

Netzwerk Privatbahnen

Vereinigung Europäischer Eisenbahngüterverkehrsunternehmen e.V.
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1. The situation

The executive draws a blank

Following the devastating result of the experts’ hearing on constitutional and accounting law, the FM Transport (Federal Ministry of Transport) has again submitted improvements to the draft bill from March for the partial privatisation of DB AG. Under-Secretaries of State from the participating Ministries rubber-stamped the draft bill on 29th June. On 2nd July, the draft was passed on to the trade associations for evaluation. They were given a generous deadline of 9 working days to compose their response. On 24th July, the Cabinet will address the proposed bill so that it could then be taken directly to parliament.

As in the previous drafts the state shall only be the *formal* owner (*Sicherungseigentum* – pledged property) of railway infrastructure. However, the partially privatised DB AG will exercise the rights of ownership, not the state. In order to comply with article 87e, paragraph 3 of the German Constitution, which is intended to ensure that the state retains its influence over transport policy, the draft bill now stipulates that the state may appoint *all*¹ members of the ownership group to the Supervisory Board of DB AG (not to DB Netz AG!). In addition, some decisions require the prior approval of the state. In the opinion of the FM Transport, these weak, formal rights of the state are in accordance with the constitution (period!). In addition the bill’s introductory statement does not even

¹This interpretation “all” has, at least, been claimed by interested parties. Certainly, the formulation of the respective issue is suspiciously complicated in the draft (DBPrivG §1, paragraph 2, sentence 2): “Statutory nomination rights for shareholders of Deutsche Bahn AG are prohibited, with the exception of current nomination rights for the state.”

substantiate balance sheet inclusions, but simply states them (period!). So the issues of constitutionality and accounting feasibility continue to be hotly debated, possibly even at the courts of Karlsruhe and Luxembourg.

The status of the discussion prior to a possible Cabinet resolution can be taken from a working paper, which disproves point for point the arguments used by the FM Transport in a letter to MPs to defend the draft bill. The paper is using facts and developments, and corrects a series of completely untenable assertions made by the ministry responsible². If this letter was about washing powder or car adverts, the courts would have immediately prohibited this kind of argumentation by preliminary injunction due to a contravention of the law against unfair competition (ban on confusing advertising claims).

2. The role of the state

Things are different in practice

In the opinion of private rail freight operators, both measures are unsuitable for granting the state the sovereign role of shaping transport policy, as intended by the authors of the constitution. The consequence of this is that the position of the Chairman of DB AG is strengthened even further than it is today³. The weaker or more divided the owners are, the stronger the executive becomes. The Chairman would not only be able to use the interests of employees, as he currently does⁴, but those of the new shareholders as well. With a probability bordering on certainty, there will be a slimmed-down *shadow* supervisory board, in which participants agree decisions in advance. Almost all codetermined German companies do this for the sake of peace, sometimes using "special personnel" from Brazil. The influence of the owner on railway infrastructure(!) will, despite its presence on the supervisory board of the holding company(!), be weak, even weaker than it is today. The state obviously desires to concentrate on its role as paymaster.

Furthermore, it is undisputed that the feasibility of DB AG including railway infrastructure in its balance sheet is reduced to the same degree that the state's influence on DB business policy increases⁵. As a result, the supervisory board trick (see above) has formally strengthened the state's influence over DB. However, this is disastrous for the inclusion of railway infrastructure in the balance sheet of DB AG. One is intrigued as to what will happen next.

3. What it's really about

The big distraction tactic

The entire German railway world is currently battling through the legal issues of the various draft bills. Hundreds of sometimes highly qualified and sometimes extremely highly paid⁶ people are at odds on the issues of constitutionality and the accounting

² The assessment by Network Private Rail of a letter from the FM Transport dd. 4th July 2007 to all MPs of the governing Grand Coalition: <http://www.privatbahnen.com/pdf/070709+NP+Bewertung+Brief+Tiefensee.pdf>

³ Cf. Newsletter 1/07, number 3: http://www.netzwerk-privatbahnen.de/pdf/Infobrief1_07.pdf

⁴ Is there any union in the world – apart from Transnet/Germany – which has been in favour of the privatisation of a state-owned company? The Chairman of DB AG once described this phenomenon to representatives of the press as follows: "We also offered them a little carrot...."

⁵ Prof. Möllers and Prof. Schäfer compared the relationship of constitutionality and accounting options with connecting pipes: if the bill is constitutional, then the infrastructure cannot be included in the balance sheet; if it is legally included in the balance sheet, then the bill is not in accordance with the Constitution.

