

# Master Thesis European Governance

The Patchwork European Long-Distance Bus Market

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**FlixBus at French-German border near Kehl**

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## Introduction

‘Traveling by bus is hip again, thanks to the Germans’<sup>1</sup> was the headline of a Dutch news article reviewing six years of FlixBus. FlixBus was only able to launch operations in its home market, Germany, after the country’s public transport act deregulated the industry, which created an opening in the market for long-distance service.<sup>2</sup> The European Union (EU) also established regulations to promote sustainable and affordable mobility for citizens.<sup>3</sup> Promoting access to transportation is critical to ensuring citizens can exercise their freedom to move about Member States to engage in work, study, or leisure. Long-distance coach and bus services provide an affordable and ecologically sustainable means of transportation to citizens who wish to exercise their freedoms.<sup>4</sup> The specific operations of these services may vary, but they entail running coaches<sup>5</sup> over longer distances, with stops usually spaced over 50 kilometres apart. The distance travelled and their operation by private entities distinguishes long-distance services from (sub)-urban services, which tend to be operated by a public service operator (PSO) under a public service contract. Unless a bus is stopped and the driver does not have the correct authorisation on their person, passengers tend to be completely unaware of the complex regulatory framework that governs long-distance service in Europe. Once a line is operational, the administrative hurdles by carriers have already been overcome.

Carriers must comply with not only EU regulations but also national legislation, both of which restrict their ability to offer certain services. The EU has been regulating the market for coach and bus services since 1992. Currently, these services are regulated by EU Regulation

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<sup>1</sup> Voermans, T. (2019, January 1). Reizen met de bus wordt weer hip, met dank aan de Duitsers. *Algemeen Dagblad*. Retrieved from <https://www.ad.nl/economie/reizen-met-de-bus-wordt-weer-hip-met-dank-aan-de-duitsers~a5d6a310/>.

<sup>2</sup> See Chapter 6 below or see this dissertation: Maier, E. (2015). *Die Liberalisierung des Fernlinienbusverkehrs: Eine personenbeförderungsrechtliche Analyse der Marktöffnung im Fernbusverkehr mit Berücksichtigung der europäischen Vorgaben* (Schriften zum Verkehrsmarktrecht, v. 1). Nomos Verlagsgesellschaft. p. 134.

<sup>3</sup> See the Explanatory Memorandum of the latest proposal for regulation: European Union, European Commission. (2017). *Proposal for a Regulation of the European Parliament and of the Council Amending Regulation (EC) No 1073/2009 on common rules for access to the international market for coach and bus services*. Retrieved from: <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:52017PC0647>.

<sup>4</sup> Ibid. Here explicit reference is made to the sustainability and the service long-distance services provide to people with lower incomes.

<sup>5</sup> The English language differentiates between the words ‘coach’ and ‘bus’. Long-distance services carriers usually make use of coaches only. For this thesis the difference between a bus and a coach is mostly irrelevant.

1073/2009,<sup>6</sup> but no ‘coherent framework’ has been established.<sup>7</sup> Instead, long-distance bus service is subject to a patchwork of country-specific regulatory regimes that interact with, and sometimes outright conflict with, the Regulation in various ways, leaving gaps and uncertainties in the overall regulatory scheme, as the European Commission’s ex post evaluation of the Regulation concluded.<sup>8</sup>

The scope of the ex post evaluation<sup>9</sup> and studies conducted for the European Commission by Steer Davies Glease<sup>10</sup> encompassed the entire Regulation, which covers much more than regular long-distance services. However, this thesis is much more limited in scope and only considers the parts of the Regulation that address regular long-distance services. This study also has a limited geographic scope, focussing on the Netherlands, Germany, and Belgium. This narrow focus allows the researcher to more closely scrutinise the national legal frameworks. This study discusses how FlixBus is affected by the inconsistency of EU and national regulatory frameworks. This study draws examples from the experiences of FlixBus in applying for regular international service authorisations. This study also draws on the author’s experience as an intern in the authorisations department of FlixBus BeNeLux as well as interviews conducted with colleagues to learn about their experiences working with Regulation 1073/2009 in combination with the national legal frameworks. The study focuses on two key topics: cabotage—the right to carry passengers domestically on an international line—and access to terminals. A study of these two topics is most likely to reflect conflicts and gaps between national legislation and the EU Regulation.

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<sup>6</sup>The latest Regulation currently in force in full: European Union, European Commission. (2009). *Regulation (EC) No 1073/2009 of the European Parliament and of the Council of 21 October 2009 on common rules for access to the international market for coach and bus services, and amending Regulation (EC) No 561/2006*, hereafter: Regulation (EC) 1073/2009.

<sup>7</sup> The aim of Regulation (EC) 1073/2009 as formulated in Recital 3 in the preamble of Regulation 1073/2009.

<sup>8</sup> European Union, European Commission. (2017). *Commission Staff Working Document: Ex-post evaluation of Regulation (EC) No 1073/2009 of the European Parliament and of the Council of 21 October 2009 on common rules for access to the international market for coach and bus services*. Retrieved from: <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A52017SC0361>. Hereafter: Ex-post evaluation of Regulation (EC) No 1073/2009.

<sup>9</sup> Ibid.

<sup>10</sup> Steer Davies Gleave. (2017). *Support study for an Impact Assessment for the revision of Regulation (EC) No 1073/2009 on access to the international market for coach and bus services*. Retrieved from: <https://ec.europa.eu/transport/sites/transport/files/studies/2017-12-support-study-ia-revision-access-intl-market-bus-coach.pdf>; Steer Davies Gleave. (2016). *Comprehensive Study on Passenger Transport by Coach in Europe*. Retrieved from: <https://ec.europa.eu/transport/sites/transport/files/modes/road/studies/doc/2016-04-passenger-transport-by-coach-in-europe.pdf>.

This study considers two central themes in EU law: the supremacy of EU law<sup>11</sup> and the creation and maintenance of a single market.<sup>12</sup> EU law does not exist in a vacuum; in most cases, national markets and national legislation already existed before EU laws were enacted. National and EU legislation do not always share the same goal, which makes it more difficult to achieve a single market transnationally. Clearly identifying the differences between the national and EU legal frameworks for long-distance carriers can demonstrate how important it is for the EU and Member States to collaborate to prevent enactment of legislation with conflicting goals. Although the intersection between EU secondary legislation and national legislation has been explored in previous studies, those scholars have mostly focused on the transposition and implementation of EU directives. The intersection/conflict between EU regulations and national laws has received little academic attention. Especially in the context of long-distance bus and coach service.

This study is structured as follows: first, the research design and methodological considerations are discussed. This section is followed by a description of the EU market for long-distance bus and coach services, which provides some background information on the current situation. The third section discusses the theoretical framework and reviews existing literature on the interaction between EU law and national laws. The three sections that follow discuss and compare the situations in the respective Member States of the Netherlands, Belgium, and Germany. The last section presents the findings and conclusion of this study.

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<sup>11</sup> See Craig, P., & De Búrca, G. (2011). The Relationship between EU Law and National Law: Supremacy. In: *EU Law: Text, Cases and Materials* (pp. 266-315). Oxford University Press, pp. 266-315. It should also be noted here that creation is something different from maintaining: as markets develop, regulation need to keep up and new problems arise.

<sup>12</sup> See Craig, P., & De Búrca, G. (2011). The Relationship between EU Law and National Law: Supremacy. In: *EU Law: Text, Cases and Materials* (pp. 266-315). Oxford University Press, pp. 266-315.

# 1 Research Question and Design

Regulation 1073/2009 forms part of the legal framework governing long-distance coach and bus services in the EU. According to the Treaty on the Functioning of the European Union (TFEU), a regulation ‘shall have general application. It shall be binding in its entirety and applicable in all Member States’.<sup>13</sup> This does not mean, however, that the provisions of the Regulation function in isolation from the domestic legal frameworks that cover the long-distance bus and coach services of Member States. Carriers active in this market must operate in compliance with both the EU Regulation and the various domestic regulations that apply in each of the Member States. These legal frameworks may overlap or conflict. Thus, this thesis asks the following research question: **To what extent do national regulatory frameworks conflict or promote the goals of Regulation 1073/2009?** In addition, this thesis investigates how and why the regulatory regimes of members states and the EU diverge. The findings of this these may be critical to carriers that must comply with multiple sets of regulations. Further, these questions are relevant to the EU because since its first regulation in 1992, the regulatory framework for long-distance bus carriers has remained fragmented. The EU and the member states collectively agreed that creating such a market is important, if this is what they try to reach, the goals should be attained. Moreover, Member States may find themselves confronted with a mode of transportation not defined in their domestic legal framework; consequently, they must resort to applying their general provisions for public transportation. Because the EU and Member States share an interest in promoting a modal shift from individual transportation by car to the use of a collective means of transportation, a comprehensive regulatory regime is necessary to reduce the burden for of compliance<sup>14</sup> with the patchwork regulatory environment.

Various reports have concluded that the EU market for long-distance regular coach services is governed by a patchwork of regulatory systems.<sup>15</sup> In line with these findings, this author’s hypothesis is that the various approaches adopted by Member States to regulate their domestic markets for public transportation and long-distance bus and coach services conflict with the

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<sup>13</sup> See Article 288 of: European Union. (2012). *Consolidated version of the Treaty on the Functioning of the European Union*. Retrieved from: <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex:12012E288>.

<sup>14</sup> Burdens of compliance primarily for the carriers but also for the various competent authorities in the member States.

<sup>15</sup> Cf. the Ex-post evaluation as cited in f.n. 9 and the studies conducted by Steers Davies Gleave as cited in f.n. 11.



objectives of Regulation 1073/2009. To analyse whether this is the case and how exactly domestic legal frameworks conflict with Regulation 1073/2009, this study focuses on the procedures that must be followed to acquire an authorisation to offer regular international services. Authorisations for regular services must be obtained by every individual line and are valid throughout the EU. They are requested from the competent authorities in the country where a line departs or ends.<sup>16</sup> For companies like FlixBus, which changes its timetables twice a year, the process of obtaining these authorisations is time consuming but also crucial to operations.<sup>17</sup>

This study adopts a practical approach to assess the procedural hurdles to operate an individual line and looks beyond the formalities of authorisation, such as the submission of paper documents, to take account of access to terminals, something currently not covered by Regulation 1073/2009. In addition, a special focus is placed on cabotage because it is in the context of cabotage that conflicts between EU and national legislation are expected to be higher, as was suggested by the evaluations.<sup>18</sup>

This study differs from other studies conducted by and for the Commission in that it delves deeper into national legislation and legislative history with the aim of providing an accurate picture of the patchwork of regulatory systems across the EU.<sup>19</sup> Such an approach requires a deeper understanding of both national legal frameworks and how things unfold in practice. For these reasons, the territorial scope of this study is limited to three Member States: the Netherlands, Germany, and Flanders, Belgium. These countries have organised their national markets for long-distance bus and coach service in different manners. For example, in Germany, the market for long-distance bus and coach services has been liberalised and separated from that for regional and urban transportation, whereas the Netherlands and Belgium have each adopted a system of concessions for all public transportation.<sup>20</sup> In addition, the geographical size of Germany means that it oversees a larger number of domestic lines.<sup>21</sup>

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<sup>16</sup> Cf. Chapter III Regulation (EC) 1073/2009, the process is described further below.

