

**Resolution**  
of the Bundesrat

**Proposal for a regulation of the European Parliament and of the Council amending Regulation (EC) No 1370/2007 concerning the opening of the market for domestic passenger transport services by rail**

**COM(2013) 28 final**

At its 928th sitting on 28 November 2014 the Bundesrat adopted the following opinion pursuant to Sections 3 and 5 of the Act on Cooperation between the Federation and the Länder in European Union Affairs (EUZBLG):

1. The Bundesrat reiterates its view that any amendment of Regulation (EC) No 1370/2007 of the European Parliament and of the Council of 23 October 2007 on public passenger transport services by rail and by road and repealing Council Regulations (EEC) Nos 1191/69 and 1107/70 should not go beyond what is necessary to open up the market for passenger transport services by rail. Broadening the scope to include public passenger transport services by road would be at variance with the procedure laid down in Article 11 of Regulation (EC) No 1370/2007 for assessing its effects.
2. The Bundesrat continues to oppose overregulation of the matter and undue encroachment on the decision-making powers of awarding authorities in the field of public passenger transport services. This is particularly true with respect to the Resolution of the European Parliament of 26 February 2014, in which changes are proposed that go even further than the Commission's proposal.
  - The Bundesrat considers the proposal that the competent authorities should be required to draw up multimodal network plans and to determine the award procedure under those plans inappropriate. The proposed draft regulation would

make it more difficult for the municipalities to plan, organise and award local public transport services, not least due to the multimodal public transport plans that it introduces and the restrictions on direct awards that this would entail. Indeed, under the draft proposal the competent authorities would be required to justify their choice of award procedure in a public statement showing that the plan's viability, efficiency and quality targets can only be achieved by way of the procedure chosen. It is questionable whether it is even feasible to provide such a justification. In any case, requiring the award procedure to be determined as part of the multimodal plan would in effect do away with the option of direct awards.

- Furthermore, the Bundesrat does not concur with the proposal, set out in the draft amendment, that the competent authorities should be required to draw up detailed annual reports that also include the quality criteria applied, since the time and effort involved would be disproportionate. Under Article 7(1) of Regulation (EC) No 1370/2007 the authorities are already required to draw up an aggregated annual report. Quality control can thus be ensured under the provisions of the current Regulation. On the other hand, the current Regulation gives the authorities greater room for manoeuvre to take account of any costs associated with this. Any obligation to ascertain that the quality criteria listed in the draft amendment have been met could give rise to considerable costs if payment of a fee is required to obtain such data.

- Lastly, the proposal to introduce a ban on under-compensation must also be rejected. Introducing a ban on under-compensation could jeopardise the use of taxation-based cross-subsidisation to fund local public transport services and thus burden the municipalities with substantial additional costs. It would have serious consequences for the municipalities if the regulation were to include a ban on under-compensation, since it would mean that compensation payments could no longer be lower than the net costs of running local public transport services. Consequently, the municipality would have to pay companies entrusted with providing public services full compensation, with the result that for the services in question losses would no longer be incurred and tax-based cross-subsidisation would become largely irrelevant. If a company waived its right to full compensation, this would constitute covert profit distribution in tax law terms. Tax-based cross-subsidisation, whereby loss-making services within a company can be offset by profit-making ones, is a vital arrangement for the municipalities and municipal undertakings given that it allows them to continue providing unprofitable public transport services free of charge, or against a reasonable fee.

Moreover, introducing a ban on under-compensation could remove the possibility of awarding service concessions under the Regulation. Such a ban could create a

legally enforceable right to compensation for any losses incurred. Thus sustaining losses from operating public transport services, which is the basis for tax-based cross-subsidisation, would be ruled out. On the other hand, if such a right to compensation for losses existed, the provision of public transport services would be practically free of any risk. Yet considerable operational risk must be assumed in order for the provisions of Regulation (EC) No 1370/2007 to be applied to the award of public services, as opposed to the rules on public procurement.

3. The Bundesrat hereby resolves to submit this opinion directly to the Commission.
4. The Bundesrat hereby resolves to submit this opinion directly to the European Parliament.