⁶ According to the Federation of Taxpayers, the Ministry of Transport, Construction and Cities will spend in 2007 more than € 64 million on consulting, (Interior: € 21, Defence: € 10; Finance € 8; Health € 4): *The Taxpayer* 7/07 p. 132

problems of the planned bill. The strategic core of the issue is purely and simply about *cementing the DB as an integrated rail group*. If the state loses its position as sole proprietor through privatisation then the infrastructure can no longer be separated from the group without expropriation⁷. The aim of the Mehdorn-Schröder Axis, which the CDU fought against for many years, will have been achieved and the FROGS⁸ will have won.

Of importance is that the Federal Chancellor has skilfully been very reserved on this issue in the past months. Expectations were high since the Chancellor made clear her position in her parliamentary election campaign for less state, less bureaucracy, more freedom. Since the agreement among the ministries involved at the end of June, we have the impression that the boss of the Grand Coalition wants the rail privatisation issue resolved and has made her decision how: to close her eyes and hope for the best, no matter whether regulatory policies and transport policy aspects are ignored in the process. This is bad for Germany and bad for Europe. How is the EU Commission going to pursue the ideal route for rail policy of separating infrastructure from operation, if the largest country in the EU has virtually cemented the integrated semi-state rail group?

4. Access to the capital market

A keyword is misused

Access to the capital market is essential for the continued existence of fast growing companies, which create equity capital by issuing new shares, without having to go begging to the banks for credit. These mostly new companies are often refused credit or are given loans at very bad conditions. There has never been better access to the capital market than the DB AG currently enjoys, without an IPO: DB has – with the state as majority shareholder – almost AAA creditworthiness and cannot go bust, at least, as long as article 87e of the Constitution applies. Consequently, in contrast to every other private company, DB has no credit problems and can finance any investment and any expansion. The *access to the capital market* ‘argument’ is a spurious one and is used by those who pass it on to others, against better knowledge. Unfortunately, we are now hearing this from the Chancellor’s Office.

5. The fairytale of the National Champion

Learning from Napoleon

The massive financial aid given to Airbus has led to Boeing being massively subsidised by the US government. As the US government couldn’t and didn’t want to finance two large aerospace conglomerates, Lockheed was in the firing line. From that point on, the world market has been dominated by only two companies. The benefits afforded to the DB AG logistics group are clearly at the expense of their global logistics competitors. Protection given to DB Regio and DB Railion is at the expense of comparatively small, but growing private rail freight companies in Germany⁹. - DB, which is currently in debt to the tune of over €20 billion, is currently buying the largest British rail freight operator, EWS (65% market share), the Spanish company, Transfesa, and soon the state-owned Hungarian rail freight operator¹⁰. What the protagonists of a National Champion are

⁷ See discussion on separating infrastructure from generation in the energy sector.

⁸ FROGS: Friends of Gerhard Schröder

⁹ In 2006, the DB Railion Group turned over €3.2 billion. The rail freight operators associated to Network Private Rail achieved an average turnover of €20 million, more than half of the member companies turn over less than €10 million. However, they stimulate the market immensely.

¹⁰ The Hungarian state is currently holding back on issuing or extending new licences for existing private rail operators. This increases the attractiveness of the purchase object and its purchase price.

actually attempting to achieve is subsidised economic imperialism. For all the criticism of the French rail situation (legally separated, actually integrated): in terms of railway, France is surrounded by DB. The German state railway, pampered by the government¹¹, now leads directly into France via EWS. Germany no longer has the right to complain about France's state industrial policies.

6. Network status report by DB

Time bomb for the IPO?

For more than 5 years, parliament has been trying to obtain a report about the state of the railway infrastructure from the FMTransport and/or the DB AG. With surveys into the age, length and duration of temporary speed restrictions, Network Private Rail backs up these demands with alarming facts¹². Only now, at the occasion of discussions about rail privatisation, the publication of a *kind of* status description has become unavoidable. This was officially passed on to the Chairman of the Federal Parliament's transport committee on 2nd July 2007¹³. The rail network will initially be quantified there in an assets accounting style. The quality should be made verifiable using theoretically possible journey times¹⁴. The subject of *maintenance* will only be reported in the form of maintenance budgets which are known to say nothing about the success of a maintenance strategy. The titles '*Capacity development*' or '*Performance capability of the network*' can be sought in vain. In view of suspension and dismantling activity carried out to achieve so-called capital marketability, the current statements on these items (capacity, Performance) will certainly not be particularly amusing. It can confidently be assumed today that the DB will always just exceed standards as it does not share its dominating knowledge of the network with anyone: company secret¹⁵. One then asks concernedly, who imposes penalties for poor performance? The state and not the railway! Because if the state were to demand penalty payments from DB, this would increase the subsidy demand for the railway. This then affects the state, all taxpayers and rail users. Furthermore, the report is riddled with undefined terms, so that the door is open to manipulation¹⁶. In terms of budget law that should be not acceptable. The reporting of efficient use of funds, around €2.5 billion annually, could easily develop into a time bomb for the DB's IPO including the infrastructure.