<sup>17</sup> Based on the author's own experience at FlixBus.

<sup>18</sup> Cf. f.n. 9 and 11.

<sup>19</sup> Although the reports by Steer Davies Gleave (f.n. 11) also contain per-country examples and case studies, given the dynamics of the market these are not always accurate.

<sup>20</sup> Unfortunately there is also a patchwork of legislative terms: in EU law authorisations is used; however, in national legal frameworks they use both concessions, authorisations, licenses etc. This Study tries to be consistent with national legislative terminology.

<sup>21</sup> See for the composition of the German market figure III. Unfortunately, such statistics for the Netherlands and Belgium do not exist. It is safe to conclude that lines in the Netherlands and Belgium are predominantly international lines.

A difference between the Netherlands and Belgium is that in the Netherlands, concessions are granted through a process of competitive tendering, whereas in Belgium, concessions are allocated to publicly owned transportation companies in three regions, Flanders, the Walloon Region, and the Capital Region of Brussels. Given Belgium's complex domestic legal framework, this study focuses only the Flanders region. Although the sample size is limited, the inclusion of a variety of national markets can yield findings that are representative of other Member States with similar characteristics. However, specific recommendations for Member States other than those studied here cannot be made.

## 1.1 Methodological Considerations

To analyse the relationship between Regulation 1073/2009 and the domestic legal frameworks, this study compares the goals and provisions of Regulation 1073/2009 with the domestic legal frameworks that apply to the aforementioned Member States.

This study uses doctrinal legal research to analyse domestic frameworks: 'The crux of the doctrinal research method lies in identifying the legislation and pertinent case law and stating what the law is in the area'.<sup>22</sup> With regard to regulations, identification of the legislative process can be difficult because unlike in the case of directives, regulations do not involve a process of transposition.<sup>23</sup> This means that there is no national law adopting and implementing the regulation, unlike in the case of directives. This is especially true for the Netherlands and Belgium, which do not have specific national legal frameworks for long-distance bus and coach transportation. A lack of such specific legislation necessitates extending the scope of the area of law under investigation from long-distance bus and coach transportation to public bus transportation.

The use of doctrinal legal research has been widely criticised. The main point of criticism is summarised in the following quote by Hutchinson:

At times doctrinal researchers do no more than 'work the rules' in isolation from practice or the theory underlying the rules, and without due consideration for

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<sup>22</sup> Hutchinson, T. (2013). Doctrinal research: researching the jury. In Watkins, D. & Burton, M. (Eds.) *Research Methods in Law* (pp. 15-41). Routledge. P. 23.

<sup>23</sup> See the theoretical framework below for a more comprehensive assessment.

how the rules might be improved or reformed. The research is not always grounded in the practice of the courts or the policy discussed in parliament. Using this method some researchers may consider the law can be examined effectively in a social, political, moral, economic and theoretical vacuum. Rules and case law can be reviewed by a doctrinal researcher from an undisclosed and seemingly objective viewpoint that is disguising a personal attitude which too often is deeply conservative and imbued with positivism and liberal theory.<sup>24</sup>

The purpose of this study is to assess the content of legislation, including its legislative history in parliament where necessary. This research is complemented by insights acquired during an eight-month internship at FlixBus BeNeLux. Based on the author's experiences as well as those of his colleagues, this study, taking into account national legal frameworks, reviews whether the actual practices of a long-distance carriers align with the goals of Regulation 1073/2009. The doctrinal method is used to better our understanding of the existing legal framework and help highlight aspects of law that matter in practice.

The national frameworks are introduced and then compared. The goal is to compare the national frameworks in light of the findings of the country analyses and the goals of the Regulation. Comparative law is essential here, and as Mark van Hoecke contends,

Researchers get easily lost when embarking on comparative legal research. The main reason being that there is no agreement on the kind of methodology to be followed, nor even on the methodologies that could be followed.<sup>25</sup> Moreover, almost everything that was more or less established in the area of comparative law over the last century has been increasingly criticized during the last few

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<sup>24</sup> Hutchinson, T. (2013). Doctrinal research: researching the jury. In Watkins, D. & Burton, M. (Eds.) *Research methods in law* (pp. 15-41). Routledge. See also the full discussion pp. 15-16 and her endnotes. See also a discussion between Pauline Westerman (Ch. 5) and Jan Vrancken (Ch. 6) in van Hoecke, M. (Ed.) (2011). *Methodologies of Legal Research: Which Kind of Method for What Kind of Discipline?* Hart Publishing.

<sup>25</sup> F.n. 2 in van Hoecke as cited below: This chaotic and unscientific situation has been well described by Esin Örüçü: "There are comparative lawyers who see comparative law as a science with its own separate sphere. Others call comparative law merely a method of study and research or even a technique. Some regard it both as a comparative method and a comparative science of law or see in comparative law more than one of these aspects. It is immediately obvious that those who see comparative law as a method only do not tell us what that method is, leaving this issue unanswered or very vaguely covered, and those who think or feel that comparative law must be more than a mere method do not seem to agree on what this subject-matter is." Örüçü, E. Developing Comparative Law. In: Örüçü, E. & Nelken, D. (Eds.). (2007). *Comparative Law: A Handbook*. Hart Publishing. P. 62.

decades: the concept of ‘legal family’, the possibility of comparison itself, the object of comparison, etc.<sup>26</sup>

To not ‘get lost’, the section below discusses the methodologies from comparative law that were adopted<sup>27</sup> for this study and those that are crucial for the comparisons being made in this text.

First, with regard to comparative law in the context of European harmonisation, Geoffrey Samuel, referencing Bubloz, identifies a major difference between genealogical and analogical comparisons:<sup>28</sup>

The former is a comparison between two phenomena (the objects of comparison) that, although now distinct, have a common ancestry. From this viewpoint, says Bubloz, it is a matter of explaining similarities between systems in terms of real historical connections and thus any resemblance is interpreted as the sign of a genealogical connection.<sup>29</sup> Analogical comparison, by contrast, is where the two phenomena do not have any genealogical or common ancestry connection and thus it is a matter of comparing, at least in the biological sciences, only structure and form. ‘In analogical comparison’, notes Bubloz,

‘To compare A and B is not then about presenting similarities as intrinsic properties resulting from a common source or differences as the sign of an irreducible singularity; to compare A and B is to establish some ideal relations between one phenomenon and another in the hope of improving the respective intelligibility of each of them’.<sup>30</sup>

With respect to the comparison between national legal frameworks and their conflicts with Regulation 1073/2009, it must be decided whether the genealogical or analogical approach

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<sup>26</sup> Van Hoecke, M. (2015). Methodology of comparative legal research. *Law and Method*, 1-35. P.1.

<sup>27</sup> The adopted methodologies are not meant to be exhaustive.

<sup>28</sup> Samuel, G. (2011). Does One Need an Understanding of Methodology in Law before One Can Understand Methodology in Comparative Law? In Van Hoecke, M. (ed.) *Methodologies of Legal Research: Which Kind of Method for What Kind of Discipline?* (pp. 183). Hart Publishing. P. 183.

<sup>29</sup> F.n. 34 in Samuel cited above. The footnot reads Bubloz, S.Y. (2006). Augustine et Porphyre sur le salut: Pour une comparaison analogique et non apologétique du Christianisme et du Néoplatonisme’ in Burger and Calme, *Comparer les comparatismes: Perspectives sur l’histoire et les sciences des religions*. Edidit-Archè. P. 113, 115.

<sup>30</sup> Idem, p. 117.

should be applied. It could be argued that the Regulation is the overarching legal framework; however, there is no ancestral relation between the Regulation and the national legal frameworks. The Regulation applies directly to Member States, but the Member States all have national legal frameworks that have developed independently of the Regulation.<sup>31</sup> It is precisely because Regulation 1073/2009 is not the common source of national regulatory schemes and does not function in a vacuum that gives rise to national regulatory differences. Thus, the genealogical approach would be inappropriate.

Analogical comparison is thus adopted, and this study uses two tools from Hoeke's 'toolbox for comparative research'<sup>32</sup>:

- The functionalist method, which does not depend on 'primarily comparing rules, but solutions to practical problems with conflicting interest'<sup>33</sup> and
- The law-in-context method, which moves beyond the black letter law and extends the scope of analysis to law in practice.<sup>34</sup> This is where the author's own experience and those of colleagues are useful.

Based on the foregoing, the author determined that the doctrinal method, entailing the evaluation of laws, parliamentary documents, and other materials, would be used to understand the situation in each country. The information obtained through the doctrinal method can then be used functionally to explore the practical problems evident not only in case law but also 'in action' and how the Regulation's goals relate to these challenges. In the penultimate chapter, the findings for each country are compared according to function and context, specifically focusing on cabotage and terminal access.

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<sup>31</sup> This is notwithstanding the fact that community law may have had its influence on the domestic legal frameworks; however, there is no direct ancestral relationship. This of course would be different if national transposition laws of a directive would have been discussed.

<sup>32</sup> Van Hoecke, M. (2015). Methodology of comparative legal research. *Law and Method*, 1-35. P. 8 ff.

<sup>33</sup> Idem, p. 11.

<sup>34</sup> Idem, p. 16 ff.

