract applicable to employer – employee relationships in the sector<sup>222</sup>.

Since this agreement provides only for minimum employment standards, each operator has its own company level local agreement agreed between the trade representatives and the operator for a particular line or set of lines (for example the operation of the Stockholm subway system). The local agreements can only enhance the standards set in the national sectoral agreement.

For example the minimum salary in the national sectoral agreement for staff employed in the transfer sector is €1,890 per month while the minimum salary for the collective agreement between SEKO and SJ Götalandståg €2,507 per month during training and goes up to €3,790 for a driver who has been working over 3 years after completing their vocational training. Other examples of differences are set out in Table A1.6 below.

Elements usually covered in the both the national sector and local (operation specific) agreements are the following:

- Pay
- Working hours
- Overtime
- Additional hours
- Travelling time allowance, etc.
- Compensation for unsocial and on-call hours
- Holidays
- Sick pay, etc.
- Parental leave
- Leave
- Notice of termination

The sectoral agreement is very broad and does not mention specific roles. The working conditions in the local agreement are usually not role specific either with expectation of the salary conditions. As also highlighted in Table A1.7 below, the sectoral agreement only

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<sup>219</sup> Quality can be weighted up to 30-40% in the tender evaluation, however different tendering authorities often use different evaluation and monitoring systems.

<sup>220</sup> The IFQM evaluation method is commonly used in evaluations

<sup>221</sup> This is called a "Hängavtal" which is a local collective agreement between an employer who is not a member of an employers' organization and a trade union. This means that the employer does not need to be connected to any employer or professional organization to use the terms contained in a collective agreement.

<sup>222</sup> It should be noted that the current models are now under renegotiation with the social partners. Current model contracts for the bus and train sector are available under the following link:

<http://www.svenskkollektivtrafik.se/fordubbling/Avtalsprocessen/Avtalsprocessen-bilagor/>

secures a minimum wage of around €1890 (for all categories of employees), whereas company agreements for onboard staff provide wages between € 2400-2860 and between € 2980- 3890 for drivers.

**Table A1.8 Differences between sectoral and local agreement**

	<b>Sectoral agreement (Spårtrafik) Valid 01.04.2012 - 31.03.13 (new agreement under negotiation)</b>	<b>Local agreement (SJ Götalandståg) Valid 01.04.2013 – 31.03.2014</b>
Minimum salary	€1,890 (at present)	€2,507 /month during education
Maximum working hours/day	10 hours	10 hours <u>with minimum 3 hours of paid rest</u>
Maximum working hour/week	40 hours / normal working week (Monday – Friday) 38 hours / week (Monday – Sunday)	40 hours / normal working week (Monday – Friday) 38 hours / week (Monday – Sunday)
Holiday leave	25 days (if not otherwise stated) 30 days for employees that have agreed that a certain number of overtime is not compensated	25 days (if not otherwise stated) 30 days for employees that have agreed that a certain number of overtime is not compensated

### Rules on transfer of staff

The rules on the transfer of staff are related to the rules on transfer of business. Therefore in order to understand the obligations on operators and the impact on staff, one first needs to determine whether the rules on transfer of business apply.

Criteria used to establish whether Article 6b of the Employment Protection Act (LAS 6b) should be applied are the following:

- The majority of employees are transferred (over 50%)
- The operations and purpose remain the same
- The material assets have been transferred
- The value of transferred non-material assets
- If the same customer group is being served
- The degree of similarity of the operation before and after the transfer
- Eventual period that the operation was shut down

These criteria are non-cumulative and the importance of each criterion depends on the character of the business. For example, if it is a service business, criterion number 1 will be the most significant one used in the evaluation. If it is determined that the transition between two operators should be treated as transfer of business, or if the operators themselves decide that a certain operation should be regarded as such, a specific section (Article 6b) of the law on employment security (1982:80, hereafter referred to as LAS) comes into force.

According to LAS 6b, with the transfer of an undertaking, business or part of a business from one employer to another, the rights and obligations arising from the employment contract and the employment relationship existing on the date of transfer are also transferred to the new employer. The former employer remains liable to the employee for the financial obligations relating to the period before the transition. This does not apply to transitions in the context of bankruptcy and to old-age, invalidity or survivors' benefits. Transfer to the new employer on the part of the employee is voluntary, but the former employer would have legitimate reasons for terminating their contract if there is no economic requirement for their role. Refusal to transfer is therefore at the employee's own risk (SFS 1994:1685).

Another relevant piece of legislation is the law concerning the participation in the workplace/law on information and consultation (1976:580)<sup>223</sup>. This law governs the relationship between employers and employees. The Act regulates areas such as right of information and the participation in collective agreements. According to article 28 of this law, when a company, business or part of a business is transferred from one employer bound by a collective agreement to a new employer, through a transfer covered by § 6 b of the law on employment security(1982:80), the applicable parts of the agreement are valid for the new employer. This is however does not apply if the new employer is already bound by another collective agreement applicable to the employees who are joining the company. When employment contracts and employment relationships have been transferred to a new employer under LAS Article 6b (1982:80), the new employer is required to maintain the conditions in force under the former employers' collective agreement for the period of one year (or until the end of the collective agreement if the collective agreement expires within 1 year) . This does not apply if the collective agreement has expired or after a new collective agreement is in force for the transferred employees. A new collective agreement has to be negotiated at the latest after one year following the transfer.

Both the law on employment security and on participation in the workforce are based on the Acquired Rights Directive 77/187/EC and adapted to the new Transfers of Undertakings Directive 2001/23/EC.

Although Article 6b on employment security and Article 28 on the law concerning the participation in the workplace do not automatically apply to the change of operators in the rail sector and tendering authorities (with some notable exceptions) tend not to stipulate a requirement for staff transfer, operators usually choose to treat the change of operators in the railway sector as a transfer of business. The norm is therefore that there is a common desire (of the parting and arriving party) to implement the transition according to article LAS 6b and article 28 concerning the participation in the workplace. The transfer of staff (according to LAS 6b) is usually agreed upon since the outgoing operator will not have enough work to employ the existing staff and the incoming operator needs the outgoing operators staff in order to start the operation on time. Therefore, in each case of change of operators there is a negotiated process of transfer of staff taking place between the unions and the employer. The transfer of staff will depend on the negotiations and the final agreement reached under which conditions workers will be transferred.

The process of staff transfer in the case of a change of operator usually follows the steps listed below:

- Meeting of both parties to agree on the arrangements of the transition
- Investigation whether there is consensus on the application of LAS 6b
- Identify the employees affected by the transition
- Settle how the employees are to be transferred
- Settle holidays used, often with invoice between companies
- Settle saved vacation and other outstanding time
- Settle the transfer of training records, health checks and other necessary information
- Resolve the question of how the employees should be consulted.

Since the transfer only involves the operation and maintenance of the trains (without any change in trains or tracks), the transfer of business mainly involves the transfer of relevant employees such as train drivers and on-board service personnel. Other operations such as administration and central services remain unchanged.

Rights and obligations applicable at the date of transition to contractor are transferred in accordance with employment contracts and relationships including employees' periods of

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<sup>223</sup> Lag (1976:580) om medbestämmande i arbetslivet

employment. The only exceptions are benefits in the contract relating to old age, invalidity and survivors' pensions..

In a transfer of business, the new operator is not obliged to take over contracts with subcontractors. The operator only needs approval from the tendering authority for essential sub-contractors who would be delivering significant parts of a contract.

Despite the possibility of a conflict with European legislation and precedents in the Swedish juridical system (see case study 2). Stockholm transport authority always requires a transfer of staff. The authority knows that operators can challenge this requirement in court but thinks that since it has always had this requirement (since its first competitive tender) it has become accepted by the operators. While this is accepted in the railway sector, the need for a continuation of employment is seen as less relevant in the bus traffic service and therefore would not warrant an authority to make such a request and the risk to losing a court case.

If an authority requires the change of operator to be treated as a transfer of business (requiring a transfer of staff) it needs to obtain all staff information from the incumbent operator so that applicants can thoroughly assess the cost of running the operation. All relevant employment details are shared such as age, position, working time with the operator, accumulated holiday, people on long term sick leave, etc. If a transfer of business is not required, no such information is given to the authorities. However, it is considered good business practice that this information is shared between competing parties, Since the profit margin in this sector is very low, the incumbent operator also very proactively shares this information in order for competing operators not to underestimate the running costs. New operators usually count on being able to reduce costs by improving efficiency, but there is usually no discussion about reducing salaries. Cost reductions are usually achieved through 'more efficient' rostering, which can of course ultimately have an impact on working conditions.

In theory there should be no difference between bus or railway contracts. However, while it is common practice that the change of operators in the railway sector is treated as a transfer of business this is not the case in the bus sector because while in the railway sector the contract involves only the operation of the traffic and related service while the track and vehicles are leased by the Swedish Transport Administration or the local authorities, the busses often change hands in the case of a change of bus operator (the busses are bought or leased). This makes the decision if it is a transfer of business not only dependent on the question whether the majority of staff transfer to the new operator but it is also dependent on whether the material possessions of the operation are transferred.

There have therefore been many issues and court proceedings relating to the change of bus operators and in June 2013 a significant part of the bus sector was on strike with the request that a change of operators in the bus sector should be regarded as a transfer of business as is the norm in the railway sector (although that is a practice and not a legal obligation).

## **Case 1 SL Tunnelbanan-Veolia-MTR (Stockholm subway)**

### **Background of the case**

This section describes the tendering process and change of operator for the operation of the Stockholm metro system. Veolia, the incumbent operator handed over the operation to MTR in November 2009. The reason for tendering was the end of the previous operational contract with Veolia. The tendering authority is Storstockholms Lokaltrafik (SL) which is responsible for the public transport system in the region of Stockholm and which owns the metro system. The Stockholm metro system is composed by 7 lines, covering 110 km with 100 stations and frequency of services running every 2 minutes. The metro system has about 320 million passengers per year.

Veolia is one of the leading private operators of public transport in Sweden, with a 12% market share in the bus sector. It holds 35 contracts for the operation of buses, coaches, trains and ferries.

MTR Corporation is a Hong Kong based company with the Hong Kong government as a majority owner (75%).

### **Tendering procedure and details of tender documents**

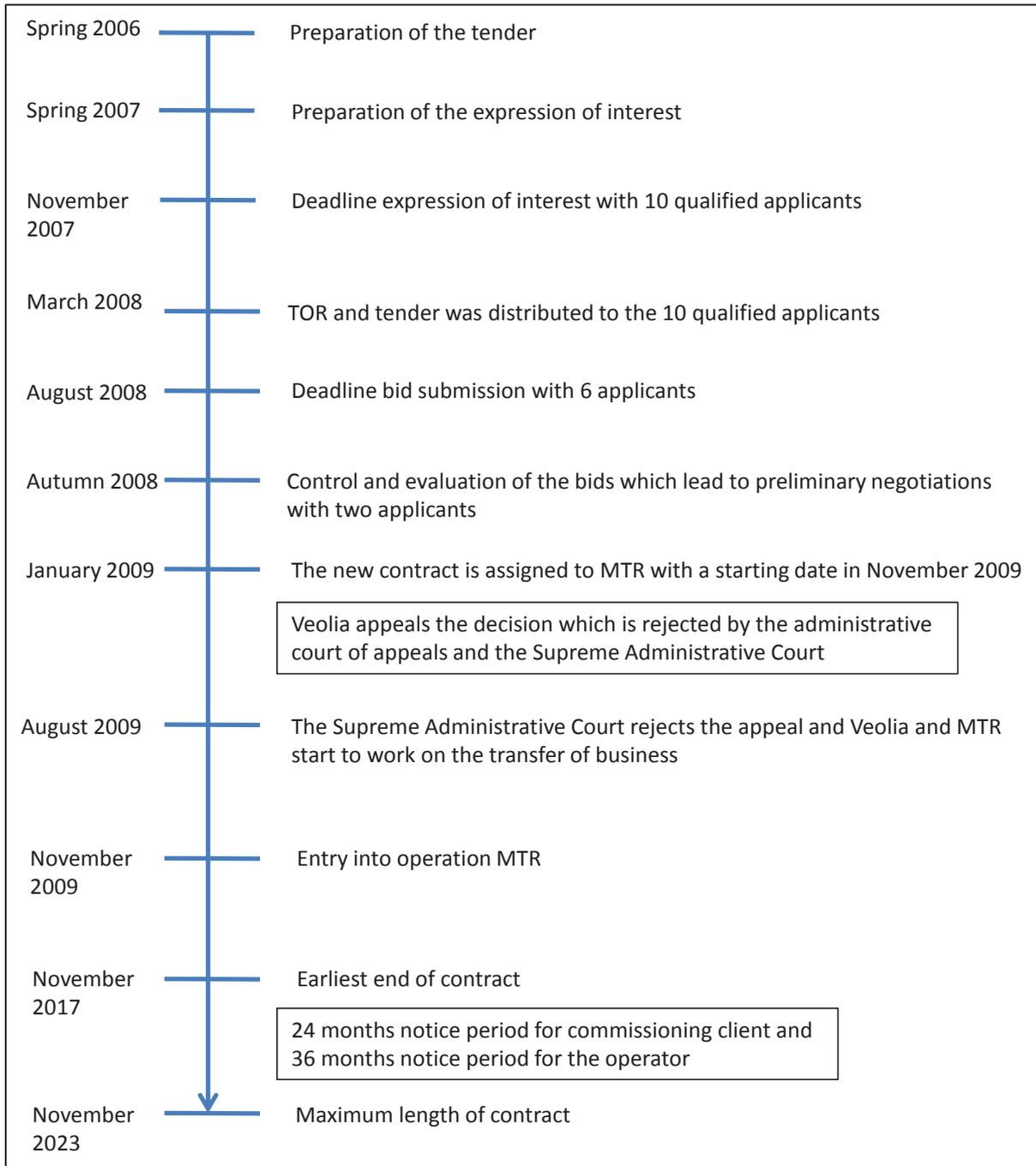
The tendering process took 3,5 years and is described in Figure A1.3. The procedure involved a pre-qualification stage (expression of interest) and a full tender stage in which pre-qualified companies were invited to participate. The tender involved four main service areas:

- Traffic operation
- Vehicle maintenance and depot operation
- Ensuring a pleasant customer environment (including cleaning of trains and stations)
- Customer service (including traffic information and ticket sales)

Under the section 'special requirements and conditions for the work' there was a section entitled employee transfer. This stipulated that 'the operator shall, in conjunction with the start of the operation, take over the prior operator's employees who to a majority of the time were conducting work under the tender. LAS and the rules on co-participation shall be respected by the operator. The two operators shall collaborate to the degree necessary for the transfer of the personnel and the new operator shall inform and collaborate with the relevant trade union'. The transfer involved around 2,000 employees.

