
NP Newsletter 1/07

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1. Achieving the impossible

On 13th March 2007, the Federal Transport Ministry submitted an improved draft bill for the privatisation of DB AG. In order to meet the requirements of EU law (separation), the ownership of DB infrastructure companies is to be transferred from the DB AG to the government. Nevertheless DB shall continue controlling and drawing up balance sheets for these companies. In order to do this (draw up balance sheet) DB must be at least the economic owner of the infrastructure company, if not the legal owner. But we know from decade-long discussions about the *leasing order* (Leasingerlass) that the axiom of *economic ownership* (DB) only works if the *legal owner* (Federal Government) refrains from influencing the property. If the Federal Government were to voluntarily revoke its function as paymaster, it would be breaching Article 87e of the German Constitution.

The cleanest solution would still be a clear legal separation of infrastructure and transport: This is the only way of getting more traffic travelling by rail and of preventing gridlock on our roads.

2. Where do we go from here?

This 'legislative impossibility' of the draft bill has already been anchored in the Resolution by the Federal Parliament dated 24th November 2006. It is an expression of the fact that no agreement was reached. As national parliamentary elections are due in 2009, the time window for difficult legislative initiatives will close in the course of 2008.

Unless a miracle occurs, no privatisation bill will be passed in this election period. On the one hand, this is regrettable for private rail operators. On the other hand, it will be welcomed because the proposals submitted by the Transport Ministry strengthen the state's rail monopoly despite the participation of third parties and weaken the state as a guarantor for retaining a demand-oriented and financially viable railway infrastructure.

From our point of view, members of parliament should not allow themselves to get carried away by agreeing to a poorly conceived compromise, come hell or high water. This appeal is also and in particular aimed at the Federal States: The *Länder* can only break free of DB AG's stranglehold, reduce subsidies and still get more traffic travelling by rail, through a, possibly gradual, separation of railway infrastructure from the DB rail group.

What Professor Eisenkopf¹ recently announced applies to all parties involved: Politics must decide who the principal is and who the agent is.

3. The role of the DB boss

The boss of the state railway has an eminent role in German transport policy, the importance of which is determined by the complexity of the subject. Apart from the rail group itself, "no one knows what's going on". The rail boss has comparatively extensive resources at his disposal and is able to, more or less, openly influence the policies of the EU, Federal Government, *Länder* and science (the latter is strongly dependent on third-party funds) and, therefore, also the trade press. The whole scenario is then completed with his headstart as far as information is concerned, which could also be called 'dominant knowledge'. This role is not contained in any legislation and was neither planned nor foreseen by the founding fathers of rail reform. Equally unplanned and unforeseen was the fact that the state railway – in the negligée of an *Aktiengesellschaft* (AG) – suddenly started acting as a body with its own rights against the state: Every incriminating directive issued by the supervising authorities, its owner, is met by stiff resistance – and this is even announced in advance. You can't get more audacious than that.

The transition process from a state-run to a private railway, however, requires a rail boss who shows a great deal of responsibility towards the community and respect for parliament, government and the general public in dealing with a potential he hasn't legally been allocated. Many areas would be more simple and transparent in terms of constitutional law, if the enormous capabilities of the rail boss were deployed constructively and without the need to assert his own ambitions. Whether the Federal Government is well advised to extend the contract of the current rail boss, who will reach retirement age this year, is doubted by many, to put it diplomatically. When assessing the situation realistically, the continuity argument is invalid because a political solution to the problem (rail privatisation) can certainly not be implemented prior to the expiry of such a contract extension period.