## 2 The Market for Long-Distance Regular Services

The market for long-distance regular services by coach or bus in the EU is regulated by Regulation 1073/2009, which entered into force on 4 December 2011. This Regulation aimed at ‘ensur[ing] a coherent framework for the international carriage of passengers by coach and bus throughout the Community’.<sup>35</sup> The goal was to reduce the administrative hurdles and barriers that carriers used to face.<sup>36</sup> In the preamble to the Regulation, reference is made to how the ‘freedom to provide services constitutes a basic principle of the common transport policy and requires that carriers from all Member States be guaranteed access to international transport markets without discrimination on grounds of nationality or place of establishment’.<sup>37</sup>

However, as has been mentioned, the EU system still does not provide a ‘coherent framework’.<sup>38</sup> Instead, it comprises a patchwork of different national market-based systems that interact with the Regulation, as is made clear by the ex post evaluation of the European Commission.<sup>39</sup> It is true that *de jure*, the market for bus services within the EU has been liberalised. However, the various national markets and regulatory mechanisms of the Member States remain. One of the problems identified in the ex post evaluation of Regulation 1073/2009 is that the Regulation does not prescribe a system or framework for the Member States to adopt to organise their domestic transportation markets.<sup>40</sup> As a consequence, the regulatory regime of the market for long-distance bus transportation might be considered a ‘patchwork of national regulation’.<sup>41</sup> Figure 1 depicts which Member States have liberalised bus markets; it is evident that there is diversity in whether and the degree to which countries have liberalised the industry. Some are transitioning to a liberalised bus market, some have a

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<sup>35</sup> Recital 3 in the preamble of Regulation (EC) 1073/2009.

<sup>36</sup> Recital 14 in the preamble of Regulation (EC) 1073/2009; and also Commission staff working paper - Impact assessment accompanying the proposal for a Regulation of the European Parliament and of the Council on common rules concerning the conditions to be complied with to pursue the occupation of road transport operator - proposal for a Regulation of the European Parliament and of the Council on common rules for access to the international road haulage market (recast) - proposal for a Regulation of the European Parliament and of the Council on common rules for access to the market in coach and bus services (recast) - {COM(2007) 263 final} {COM(2007) 264 final} {COM(2007) 265 final} {SEC(2007) 636} /\* SEC/2007/0635 \*/ p. 17.

<sup>37</sup> Recital 4 in the preamble of Regulation (EC) 1073/2009.

<sup>38</sup> Recital 3 in the preamble of Regulation (EC) 1073/2009.

<sup>39</sup> Ex-post evaluation of Regulation (EC) No 1073/2009.

<sup>40</sup> *Idem*, p. 47.

<sup>41</sup> *Idem*, p.43.

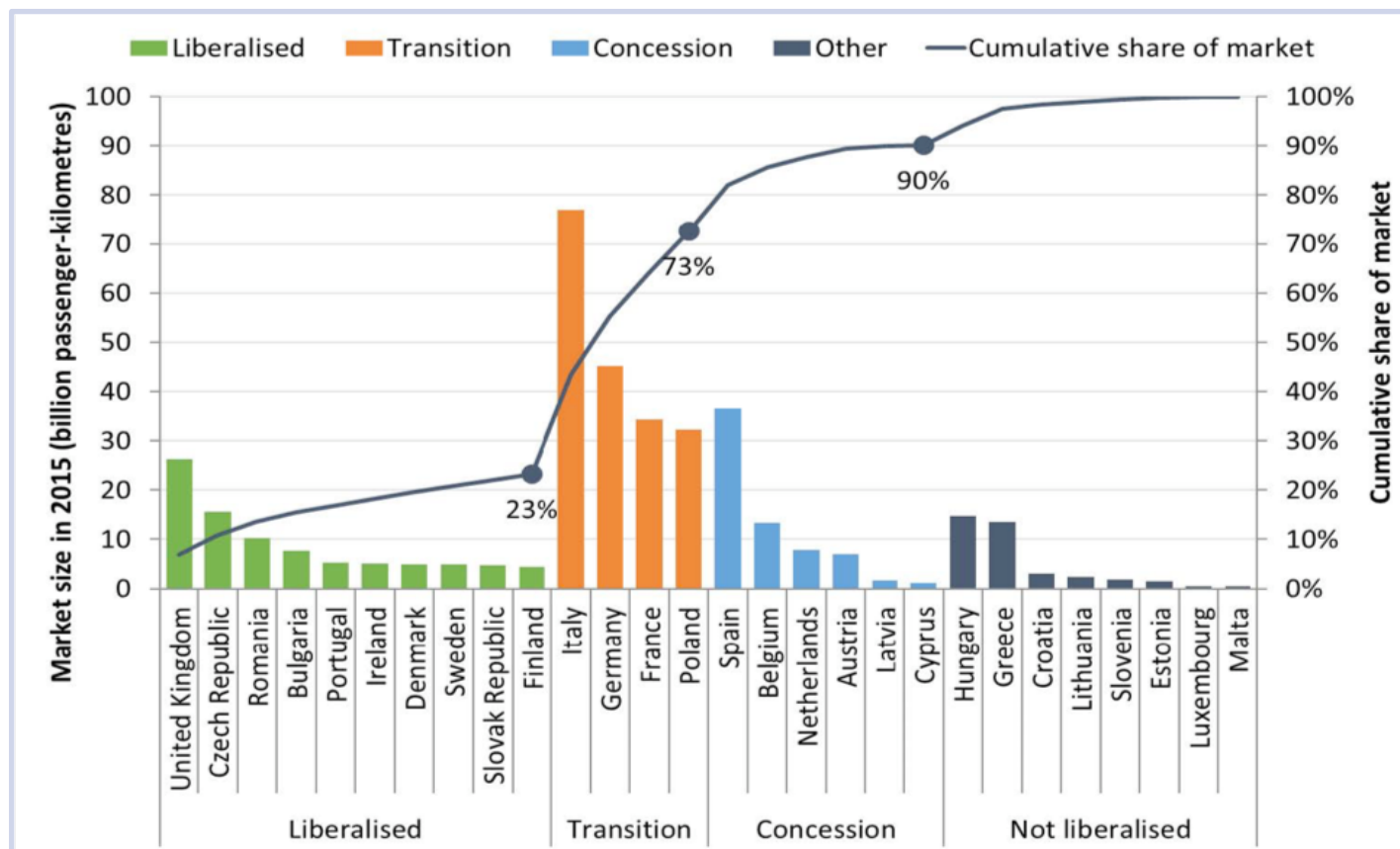
system with concessions, and others do not have a liberalised market. Several Member States, such as Germany and France, have chosen to liberalise their domestic markets under certain conditions. Others have retained a system of competitive tendering of concessions (e.g., the Netherlands) or even direct awards (Greece).<sup>42</sup> According to the ex post evaluation by the European Commission, ‘the persistence of separate national markets impede integration and undermine efficiency by imposing high administrative burdens on coach and bus services’.<sup>43</sup>

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<sup>42</sup> See for a complete overview of all the Member States Appendix B in: Steer Davies Gleave. (2017). *Support study for an Impact Assessment for the revision of Regulation (EC) No 1073/2009 on access to the international market for coach and bus services*. Retrieved from: <https://ec.europa.eu/transport/sites/transport/files/studies/2017-12-support-study-ia-revision-access-intl-market-bus-coach.pdf>.

<sup>43</sup> Ex-post evaluation of Regulation (EC) No 1073/2009. P.20.

Figure 1 Member States and Regimes 2015 (Source graph: Steer Davies Gleave [2017] Support study for an Impact Assessment for the revision of Regulation (EC) No 1073/2009 on access to the international market for coach and bus services | Final Report.)<sup>44</sup>



<sup>44</sup> The graph above is from 2015. Note that markets in Italy, Germany and France have been liberalised since then. Unfortunately more recent and reliable statistics are not available, except for Germany which can be found in Figure 3.



According to the European Commission's ex post evaluation, 'The patchwork of national regulatory frameworks undermines competition and hinders the development [of] international services and of a true internal market and also introduces administrative costs but the extent of the impact is unclear'.<sup>45</sup> The existence of different national regulatory frameworks makes it harder for operators to offer their services across borders. When access to national markets is restricted, access to the EU market as a whole is restricted as well.

The problem of limited market access become especially apparent when carriers want to transport passengers domestically on an international line. In the Regulation, cabotage is authorised in Article 15(c), which provides as follows:

regular services, performed by a carrier not resident in the host Member State in the course of a regular international service in accordance with this Regulation with the exception of transport services meeting the needs of an urban centre or conurbation, or transport needs between it and the surrounding areas. Cabotage operations shall not be performed independently of such international service.<sup>46</sup>

Contrary to the common understanding of cabotage<sup>47</sup>, the Regulation limits this practice to non-resident carriers.<sup>48</sup>

The ex post evaluation conducted by the Commission highlights the difficulty in exercising these rights and the administrative hurdles involved.<sup>49</sup> When carriers are not allowed to transport passengers domestically, this reduces their profitability because they are unable to sell tickets for domestic segments. This type of regulation also affects service penetration—the number of routes offered to potential passengers, and thus, passengers do not have the choice to use international bus lines for domestic purposes.

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<sup>45</sup> Ex-post evaluation of Regulation (EC) No 1073/2009. P. 26.

<sup>46</sup> Art. 15 (c) in Regulation (EC) 1073/2009.

<sup>47</sup> Cambridge Dictionary gives for cabotage: 'the transport of goods or people within a country's borders'

<sup>48</sup> This is not specific to passenger transportation. Likewise in freight hauling, cabotage is limited to non-resident hauliers. See arts. 8 & 9 of European Union, European Commission. (2009). *Regulation (EC) No 1072/2009 of the European Parliament and of the Council of 21 October 2009 on common rules for access to the international road haulage market*. Retrieved from: <https://eur-lex.europa.eu/legal-content/en/TXT/?uri=CELEX:32009R1072>.

<sup>49</sup> Ex-post evaluation of Regulation (EC) No 1073/2009. P. 25.

Another problem is that some national regulatory frameworks do not provide long-distance bus carriers equal access to the main passenger transport terminals. Concession owners and/or publicly owned transport companies are sometimes privileged in their ability to use these types of facilities. This can result in the terminal operator being the sole user of the infrastructure because no clear rules prohibit discriminatory access; thus, if such an operator fears competition, it might decline the use of terminal access to other carriers.

Although access to terminals is not currently regulated by Regulation 1073/2009, such access has a major effect on the functioning of the market; this was also recognised by the European Commission in their ex post evaluation<sup>50</sup> and motivated the Commission's inclusion of it in the new proposal.