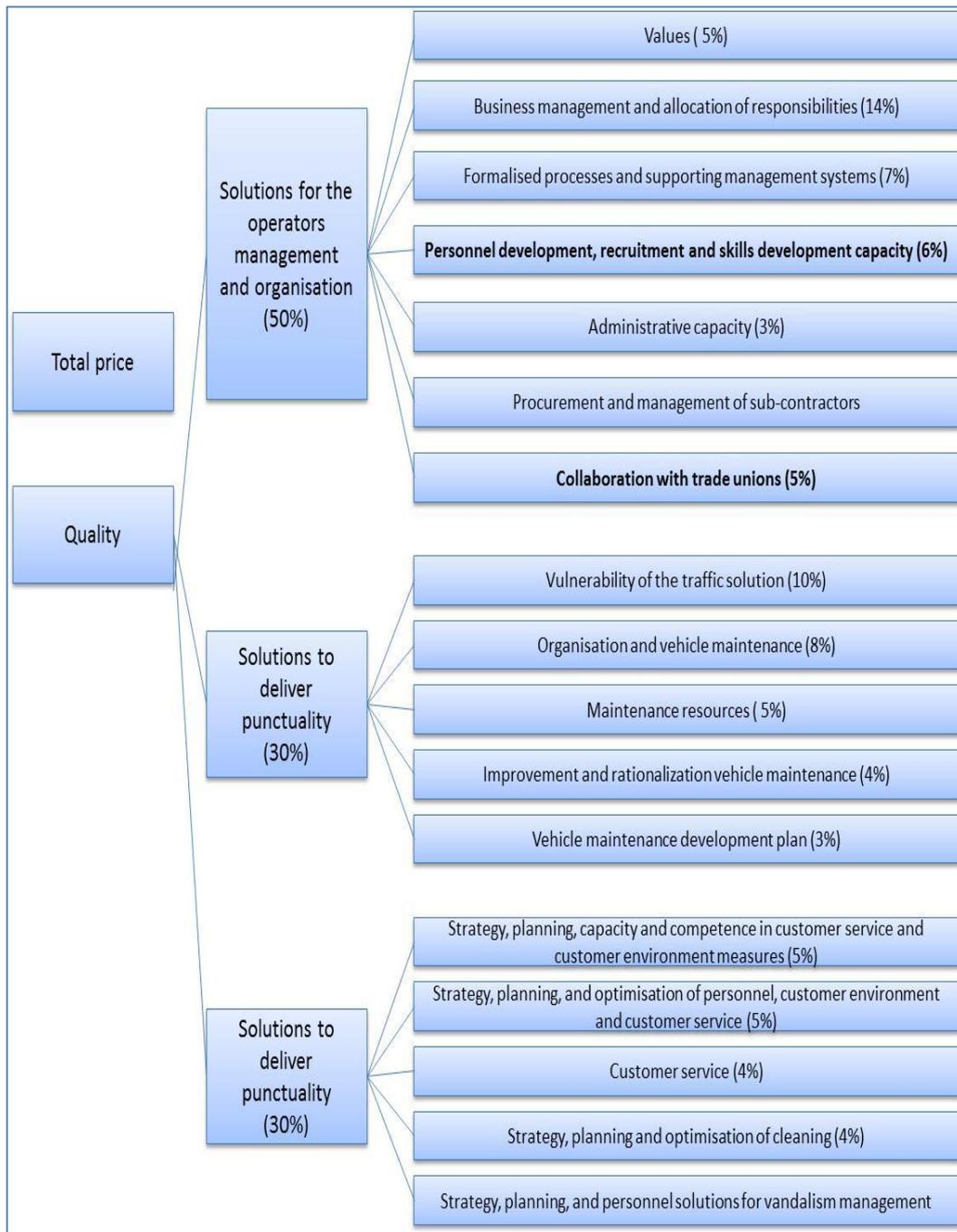
The selection of the operator was heavily based on the expected quality of the operation which had a weight of about 40%. The most important evaluation criterion under the quality heading, was the operators' management competence (14%). The focus on quality explains why the winning tender (MTR) was €255 million more expensive than the second ranked tender (see also Figure A1.2).

**Figure A1.3** Timeline tendering process of the Stockholm subway system



The tender evaluation methodology is described in Figure A1.3.

Figure A1.4 Evaluation methodology SL



## Selection of operator

The strong focus on quality did not make specific reference to working conditions or other social criteria but mainly targeted punctuality and other service related improvements. Ensuring a smooth transition between the operators was however important for the commissioning traffic authority. MTR had put a lot of effort on speaking both to the incumbent operator and the trade union to establish exactly how and on what conditions an eventual transition would take place.

## Transfer of business

Since it had been requested by the client that there would be a transfer of business between the operators, the change-over was very smooth. During the tendering process, MTR had already been in contact and collaborated with Veolia to find out exactly who was employed in the operation and how an eventual transfer could take place. They had also spoken to the labour trade union on the details for a possible transfer. MTR (as well as other competitors) were given information on relevant Veolia employees including salaries, age, position, and working experience.

MTR won the tender in January 2009, but Veolia appealed both to the Administrative Court of Appeals and the Supreme Administrative Court complaining that the terms of evaluation had not been clearly stated (which gave an unexpectedly high weight to quality) and was therefore arguing for a re-tendering. However, when the Supreme Administrative Court decided that there were not enough grounds for retendering, Veolia and MTR started to collaborate on the transfer of business.

Employees were informed about the tendering process (once the bid has gone in) and the relevant court procedures via their intranet and through the company journal which was sent home to all employees. MTR sent brochures to employees to present themselves and arranged drop-in sessions where employees could come in to talk to MTRs HR personnel and where they were given uniforms and information. The necessary forms that employees would need to sign in order not to be automatically transferred to MTR were also sent to all relevant employees. Veolia organised a project group that would deal with all the details for the transfer as well as department representatives who participated in the project group meetings and were informed about the details of the transfer and relevant discussions. These representatives were then responsible for answering questions or forwarding issues to the project group which had a counterpart project group at MTR. The trade union was also involved in the discussions relating to the salary administration and the commissioning transport authority was engaged to see that everything was running smoothly. Veolia and MTR and the client had weekly meetings. In addition to the initial information distributed by the incumbent operator to potential new operators (on employees and working conditions), other relevant information was shared such as overtime and holiday entitlements, the Christmas schedule, uniform sizes, cash registers, etc. The only information that was not shared were personal details that could not be shared such as sick leaves, mismanagement, and security neglect. 2,468 staff were eventually transferred from Veolia to MTR. A detailed list of the occupations transferred is given in Table A1.7.

**Table A1.9 Categories and number of staff transferred**

<b>Category</b>	<b>Subcategory</b>	<b>Number of people</b>	
Mangers	Business area manager	2	
	Vice Business area manger	1	
	Unit managers	31	
	Vice unit mangers	2	
	Group manager	1	
	Operational manager	4	
	Local branch manager	6	
	Support staff	Administrator	1
Controller		1	
Finance coordinator		1	
Financial controller		1	
PR manager		1	
PR		1	
Human resources manager		1	
Human resources superintendent		19	
Human resources representative		2	
Project leader information and market		1	
Recruiter		2	
Recruitment manager		1	
Damage regulator		2	
Education assistant		5	
Business controller		1	
Operational staff		Depot worker	8
		Traffic information	12
	cash desk responsible	2	
	Vandalism sanitation	1	
	Cleaner	261	
	Encoder	2	
	Human resources organiser	9	
	Shift leader	11	
	shift leader unit manger	1	
	Ticket seller and controller	1359	

Category	Subcategory	Number of people
	Station administrator	1
	Safety inspector	2
	technical controller	1
	Traffic manager	13
	Traffic superintendent	44
	Traffic organiser	5
	Metro train drivers	596
	Hosts	53
	<b>Total</b>	<b>2468</b>

*Veolia Human Resources Department 2013*

The transfer included not only the transfer of the employees but also premises and other business related material and non-material goods (such as mobile phone contracts). The tender also requested that Tågia, a sub-contractor of Veolia, responsible for the train maintenance such as technical maintenance and cleaning was split in two companies where the part of the company that was operating the metro was transferred to Mantera, the maintenance company mandated by MTR. Veolia later changed the name of the company to TBT Stockholm and became the majority shareholder.

### Impact analysis – transfer of staff

MTR took over the relevant personnel employed by Veolia while the consortium partner responsible for the maintenance of the trains, Mantera takes over the relevant maintenance personnel employed by Tågia.

The fact that that the transfer of business was requested by the traffic authority might have had an impact in putting more effort, during the tendering process, on how an eventual change of operator and transfer of staff would take place. The tendering authority had also encouraged the involvement of trade unions in the drawing up of the tendering documents which might have impacted their greater involvement during the transition period. However, due to the lack of skilled workforce in the sector, the change of operators would probably have resulted in a transfer of many Veolia employees in any case. Tågia employees however might have suffered from the lack of work if their transfer would not have been requested by the commissioning authority since cleaning and maintenance personnel are more readily substituted and the transfer of the majority of Veolia's personnel would not have required a transfer of business for Tågia.

### Conclusion

The national industrial relations framework, legislation in force, and the tendering authority's decision to request a transfer of staff ensured to protection of employment and maintenance of existing working conditions. This case study is relatively representative of change of operators in the Swedish railway sector. The case study is a good example of the collaboration between operators in preparing and managing the transfer of business, the collaboration with trade unions, and how employees were informed and involved during the tendering process and the transition period.

This case however differs from other tendering processes and changes of operators since SL is one of the few authorities in Sweden that requests the change of operators to be considerate as a transfer of business. It also requested the transfer of staff of a subcontractor (Tågia). Additionally, the evaluation criteria used, which weighted heavily the quality part of the proposals, differs from other evaluations in the railway sector which more emphasis on price.

They also highlight the importance of informing all bidders about the evaluation methodology and for the tendering authority to be aware of the consequences and outcome of their evaluation criteria and methodology. The lack of transparency of the evaluation methodology (and the weight of individual evaluation criteria) led to differences in bidding strategies among the different bidders which might not have brought forward suitable tenders. The lack of transparency of the evaluation methodology also brought a delay in the preparations of the change of operators which only began once the superior court had cleared that there would be no re-tendering.