¹ He spoke rather diplomatically about 'Principals' and 'Agents': Prof. Dr. Christoph Eisenkopf, Zeppelin University Friedrichshafen, on 28th February 2007 during a speech at a parliamentary evening hosted by mofair (interest group for private operators in local public passenger transport in Germany): http://mofair.de/content/070307_vortrag_eisenkopf.pdf

4. Unbundling/corporate lawyers

Last year, Network Private Rail made a major contribution towards the internal separation of competitively sensitive areas (route allocation and remuneration) within the DB Group². The EBA reacted with a very comprehensively justified and immediately executable ruling, in which the DB AG was prohibited from using its corporate lawyers to represent the DB Netz AG in competitively sensitive areas³. But, of course, the state railway is not going to accept any inconvenient rulings from the state: Not only is the DB Netz AG taking legal action against the EBA's ruling, but also the DB Holding itself and lawyers employed at DB's legal department who obviously feel that their rights are being personally 'infringed'. The DB has commissioned two leading law firms to represent them, each of which has had their say in very comprehensive legal briefs, large sections of which certainly appear to be identical. As an aside, it should be noted that it is DB customers who will pay for the lawyers' fees and court costs through ticket prices and track fees. And all that for a completely superfluous dispute: state railway against state.

5. Traction power

In Newsletter 3/2006, we commented on the 'remarkable' traction power judgement made by the Higher Regional Court (OLG) of Frankfurt/Main. The court decided that, as an integrated group, the German state railway is free to structure its energy prices for the own transport divisions as it pleases. In the meantime, the private operator involved has submitted an appeal with the Federal Court of Justice (BGH) against this judgement. Also and, in particular, following a study into the admirably stringent and almost ascetic reasons for the appeal, there is no doubt on the part of the private operators that the appeal will be successful. In expert circles it is firmly expected that the ruling by the Frankfurt Regional Court will be overturned. This decision would then confirm that the pricing privileges of DB's transport subsidiaries are an abuse of DB's monopoly on the infrastructure at the expense of DB's private competitors.

This discussion has made it plain that in the current legal situation it is not clear whether the wheeling of traction power by the DB long-distance power network is subject to the regulations of the German Energy Industry Act or General Railway Act. Furthermore, it is also unclear to what extent the pure supply of traction power itself is subject to regulation. In theory, users of the rail network can also get traction power from other supply companies. However, the wheeling costs imposed by DB Energie GmbH are so high that it is not financially viable for private operators to draw on external power suppliers, especially in view of the discounts granted by DB Energie to its DB sister companies. It can be concluded from this that, with the usual all-inclusive pricing, wheeling prices are also subject to discounts, which certainly contradicts the precept of free access, also to the power infrastructure – irrespective of whether the traction power infrastructure is subject to the General Railway Act or to German energy law.

² NP complaints from 21st October 2005:

http://www.netzwerk-privatbahnen.de/pdf/Abschrift_DBNetzAG.pdf

³ http://www.netzwerk-privatbahnen.de/pdf/061127_EBA_Presseerklaerung_Konzernjuristen.pdf

6. Maintenance congestion

Since the middle of 2005, Network Private Rail has been involved in a systematic investigation into the number, length and age of speed restrictions on the German network⁴. Now the German Federal Court of Auditors (*Bundesrechnungshof, BRH*) has taken up the matter⁵. The BRH stated that the speed restrictions are recognised as an indicator of the quality of the rail network. It is embarrassing, however, that DB and the Federal Transport Ministry have concentrated on vehemently denying this trivial correlation. Suddenly the top management of DB Holding (not: DB Netz AG!) have conjured up a maintenance concept. With a PR campaign at national and state level, DB is now trying to propagate a positive message with their 'Pro Netz' initiative – which assures everyone that they have 'everything under control'. In Leipzig recently, it was announced that there are just 13 speed restrictions in three South-East Länder. According to findings by Network Private Rail for these regions, in summer 2006 there were a total of 253 speed restrictions, 55 percent of which were more than 12 months old⁶.

At the beginning of March, a committee of the German Parliament invited experts to take part in a discussion on the subject of maintenance. All the experts asked confirmed the findings of the BRH with some rather drastic practical examples. The representative of Network Private Rail explained, when asked, that in his opinion this was a case of intentional damage to the railway infrastructure, which would lead to disproportionately high traffic restrictions due to repairs. These kinds of strategic mistakes in a private economy would regularly lead to significant personal consequences.

If the privatisation had gone ahead as planned in 2006 then this neglecting of infrastructure would certainly have come to light later – that is, after the IPO and after the retirement of the rail boss. In 2007, it is no longer possible to carry on covering up the condition of the rail network: a case of incorrect speculation about the schedule of privatisation. The question is whether only the management of DB are to blame. Those people who will always want to buy shares in the DB AG will be keen to precisely evaluate the maintenance congestion.