Regulation 1073/2009 is intended to solve a number of complex problems by addressing their root causes<sup>51</sup> and has prompted a series of interventions.<sup>52</sup> However, in the proposal for the amended regulation, data to support the existence of these problems and need for interventions are not provided. It would thus appear that the Commission only retroactively draws up schedules and intervention schemes in evaluations instead of including them in proposals.<sup>53</sup> Nonetheless, based on the ex post evaluation and the studies by Steer Davies Gleave, it is implicit that the root cause of these problems is the different national frameworks for market access. Specifically, this thesis is concerned with authorisations for carriers to provide regular international services and access to terminals, although the Commission has raised other concerns as needing remedies.<sup>54</sup> In addition, and in contrast to the Commission, this thesis also considers the position of resident carriers. In the broader context of a functioning EU market for long-distance regular service, this thesis argues that the definition of cabotage, as formulated in the Regulation, is restrictive because it only applies to resident carriers. Based on both theory and practice, my argument is that the existing patchwork regulatory system has led to problems with cabotage and conflicts of interest involving public service operators and other state-owned companies that have negatively affected private carriers. Both of these challenges can be traced back to the disconnects between international or long-distance services and national bus and coach services. The concrete problems created by this lack of

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<sup>50</sup> Idem, p. 27.

<sup>51</sup> Figure 1 in: Ex-post evaluation of Regulation (EC) No 1073/2009.

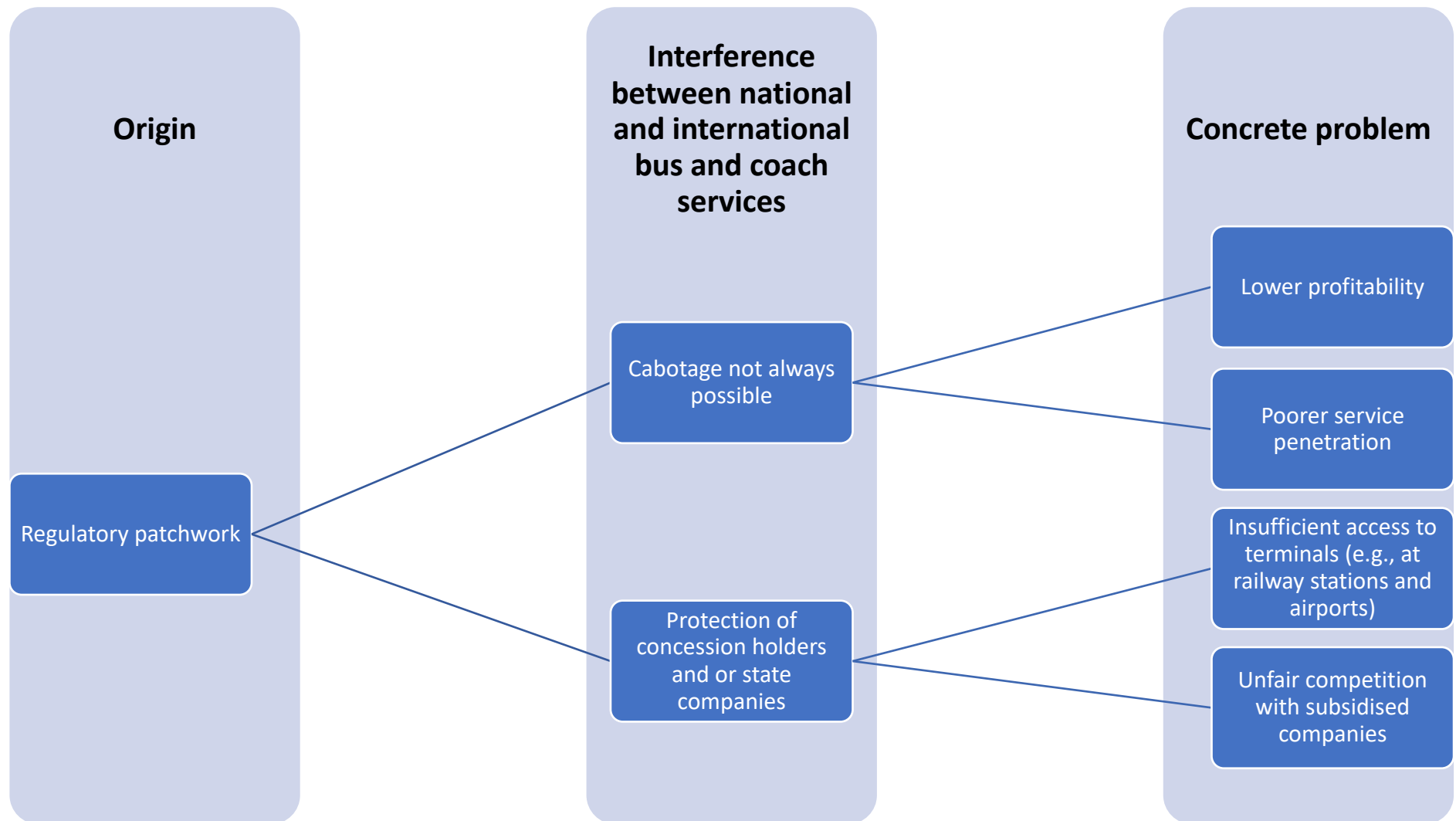
<sup>52</sup> Figure 2 in: Ex-post evaluation of Regulation (EC) No 1073/2009.

<sup>53</sup> See the proposal as cited in f.n. 3.

<sup>54</sup> E.g. the community license that all operators need to possess in order to be allowed to carry passengers.

alignment undermine the goals and potential of the legal frameworks. A schematic representation of this discussion is presented in Figure 2.

Figure 2: Schematic representation of the problems arising from the regulatory patchwork



## 3 Theoretical Framework

### 3.1 Regulations

The focus of this thesis is the intersection between EU Regulation 1073/2009 and national legal frameworks with regard to long-distance bus and coach services. Not much has been written about the implementation of regulations in different Member States, but in studies that have addressed compliance, the focus has usually been on directives. By definition, a directive interacts with national law by means of the transposition process; however, for regulations, this is not the case because according to Article 288 of the TFEU, a regulation ‘shall have general application. It shall be binding in its entirety and applicable in all Member States’<sup>55</sup>. This means that regulations do not need to be transposed into national law and that they can be directly relied upon in national courts. Thus, when a regulation enters into force, it is immediately applicable in all EU Member States.

This does not mean, however, that European regulations are completely separate from national regulatory frameworks; regulations may be differently applied in Member States. In 2013, the Dutch Ministry of Economic Affairs commissioned a report<sup>56</sup> exploring the extent to which the Netherlands was taking on an extra administrative burden when implementing EU legislation.<sup>57</sup> Although the report primarily focused on the implementation of directives, it noted that in some cases, regulations require national adaptations as well. This means that although regulations do not require formal implementation and transposition, there can still be differences in application by Member States.

Provisions of regulations may also lack sufficiently clear and precise definitions, leaving it up to Member States to determine how to implement them. In *Azienda Agricola Monte Acrosu*,<sup>58</sup> the European Court of Justice ruled that a regulation provision concerning the process of obtaining the status of ‘farmer’ for non-natural persons requires national measures of

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<sup>55</sup> Art. 288 TFEU

<sup>56</sup> Deloitte Consultancy. (2013). *Onderzoek naar lastenluwe implementatie van Europese Regelgeving: Eindrapportage*. Retrieved from: <https://zoek.officielebekendmakingen.nl/blg-249702.pdf>.

<sup>57</sup> In literature this is referred to as “gold-plating”, more on this below.

<sup>58</sup> *Azienda Agricola Monte Acrosu v Regione Autonoma della Sardegna*. C-403/98. (11 January 2001). Retrieved from: <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A61998CJ0403>. See especially §26.

application. Because Italy had failed to outline such measures in its policies, the provision in question could not be directly relied upon.<sup>59</sup>

It is also possible for a regulation to be limited to certain parts of a market; such is the case for Regulation 1073/2009, which only covers the market for international carriage between Member States,<sup>60</sup> leaving domestic markets outside its scope. If regulations are limited in their scope, differences between Member States in terms of practises outside the scope of the regulations are inevitable.

Thus, despite Article 288 of the TFEU, which states that a regulation ‘shall have general application. It shall be binding in its entirety and applicable in all Member States’, differences can still exist for the reasons mentioned. These divergences include regulatory and practical differences within a Member State and differences between Member States.

Research on compliance with EU law thus far has primarily focused on directives. According to Article 288 of the TFEU, ‘a directive shall be binding, as to the result to be achieved, upon each Member State to which it is addressed, but shall leave to the national authorities the choice of form and methods’. This has several implications. First, Member States need to transpose directives into national legislation, meaning that action is required. Second, in taking such action, they have the choice over the form and methods to employ. This leads to divergences with regard to whether, when, and how directives are implemented in different Member States. Again, these divergences can be both between a directive and a Member State’s own legal regime as well as between Member States.

Even though directives and regulations have different legal effect, directives can be investigated to identify how they have relevance to this study. In the following section, two lines of literature are discussed: the under-implementation of directives and gold-plating of directives. Studies on under-implementation or noncompliance have tried to explain which factors enable or promote compliance with directives. Given that the correct and timely transposition of directives is closely monitored by the Commission, this has yielded data that have been useful for previous researchers. Member States can also exceed that which is strictly

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<sup>59</sup> See for a more extensive discussion about the direct effect of Regulations: Craig, P., & De Búrca, G. (2011). *EU Law: Text, Cases, and Materials*. Oxford University Press. P. 198 ff.

<sup>60</sup> See Article 1 in: Regulation (EC) No 1073/2009.

necessary to comply with a directive. This over-compliance is referred to as gold-plating. The purpose of reviewing both these themes is not only to see the results but also to understand the implications for this study, with its focus on the relationship between an EU regulation and national frameworks.

## 3.2 Directives

### 3.2.1 Under-Implementation

Under-implementation, also known as noncompliance with an EU directive, is one of the topics widely addressed in existing literature. Dimitar Toshkov collected over 30 quantitative studies concerning transposition, implementation, and compliance with EU law in a database.<sup>61</sup> Complementary to the database, Toshkov also published a review article<sup>62</sup> in which he attempts to ‘take stock’ of the studies, not only discussing their findings but also their research designs.