## **Case 2 SJ- DSB First Väst- SJ Götalandståg-SJ- SJ Götalandståg (West coast commuter traffic)**

### **Background of the case**

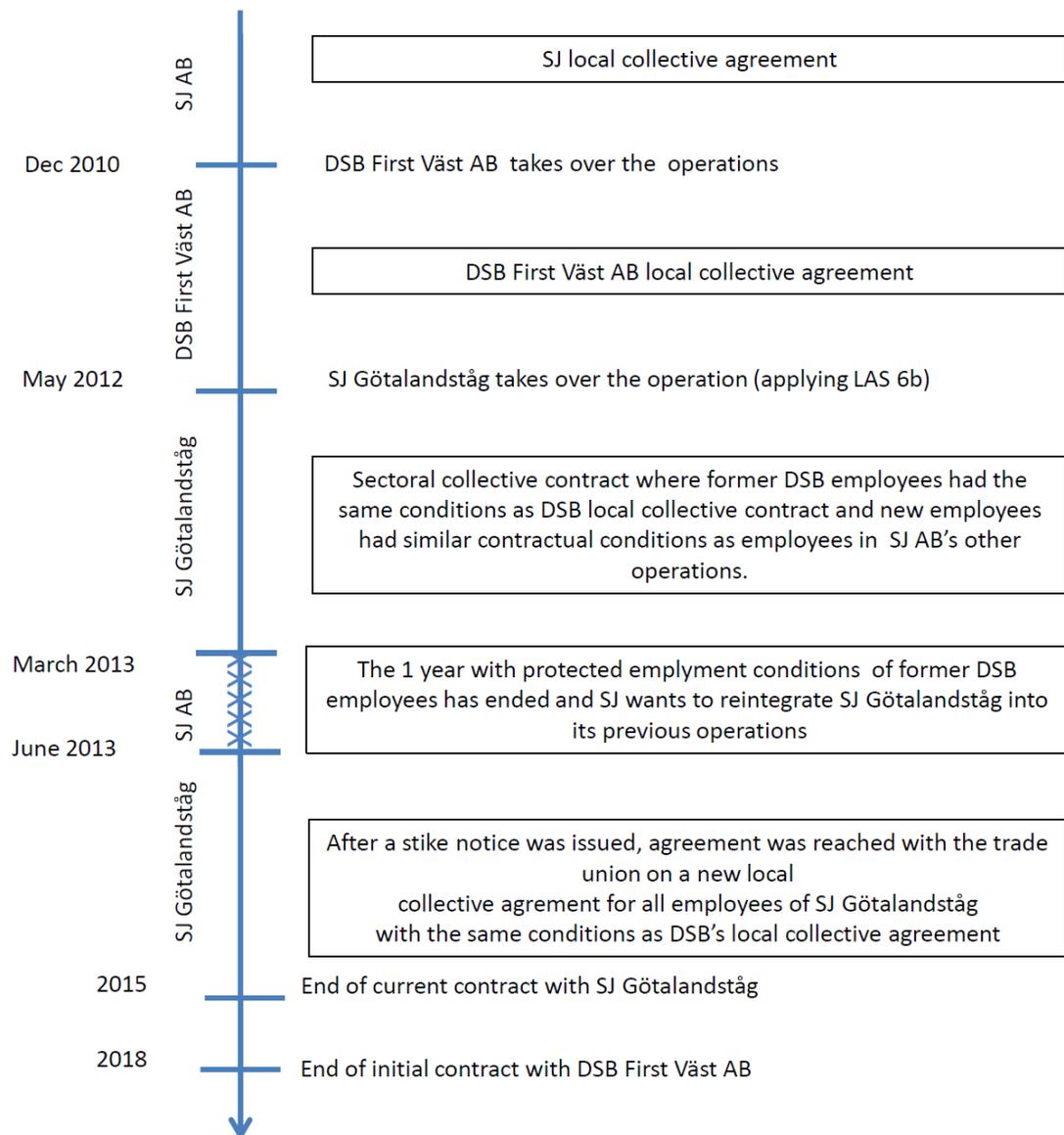
This case study involves the delivery of rail services handling west coast commuter traffic in Sweden. Västra Götaland County is the second largest (in terms of population) of Sweden's counties and it is subdivided into 49 municipalities with a population of 1,590,000, thus amounting to 17% of Sweden's population. The county extends over an area of 23,945 km<sup>2</sup> with a population density of 66/km<sup>2</sup>. The tracks tendered and operated are Västtrafiks commuter train in the Göteborg area and the regional trains within the Västtågen system. Västtrafiks commuter train in the Göteborg area is composed by three lines: Alingsåspendeln, Kungsbackapendeln och Alependeln with a total length of 104 km, 25 stations and about 4trains/hour at peak time. Västtågen is composed by 7 lines (of which one line is operated by another operator (Arriva). The tendered tracks include:

- Göteborg C – Stenungsund – Uddevalla C – Strömstad;
- Göteborg C – Trollhättan – Vänersborg C;
- Göteborg C – Borås C via Liseberg;
- Göteborg C – Alingsås – Skövde C- Töreboda;
- Skövde – Falköping C – Jönköping C – Nässjö;
- Uddevalla C – Vänersborg C – Herrljunga – Borås C – Varberg.

These 6 lines compose a total of 841 km of track with 87 stations.

Until 2010 the passenger rail operator on these lines was SJ AB, the state owned and largest railway operator in Sweden. In 2008, a new open tender was issued for the operation of the regional commuter traffic which was won by the Danish state railway operator DSB. In 2010 it became apparent that DSB was facing financial difficulties leading them to exit the market. After some initial inquiries the traffic authority settled a direct tendering agreement with SJ Götalandståg AB for the operation of the same network (see Figure A1.4).

**Figure A1.5** Timeline of the tendering process and collective agreements relevant for the operation of the western railway service system in Sweden



### Tendering procedure and details of tender documents

The first tender process followed a normal tendering procedure as described above on the rules of tendering. As is practice in the sector, the tender process is based on a two-step approach with a first expression of interest and then an invitation to tender for the eligible operators who had declared their interest in participating in the bid. The whole tendering process took about 3 years including about 1 year to prepare the tender documents, 6 months to 1 year for applicants to prepare a bid, and one year for consultations and negotiations with

the winning operator. The selection of the bidder was based mainly on the price (70%) and about 30% on the quality criteria.

The second tendering process was far shorter. When DSB difficulties in running the operation became evident, the national traffic operator was warranted to do a direct procurement without preparing an open tender since a new operator would need to take over the business in only 3 months. The traffic office spoke with two operators who they thought had the resources to take over the operation and settled on SJ who was the only one who felt that it could take over the operation in such a short time. After the negotiation was done, SJ had 1 month to take over the operation from DSB.

Västtrafik generally does not require a change of operator to be considered to be a transfer of business since it considers that the market can regulate itself and therefore it is better for the incoming and outgoing operator to settle the question with the employees and to decide whether the transition should be performed as a transport for business. Additionally, the traffic authority is advised by their legal department not to impose a transfer of business because this request could be challenged in court because the requirement can conflict with the EU legislation on proportionality, equal treatment of contractors and non-discrimination since it would give an obvious advantage to the incumbent operator. Västtrafik has previously been challenged in court (and lost) when including this request in a public tender (Rosen Andersson 2008<sup>224</sup>, Olsson 2013)<sup>225</sup>. However, for the “emergency transition” between DSB and SJ Götalandståg AB it was agreed that the change of operators should be considered as a business transfer since it would have been impossible for SJ to recruit new personnel in such a short period of time.

### Selection of operator

In the first tender process, the selection of the operator was based on a split of 30% of weight to quality criteria and 70% to price. In the quality evaluation, employees’ working conditions are only relevant in relation to how they affect the delivery of the operation including the customer experience (e.g. work scheduling, ensuring a low level of staff absence etc).

### Transfer of business

SJ AB is a government-owned passenger train operator created in 2001, out of the public transport division of Statens Järnvägar, when the former government agency was divided into six separate government-owned limited companies. SJ operates mainly in Sweden but it is also active in Norway and Denmark. It has approximately 4,000 employees.

DSB Sverige AB was part of the Danish state railway operator DSB concern and owned the daughter company DSB Väst AB. DSB Väst AB first entered the Swedish market by operating the Swedish-Danish cross border train across the Öresund/ Øresund bridge and other operations including West-Sweden’s regional and commuter train traffic. DSB Sverige AB started to have economic difficulties and in December 2011. DSB Väst AB subsequently decided to terminate its Swedish operations. Veolia took over the operations in Öresund while SJ Götalandståg AB took over its operations in West-Sweden.

SJ Götalandståg AB is a 100% owned daughter company of SJ AB which only operates the regional and commuter train service in Western Sweden. The company was founded in April 2012 right before taking over the traffic operation from DSB Väst AB. It has approximately 600 employees.

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<sup>224</sup> PM on the request of transfer of personnel in a public procurement circulated by Helena Rosen Andersson on 14.10.2008.

<sup>225</sup> In an open competition for a personal transport operation the commissioning authority, Västtrafik, requested the transfer of personnel and vehicles. The administrative court of appeals in Göteborg judged this request not to be compliant with current business principles since the suppliers did not have the freedom to use the organisations own competence.

## SJ – DSB 2010

As stated above once an agreement had been made with the traffic authority and the new operator, the outgoing and incoming operator started to make the necessary arrangements about the transition which followed the below common stages during which the trade unions were also involved:

- Meeting of both parties to agree on the arrangements of the transition
- Investigation whether there is consensus on the application of LAS 6b
- Identify the employees affected by the transition
- Settle how the employees are to be transferred
- Settle holidays used, often with invoice between companies
- Settle saved vacation and other outstanding time
- Settle the transfer of training records, health checks and other necessary information
- Resolve the question of how the employees should be consulted.

SJ and DSB calculated the staff necessary to run the operation and then offered the employees that fully belonged<sup>226</sup> to the operation a transfer in order of seniority. Around 100 train drivers were needed for the new operation however less than this number agreed to move to the new operator. In addition to this, there were on board personnel and station staff, meaning that eventually around 600 individuals transferred to the new employer.

As can be seen from Table A1.8, the salary conditions offered by DSB were more favourable than those offered by SJ.

**Table A1.10 Salary conditions SJ and Götalandståg (in €)**

Position	Level of seniority	SJ's collective agreement in € (Valid from April 2012)	DSB Väst agreement collective agreement in € (Valid from April 2012)	Götalandståg's collective agreement in € (Based on the previous DSB Väst agreement) (Valid from April 2012)
On-board host	During education	-	2,502	2,502
	Entry level	2,076	2,735	2,735
	1 year experience	2,297	2,905	2,905
	3 years' experience	2,600	3,076	3,076
	Train driver	During education	1,823	2,502
	Entry level	3,050	3,113	3,113
	2 years' experience	3,498	3,784	3,784

### *SJ's and Götalandståg's collective agreement*

The larger part of the employees moved to the new operator, however, despite the more advantageous salary conditions, a small percentage of people, mainly employees close to retirement age, decided to stay with SJ although this involved the risk of being given notice due to lack of work. This was mainly due to advantageous pension conditions at SJ which allowed an early retirement at 60. Some of these employees could be reallocated in other

<sup>226</sup> There were stations where other lines were operating and lines that did not belong to the contract where SJ employees were working full or part time. Stations where employees were not asked to move was Göteborg, Falköping, and people operating on SJ's own traffic (where they were operating their own trains and just paying for the use of the track)

regions however about 5 people had to be given notice due to lack of work. SJ and the trade union had explained to the people that had opposed a transfer to the new operator that SJ would try to reallocate them but that they could not guarantee a continuation of the contract and were running a high risk of being given notice.

DSB had some difficulties filling all the necessary positions. While some personnel is quite easily to substitute (only short courses are necessary) the train driver education is quite long so the new operator (DSB) had to hire external train drivers before it could use newly recruited train drivers<sup>227</sup>.

### **DSB – SJ Götalandståg 2012**

SJ Götalandståg AB is a 100% owned daughter company of SJ AB and therefore had no employees. SJ Götalandståg only had 1 month to prepare the takeover of the operation and DSB and SJ underwent a period of transition where DSB helped SJ to pay the salaries the first month since SJs system was not ready for the payment.

SJ took over almost everything necessary for the running of the operation from DSB including uniforms, premises, and sub-contractor contracts (on the same conditions) since it did not have time to prepare new contracts. They also took over the IT programmes and mobile phone contracts.

SJ decided to incorporate the operations into their new dormant daughter company instead of into SJ since the traffic authority had asked the transition to be considered a transfer of business (due to the short hand over period) and SJ did not wish to blend DSB personnel with its SJ personnel since this would change the levels of seniority within SJ<sup>228</sup> and it would mean different levels of salaries within SJ (SJs salaries and DSB employees salary levels). The client (traffic office) also preferred that the operator had a separate finance position which would make the calculation of costs easier.

They agreed that it was a transfer of business and to keep the working conditions of the employees for 1 year however they did not allow the transfer of saved leave (leave taken over from previous years). Since it was agreed that the change of operators would be treated as a transfer of business, the transferred employees enjoyed the same employment conditions with SJ as with DSB. SJ Götalandståg took over 415 staff members from DSB Väst.

### **Impact analysis – transfer of staff**

The traffic authority is concerned with the operation of the service and, as long as the operator complies with relevant legislation, they do not intervene in employer – employee relationships since they are not the employer. The transfer between SJ and DSB was quite straightforward. The employer and the trade union agreed on a local collective agreement with better working conditions than the previous one with SJ and new employees enjoyed the same working conditions under the same collective agreement. The transfer between DSB and SJ Götalandståg was more problematic. SJ Götalandståg tried to reach a local agreement with the trade union but could not find an agreement. However, since they subscribed to the employer trade association ALMEGA they could take part of the sectoral trade agreement which however covers a quite wide group of employees in the transport sector and therefore the minimum working conditions are very low and not representative of the rail operation sector. SJ Götalandståg therefore applied the working conditions for the former DSB workers for 1 year and SJ's collective agreement for new employees (not formerly employed by DSB). The difference in working conditions of course lead to many issues and criticism since SJ's conditions, in terms of salaries were lower than those of DSB. However, it should be noted that although DSBs conditions included a higher salary, this was compensated by shorter

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<sup>227</sup> 12-18 months are needed to train drivers so an operator would need about 3 years to recruit and train drivers (Gunnar Schon, Veolia)

<sup>228</sup> Levels of seniority is very important in railway operators because employees are usually given the right to choose their shifts in order of seniority;

holiday leaves and a higher pension age<sup>229</sup>. After about 1 year, when DSB's working conditions were about to expire, SJ Götalandståg wanted to incorporate SJ Götalandståg into SJ AB and use the local collective agreement established for other regions. This was however not accepted by the trade union who would not accept any conditions that were worse than DSB's collective agreement. After a lot of discussion between the employer and the trade union and subsequent strike threats, a new local collective agreement was finally signed in June 2013 that was equal to DSBs collective agreement.