7. Infrastructure capacity

2006 was a good year for rail freight transport. Freight transport has risen significantly, as has the percentage of rail volume compared to overall transport volumes (modal split). One can assume that participation by private providers in this growth was, once again, disproportionately high. It is estimated that they increased their share from 15 to 17 or 18 percent. But: suddenly the rail infrastructure has reached its limits. Now it turns out that numerous routes are occupied by up to 135 percent. The cause is the

⁴ Link to the 'Slow routes and condition of rail infrastructure' dossier from 14/8/2006:

http://www.netzwerk-privatbahnen.de/pdf/Zustand_Schiene_mit_Anlagen.pdf

⁵ http://www.netzwerk-privatbahnen.de/pdf/070110_BRH2007_Bericht_nach_88_2_BHO_Instandhaltung_Schienenwege.pdf

⁶ Investigation into south-east routes with speed restrictions (Saxony, Thuringia, Saxony-Anhalt, Brandenburg) in the 26th calendar week of 2006 compared to the 26th calendar week of 2005: http://www.netzwerk-privatbahnen.de/pdf/070312_BerichtLa-StellenSUEDOST0506.pdf

Investigation South II, comparison of 30th calendar weeks for 2004/5/6:

http://www.netzwerk-privatbahnen.de/pdf/061222_La-StellenkurzBerichtSued.pdf

dismantling of switch points, crossing platforms and lay-bys for purely business reasons (IPO!). This has had serious consequences for the productivity of the entire rail network. The regrettable accident in Tornesch, north of Hamburg, showed where this business policy is leading: In the past, all the detour routes in existence there were scaled down to the demand contracted by public passenger transport. This had the result that the service interruption at Tornesch blocked freight traffic between Scandinavian countries and central and southern Europe for days⁷. There were no longer any detour routes which weren't already completely occupied by synchronised regional passenger transport.

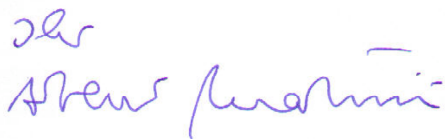
Another example: the dismantling of the Arnsdorf (east of Dresden) to Dürrröhrsdorf route (south of there, on the Pirna/Elbe route). This is a detour for the only available route via Dresden-Pirna-Bad Schandau to The Czech Republic. It was still used last year as a detour route during the flooding of the River Elbe. Now an application has been submitted for its closure because, in the meantime, passenger traffic has been discontinued. This closure would only be justified if, at the same time, the DB had applied to the EBA to abolish the flooding of the River Elbe and to cancel construction measures already announced for the main line.

Those of you, who are interested in the state of parts of the German rail network, might like to read the following article: "Freight chaos, the evening draws near and the chaos of long-distance freight transport runs its course"⁸.

8. And finally

*"Purely non-state owned rail traffic is **meaningless** for the purpose of national infrastructure planning as such traffic almost exclusively represents transport over very short distances. The average transport distance for non-state owned rail traffic in the base year 1997 was only 6.5 km".⁹*

Until the next NP Newsletter



P.S. The English version of our last Newsletter dated 5th December 2006:
http://www.netzwerk-privatbahnen.de/pdf/Newsletter3_06.pdf

⁷ Press release from Network Private Rail dated 25th January 2007:
http://www.netzwerk-privatbahnen.de/pdf/PM07_2.pdf

⁸ With the kind approval of the editors of *Der Fahrgast* (4/06), the magazine from *PRO Bahn*:
http://www.der-fahrgast.de/Archiv/2006/2006-4-31_38.pdf

⁹ BVU appraisal of the Federal Transport Routes Plan (BVWP) 2003, Chapter 4 – Freight Transport, p. 191, footnote 1.

Note: In 2006 the percentage of non-DB rail freight transport to overall rail freight transport was 17-18% or 17,000,000,000 tkm (in words: 17 out of 105 billion tonnes/kilometre). The BVWP is the legal basis for investments in the transport infrastructure from budget funds.