The studies compiled in Toshkov’s database operationalise compliance, using transposition and/or infringement data as dependent variables.<sup>63</sup> Directives, according to their definition, require national implementing measures and a transposition deadline by which Member States must comply. Studies that use transposition data compare the moment national implementing measures are adopted with either the date of adoption of the directive or the transposition deadline.<sup>64</sup> Studies that have used infringement data have used the different stages of the infringement procedure. If a Member State does not transpose an EU directive in time, it receives a Letter of Formal Notice, then a Reasoned Opinion, and finally, a referral to the European Court of Justice. As Toshkov suggests, this reliance on formal procedures entails a drawback: the data are ‘generated by strategic interactions between the Commission and the

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<sup>61</sup> Toshkov, D. (n.d.) *Implementation of EU Law: An Online Database of Existing Research, in cooperation with the Institute for European Integration Research*. Vienna Institute for European Integration Research. Retrieved from [https://eif.univie.ac.at/eif\\_implementation/index.php](https://eif.univie.ac.at/eif_implementation/index.php).

<sup>62</sup> Toshkov, D. (2010). *Taking stock: a review of quantitative studies of transposition and implementation of EU law*. Vienna Institute for European Integration Research. Retrieved from: <https://ideas.repec.org/p/erp/eifxxx/p0009.html>.

<sup>63</sup> Idem, p. 12.

<sup>64</sup> All transposition studies use a temporal aspect, but they differ in the way how they operationalise implementation, see f.n. 62 above, p. 14.

Member States and [such generation] is not a result of a process of perfect detection and pursuit of transgressions'.<sup>65</sup>

Analysing regulations in a similar fashion would not be possible because unlike directives, regulations do not usually require national implementing measures, and thus, transposition data are not available. In addition, regulations lack a transposition deadline; they simply enter into force. Thus, it follows that there are no infringement procedures related to failing to meet a transposition deadline. However, it is possible for the Commission to initiate the infringement procedure in the case that a Member State does not meet the obligations of a regulation.

To determine which variables reflect compliance with directives, numerous relationships have been assessed.<sup>66</sup> Although research has yielded little consistency concerning which variables determine compliance, some variables do seem to reflect compliance or noncompliance with directives. The following two sections discuss both variable where a positive and a negative effect on compliance has been found.

### 3.2.1.1 Positive Effects

According to Toshkov, variables that 'almost certain[ly] affect compliance positively (or at least not negatively)'<sup>67</sup> are the following: administrative efficiency, parliamentary scrutiny, and coordination strength.<sup>68</sup> The studies looking at these variables vary in number as well as operationalisation and territorial scope.<sup>69</sup> What these variables have in common, however, is that they look at bureaucratic capacity,<sup>70</sup> political scrutiny,<sup>71</sup> or, in the case of coordination, a combination of both based on the micro, meso, and macro capacities of Member States vis-à-vis the EU as well as the relations between different departments domestically.<sup>72</sup>

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<sup>65</sup> See above. See also for a more detailed description of the operationalization of the dependent variables. CF f.n. 62 at p.14 ff.

<sup>66</sup> 263 relationships See f.n. 62, p.24.

<sup>67</sup> Toshkov, D. (2010). *Taking stock: a review of quantitative studies of transposition and implementation of EU law*. Retrieved from: <https://ideas.repec.org/p/erp/eifxxx/p0009.html>.

<sup>68</sup> See Toshkov a cited above, p. 35 as well as the tables at pp. 24 ff. A more dynamic overview can be found in the database as cited in f.n. 62.

<sup>69</sup> Cf. both the review article and database as cited above.

<sup>70</sup> The administrative efficiency is measured using databases such as the World Bank Governance Indicators or a study by Aurer *et al*: Auer, A., Demmke, C., & Polet, R. (1996). *Civil services in the Europe of fifteen: current situation and prospects*. European Institute of Public Administration.

<sup>71</sup> Operationalised as the involvement of Parliaments, measured in various ways.

<sup>72</sup> Cf. Giuliani, M. (2004) *UE Compliance: Macro, Meso or No Institutions At All?* (URGE Working Paper). Retrieved from: [https://www.academia.edu/2851672/URGE\\_Working\\_Paper\\_6\\_2004](https://www.academia.edu/2851672/URGE_Working_Paper_6_2004).



In a somewhat more recent study looking at both quantitative and qualitative factors, Angelova *et al.* found that effect of administrative efficiency on compliance is only strong in qualitative case studies because of the confirmation and selection biases of case studies.<sup>73</sup> They also found another strong variable contributing positively to compliance, the goodness-of-fit,<sup>74</sup> something Toshkov had also found to be explanatory in all cases except for social and transport policies.<sup>75</sup> To some extent, goodness-of-fit might also be explanatory for this study because the exercise in this study is essentially an assessment of the level of alignment between EU and national legislation. This study is limited to the application of the Regulation and does not consider infringement.<sup>76</sup> A qualitative content analysis approach or sophisticated interview coding scheme, as applied in some of the studies mentioned by Angelova *et al.*,<sup>77</sup> would not be useful because there is no direct text to use for comparison, and although conducting interviews with sophisticated coding makes sense, it is only useful when many interviews are conducted.

### 3.2.1.2 Negative Effects

With respect to negative effects, Toshkov found five variables ‘exert[ing] a negative (or at least not positive) influence on compliance’.<sup>78</sup> These are federalism/regionalism, corruption level, veto players, the number of ministries involved, and domestic conflict. Among these variables, there is less overarching commonality. Federalism and regionalism are already combined, and given the different operationalisation of variables it is very hard to see whether the other variables interrelate with each other. For this study, the variable of federalism/regionalism is of interest because the sample includes variance. Although transposition of directives involves a different interaction between federal and state levels in terms of competencies, it might still be true that federalism/regionalism also plays a role. The databases<sup>79</sup> used in the studies on

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<sup>73</sup> Angelova, M., Dannwolf, T. & König, T. (2012). How Robust are Compliance Findings? A Research Synthesis. *Journal of European Public Policy*, 19:8, 1269-1291. Retrieved from: [10.1080/13501763.2012.705051](https://doi.org/10.1080/13501763.2012.705051). See Pp. 1283 ff.

<sup>74</sup> Idem. Please note that with goodness-of-fit the fit between national en EU legislation is meant here, not the statistical goodness of fit.

<sup>75</sup> Toshkov, D. (2010). *Taking stock: a review of quantitative studies of transposition and implementation of EU law*. Retrieved from: <https://ideas.repec.org/p/erp/eifxxx/p0009.html>.

<sup>76</sup> See Angelova *et al* as cited in f.n. 74 above, p. 1274.

<sup>77</sup> Idem.

<sup>78</sup> Toshkov, D. (2010). *Taking stock: a review of quantitative studies of transposition and implementation of EU law*. P. 34. Retrieved from: <https://ideas.repec.org/p/erp/eifxxx/p0009.html>.

<sup>79</sup> Lijphart has designed a 5-point scale to measure the degree of Federalism, see Lijphart A (2012 [1999]) *Patterns of Democracy: Government Forms and Performance in Thirty-Six Countries*. Yale University Press. Hooghe and Marks offer a Regionalism Index: Hooghe, L., & Marks, G. W. (2001). *Multi-level governance and*

federalism and regionalism cited by Toshkov can also be easily applied to the sample of countries in this study.

### 3.2.1.3 Implications

Toshkov's database and review paper demonstrate that the body of quantitative studies collected is not able to fully explain the variables that determine compliance.<sup>80</sup> In addition, as has been mentioned, studying regulations in the same manner as directives are studied would be impossible because there are no transposition data available for regulations. Even if there were such data, this type of research could lead to the same inconsistencies evident in the studies Toshkov analysed.

In this study, the intersection between Regulation 1073/2009 and national legislation in the three Member States is analysed differently. Whereas the studies from Toshkov's database tried to find explanatory variables for noncompliance, this study aims at describing how Regulation 1073/2009 interacts with national frameworks for passenger transportation. Because each of the countries has a different national legal framework for passenger transportation, the regulatory focus in each country differs. Thus, advantageously, the peculiarities of each national regulatory framework can be taken into account. However, a disadvantage is that it is difficult to generalise findings to other regulations, but this is not the objective of this study. The variable that was found to be strong by Angelova *et al.* and is of interest for this study is goodness-of-fit.<sup>81</sup> A variable found by Toshkov may also be relevant: the effect of federalism and regionalism, as these concepts may influence the effect of both national legislation and EU regulation. These variables can both be applied in this study, but they cannot be hypothesis tested. This is of course a limitation to the external validity of this study.

Because this study aims to describe the interactions between national legislation and the EU Regulation, it is not sufficient to look at under-implementation/noncompliance alone because

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*European integration*. Rowman & Littlefield. And Marks, G.W., Hooghe, L. and Schakel, A. 2008. Regional authority in 42 democracies, 1950–2006: a measure and five hypotheses. *Regional and Federal Studies*, 18(2–3): P. 111–302.

<sup>80</sup> Toshkov, D. (2010). *Taking stock: a review of quantitative studies of transposition and implementation of EU law*. Retrieved from: <https://ideas.repec.org/p/erp/eifxxx/p0009.html>. P. 38 ff.

<sup>81</sup> Angelova, M., Dannwolf, T. & König, T. (2012). How Robust are Compliance Findings? A Research Synthesis. *Journal of European Public Policy*, 19:8, 1269–1291. DOI: [10.1080/13501763.2012.705051](https://doi.org/10.1080/13501763.2012.705051).

in transposing directives Member States can do less *or* more than is required. Therefore, in the next section, the focus will be on over-implementation, also referred to as gold-plating.

### 3.2.2 Over-Implementation and Gold-Plating: Exceeding Requirements

While the studies in Toshkov's database are those focused on noncompliance with directives or under-implementation, other studies have focused on the phenomenon of over-implementation of EU directives. An example of over-implementation is gold-plating. A comprehensive definition of this phenomenon is provided in the Davidson Report:<sup>82</sup>

Gold-plating is when implementation goes beyond the minimum necessary to comply with the requirements of European legislation by:

- extending the scope, adding in some way to the substantive requirement, or substituting wider UK legal terms for those used in the directive; or
- not taking full advantage of any derogations which keep requirements to a minimum (e.g. for certain scales of operation, or specific activities); or
- providing sanctions, enforcement mechanisms and matters such as burden of proof which go beyond the minimum needed (e.g. as a result of picking up the existing criminal sanctions in that area); or
- implementing early, before the date given in the directive.<sup>83</sup>

By doing more than an EU directive requires, a Member State puts domestic businesses at a comparative disadvantage by creating administrative burdens. It is not entirely clear who coined the term gold-plating in relation to EU directives<sup>84</sup> or whether it is more of a buzz word

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<sup>82</sup> In 2005 the Chancellor of the Exchequer of the UK asked Lord Davidson QC "to examine selectively the stock of EU-sourced legislation in the UK and identify measures where unnecessary regulatory burdens can be reduced or the system simplified." See the Foreword in the report as cited below p. 1.