One comment from an operator was that with the though trade unions and the obligation to conserve the same working conditions as the outgoing operator leaves new operators to take over expensive agreements that they might not be able to afford and making the service more expensive for customers and tax-payers. On one had they understand the need for employees to feel safe and to be able to count on a certain income but in the case of the transfer between SJ – DSB – and the daughter company of SJ, the former SJ employees gained significant in salary conditions by being away from SJ for only 17 months.

## Conclusion

The national industrial relations framework, existing legislation and the practice of applying the transfer of business concept (at least between operators) does not allow for a deterioration in working conditions (as least for one year). The scarcity of train drivers and the importance strong role of the trade unions ensure that although the different parts of the working conditions might change (i.e. salary, holidays, pension age, etc), their compressive value for the employees is not reduced.

The first part of this case study, the change between SJ and DSB is quite representative for the market, with the exception of the considerably improved working conditions offered by DSB which lead to the abovementioned difficulties at the time of the transfer between DSB and SJ Götalandståg which in practice was a re-integration of former SJ staff into a SJ daughter company.

The second part of the case study shows that despite the strictly regulated and long public tendering process there is enough flexibility in the system for direct tendering in special cases.

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<sup>229</sup> <http://www.publikt.se/artikel/gor-samma-jobb-med-lagre-lon-44638>

## UK

### Background

The UK is one of the countries with the longest experience of tendering in the railway sector. It awards all passenger rail franchises on the basis of competitive tenders (no use of direct awards). At present, only one of the 15 existing rail franchises is publicly operated after the existing contractor handed back the franchise after finding itself unable to run the service within the terms of the franchise agreement.

The use of explicit social criteria in tendering is very limited, but this is partly due to the fact under existing rules regarding the transfer of undertakings, all staff transfer across to the new operator under the full protection of their terms and conditions (at the point of transfer).

While there has therefore been an evolution in social and wage standards since privatisation, this has been gradual. Restructuring and renegotiation of terms and conditions between trade unions and the management of the train operating companies (TOCs) does take place and, with subsequent franchise re-mapping by the UK government, has led to a complex patchwork of terms and conditions. In the most vulnerable position are individuals performing sub-contracted tasks because albeit their terms are in principle also protected, many work on fixed-term or agency contracts and their work cannot be guaranteed to continue when there is a change of operator. It is also worth noting that the government is currently consulting on changes to the TUPE regulations which would provide for greater flexibility and potentially more limited protections for staff, particularly in sub-contracting situations.

### Use of tendering

Together with Sweden, the UK is the EU country with the longest experience of competitive tendering in the railway sector. Separation of track maintenance, rolling stock operation and the delivery of passenger rail services by TOCs through the competitive letting of franchises have been implemented through the Railways Act (1993).

The first tender procedures were organised in 1994, with the first franchises awarded in 1996 and the first privatised rail services operating since 1996.

Additional rail competition is provided by open access operators (who bid for specific slots on the timetable) to run services separate from the franchises. Open access operators are not major players, with most railway services delivered on the basis of franchise agreements. These franchises involve the government setting specification (duration of services, upgrades required, performance benchmarks etc), which are partly developed in consultation with passengers, regional and local authorities and TOCs. More recently, there has been increasing emphasis on a pre-qualification process, with potential operators invited to express their interest and submitting key documents to prove their suitability to deliver the required services. It is considered that such pre-qualification stages can increase the level of interest in the tender among competitors, but can also filter out companies who do not have the required resources or do not meet the relevant conditions for the delivery of a franchise.

The competitive tendering of rail franchises is a time intensive process, with several years often passing between the initial tender and the initiation of the new service. It has been estimated that each franchise award process (with three bidders) costs on average €17 million and the administrative and contractual running and supervision of each franchise consumes an extra €14 million per year.<sup>230</sup>

In this system rail services operate under licence and with clear parameters set by the rail regulator. A health and safety case for each franchise needs to be approved by the Health and Safety Executive, and track and station access as well as the leasing of rolling stock are

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<sup>230</sup> House of Commons Transport Committee (2006); Passenger Rail Franchising, Fourteenth Report of Session 2005-2006

agreed for each procedure. Franchise agreements also clearly set out the level of compensation available to run specific non-economic routes.

There has been a degree of instability in the responsibility of tendering and overseeing the performance of train operating companies, particular as a result of a number of high profile accidents. Each accident in turn led to a re-thinking of responsibilities in this field. Between 1993 and 2000 a Franchising Director was responsible for competitive tenders and performance. This was handed over to the Strategic Rail Authority between 2000 and 2005 and then returned to the hands of the Secretary of State for Transport in England and Wales.

As shown in Table A1.11, there are currently 15 franchises in operation in England and Wales (in Scotland the sole operator is Scotrail). These are run by 10 different train operating companies, with one service, the prestigious East Coast Mainline, the only service currently directly operated by the government after the private provider handed back the licence after finding itself unable to meet its terms. A new franchising process for this line is foreseen for 2014. There are also two passenger rail concessions let by regional transport authorities (London Overground by Transport for London and Merseyrail Electrics by Merseytravel).

**Table A1.11 Rail franchises in the UK: outcomes of the most recent franchising processes**

Name of franchise	Date of last award	Name of current operator	Name of previous operator
Essex Thameside	26 May 1996	c2c	c2c
Thameslink, Southern and Great Northern	1 April 2006	First Capital Connect	Thameslink
South Central	20 September 2009	Southern (Govia)	Southern (Govia)
Inter City East Coast	14 November 2009	East Coast Main Line Company	National Express East Coast
Northern	12 December 2004	Northern (Serco-Abellio)	Arriva Trains Northern and First North Western
TransPennine	1 February 2004	First Keolis TransPennine Express	Arriva Trains Northern and First North Western
Greater Western	1 April 2006	First Great Western	First Great Western, First Great Western Link, Wessex Trains
Greater Anglia	5 February 2012	Greater Anglia (Abellio)	National Express East Anglia
Inter City West Coast	9 March 1997	Virgin Trains (Virgin Rail Group)	N/a
West Midlands	11 November 2011	London Midland (Govia)	Central Trains ( <i>Birmingham Routes</i> ) and Silverlink ( <i>Northampton Line</i> )
East Midlands	11 November 2011	East Midlands Trains (Stagecoach)	Central Trains ( <i>Liverpool-Norwich and East Midlands routes</i> ) and Midland Mainline
Integrated Kent	1 April 2006	Southeastern	
Wales and Borders	8 December 2003	Arriva Trains Wales	First North Western and Valley Lines and Wales & West
South West	4 February 2007	South West Trains	South West Trains
Cross Country	11 November 2007	CrossCountry (Arriva)	Virgin Trains
Chiltern	3 March 2002	Chiltern Railways (DB Regio)	Chiltern Railways

Source: ICF GHK with information from Department of Transport (2013)

The most recent review of the rail franchising system took place in 2013 (the Brown review) after the challenge over the award of the West Coast mainline to a new operator and the re-opening of this procedure.<sup>231</sup>

Franchises have generally run for an average of 10 years, with some services sometimes awarded for as little as 2/3 years, i.e. when there is a planned change (e.g. Greater Anglia – where some services are to become part of the new Crossrail concession). The length of franchises has been subject to debate and the current thinking is that franchises will be let for between 5 to 15 years dependant on the nature of the operation and government strategy.

### Social Aspects in tendering

Few social standards are mentioned in tenders for rail franchises and it is primarily national laws and regulations setting minimum standards which provide the framework for minimum social standards to be respected. Key legislation in force includes:

- Regulations on the Transfer of Undertakings (protection of employment) 2006<sup>232</sup>
- National Minimum Wage Regulations (1998)<sup>233</sup>
- Working Time Regulations (1998)<sup>234</sup>
- National Health and Safety Regulations (various)
- Respect for acquired pension rights
- Respect for national training requirements (particularly in relation to health and safety)

When considering these national regulations, for example in relation to wages and working hours, it must be borne in mind that such minimum standards apply to few 'core' workers in the passenger rail sector. Collective agreements negotiated at company level (see also below) generally provide for higher wage standards and specific working hours are negotiated for the sector, including for specific groups of staff (such as train drivers).

The only social aspects sometimes explicitly mentioned in tender documents relate to requirements for train frontline staff, usually in relation to customer service skills.

Each invitation to tender sets out how price and quality criteria will be weighted (e.g. 70% price, 30% cost). In assessing a bid, the Department for Transport first looks at price proposals and assesses them within a set assessment framework (e.g. lowest price receiving a certain number points, higher priced bids losing a specific number of points etc). Different quality criteria are subsequently assessed and companies not meeting certain framework requirements can be eliminated from the process along the way. In terms of quality, each bid is assessed firstly according to whether it is considered compliant in meeting the key objectives for the franchise set out in the invitation to tender. If compliant, a deliverability score is then awarded and it is here that social criteria (in the wider sense) can come into play. For example, if a company claims it will significantly improve customer satisfaction but does not outline a clear plan (such as staff training) and associated resources to achieve this, the deliverability score received will be low.

When considering the relatively limited use of social standards, it is important to bear in mind that under UK legislation, existing staff always transfer across to a new provider under the existing terms and conditions. This will be further elaborated in section 1.3 below.

<sup>231</sup> The Brown Review of the Rail Franchising Programme, Delivered to the Department of Transport December 2012; see [https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/49453/cm-8526.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/49453/cm-8526.pdf)

<sup>232</sup> <http://www.legislation.gov.uk/uksi/2006/2405/contents/made>

<sup>233</sup> <http://www.legislation.gov.uk/ukpga/1998/39/crossheading/regulations-relating-to-the-national-minimum-wage>

<sup>234</sup> <http://www.legislation.gov.uk/uksi/1998/1833/made/data.pdf>

## Industrial relations

In the passenger rail sector, collective agreements are negotiated at company level for each franchise and there are no sectoral collective agreements. These collective agreements are often wide-ranging, covering not only details of wages and working conditions, but also access to training and rules regarding selection for redundancy etc.

When British Rail was privatised, the new train operating companies inherited (under TUPE) the old collective agreements, legacy entitlements for staff, e.g. in relation to pensions (see section 1.3 below) and the '1992 procedures' relating to how collective bargaining is to be conducted; rights for trade union representatives and other rules specific to information and consultation.

Employers negotiate with trade unions recognised for collective bargaining at individual company level. Within the rail sector, these are primarily the trade unions ASLEF, RMT, TSSA and Unite. Agreements are negotiated for different types of staff in so-called 'bargaining groups'. Today there are over 100 bargaining groups negotiating the terms and conditions of different types of staff in different TOCs and franchises. This has led to a patchwork of provisions and where franchises have been remapped, there can be 2-3 different sets of terms and conditions and salaries present in the same company for the same occupational groups.

It is estimated that collective bargaining coverage in the sector is almost 100%.<sup>235</sup> Although there is always a risk of TOCs not recognising or de-recognising trade unions, there is currently no significant evidence or likelihood of this taking place.

## Rules on transfer of staff

In the UK, all changes of passenger rail operator are automatically considered to be transfers of undertakings.<sup>236</sup>

The Regulations on Transfer for Employment (Protection of Employees – TUPE) were first introduced in 1981 as a result of the EU Acquired Rights Directive (77/187/EEC). TUPE requires that all current staff (including sub-contracted and fixed-term staff still in contract) are transferred across to the new operator.

Under TUPE employees also have the right to obtain information about the transfer and how it is likely to affect them. All terms and conditions are protected 'at the point of transfer' (unless variations are agreed) and company collective agreements in force also transfer across. TUPE applies to all employees assigned to the part of the train operating company which is transferring. This can become more difficult when there is franchise remapping, in which case it has to be assessed how much time an individual spends working on the relevant part of the line. Any employee spending more than 60-70% of their time on a particular line is generally considered eligible for a TUPE transfer. The situation of Head Office staff can also be more difficult to assess, but the general experience is that they do transfer across if they spend a significant amount of their working time working on matters relating to a specific franchise.

The transfer includes terms and conditions of employment (e.g. salary, sick pay, holidays); hours and place of work; notice provisions; duties, continuous service etc. In addition, transferor's liabilities such as personal injury claims, tribunal cases; ongoing grievance issues etc also transfer across, and transferees must therefore be made aware of all such commitments and liabilities.

Transferors must supply, no less than 14 days before the transfer information on transferring employees':

- identity

<sup>235</sup> Eurofound (2008); Representativeness of social partner organisation in the rail sector: UK

<sup>236</sup> In principle, this is even the case where there is no change of operator, but the franchise is awarded to the incumbent.