7. Stuttgart 21: New route Stuttgart-Ulm

Freight trains will make large detours

One of the largest concerns of private rail operators is the infrastructure investment policy. Exorbitantly expensive high-speed routes will eat into scarce budget funds for

¹¹ Without legislative protection (public procurement law, potential for extortion regarding infrastructure), DB Regio wouldn't make any profit. They are the cash cows of the group. There would be no IPO without the profit of this cash cow. Read Railway Gazette 2/07: http://www.netzwerk-privatbahnen.de/pdf/0207_RG_More_Shadow_than_Light_Arthur-Iren_Martini.pdf

¹² Latest TSR (temporary speed restriction) in the East: http://www.privatbahnen.com/pdf/PM07_6.pdf

¹³ Infrastructure status and development report 2006 by the DB AG (Holding):

http://www.privatbahnen.com/pdf/Infrastrukturzustandsbericht+2006_final_Juni07.pdf

The number of TSRs cannot be found in that report 2006. The reference in the list of keywords leads to nowhere. Instead one finds the brandnew expression 'infrastructure defects older than 6 months' with no definition for this technical term.

¹⁴ Such statistical data in no way reflect the problems in regions and in the single Federal States. And that a freight train has to wait for hours in Berlin-Köpenick for a slot on the route from Berlin to Frankfurt/Oder is not taken into account at all. More recently, the freight train often can only be sent on the route when it can travel through due to the lack of passing points which have been significantly dismantled in the last few years. Certainly the report is suitable for academic discussion, but not as an instrument for recording efficiency, and certainly not in connection with a Multi Annual Rail Financing Contract over 10 x € 2.5 = € 25 billion

¹⁵ Perhaps the DB is afraid that a competitor would want to build a copy of the network. This would certainly be a very serious reason for strict confidentiality.

¹⁶ Those interested in the quality and frequency that Network Rail report to the UK regulation authorities (English with German translation and glossary): <http://www.netzwerk-privatbahnen.de/pdf/ORRReporting.pdf>

decades not only for the investments but also for maintenance. These funds will then be missing elsewhere, for decades too. Such investment projects are questionable where it can be said with some degree of certainty that, from today's point of view, freight transport will make no significant contribution to the amortisation of the routes. One example of this is the planned high-speed route Stuttgart-Ulm in connection with the Stuttgart 21 project. Already today, freight transport makes large detours (via Würzburg) around the parallel Fils valley line due to its steep incline.¹⁷ Some sections of the newly constructed route are even steeper, track remuneration will probably cost around 60% more and it may only be used by light freight trains with disc brakes, a demand which will not be able to be fulfilled for decades. Rail freight will make large detours in order to avoid the new track.

8. And finally

A difficult brainteaser

Who does this quote come from: "**Germany is too small for us**"?¹⁸

Until the next newsletter

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http://www.privatbahnen.com/index.php?option=com_content&task=view&id=51&Itemid=99

Yours sincerely,



(Arthur-Iren Martini)

The Network Private Rail infoletters, press releases and dossiers you can find here:

http://www.privatbahnen.com/index.php?option=com_content&task=blogsection&id=6&Itemid=51

¹⁷ Press statement and position paper from Network Private Rail from 12th July 2007:
Stuttgart 21 – freight transport makes a generous detour around the newly constructed Stuttgart-Ulm route
http://www.privatbahnen.com/pdf/PM07_7.pdf
http://www.privatbahnen.com/pdf/20070712_NP_Positionspapier+Gueterverkehr_NBS_Stuttgart_Ulm-F.pdf

¹⁸ This is, of course, from Hartmut Mehdorn in the 'Germany is too small' report by Sascha Meyer, Lüneburger Zeitung, 26th May 2007. The private rail operators are constantly expanding, significantly stronger expanding than DG Railion, however, without the protection of the state and with unlimited private risk.