<sup>83</sup> Lord Davidson (2006). *Davidson Review Final Report*. Stationery Office. Retrieved from: [https://webarchive.nationalarchives.gov.uk/http://www.hm-treasury.gov.uk/d/davidson\\_review281106.pdf](https://webarchive.nationalarchives.gov.uk/http://www.hm-treasury.gov.uk/d/davidson_review281106.pdf).

<sup>84</sup> Michael Keading quotes both: Bellis, R. (2003) *Improving implementation of EU legislation*. Foreign and Commonwealth Office. As well as: Chittenden, F., Ambler, T., & Obodovski, M. (2004). *How Much Regulation is Gold Plate? A Study of UK Elaboration of EU Directives*. British Chambers of Commerce. Unfortunately, both of these studies could not be retrieved. See Kaeding, M. (2007). *Better regulation in the European Union: lost in translation or full steam ahead?: the transposition of EU transport directives across Member States*. Leiden University Press. P. 176.

or an actual phenomenon that truly represents a threat to businesses.<sup>85</sup> In his report, Lord Davidson points to the difficulties of measuring gold-plating, citing a study that previously compared the number of words in an original directive with the number of words in implementing legislation adopted in the United Kingdom as an example.<sup>86</sup> Although Davidson found some instances of gold-plating in the UK legislation,<sup>87</sup> he also downplays the problems associated with gold-plating and over-implementation, noting that not all complaints are related to this practise.<sup>88</sup>

Similar to the United Kingdom, the Netherlands also commissioned research to examine the possible over-implementation and gold-plating of EU directives. Voermans<sup>89</sup> compared the Davidson Report with the findings of research in the Netherlands and came to the following conclusion:

What is apparent from both projects [the Davidson Report and the Nationale Koppen report] is that perceptions of over-implementation in one's own country and suspected under-implementation in other countries are widespread and tenacious. Although over-implementation is not widespread it does occur, only with less damaging effect to business and industry than is commonly believed. Businesses and industries that operate throughout Europe seems to suffer more from differentiated implementation in different countries than from over-implementation at home.<sup>90</sup>

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<sup>85</sup> See for an overview of gold-plating also Squintani, L. (2019). *Beyond Minimum Harmonisation: Gold-plating and Green-plating of European Environmental Law*. Cambridge University Press.

<sup>86</sup> Lord Davidson (2006). *Davidson Review Final Report*. Stationery Office. Retrieved from: [https://webarchive.nationalarchives.gov.uk/+/http://www.hm-treasury.gov.uk/d/davidson\\_review281106.pdf](https://webarchive.nationalarchives.gov.uk/+/http://www.hm-treasury.gov.uk/d/davidson_review281106.pdf). Lord Davidson doesn't specify what study he's referring to, but it seems to be a study conducted for the British Chamber of Commerce: Chittenden, F., Ambler, T., & Obodovski, M. (2004). *How Much Regulation is Gold Plate? A Study of UK Elaboration of EU Directives*. British Chambers of Commerce.

<sup>87</sup> Examples he found in the Insurance Mediation Directive, MOT-testing, animal scientific procedures and close links.

<sup>88</sup> Lord Davidson (2006). *Davidson Review Final Report*. Stationery Office. P. 14.

<sup>89</sup> Voermans was part of the second committee that looked at gold-plating in the Netherlands, the findings of this committee can be found here: P.J. Slot, W.J.M. Voermans, S.F. Blockmans, M.K. Bulterman, M. van der Harst, S.A.L. Josaputra, B. Platell, P. Willemsen, A. Cuyvers, S.H. Romein, M. Park, H. Park (2007), *Nationale koppen op EG-regelgeving* (Over-implementation of EC Legislation). Retrieved from: <https://openaccess.leidenuniv.nl/bitstream/handle/1887/13380/Koppen%20II%2027-04-07.pdf?sequence=1>

<sup>90</sup> Voermans, W. J. (2009). Gold-plating and double banking: an overrated problem? In Snijders, H. & Vogenauer, S. (Eds.) *Content and Meaning of National Law in the Context of Transnational Law* (pp. 79-88). Sellier European Law Publishers. P. 88.

### 3.2.3 Implications

Although the studies from Toshkov and Angelova *et al.* as well as the studies focussing on gold-plating directly concern directives, the *modus operandi* of the gold-plating research is relevant to this study. To test whether a directive has been gold-plated, researchers compare provisions from a directive to provisions in the national legislation implementing that directive. In the case of directives, there is always a national implementing law. However, because regulations do not need to be transposed and implemented into national legislation, this makes it harder to identify the specific national laws that cover the same issues addressed in EU regulations. This does not mean that it is impossible to compare a national regulatory framework with a regulation, but in this case, a wider sample of national regulatory frameworks needs to be assessed. In the absence of legislation for long-distance regular service by bus and coach, it may be necessary to expand the scope to regular service by bus to adequately assess the interaction between national regulatory frameworks and Regulation 1073/2009. This could even reflect a point of interaction: If national legislation does not provide a specific framework for long-distance buses, it could be the case that they are subject to that governing regular service.

A question to consider is whether it is always negative to go beyond what is required by EU legislation. For several reasons, it may be beneficial for a Member State to exceed what is required by a directive or regulation. Previous studies about gold-plating have mostly been concerned with directives that set standards for safety, consumer protection, or environmental protection, among others. As Lord Davidson opined, ‘in some cases, setting or maintaining higher standards may be beneficial as well’.<sup>91</sup> However, it is crucial to note that this is only possible when directives have minimum harmonisation as their objective. Such directives only set lower boundaries for Member States, whereas maximum harmonisation directives aim at achieving full harmonisation, leaving Member States no room to deviate.<sup>92</sup> With regard to the gold-plating of environmental legislation, Lorenzo Squintani distinguishes between gold-plating and green-plating. He narrows the term gold-plating to the instances where ‘the costs

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<sup>91</sup> See e.g. Lord Davidson (2006). *Davidson Review Final Report*. Stationery Office. See p. 3 where he points at situations where benefits outweigh the costs.

<sup>92</sup> See Craig, P., & De Búrca, G. (2011). *EU Law: Text, Cases, and Materials*. Oxford: Oxford University Press. See pp. 703-704 for a short explanation applied to free movement of goods (including some case law). Squintani also gives a nice overview of the difference and the history applied to environmental law: Squintani, L. (2019). *Beyond Minimum Harmonisation: Gold-plating and Green-plating of European Environmental Law*. Cambridge University Press. p. 4 ff.

in a cost-benefit analysis prevail'.<sup>93</sup> It is not surprising that businesses would be wary of the costs of additional measures imposed by their governments. However, as Squintani asserts, 'political institutions are responsible for the attainment of a variety of objectives, which must be pursued in an integrated manner'.<sup>94</sup> This means that they should take the benefits into account as well.

Although this study is concerned with a particular regulation, which is, in turn, concerned with market access instead of standard setting, previous literature about gold-plating has identified legitimate reasons to exceed what is required by EU legislation. This is especially true in cases where EU legislation regarding market access distinguishes between non-residents and residents. In such instances, non-residents must be treated according to the provisions of EU legislation, whereas residents are subject to national legislation. Wherever the national legislation is less favourable than the EU legislation, reverse discrimination emerges.<sup>95</sup> In these cases, extending the scope of legislation by voluntarily integrating EU provisions into national law<sup>96</sup> and treating residents equally to non-residents would put residents on equal footing. With regard to companies, this would provide them with a level playing field, and thus, it would be unlikely that businesses would complain about gold-plating.

### 3.3 Taking Stock

It has been shown that there is extensive literature on (non)compliance with directives. However, despite scholarly efforts, it remains difficult to identify consistent and strong results regarding possible explanatory variables. The choice appears to be doing quantitative research analysing many countries and directives (covering a range of policy fields), which might lead to inconsistent findings, or undertaking qualitative case studies limited to countries and policy fields, which might suffer from biases. Grand theories of compliance are thus elusive. With regards to gold-plating, one can conclude that Member States do sometimes go beyond the

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<sup>93</sup> Cf. Squintani, L. (2019). *Beyond Minimum Harmonisation: Gold-plating and Green-plating of European Environmental Law*. Cambridge University Press. p. 71.

<sup>94</sup> Idem, p. 69.

<sup>95</sup> See for an extensive discussion of CJEU case law regarding reverse discrimination: Ambrosini E. (2017) Reverse Discrimination in EU Law: An Internal Market Perspective. In: Rossi L., Casolari F. (Eds.) *The Principle of Equality in EU Law*. Springer.

<sup>96</sup> Voluntary adoption has been widely discussed with regards to EU-Law principles as a way to prevent reverse discrimination. See Widdershoven, R. J. (2014). Developing Administrative Law in Europe: Natural Convergence or Imposed Uniformity. *REALaw, Review of European Administrative Law*, Vol. 7, nr. 2. P. 9 ff. The logic behind it would however also apply to secondary legislation, such as regulations.

requirement of a directive, but this certainly does not always need to be bad; as both Davidson and Squintani have shown, there might be good reasons to do so.

With regard to regulations, there are good reasons to expect Member States to deviate as well, not in their transposition but in their application as well as adaptation of their general framework. This can entail either doing less or more than the goals of the Regulation would require. With regard to the noncompliance studies, this study considers both regionalism/federalism and goodness-of fit to assess whether they contribute to a better understanding of the findings (explanatory power is not considered).

Methodologically, the following chapters align more closely with previous literature on gold-plating: they use close reading and comparison of secondary EU legislation with national legislation. These studies have also often compared the national legislation of various Member States. Although gold-plating literature is of interest to this study substantively, it may well be that a Member State is perfectly complying with a regulation but because of the content of the regulation itself, the wider goals envisioned by the EU are not being met. In the broadest sense, the Regulation is aimed at creating a modal-shift and increasing the mobility of EU citizens. A Member State gold-plating its regulatory framework may be in line with these wider goals. It is also important to discuss difference between maximum and minimum harmonisation. With minimum harmonisation, there are ample opportunities for Member States to go beyond what is required of them; maximum harmonisation means that the directive or regulation aims at fully harmonising the law throughout the EU, this leaves no leeway for Member States to deviate either beyond or below what is required.