- age
- terms
- disciplinary & grievance procedures ongoing
- claims
- collective agreements in force

This means that following a TUPE transfer, the new franchisee (in case of a change of operator) effectively takes on the agreements on wages, terms and conditions reached by another operator.

Following a transfer of undertakings, a TOC is subsequently entitled to re-negotiate terms and conditions, but it should be noted that trade unions in this sector are traditionally strong and changes to term and conditions have to be negotiated and agreed and cannot be unilaterally imposed. Workers on precarious contracts tend to be in the most difficult position as their terms can be reviewed when their contracts come to an end after a transfer.

During the process of franchise renewal since 1993, TOCs have begun to make changes to collective agreements in negotiations with trade unions. As a result differences have emerged. In this context it is worth noting that collective agreements do not hold legal status under UK law, which means that only elements of such collective agreements which subsequently become part of employment contracts are legally enforceable. However, employers generally shy away from breaching such agreements because of the threat of any costly collective action which might result. As mentioned above, the process of franchise re-mapping has thus led to a patchwork of term and conditions among staff even within the same franchise.

Dismissals following a TUPE transfer are allowed for economic, technical and organisation (ETO) reasons, which have been variously interpreted by the courts and are a significant source of case law. Valid economic reasons have been considered to be, among other things, reduced demand for services; technical reasons include the introduction of new technologies which limits staffing requirements; and organisational reasons include restructuring (but not directly resulting from the transfer). In theory, it could be considered easy to re-badge a change in conditions are resulting from restructuring rather than a TUPE transfer, but case law has shown that because of full disclosure requirements, the courts are usually able to see if the underpinning reason for a change is the transfer and will consider changes to conditions to be unlawful.

For example, a significant worsening of terms and conditions and a location change has been considered as significant detriment to workers which means that they can consider themselves to be constructively dismissed and therefore entitled to damages.

ETO reasons primarily play a role for the restructuring of management teams in the case of a change of operator. The new operator generally wishes to bring in its own management team at the highest level and although it is generally the case that the old contractor also wishes to retain their management staff, this is not always the case where a new position cannot be found for them. In such cases ETO reasons are often used to lay off managerial staff from the previous operator unless they can be otherwise deployed.

The 1993 Railways Act guarantees the protection of pension entitlements under the old British Rail Scheme. Franchise agreements stipulate that new employees must be allowed access to current pension schemes. However, these are not always as generous as the old British rail scheme, although most TOCs do operate defined benefit schemes and the majority of schemes to remain final salary schemes. Some operators have launched defined contributions' schemes, but employees usually have an option to transfer into a defined benefits' sector after a qualifying period. Under TUPE, pension entitlements (other than British Rail legacy entitlements) do not transfer across. However, the 2004 Pension's Act provides that the transferee must provide a scheme satisfying certain minimum conditions. In addition,

case law<sup>237</sup> stipulates that early retirement pension entitlements do transfer, as do contractual obligations for employer to pay contributions to employees' personal pensions.

Another protected 'legacy' entitlement for former British Rail workers relates to free or reduced travel facilities for these workers and their families, including into retirement. These benefits are generally not available (to the same extent) to individuals employed post 1 April 1996.

The law requires that employees are informed and consulted about the transfer long enough before the transfer with appropriate representatives of affected employees. Employee representatives must be informed of:

- The proposed date and reasons for the transfer
- The legal, social and economic implications
- The measures envisaged

This is essentially a process of negotiation as representations made by employee representatives have to be considered and reasons given for not taking any suggestions on board. Penalties for failing to consult are significant and can be up to 13 weeks of salary per affected employee.

### Proposal for changes to TUPE Regulations

In November 2011, the Department for Business, Skills and Innovation (BIS) published a call for evidence, seeking views on the effectiveness of current TUPE regulations. In January 2013, BIS subsequently launched a public consultation on a series of wide-ranging changes to TUPE to address what it considers to be the 'gold plating' of the UK's implementation of EU legislation on the transfer of undertakings. The consultation closed in April 2013 and the government is currently considering the responses received. Based on the current timetable, a review of the legislation is foreseen in September 2013 and due to enter into effect over a number of years. These revisions, if implemented, would arguably provide for a much 'lighter touch' approach to TUPE, undoing many of the changes introduced 6 years ago under the Labour government and introducing greater flexibility with regard to decisions on the situations in which TUPE applies and the reasons which can be used to change terms and conditions subsequent to a TUPE transfer. The main changes foreseen are summarised below:

- Scrapping of Service Provision Change rule: this is a test introduced 6 years ago, leading to a clear assumption that TUPE will apply in all cases of subcontracting, outsourcing and insourcing and change of service provider. The proposed provisions would mean that such situations would not in all cases amount to a TUPE transfer.
- Harmonising terms and conditions after a transfer: the goal of this change is to allow greater freedom for transferees to change terms and conditions after a transfer. The requirement would still be to maintain terms at the point of transfer, but this seeks to review how long these provisions should remain in place until a variation can be agreed, for example to harmonise terms and conditions with an existing workforce.
- Extension of definition of economic, technical and organisational reasons: It is proposed to extend the concept of ETO reasons, for example, to changes in location. This would mean that such a change of location would not automatically be grounds for a constructive dismissal claim in future. There are also considerations to permit transferors to rely on transferee's ETO reasons for pre-transfer dismissals.

### Case study of a transfer of operator: Greater Anglia rail franchise

#### Background of the case

The Greater Anglia rail franchise is the most recent UK passenger rail franchise to be awarded.<sup>238</sup> The franchise emerged in 2002, as part of a franchise re-organisation by the then

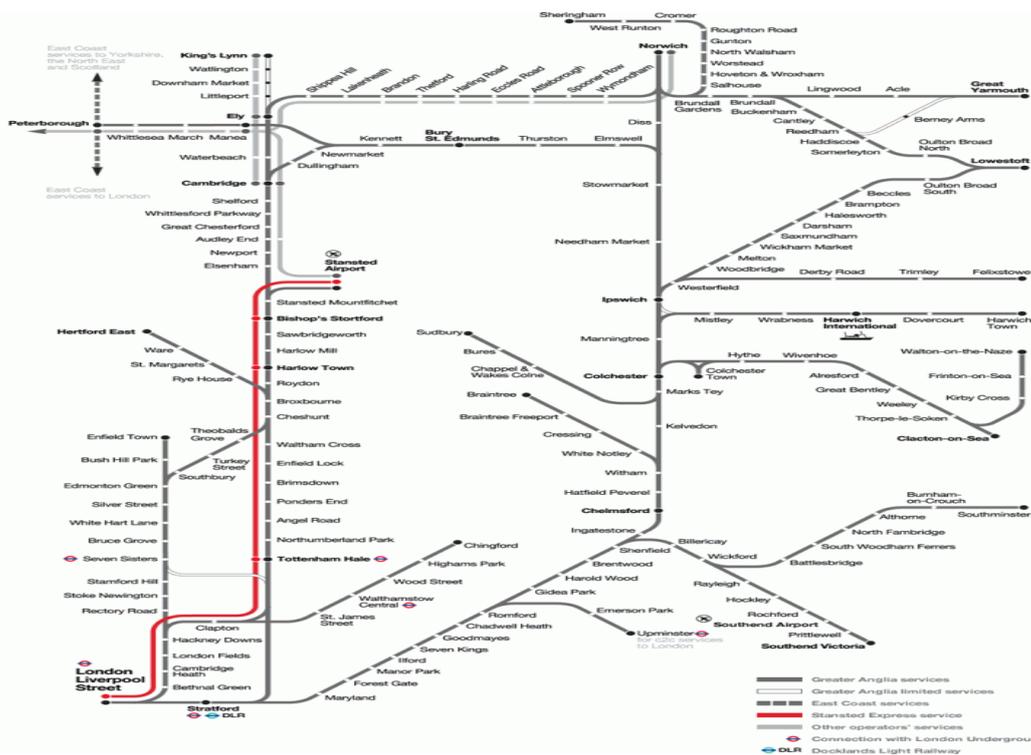
<sup>237</sup>Beckmann v Dynamco; Martin v South Bank University (2002)

Strategic Rail Authority which brought the Anglia Railways and Great Eastern franchises together with the West Anglia part of the West Anglia Great Northern franchise to form the Greater Anglia Rail Franchise.<sup>239</sup>

The figure below shows the key routes covered by the franchise which primarily link London Liverpool Street to the east and north (e.g. Cambridge, Great Yarmouth, Ipswich and Norwich), includes the strategic link to Stansted airport, as well as providing local, regional and commuter services in Greater London and the East and West Anglia regions.

Between 2002 and 2012, the franchise was operated by National Express, but since February 2012 has been taken over by Abellio (part of Nederlandse Spoorwegen). It was let as a short-term franchise (28 months) as part of the wider review of franchises under the McNulty Review on Rail Value for Money.<sup>240</sup> However, within the context of the current review of franchising processes (the Brown Review), this franchise has now been extended until 2016.<sup>241</sup>

Figure A1.6 Greater Anglia network map



Source: Greater Anglia website (downloaded July 2013)

## Tendering procedure and details of tender documents

The invitation to tender (pre-qualification) for the Greater Anglia franchise was published in the Official Journal of the European Union on 11 January 2011.<sup>242</sup> At the same time, the pre-qualification process documents were published by the Department of Transport. Interested

<sup>238</sup> The process of awarding the West Coast mainline franchise which was tendered at the same time broke down after having been awarded to First Westcoast Limited, following a challenge by incumbent operator Virgin Trains. This has led to a wider review of franchise processes (the Brown review).

<sup>239</sup> Rail Magazine Issue 426 9 January 2002

<sup>240</sup> Department for Transport (2011); Realising the Potential of GB Rail: Final Independent Report of the Rail Value for Money Study; see <http://www.rail-reg.gov.uk/upload/pdf/rail-vfm-detailed-report-may11.pdf>

<sup>241</sup> [www.eadt.co.uk/business/east\\_anglia\\_greater\\_anglia\\_rail\\_franchise\\_to\\_be\\_extended\\_until\\_2016\\_1\\_1991970](http://www.eadt.co.uk/business/east_anglia_greater_anglia_rail_franchise_to_be_extended_until_2016_1_1991970)

<sup>242</sup> For all documents relating to the Greater Anglia franchise process see <https://www.gov.uk/government/publications/greater-anglia-franchise>

parties could pass the pre-qualification process by completing a pre-qualification questionnaire and delivering the requested documents (by 18 February 2011).

On 24 March 2011, the Department of Transport announced the following shortlisted bidders in the process:

- Abellio Greater Anglia Ltd (NV Nederlandse Spoorwegen)
- Eastern Railway Limited (Go-Ahead Group plc)
- Stagecoach Anglia Trains Limited (Stagecoach Group plc)

The full invitation to tender was subsequently issued on 21 April 2011, with shortlisted companies required to submit responses by 21 July 2011.

The invitation to tender did not contain any specific social criteria (e.g. regarding the training of staff), but did make specific reference to the application of TUPE to staff operating part of the line (and up to then employed by London Eastern Railways Limited) not currently part of the services provided by the incumbent operator. It is stated that details of the relevant employees of London Eastern Railway Limited, who will transfer to the Greater Anglia franchise would also be made available. No specific mention was made of the application of TUPE to staff operating Greater Anglia services under the incumbent at the time, as this is taken as a given for all franchising processes. The invitation to tender also makes specific provisions in relation to pensions, taking account of the specific requirements the Railways Pensions (Protection and Designation of Schemes) Order 1994 which applies to former British Rail employees.

#### **Provisions on pensions in Greater Anglia franchise Invitation to Tender**

The following extract of the ITT sets out the requirements of the new franchisee regarding pension contributions and payments:

*Bidders should not assume that the Department will provide any indemnity regarding any payments that may be required under the Railways Pensions (Protection and Designation of Schemes) Order 1994 (SI 1433) or otherwise. The Franchisee will become the Designated Employer for the active, retired and deferred members of the current shared cost sections of the Railways Pension Scheme ("RPS") as defined below:*

- *Anglia Railways shared cost section*
- *Great Eastern Railway shared cost section*
- *London Eastern Railway (West Anglia) shared cost section*

*Currently new employees join the London Eastern Railway Ltd defined contribution section for a period of 2 years and are then offered the opportunity to transfer into one of the above defined benefit sections. Bidders are required to set out their approach to managing the existing pension scheme from the start of the franchise period with all assumptions clearly stated. Subject to meeting their obligations under the RPS, at the end of the Franchise Term the Franchisee shall have no responsibility for any deficit in the scheme (other than contributions due and payable before the end of the Franchise Term by the Franchisee) and have no right to benefit from any surplus which may exist in the relevant section.*

*Source: Department of Transport, Greater Anglia Franchise, Invitation to Tender, April 2011*

In order to allow bidders (selected post pre-qualification stage) to make a clear assessment of personnel cost commitments, the Department for Transport operates a database which holds organisation charts, staffing details (anonymised), associated rates of pay as well as terms and conditions which it makes available to all bidding companies. This allows bidders to use these details for the financial modelling of their bid. Bidders are also able to raise additional questions about the details provided in this database as part of the clarification question process. This could, for instance, include questions around the patterns of staff at different grades or the number of individuals in different pension schemes. If the database only

includes basic information on the total number of staff in different grades<sup>243</sup>, it may be necessary to know the spread of individuals at the higher, medium or lower end of this scale as this can make a significant difference to cost calculations.

Furthermore, there are different sections of the Railways Pension Scheme (or indeed other defined contribution schemes) individuals could be in, which again can also impact staffing costs. Awareness of the number of individuals with RPS entitlements is particularly important as the employer contribution to these sections is around 18-20% of salary, whereas under newer, deferred contribution schemes, employers generally only contribute around 7.5% of salary. In addition to taking on responsibility for the payment of current employees' contributions, the new franchise holder also takes on the responsibility for payments of pension benefits to retired workers and preserved benefits.<sup>244</sup>

Such questions are clarified by the Department for Transport at the bidding stage, answers are shared with all bidders and additional information (which has to be furnished by the incumbent) is then added to the Department's database.

Pension and social insurance costs are generally considered to make up around 25% of total staffing costs.

### Selection of operator

Abellio was announced as the successful franchisee in November 2011 and took up operations on 5 February 2012. As indicated above, the franchise was initially due to run until July 2013, with the possibility to extend until July 2014. The Secretary of State for Transport announced quite early on his intentions to exploit the full possible franchise period. Since then, it has in fact been decided to extend the franchise further until 2016, awaiting the results of the period of consultation on future franchise processes set in train by the Brown review.

Abellio operates public transport services in Europe, on both bus and rail networks. It was founded as NedRailways in 2001, before being renamed Abellio in October 2009. Abellio is the international arm of the Dutch government rail operator Nederlandse Spoorwegen.

At the bid stage, Abellio had already factored into their price not only regular and development training costs, but also the delivery of a specific customer services training programme. This was linked to the company's commitments to improving customer satisfaction and began rolling out almost from day 1.<sup>245</sup>

### Transfer of staff

As required by the TUPE Regulations, the 2,862 employees previously providing services on the transferred lines (primarily former National Express employees, but also some London Eastern Railways employees) saw their contracts of employment transfer across to Abellio as of 5 February 2012. This number includes permanent and fixed-term staff.

In the case of the latter, this includes those in contract on the date of the TUPE transfer. In this case, the incumbent had taken the decision to recruit only fixed-term (and temporary agency) staff from the time that the new invitation to tender for the franchise was issued. For around 50 staff members, these fixed-term contracts had been concluded to end on or before the franchise start date. Abellio were then told that if they wished to retain these staff, they would have to cover the cost of employing these frontline staff between the end of the fixed term contract and the actual transfer date of the franchise on 5 February 2012. Upon request, this

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<sup>243</sup> Grades are associated with a salary range, which can be quite significant.

<sup>244</sup> Where an individual once paid into the scheme but has since left employment or withdrawn from the scheme for another reason.

<sup>245</sup> According to customer surveys, customer satisfaction on the franchise has increase by 10% since February 2011.

was challenged by the Department for Transport and the staff affected subsequently remained in post until the TUPE transfer deadline<sup>246</sup> and transferred across with all other staff.

There were no sub-contracted staff working on the franchise, but agency staff were being used, virtually all of whose contracts (with their agency) were renewed.

As mentioned above, the incumbent is required to provide the new franchise holder with full details of all staff (identity, age, terms, collective agreements in force, ongoing grievance procedures etc) no less than 14 days in advance of the transfer. Until then, Abellio only had the information contained in the Department for Transport database (which is anonymised). Keen to make early contact with transferring staff, Abellio sought to obtain employee details in a timely fashion, but a full list was only transmitted on the deadline day. As the incumbent denied Abellio access to staff, the company held a number of road shows, set up a helpline and provided access to a specific area of their website to communicate with affected workers and to seek to allay any concerns they might have. Around 1,000 individuals attended the road shows which could not be held at their workplaces (or during working hours). Employees primarily sought assurance about their employment security, preservation of their terms and conditions and working patterns and details of their new uniforms.

Communication also started with the trade unions (ASLEF, RMT, TSSA and Unite) who also assisted in passing information on the road shows, website and helpline on to employees.

Discussion on the roll-out of customer service training also began prior to the franchise start up date on 5 February to ensure a smooth kick off of this process (which was important in light of the upcoming London Olympics). Similarly, the company had undertaken (as part of its bid) to improve revenue protection (through ticket checks) and therefore worked with National Express to recruit 30 or more revenue protection officers prior to 5 February 2012. The incumbent requested – and received – compensation for their cooperation in this.

Once the full list of affected staff had been furnished, Abellio wrote to all employees and communicated the details of their (unchanged) terms and conditions within two weeks of taking up the franchise. An employee's period of continuous employment is not broken by a transfer, and, for the purposes of calculating entitlement to statutory employment rights, the date on which the period of continuous employment started is the date on which the employee started work with the old employer. This is stated in the employee's new written statement of terms and conditions.

One of the more complex elements of any TUPE transfer is always the (potential) reorganisation of the management team. In this case, it was not clear until very late on whether key staff such as the Managing Director for the Franchise for National Express and other management staff such as the HR Director would be placed on the TUPE transfer list. In the end this was not the case, but it meant that Abellio was unable to formally announce its new Managing Director for the franchise until February 2012 and an interim HR Director had to be appointed at short notice.

Since taking over the franchise, Abellio has recruited a number of additional staff (around 2,900 work on the Great Anglia franchise at present). This includes the additional revenue protection officers as well as station asset management staff<sup>247</sup>. New staff were recruited under the same terms and conditions as staff transferred across from National Express.

However, it must be borne in mind that as a result of frequent franchise re-mapping and industry restructuring, there are already 3 different sets of terms and conditions applying to some Greater Anglia staff in the same occupations. This applies, for example, to drivers, conductors and station staff. For drivers, this can mean that some drivers earn between €2,300 and €3,300 more than others, but will have different terms and conditions (fewer holidays or other benefits). This makes wage negotiations difficult.

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<sup>246</sup> At the incumbent's cost.

<sup>247</sup> Take up of the full repair lease of the relevant stations was part of the franchise contract.

As wages and terms and conditions are negotiated not just for each train operating company but also for each franchise, this means that when franchises are re-structured individuals in the same occupations (and grades) can hold different terms and conditions balanced against wage levels. Any significant negotiated changes to terms and conditions have to receive approval from the Department of Transport as this could lead to additional costs being imported into the franchise (and therefore potentially additional costs to the taxpayer through rail subsidies).

In the last 12 months of a franchise an incumbent is not permitted, without Department authority, to reduce the workplace by more than a certain percentage or make other significant changes to staffing as this could affect the operation and pricing of future bids for the franchise.

### Impact analysis – transfer of staff

As transfer of staff is obligatory under TUPE in all cases of changes of rail franchise holder, the impact on core staff in the railway sector is cushioned. Employment and terms and conditions are protected at the point of transfer and the new employer is not permitted to introduce less favourable working conditions or effect redundancies linked in any way to the transfer of undertakings. Redundancies are permitted for economic, technical and organisational reasons. As mentioned above, this has been a significant source of case law. Valid economic reasons have been considered to be, among other things, reduced demand for services; technical reasons include the introduction of new technologies which limits staffing requirements; and organisational reasons include restructuring (but not directly resulting from the transfer). In practice, such reasons are sometimes used in relation to restructuring management team.

The definition of these reasons and other aspects of TUPE stand to become more flexible if current proposals for the revision of TUPE are implemented.

Terms and conditions in the sector are strongly influenced by three factors:

- The strength of trade union representation in company level negotiations and in ensuring unions are - and remain - recognised at individual company level.

As outlined above, there is historically strong trade union representation in this sector with bargaining covered still estimated at close to 100% (2006 data).

- Franchise re-mapping

As terms and conditions are negotiated at company and individual franchise level, when franchises are re-mapped this can lead to different terms and conditions applying to the same group of staff in one company. This provides for a very complex picture and a difficult framework for wage negotiations.

- The extent to which services are sub-contracted.

This currently mainly applies to services such as cleaning, catering or maintenance. Companies do seek to make substantial savings in these areas by using sub-contractors (generally selected on the basis of lowest price) who often employ staff on fixed-term contracts. While sub-contractors are currently covered by TUPE, it still remains possible not to renew fixed term contracts once their terms have expired and to make cost savings in this way. The proposed revisions of the TUPE also call into question whether sub-contractors are always covered by TUPE, so changes could also be afoot in this regard.

The argument in the PIQUE studies<sup>248</sup> on the privatisation on public services and the impact of quality of employment and productivity that privatisation in the UK (in the local public transport

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<sup>248</sup> Flecker, J et al (2009), Privatisation on public services and the impact of quality of employment and productivity; [http://www.pique.at/reports/pubs/PIQUE\\_SummaryReport\\_Download\\_May2009.pdf](http://www.pique.at/reports/pubs/PIQUE_SummaryReport_Download_May2009.pdf)

sector which is also covered by TUPE) has led to a significant decline in wages and more pressuring working conditions can therefore partly be explained through the impact of liberalisation trends on outsourcing. These have left a relatively well protected core workforce which is supplemented with an increasing number of poorly paid sub-contractors, many of whom work on precarious contracts. Employers consider that an increasing trend can be observed towards political pressure from local and central government to pay a 'living wage' above the minimum wage.

## Conclusion

The UK is one of the countries with the longest experience of tendering in the railway sector and awards all passenger rail franchises on the basis of competitive tenders. At present, only one of the 15 existing rail franchises is publicly operated after the existing contractor handed back the franchising after finding itself unable to run the service within the terms of the franchise agreement.

The use of social criteria in tendering is very limited, but this is partly due to the fact under existing rules regarding the transfer of undertakings, all staff transfer across to the new operator under the full protection of their terms and conditions (at the point of transfer).

Under the UK's Transfer for Employment (Protection of Employees – TUPE) Regulations, first passed in 1981 and most recently amended in 2006, all employees of the old franchisee transfer across to the new franchise holder on their existing terms and conditions on the date of the transfer. No worsening conditions by reason of the transfer are permitted. Dismissals are allowed for ETO reasons and TUPE is arguably one of the areas of employment law where case law is significant, but on the whole employee terms and conditions are well protected as a result of this legislation.

While there has therefore been an evolution in social and wage standards since privatisation, this has been gradual, with a patchwork of terms and conditions emerging which has created a complex picture even within the same companies and on the same lines, as a result of franchise re-mapping. In the most vulnerable position are individuals performing sub-contracted tasks because albeit their terms are in principle also protected under TUPE, many work on fixed-term contracts and their conditions can therefore be re-negotiated after by a new contractor.

Finally, it is also worth noting that the government is currently consulting on changes to the TUPE regulations which would provide for greater flexibility and potentially more limited protections for staff.

## Annex 1 Questionnaire

### SOCIAL ASPECTS AND THE PROTECTION OF STAFF IN CASE OF CHANGE OF RAILWAY OPERATOR (THE CURRENT SITUATION)



*The Voice  
of European  
Railways*

### Interview guidelines

## Social aspects and protection of staff in tendering procedures in the railway sector in Europe (Big picture)

Name:  
Function (job role):  
Organisation :  
Country:  
Email address:  
Phone number:

#### **Background/Introduction**

The European social partners in the railway sector wish to assess the current situation in relation to the protection of staff in case of tendering of public services and in the case of change of operator. For this purpose we would like to arrange interviews with key stakeholders in the Member States to gather some baseline information about:

- a. The extent to which tendering is currently used in the railway passenger sector
- b. If there is no tendering in this sector so far, the experience of the urban public transport sector is also of interest?
- c. Are social criteria used in tendering of public service obligations in the passenger rail sector and if so, what are these criteria?
- d. What provisions and protections are applied to safeguard social standards of staff in the case of tendering and transfer of staff to a new operator as a result of tendering?

### Definition of Terms:

- 'public service obligation' means a requirement defined or determined by a competent authority in order to ensure public passenger transport services in the general interest that an operator, if it were considering its own commercial interests, would not assume or would not assume to the same extent or under the same conditions without reward
- 'direct award' means the award of a public service contract to a given public service operator without any prior competitive tendering procedure - mostly to internal operators (a legally distinct operator where the competent local authority or the public service operator exercises control as if own department) and in exceptional cases to third operators
- 'competitive tendering' is in place where the local competent authority awards a public service contract to a given third operator. 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. Following the submission of tenders and any pre-selection, the procedure may involve negotiations in accordance with these principles in order to determine how best to meet specific or complex requirements.

## I. Use of tendering

1. In your country, is only competitive tendering used or is direct award also used by tendering authorities?

	Tick ✓ where appropriate In rail passenger transport	In urban public transport? <sup>249</sup>
Competitive tendering only	<input type="checkbox"/>	<input type="checkbox"/>
Competitive tendering and direct award	<input type="checkbox"/>	<input type="checkbox"/>
Direct award only	<input type="checkbox"/>	<input type="checkbox"/>

2. If competitive tendering is not currently in evidence in the rail passenger sector is there a political agreement to open the market?