## 4 The Netherlands

This chapter examines the Netherlands. According to the World Economic Forum (WEF)'s latest Competitiveness Report, the Netherlands scores second in Transport Infrastructure.<sup>97</sup> In 2016, cars represented the predominant mode of transportation.

Table 1: Modal Split of Passenger Transportation in the Netherlands<sup>98</sup>

	Modal split for passenger transport (shares based on passenger-kilometres)			
	Passenger cars	Buses & Coaches	Railways	Tram & Metro
Netherlands	85.5%	3.0%	10.9%	0.6%
EU-28	81.3%	9.3%	7.6%	1.8%

The share for buses and coaches was relatively low then, and this statistic included urban and suburban buses. Railways accounted for the largest share of passenger-kilometres. With regard to regulations, the Netherlands started to introduce market mechanisms to the public transport system relatively early. This was done through the introduction of competitive tendering.<sup>99</sup> In this chapter, the regulation on which this system is based is discussed. Following this discussion, the text turns to specific provisions for cabotage. This is followed by a presentation of some relevant case law. Case law offers a bridge between national legislation and the EU Regulation and illuminates any conflicts, if present, and the effect on long-distance carriers. This section demonstrates the difference between black letter law and practical application. This text also takes into account access to terminals. The conclusion summarises the findings and also offers possible solutions to the practical problems discussed.

<sup>97</sup> This included both passenger and freight transport. World Economic Forum. (2019) *Global Competitiveness Report*. The specific ranking referred to here can be Retrieved from: <http://reports.weforum.org/global-competitiveness-report-2019/competitiveness-rankings/#series=GCI4.A.02.01>.

<sup>98</sup> European Commission. (2019) *Transport in the EU: Current Trends and Issues*. Retrieved from: <https://ec.europa.eu/transport/sites/transport/files/2019-transport-in-the-eu-current-trends-and-issues.pdf>. See p. 114. As a source for the figures they give: EU Transport in figures, Statistical Pocketbook 2018.

<sup>99</sup> See for a nice overview of developments: Veeneman, W., & van de Velde, D. (2014). Developments in public transport governance in the Netherlands: A brief history and recent developments. *Research in Transportation Economics*, 48, pp. 41-47.



## 4.1 The Dutch Transport Act

In the Netherlands, access to the market for passenger transportation is regulated by the Law for Passenger Transportation 2000 (Wet Personenvervoer 2000, hereafter referred to as WP 2000), which entered into force in 2001. This law regulates all types of passenger transportation within the Netherlands. Before 2001, when the WP 2000 entered into force, the Dutch domestic market for public transportation was dominated by publicly owned transportation companies. The system was an open market system, but because it was not viable to exploit public transportation commercially, most public transportation companies were state owned.<sup>100</sup> With the WP 2000, public transportation became regulated through a system of concessions. Article 19 of the WP 2000 states that it is forbidden to provide public transportation without having been granted a concession. The concessions for public transport (except intercity railways) are awarded by regional transport authorities, which are mostly based in provinces; in the metropolitan areas of Amsterdam and Rotterdam–The Hague, there are separate authorities. The provinces of Groningen and Drenthe share one transport authority.<sup>101</sup>

### 4.1.1 Tendering System

Article 61 of the WP 2000 prescribes that local transport authorities organise a competitive tender for the concessions they possess to enable multiple public transport providers to compete for a concession. The regional public transport authorities who organise the tender set the terms of reference. These terms may include requirements regarding the services that need to be provided by operators as well as requirements for the buses used to run the services. The winner of the tender gains the exclusive right to provide public transport in a region for the term of the concession. Article 24 of the WP 2000 prescribes that the maximum term of a concession must accord with EU Regulation 1370/2007. This means that for bus concessions, the maximum term is 10 years.<sup>102</sup> With the introduction of this system of concessions, the market for public transportation changed substantially. Publicly owned operators had operated the transportation

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<sup>100</sup> Veeneman, W. W., Van de Velde, D. M., & Lutje Schipholt, L. (2007). Competitive tendering in the Netherlands: 6 lessons from 6 years of tendering. In European Transport Conference 2007, Noordwijkerhout, 17-19 October 2007. P. 1.

<sup>101</sup> See for an overview of developments on the Dutch market for Public Transportation e.g. Veeneman, W., & van de Velde, D. (2014). Developments in public transport governance in the Netherlands: A brief history and recent developments. *Research in Transportation Economics*, 48, pp. 41-47.

<sup>102</sup> European Union, European Commission. (2007). *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*. Retrieved from: <https://eur-lex.europa.eu/legal-content/en/TXT/?uri=CELEX%3A32007R1370>.

services, but now private bus operators would compete with each other in a tender organised by the public transport authority.

## 4.2 Exemption System

### 4.2.1 Exemptions and Offering Cabotage

The exclusive right to provide public transport in a certain region sometimes conflicts with the objectives of Regulation 1073/2009. Although Regulation 1073/2009 does not address the market for national public transportation, it does provide for the right to offer cabotage services in Arts. 14 and 15. According to the Regulation, ‘cabotage operations’ refers to either of the following: national road passenger services for hire and reward carried out on a temporary basis by a carrier in a host Member State or the pick-up and drop off of passengers within the same Member State in the course of an international journey . These operations should be in compliance with the provisions of this Regulation: ‘provided that it [cabotage] is not the principal purpose of the service’.<sup>103</sup> For long-distance bus carriers, the second type of cabotage operation is relevant because they provide regular international service and also carry passengers domestically on an international line. Additionally, Article 15(c) of Regulation 1073/2009 explicitly limits the right to offer cabotage to non-resident carriers.<sup>104</sup> Allowing passengers to travel domestically on an international line is attractive for long-distance bus carriers because this enables them to offer more connections on the same line. The ability to transport passengers domestically in the Netherlands, however, falls under the exclusive right of concession holders who offer public transportation. Anyone offering public transportation without a concession in the Netherlands is in violation of Article 19 of the WP 2000. In the explanatory memorandum of the WP 2000, this possible conflict is foreseen. The memorandum states that the exclusive right is not absolute: Local transport authorities may exempt an entity from the obligation to have a concession so as not to hinder other innovative transport ideas and enable cabotage.<sup>105</sup> In the explanatory memorandum of the WP 2000, it is even mentioned that the possibility of an exemption is necessary for compliance with Regulation 12/98, which is the predecessor of Regulation 1073/2009.<sup>106</sup> This is confirmed in the answers to parliamentary questions inquiring into the exact meaning and implications of the exemption

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<sup>103</sup> Regulation (EC) 1073/2009. Specifically: Article 1 paragraph 7.

<sup>104</sup> Cf. Regulation (EC) 1073/2009. Specifically: Article 15 (c).

<sup>105</sup> Tweede Kamer der Staten Generaal. (1999). *Kamerstuk 26456-3*. Retrieved from: <https://zoek.officielebekendmakingen.nl/kst-26456-3.html>.

<sup>106</sup> Idem, p. 64-65.

procedure; the answers indicate that the main reasons to include the possibility of an exemption is to allow for cabotage.<sup>107</sup> The exemption from the obligation to have a concession is described in Article 29 of the WP 2000. When an exemption is sought, local transport authorities have only limited grounds on which to refuse it: they can do so only in the case of a service for which an exemption is sought that is so similar to existing services provided by a concession holder that an exemption would disproportionately harm the concession holder.<sup>108</sup> It is up to the local transport authority to determine whether this is the case.

### 4.3 Contesting Exemption Decisions

The decision of a local transport authority can be contested either by the applicant for an exemption who is denied or by the concession holder who does not agree that the local public transport authority should exempt the applicant. Two cases have come before the highest court of appeal for administrative economic law in the Netherlands, College Beroep voor het bedrijfsleven (CBB), which dealt with the application of Article 29 of the WP 2000 to local public transport authorities. Both cases contested the similarity of the proposed service to existing services and argued the proposed service would disproportionately harm an existing concession.

#### 4.3.1 The Coastal Bus Case

The first case<sup>109</sup> from 2007 involved an initiative to provide a special coastal bus service in the province of Noord-Holland. A bus company asked the local transport authority, the province of Noord-Holland, for an exemption under Article 29 and was granted the exemption. The owner of the concession, Connexxion, did not agree with the exemption and asked the court for it to be revoked in an interim provision. The question before the court was whether the coastal bus would disproportionately harm Connexxion's concession. In this case, the court ruled that the exemption needed to be revoked because it was plausible that the coastal bus

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<sup>107</sup> Tweede Kamer der Staten Generaal. (1999). *Kamerstuk 26456-7*. P. 83. Retrieved from: <https://zoek.officielebekendmakingen.nl/kst-26456-7.html>.

<sup>108</sup> Article 29 Data Protection Working Party (2004). *Opinion 5/2004 on unsolicited communications for marketing purposes under Article 13 of Directive 2002/58/EC*. Retrieved from: [https://ec.europa.eu/justice/article-29/documentation/opinion-recommendation/files/2004/wp90\\_en.pdf](https://ec.europa.eu/justice/article-29/documentation/opinion-recommendation/files/2004/wp90_en.pdf).

<sup>109</sup> Connexxion Openbaar Vervoer N.V. te Haarlem vs Gedeputeerde staten van Noord-Holland (2007). ECLI:NL:CBB:2007:BA7916. Retrieved from: <https://www.uitspraken.nl/uitspraak/college-van-beroep-voor-het-bedrijfsleven/bestuursrecht/bestuursrecht-overig/proceskostenveroordeling/ecli-nl-cbb-2007-ba7916>.

service would compete with the lines Connexxion operated and therefore harm their exclusive rights. Important facts in the case were that this coastal bus service was subsidised by the province, which is also the local transport authority, and that the fare was lower than that charged by Connexxion. When the WP 2000 was changed in 2010, the legislature referenced this case and made clear that an exemption was only possible if no subsidy was needed.<sup>110</sup>

#### 4.3.2 FlixBus – Noord-Brabant

The second case<sup>111</sup> came before the CBB in 2018. Here, it was FlixBus' German entity that applied for an Article 29 exemption in the province of Noord-Brabant to offer cabotage in the territory of the province of Noord-Brabant for six lines. For each of the lines, an international route authorisation had already been granted. Without Article 29 exemption, it would not be possible to offer cabotage in Noord-Brabant. The province of Noord-Brabant refused to grant an exemption for all the lines because they found that FlixBus' lines were too similar to those being offered by the concession holders and that FlixBus' initiative would disproportionately harm the existing concession holders Hermes and Arriva. This position was affirmed in the first appeal at the CBB. The CBB did not find convincing the arguments of the province of Noord-Brabant comparing FlixBus' offer with a combined offer of train and bus. According to the CBB, the province of Noord-Brabant was only allowed to take their own concessions into consideration when assessing whether FlixBus' offer was a substitute and whether it would disproportionately harm the existing concession.<sup>112</sup> Because the argument of Noord-Brabant was founded on a combination of train and bus, the decision was ill founded and lacked proper motivation.<sup>113</sup> Therefore, the CBB annulled the decision to deny FlixBus an Article 29 exemption and ruled that the province of Noord-Brabant needed to reconsider the application.