	Tick ✓ where appropriate
Yes	<input type="checkbox"/>
No	<input type="checkbox"/>

3. If yes, please indicate the likely timescale for tendering to be used in the railways sector

	Tick ✓ where appropriate
In the next 1-2 years	<input type="checkbox"/>
In the next 3-5 years	<input type="checkbox"/>
In the next 5-10 years	<input type="checkbox"/>

<sup>249</sup> Bus, metro, tram

4. Can you indicate further details of the political agreement?

Click here to enter text.
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## II. Social standards

1. If competitive tendering is used, are social aspects or criteria (for example wage level, working time or others) included in the tender documents/specifications?

	Tick ✓ where appropriate	
	Yes	No
For rail passenger transport only?	<input type="checkbox"/>	<input type="checkbox"/>
For urban public transport (bus, metro, tram) only?	<input type="checkbox"/>	<input type="checkbox"/>
For both rail passenger transport and urban public transport?	<input type="checkbox"/>	<input type="checkbox"/>

2. If direct award is used, are social aspects or criteria (for example wage level, working time or others) included in the tender documents/specifications?

	Tick ✓ where appropriate	
	Yes	No
For rail passenger transport only?	<input type="checkbox"/>	<input type="checkbox"/>
For urban public transport (bus, metro, tram) only?	<input type="checkbox"/>	<input type="checkbox"/>
For both rail passenger transport and urban public transport?	<input type="checkbox"/>	<input type="checkbox"/>

3. Are these social aspects (standards, criteria) based on

	Tick ✓ where appropriate	
	In rail passenger	In urban public transport
	<input type="checkbox"/>	<input type="checkbox"/>

	transport		Yes	No
	Yes	No		
Legislation	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Collective agreements at national/sectoral level	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Collective agreements at the company level	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Regulations	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Others (please specify)	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>

If possible please provide the name and web link to the relevant legislation/collective agreement etc

Click here to enter text.

Comments:

Click here to enter text.

4. Does a collective agreement exist for the rail passenger sector

	Tick ✓ where appropriate	
	Yes	No
For the rail sector		
At company level – each company has a different one	<input type="checkbox"/>	<input type="checkbox"/>
At regional level	<input type="checkbox"/>	<input type="checkbox"/>
At sectoral level	<input type="checkbox"/>	<input type="checkbox"/>
At national level – binding for all companies	<input type="checkbox"/>	<input type="checkbox"/>
Competent public authority can chose a representative collective agreement	<input type="checkbox"/>	<input type="checkbox"/>
For the urban public transport sector		
At the regional level	<input type="checkbox"/>	<input type="checkbox"/>
At sectoral level	<input type="checkbox"/>	<input type="checkbox"/>
At the company level	<input type="checkbox"/>	<input type="checkbox"/>
At national level	<input type="checkbox"/>	<input type="checkbox"/>

binding for all companies		
Competent public authority can chose a representative collective agreement	<input type="checkbox"/>	<input type="checkbox"/>

If possible please provide the name/date and web link to the relevant collective agreement

[Click here to enter text.](#)

5. Which social aspects are included in tendering procedures in the rail/urban public transport sector? What is the basis for these provisions? (please tick as appropriate and indicate whether provisions are binding or in the form of recommendations (delete r if binding, delete b if recommendation))?

	Valid for rail passenger transport (Binding or recommendation?)	Valid for urban public transport (Binding or recommendation?)	Name the exact rule and add any remarks on the use and impact of these provisions
<b>Minimum wages</b>	<input type="checkbox"/> by law <input type="checkbox"/> sector-wide collective agreement [b/r] <input type="checkbox"/> collective agreement on company level [b/r] <input type="checkbox"/> a representative collective agreement stipulated by the tendering authority <sup>250</sup> [b/r] <input type="checkbox"/> regulations [b/r] <input type="checkbox"/> other (please specify) [b/r]	<input type="checkbox"/> by law <input type="checkbox"/> sector-wide collective agreement [b/r] <input type="checkbox"/> collective agreement on company level [b/r] <input type="checkbox"/> a representative collective agreement stipulated by the tendering authority [b/r] <input type="checkbox"/> regulations [b/r] <input type="checkbox"/> other (please specify) [b/r]	
<b>Wages (more than only minimum wages)</b>	<input type="checkbox"/> by law <input type="checkbox"/> sector-wide collective agreement [b/r] <input type="checkbox"/> collective agreement on company level [b/r] <input type="checkbox"/> a representative collective agreement stipulated by the tendering authority [b/r]	<input type="checkbox"/> by law <input type="checkbox"/> sector-wide collective agreement [b/r] <input type="checkbox"/> collective agreement on company level [b/r] <input type="checkbox"/> a representative collective agreement stipulated by the tendering authority [b/r]	

<sup>250</sup> The PSO regulation provides tendering authorities with the opportunity to stipulate a so-called "representative collective agreements" to determine basic social standards for employees under PSO contracts in the absence of national sectoral collective agreement. Countries are able to set their own criteria for selecting such "representative collective agreements" and ways of implementing its standards (see also question 6).

	Valid for rail passenger transport (Binding or recommendation?)	Valid for urban public transport (Binding or recommendation?)	Name the exact rule and add any remarks on the use and impact of these provisions
	<input type="checkbox"/> regulations [b/r] <input type="checkbox"/> others (please specify) [b/r]	<input type="checkbox"/> regulations [b/r] <input type="checkbox"/> others (please specify) [b/r]	
<b>Wage components (for example supplements for night work, shift work, work on Sundays or public holidays)</b>	<input type="checkbox"/> by law <input type="checkbox"/> sector-wide collective agreement [b/r] <input type="checkbox"/> collective agreement on company level [b/r] <input type="checkbox"/> a representative collective agreement stipulated by the tendering authority [b/r] <input type="checkbox"/> regulations [b/r] <input type="checkbox"/> other (please specify) [b/r]	<input type="checkbox"/> by law <input type="checkbox"/> sector-wide collective agreement [b/r] <input type="checkbox"/> collective agreement on company level [b/r] <input type="checkbox"/> a representative collective agreement stipulated by the tendering authority [b/r] <input type="checkbox"/> regulations [b/r] <input type="checkbox"/> other (please specify) [b/r]	
<b>Working hours</b>	<input type="checkbox"/> by law <input type="checkbox"/> sector-wide collective agreement [b/r] <input type="checkbox"/> collective agreement on company level [b/r] <input type="checkbox"/> a representative collective agreement stipulated by the tendering authority [b/r] <input type="checkbox"/> regulations [b/r] <input type="checkbox"/> other (please specify) [b/r]	<input type="checkbox"/> by law <input type="checkbox"/> sector-wide collective agreement [b/r] <input type="checkbox"/> collective agreement on company level [b/r] <input type="checkbox"/> a representative collective agreement stipulated by the tendering authority [b/r] <input type="checkbox"/> regulations [b/r] <input type="checkbox"/> other (please specify) [b/r]	
<b>Training</b>	<input type="checkbox"/> by law <input type="checkbox"/> sector-wide collective agreement [b/r] <input type="checkbox"/> collective agreement on company level	<input type="checkbox"/> by law <input type="checkbox"/> sector-wide collective agreement [b/r] <input type="checkbox"/> collective agreement on company level	

	Valid for rail passenger transport (Binding or recommendation?)	Valid for urban public transport (Binding or recommendation?)	Name the exact rule and add any remarks on the use and impact of these provisions
	[b/r] <input type="checkbox"/> a representative collective agreement stipulated by the tendering authority [b/r] <input type="checkbox"/> regulations [b/r] <input type="checkbox"/> other (please specify) [b/r]	[b/r] <input type="checkbox"/> a representative collective agreement stipulated by the tendering authority [b/r] <input type="checkbox"/> regulations [b/r] <input type="checkbox"/> other (please specify) [b/r]	
<b>Health protection / health and safety at work</b>	<input type="checkbox"/> by law <input type="checkbox"/> sector-wide collective agreement [b/r] <input type="checkbox"/> collective agreement on company level [b/r] <input type="checkbox"/> a representative collective agreement stipulated by the tendering authority [b/r] <input type="checkbox"/> regulations [b/r] <input type="checkbox"/> other (please specify) [b/r]	<input type="checkbox"/> by law <input type="checkbox"/> sector-wide collective agreement [b/r] <input type="checkbox"/> collective agreement on company level [b/r] <input type="checkbox"/> a representative collective agreement stipulated by the tendering authority [b/r] <input type="checkbox"/> regulations [b/r] <input type="checkbox"/> other (please specify) [b/r]	
<b>Protection against dismissals in case of change of operator</b>	<input type="checkbox"/> by law <input type="checkbox"/> sector-wide collective agreement [b/r] <input type="checkbox"/> collective agreement on company level [b/r] <input type="checkbox"/> a representative collective agreement stipulated by the tendering authority [b/r] <input type="checkbox"/> regulations [b/r] <input type="checkbox"/> other (please specify) [b/r]	<input type="checkbox"/> by law <input type="checkbox"/> sector-wide collective agreement [b/r] <input type="checkbox"/> collective agreement on company level [b/r] <input type="checkbox"/> a representative collective agreement stipulated by the tendering authority [b/r] <input type="checkbox"/> regulations [b/r] <input type="checkbox"/> other (please specify) [b/r]	

	Valid for rail passenger transport (Binding or recommendation?)	Valid for urban public transport (Binding or recommendation?)	Name the exact rule and add any remarks on the use and impact of these provisions
<b>Pension rights</b>	<input type="checkbox"/> by law <input type="checkbox"/> sector-wide collective agreement [b/r] <input type="checkbox"/> collective agreement on company level [b/r] <input type="checkbox"/> a representative collective agreement stipulated by the tendering authority [b/r] <input type="checkbox"/> regulations [b/r] <input type="checkbox"/> other (please specify) [b/r]	<input type="checkbox"/> by law <input type="checkbox"/> sector-wide collective agreement [b/r] <input type="checkbox"/> collective agreement on company level [b/r] <input type="checkbox"/> a representative collective agreement stipulated by the tendering authority [b/r] <input type="checkbox"/> regulations [b/r] <input type="checkbox"/> other (please specify) [b/r]	
<b>others - please specify</b>			

6. If tendering authorities make use of the ability to stipulate “representative collective agreements”, which criteria are used to determine the collective agreement to be selected?

Click here to enter text.

### III. Transfer of staff in case of change of operator

1. In tendering procedure, is there provision for the transfer of staff in case of a change of operator?

Yes  
No

Tick ✓ where appropriate

2. What is the basis of these provisions (please complete table below)?

	For rail passenger transport Recommendation (voluntary)? Binding (compulsory)?	For urban public transport Recommendation (voluntary)? Binding (compulsory)?	Exact name of rules (or number of article in law/regulation) and add any remarks on the use and impact of these provisions
Legislation	<input type="checkbox"/> Recommendation (voluntary) <input type="checkbox"/> Binding (compulsory)	<input type="checkbox"/> Recommendation (voluntary) <input type="checkbox"/> Binding (compulsory)	
Collective agreements	<input type="checkbox"/> Recommendation (voluntary) <input type="checkbox"/> Binding (compulsory)	<input type="checkbox"/> Recommendation (voluntary) <input type="checkbox"/> Binding (compulsory)	
Regulations	<input type="checkbox"/> Recommendation (voluntary) <input type="checkbox"/> Binding (compulsory)	<input type="checkbox"/> Recommendation (voluntary) <input type="checkbox"/> Binding (compulsory)	
Others/national specifications	<input type="checkbox"/> Recommendation (voluntary) <input type="checkbox"/> Binding (compulsory)	<input type="checkbox"/> Recommendation (voluntary) <input type="checkbox"/> Binding (compulsory)	
Has your organisation or company been involved in a call for tender?	<input type="checkbox"/> NO <input type="checkbox"/> YES With transfer of staff? <input type="checkbox"/> YES <input type="checkbox"/> NO	<input type="checkbox"/> NO <input type="checkbox"/> YES With transfer of staff? <input type="checkbox"/> YES <input type="checkbox"/> NO	Provide short details of the procedure and name the competent authority issuing the tender
Do you know an example of another company? A precise case of transfer of	<input type="checkbox"/> NO <input type="checkbox"/> YES With transfer of staff?	<input type="checkbox"/> NO <input type="checkbox"/> YES With transfer of staff?	Note the example here, please include the name of the competent authority

	For rail passenger transport Recommendation (voluntary)? Binding (compulsory)?	For urban public transport Recommendation (voluntary)? Binding (compulsory)?	Exact name of rules (or number of article in law/regulation) and add any remarks on the use and impact of these provisions
staff?	<input type="checkbox"/> YES <input type="checkbox"/> NO	<input type="checkbox"/> YES <input type="checkbox"/> NO	

3. Are terms and conditions of staff protected in situations where there is no change of operators following tendering?

Yes  
No

Tick ✓ where appropriate

a. Article 4(5) and 4(6) of Regulation 1370/2007/EC

1. Do you know **Regulation 1370/2007** (the so-called EU PSO [Public Service Obligation] Regulation)?

Yes  
No

Tick ✓ where appropriate

2. Do you know the provisions of Art. 4(5) & 4(6) of the EU PSO regulation on social aspects within tendering / transfer of staff)?

Yes  
No

Tick ✓ where appropriate

3. If yes, could you indicate the following

	Tick ✓ where appropriate			
	Yes	No	Don't know	Please provide further details of the legislation and remarks on the impact on tendering procedures and the protection of staff
Are there additional rules implementing Art. 4(5) & 4(6) of the Regulation under national law?	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	
Are provisions concerning Art. 4(5) & 4(6) implemented in tendering procedures?	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	
Do tendering procedures take	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	

account of Articles 4 (5+6) of Reg. 1370/2007?				
Was the spirit of these rules implemented in tendering even before the Regulation came into force?	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	
If these provisions are not implemented in tendering what is the impact on the protection of staff in tendering procedures (use final column for remarks)?	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	

4. Do you know any experts who can further explain the national context in your country?

Click here to enter text.



The Voice  
of European  
Railways



# Social aspects and the protection of staff in competitive tendering of rail public transport services and in the case of change of railway operator

## JOINT OPINION CER/ETF

### PREAMBLE

As part of an evaluation of different social rules in railway passenger transport linked to the Regulation 1370/2007 „PSO“, CER and ETF decided to conduct a study on the Social aspects and the protection of staff in competitive tendering of rail public transport services and in the case of change of railway operator. The project developed by the social partners gives a picture of the situation on the protection of personnel in the member states of the EU.

Good social standards are - both from employees' and from employers' view - a condition sine qua non for delivering good quality services and are an important factor for maintaining or improving the attractiveness of jobs in the railway sector, which becomes a major challenge due to the demographic change in nearly all EU Member States.

The project has shown that there are very different national situations in terms of social aspects and protection of staff in case of change of operator and especially concerning the application of articles 4(5) and 4(6) in conjunction with recitals 16 and 17. On the one hand some Member states established on a national level similar rules concerning binding social standards and/or compulsory transfer of staff before the Regulation 1370/2007 came into force. In fact, some countries decided to create such social rules by national laws or regulations or they established a framework for the social partners to conclude agreements for adequate social standards in the sector. On the other hand there are still Member States where the social aspects of the market opening seem to be not sufficiently or not at all taken into account.

## PRINCIPLE STATEMENTS

1. Although the European social partners differ in their view on the need for further liberalisation and market opening, they share the conclusion that the consequences of competition should not affect the working conditions of staff providing services by requiring on national, regional or local level binding social standards and/or the compulsory transfer of staff in case of change of operator.
2. The social partners insist that it must be compulsory for every EU Member State, where such protection doesn't exist, to create a social level playing field by setting binding social standards (on a national, regional or local level) in order to protect working conditions existing at the moment of change of operator and/or by requiring a transfer of staff previously taken on to provide services. This should be done according to the national or regional specificities either by the legislator and/or the social partners by sector-wide collective agreements (including the rules for civil servants or staff with a specific employment status similar to civil servants) at the latest at the opening of the domestic railway passenger market.
3. Such social standards have to include at least provisions on wages, working time, Health & Safety and training.
4. A compulsory transfer of staff in case of change of operator will also ensure the continuity of the service for the passengers and the transport authorities. When transfer occurs, it has to apply to railway staff previously taken on to provide services by the previous operator and grant them the rights to which they would have been entitled if there had been a transfer within the meaning of Directive 2001/23. Nevertheless, the previous operator has the possibility to offer new positions to the involved employees with continuing the existing contract.
5. ETF and CER recommend to use the experience and knowledge of the social partners in the whole tendering process.

Brussels, 23 September 2013

**CER – Community of European Railway and Infrastructure Companies**

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# Soziale Aspekte und der Schutz der Beschäftigten bei wettbewerblichen Ausschreibungen bei öffentlichen Schienenverkehrsdiensten und im Falle eines Betreiberwechsels als Folge

## GEMEINSAME STELLUNGNAHME CER/ETF

### PRÄAMBEL

Als Teil einer Evaluierung verschiedener Sozialvorschriften im Schienenpersonenverkehr in Zusammenhang mit der PSO-Verordnung 1370/2007 haben CER und ETF beschlossen, eine Studie zu den sozialen Aspekten und zum Schutz der Mitarbeiter bei der wettbewerblichen Ausschreibung öffentlicher Schienenpersonenverkehrsdienste und im Falle eines Betreiberwechsels durchzuführen. Das von den Sozialpartnern entwickelte Projekt veranschaulicht die Situation des Beschäftigtenschutzes im SPNV in den EU-Mitgliedstaaten.

Gute Sozialstandards sind – sowohl aus der Sicht der Beschäftigten als auch der Arbeitgeber – eine Grundvoraussetzung für die Erbringung hochwertiger Dienstleistungen und ein wichtiger Faktor für die Bewahrung bzw. Verbesserung der Attraktivität der Arbeitsplätze im Eisenbahnsektor. Aufgrund des demografischen Wandels in nahezu sämtlichen EU-Mitgliedstaaten gehört dieses zu einer wesentlichen Herausforderung.

Das Projekt hat deutlich gemacht, dass es sehr unterschiedliche nationale Sachverhalte bezüglich sozialer Bedingungen und Beschäftigtenschutz im Falle eines Betreiberwechsels gibt, insbesondere mit Blick auf die Anwendung der Artikel 4(5) sowie 4(6) in Verbindung mit den Erwägungsgründen 16 und 17 der VO (EG) 1370/2007. Einige Mitgliedstaaten haben bereits vor dem Inkrafttreten der Verordnung 1370/2007 auf nationaler Ebene ähnliche Vorschriften hinsichtlich verbindlicher Sozialstandards und/oder einem obligatorischen Personaltransfer verabschiedet. In der Tat, eine Reihe von Ländern haben beschlossen, solche Sozialvorschriften durch nationale Gesetze bzw. Verordnungen zu verankern, oder sie schufen die Rahmenbedingungen, damit die Sozialpartner Vereinbarungen über angemessene Sozialstandards in dem Sektor schließen können. Andererseits gibt es anscheinend immer noch Mitgliedstaaten, in denen die sozialen Aspekte der Marktöffnung nicht ausreichend bzw. überhaupt nicht berücksichtigt werden.

## GRUNDSÄTZLICHE STANDPUNKTE

1. Wenn auch die Meinung der europäischen Sozialpartner in der Frage der Notwendigkeit einer weiteren Liberalisierung und Marktöffnung auseinander geht, kommen beide gemeinsam zu der Schlussfolgerung, dass die Folgen des Wettbewerbs nicht zu Lasten der Arbeitsbedingungen der Beschäftigten gehen dürfen. Zu deren Schutz sollten auf nationaler, regionaler oder lokaler Ebene verbindliche Sozialstandards und/oder der obligatorische Mitarbeitertransfer im Fall eines Betreiberwechsels verlangt werden.
2. Die Sozialpartner betonen, dass für jeden EU-Mitgliedstaat, in dem ein derartiger Schutz nicht existiert, es verpflichtend sein muss, für gleiche soziale Voraussetzungen zu sorgen, indem verbindliche Sozialstandards (auf nationaler, regionaler oder lokaler Ebene) festgelegt werden, um die zum Zeitpunkt des Betreiberwechsels bestehenden Arbeitsbedingungen zu schützen, und/oder indem ein Transfer des vorher für die Erbringung der Dienstleistungen beschäftigten Personals verlangt wird. Dies sollte – im Einklang mit den nationalen oder regionalen Besonderheiten – spätestens bei der Öffnung des inländischen Schienenpersonenverkehrsmarktes entweder vom Gesetzgeber und/oder von den Sozialpartnern durch branchenweite Tarifverträge (einschließlich der Vorschriften für Beamte bzw. Personal mit einem beamtenähnlichen besonderen Beschäftigungsstatut) erfolgen.
3. Derartige Sozialstandards müssen mindestens Lohn-, Arbeitszeit-, Arbeitssicherheits- und Gesundheitsschutz- sowie Ausbildungsbestimmungen enthalten.
4. Ein obligatorischer Personaltransfer im Falle eines Betreiberwechsels wird auch die Kontinuität der Dienstleistung für die Fahrgäste und Verkehrsbehörden sicherstellen. Wenn es zu einem Transfer kommt, muss dieser für die zuvor für die Erbringung von Dienstleistungen durch den früheren Betreiber eingestellten Bahnmitarbeiter gelten und ihnen die Rechte zusichern, auf die sie bei einem Transfer im Sinne von Richtlinie 2001/23 Anspruch gehabt hätten. Nichtsdestotrotz besitzt der vormalige Betreiber die Möglichkeit, den betroffenen Mitarbeitern bei Fortsetzung des existierenden Vertrages neue Stellen anzubieten.
5. ETF und CER empfehlen, die Erfahrung und das Wissen der Sozialpartner im gesamten Ausschreibungsprozess zu nutzen.

Brüssel, 23. September 2013

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# Aspects sociaux et protection du personnel dans le cadre d'appel d'offres de services de transport public ferroviaire et en cas de changement d'opérateur ferroviaire

## AVIS CONJOINT CER/ETF

### PRÉAMBULE

Dans le cadre de l'évaluation des différentes règles sociales du secteur du transport ferroviaire de voyageurs, liées au règlement 1370/2007 «OSP», la CER et l'ETF ont décidé de réaliser une étude sur les «Aspects sociaux et la protection du personnel lors d'appels d'offres pour des services de transport public ferroviaire et en cas de changement d'opérateur ferroviaire». Ce projet, mené par les partenaires sociaux, donne une photographie de la situation en matière de protection du personnel dans les États membres de l'UE.

De bonnes normes sociales constituent, tant du point de vue des employés que des employeurs, une condition *sine qua non* à l'offre de services de qualité. Il s'agit en outre d'un facteur important pour le maintien ou le renforcement de l'attractivité des emplois proposés dans le secteur ferroviaire. En raison des changements démographiques dans la quasi-totalité des États membres de l'UE, l'attractivité du secteur devient un enjeu majeur.

Le projet a révélé qu'il existe des situations nationales très différentes en termes d'aspects sociaux et de protection du personnel en cas de changement d'opérateur, particulièrement en ce qui concerne l'application des articles 4(5) et 4(6) en liaison avec les considérants 16 et 17. D'une part, certains États membres ont défini au niveau national des règles similaires en matière de normes sociales obligatoires et/ou de transfert obligatoire de personnel avant que le règlement 1370/2007 n'entre en vigueur. En effet, certains pays ont décidé de définir ce type de règles sociales par le biais de lois ou de réglementations nationales ou d'établir un cadre destiné aux partenaires sociaux, afin que ceux-ci concluent des accords en vue d'aboutir à des normes sociales adéquates dans le secteur. D'autre part, dans certains États membres, les aspects sociaux de l'ouverture du marché ne semblent pas être suffisamment pris en compte, voire pas du tout.

## DÉCLARATIONS DE PRINCIPE

1. Bien que les partenaires sociaux européens ne soient pas du même avis quant à la nécessité de poursuivre la libéralisation et l'ouverture du marché, ils s'accordent sur le fait que les conséquences de la mise en concurrence ne devraient pas affecter les conditions de travail du personnel. Cela nécessite au niveau national, régional ou local des normes sociales obligatoires et/ou le transfert obligatoire de personnel en cas de changement d'opérateur.
2. Les partenaires sociaux insistent pour que chaque État membre de l'UE ne disposant pas de telles protections soit tenu de mettre en place des règles de jeu en matière sociale qui s'appliquent à tous (social level playing field) en définissant des normes sociales obligatoires (au niveau national, régional ou local), afin de protéger les conditions de travail en place au moment du changement d'opérateur et/ou en exigeant le transfert du personnel préalablement engagé pour fournir les services. Cela devrait se faire en fonction des spécificités nationales ou régionales par le législateur et/ou les partenaires sociaux dans le cadre des conventions collectives sectorielles (y compris les règles relatives aux fonctionnaires ou au personnel disposant d'un statut d'emploi spécifique similaire), au plus tard à l'ouverture du marché du transport ferroviaire national de passagers.
3. Ces normes sociales doivent comprendre au minimum des dispositions sur les salaires, le temps de travail, la santé, la sécurité et la formation.
4. Le transfert obligatoire de personnel en cas de changement d'opérateur permettra également de garantir la continuité du service pour les voyageurs et les autorités des transports. Lorsqu'il y a transfert, il doit s'appliquer au personnel ferroviaire préalablement engagé par l'opérateur précédent pour fournir les services et lui garantir les droits dont il aurait bénéficié s'il y avait eu un transfert au sens de la Directive 2001/23. L'opérateur précédent a toutefois la possibilité d'offrir de nouveaux postes aux employés concernés en poursuivant leur contrat.
5. L'ETF et la CER recommandent de profiter de l'expérience et des connaissances des partenaires sociaux lors de l'ensemble de la procédure d'appel d'offres.

Bruxelles, le 23 Septembre 2013

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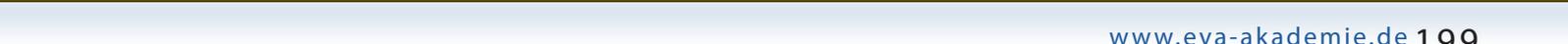
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