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<sup>110</sup> Tweede Kamer der Staten Generaal. (2010). *Kamerstuk 32403-3*. P. 11. Retrieved from: <https://zoek.officielebekendmakingen.nl/kst-32403-3.html>.

<sup>111</sup> FlixBus DACH GmbH (FlixBus) vs College van Gedeputeerde Staten van Noord-Brabant (2018). ECLI:NL:CBB:2018:384:DOC. Retrieved from: <https://www.navigators.nl/document/ideaa138442f4e4a83ba07c1493856c6a7/ecli-nl-cbb-2018-384-cbb-10-07-2018-nr-17325-tot-en-met-17330?anchor=id-77b7fffb-7bd7-4c7a-9df3-7baa5716f4e9>

<sup>112</sup> Idem at §6.3.

<sup>113</sup> Referencing Dutch Administrative Law (Awb) arts. 3:2 and 7:12.

#### 4.3.3 Conclusions from Case Law

In the cases described, the CBB further specified the criteria local public transport authorities should use to review an application for an exemption. The first case highlighted the relevance of whether a line is subsidised or not. Provided that all other criteria are satisfied, exemptions are only intended for unsubsidised public transportation. Long-distance carriers meet these criteria because they are privately operated entities. The second case made clear that to determine whether a line is similar to and would disproportionately harm an existing concession, a local public transport authority is limited to comparing lines that are part of the concession it is responsible for. This enable long-distance carriers to apply for exemptions that may constitute a substitute to a combination of intercity train and local bus.

#### 4.4 Compatibility of Exemption System with Regulation 1073/2009

In the case between FlixBus and Noord-Brabant, the court did not discuss Regulation 1073/2009 and the right to offer cabotage. The need for an exemption was left outside of the ruling.<sup>114</sup> However, when the Dutch government received applications for authorisations that included cabotage within the Netherlands, they were unsure whether the Dutch system was compatible with European regulation. Therefore, the Dutch Ministry of Infrastructure asked the European Commission to clarify whether the system of concessions and exemptions in the Netherlands accorded with European regulation.<sup>115</sup> In its answer,<sup>116</sup> the Directorate General of Mobility and Transport pointed to Article 16 paragraph 2, which states the following:

Save as otherwise provided in Community legislation, cabotage operations which form part of the transport services provided for in Article 15(c) shall be subject to the laws, regulations and administrative provisions in force in the host Member State regarding authorisations, tendering procedures, the routes to be operated and the regularity, continuity and frequency of services as well as itineraries.<sup>117</sup>

According to the Commission, this paragraph allows the Netherlands to ask for an Article 29 WP 2000 exemption when cabotage is offered as part of regular international service. A second

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<sup>114</sup> The main argument on the basis of which the court annulled the decisions was because they lacked a proper foundation. See f.n. 112 above.

<sup>115</sup> Letter from Ministry of Infrastructure dated 25-04-2016.

<sup>116</sup> Letter from DG Move dated 05-10-2017.

<sup>117</sup> Regulation (EC) 1073/2009. Specifically, art, 16 (2).

question asked whether domestic carriers were allowed to offer cabotage under Regulation 1073/2009 Article 15 paragraph c; the answer was that paragraph c only applies to non-resident carriers. Domestic carriers cannot rely on the right to offer cabotage under Regulation 1073/2009. For them, national legislation governs.

#### 4.4.1 Obstacles to Carrying Passengers

The discussion of the exemption process demonstrates that although Regulation 1073/2009 is intended to simplify the procedures and ‘ensure a coherent framework for the international carriage of passengers by coach and bus throughout the community’,<sup>118</sup> the system of concessions is consistent with the provisions of Regulation 1073/2009. Long-distance bus carriers offering cabotage simply need to apply for an Article 29 WP 2000 exemption in each concession area they serve with their connection. This is in addition to the international authorisation needed to provide a regular service under Regulation 1073/2009. In some cases, international authorisation to provide a regular service is granted by the competent authority, Kiwa Register, and at the same time, a regional transport authority might refuse to grant an Article 29 WP 2000 exemption. This happened in the Noord-Brabant case described earlier. FlixBus had already received authorisation to provide a regular service but was initially refused an Article 29 WP 2000 exemption. In 2015, a member of the Dutch parliament asked the responsible Dutch minister about the development of the market for long-distance buses and was specifically interested in whether there were any legal obstacles to offering cabotage. The minister answered that there were no obstacles in the Netherlands, that every carrier could apply for an authorisation from the competent authority to provide a regular international service, and that no such application has been refused so far.<sup>119</sup> In response to another question, the minister repeated that she saw no legal obstacles to the operation of a long-distance bus line in the Netherlands, provided that the carrier had a concession or an exemption.<sup>120</sup>

#### 4.4.2 Implications for Long-Distance Bus Carriers

Although the Dutch Ministry of Infrastructure was not entirely sure whether the Article 29 exemption practice in the Netherlands was compatible with Regulation 1073/2009, the answers

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<sup>118</sup> Regulation (EC) 1073/2009.

<sup>119</sup> Tweede Kamer der Staten Generaal. (2015) *Aanhangsel van de Handelingen ah-tk-20142015-3215*. Retrieved from: <https://zoek.officielebekendmakingen.nl/ah-tk-20142015-3215>.

<sup>120</sup> Idem, Question and Answer 6.

of the Commission assured them that exemptions were consistent with the Regulation.<sup>121</sup> Despite the fact that Article 15 of the Regulation explicitly allows for cabotage for non-resident carriers, this right is somewhat limited by a specific provision, which states that the right offered in Article 15(c) ‘shall be subject to the laws, regulations and administrative provisions in force in the host Member State regarding authorisations, tendering procedures, the routes to be operated and the regularity, continuity and frequency of services as well as itineraries’.<sup>122</sup> This does not seem to be consistent with the objective of the Regulation ‘to ensure a coherent framework for the international carriage of passengers by coach and bus throughout the Community’.<sup>123</sup> By allowing Member States to subject cabotage to national regulation, the Regulation fails to prevent the development of a layered system where carriers not only need to comply with EU regulation but also a patchwork of national provisions. In the Dutch context, this means that long-distance carriers that want to transport passengers within the Netherlands must apply for Article 29 exemptions in each concession area where the international line stops to pick up/drop off passengers. This often means that for a single line, multiple exemptions must be applied for, resulting in extra administrative costs to prepare and submit applications. In extreme cases, such as the Noord-Brabant case, it can even lead to legal disputes with the public transport authorities. In addition, FlixBus<sup>124</sup> has also made the following argument regarding competition law:

When applied for an exemption the information from the application is often shared with the concession holder by the local public transport authorities. This means that market sensible data ends up at local bus companies and this can be problematic as unlike the concession holder, FlixBus operates on a liberal market and does not have exclusive rights. With the prior knowledge they get from the local public transport authorities; they could adapt their offer or forward it to sister and/or parent companies active in the market for long-distance coach and bus services.<sup>125</sup>

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<sup>121</sup> See f.n. 116 and f.n. 117 above.

<sup>122</sup> Regulation (EC) 1073/2009. Article 16 §2.

<sup>123</sup> Regulation (EC) 1073/2009. Preamble recital (3); see also recital (21).

<sup>124</sup> Interview I with Authorisations Manager FlixBus BeNeLux.

<sup>125</sup> Many concession holders in the Netherlands are part of larger transport companies who may also have long-distance buses in their portfolio. For example, Connexxion and Hermes are owned by Transdev which was also the owner of long-distance provider Eurolines before FlixBus took over. Likewise, Arriva is owned by Deutsche Bahn, the company that also operates the long-distance brand IC Bus.

Based on what has thus far been described, one would think that when passengers are carried between stops in the Netherlands on an international line,<sup>126</sup> an exemption is always needed. However, this is not in fact the practice in the Netherlands; in practise, there is a difference between how resident and non-resident carriers are treated. This difference is discussed in the next section, which begins with an excerpt from an interview with the authorisations manager of FlixBus BeNeLux.

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<sup>126</sup> Explicitly refraining from the term cabotage to include both resident and non-resident carriers.



#### 4.4.3 Difference Between Resident and Non-resident Carriers

When MeinFernbus and FlixBus<sup>127</sup> started operating international lines from Germany to the Netherlands, they did not have cabotage on those lines under an EU authorisation for regular international service, which was not a problem. In 2016, there were also applications [pending] to offer fully domestic lines, which are not covered by the European Regulation but are based on the WP 2000 alone; with an exemption, it is possible to offer domestic long-distance coach and bus services in the Netherlands. It was, however, very problematic to apply for cabotage on an EU authorisation for regular services: the competent authority, Kiwa, who issues the authorisations told [us] that they could not issue authorisations with cabotage for the Netherlands because domestic transportation was a matter for the local transport authorities. Because Kiwa is a commercial company issuing authorisations for the government, they could not enter into a discussion regarding whether this should be allowed under Regulation 1073/2009. They referred [us] to the Inspectorate of Human Environment and Transport, who also refrained from making a decision. In the end, it was the Transport Ministry who had to make a decision, and upon closely reading the Regulation, they found that indeed cabotage should be allowed. It appears that a letter from the Dutch Ministry of Infrastructure<sup>128</sup> was sent in the process of the lawsuit between FlixBus and Noord-Brabant.<sup>129</sup> The letter and the answer of the Commission have not had any consequences for the application process for cabotage in the Netherlands. International lines operated by non-resident entities of FlixBus offer cabotage solely on the basis of an authorisation based on Regulation 1073/2009 without the need for an exemption. FlixBus also questions the validity of the Commission's answer: although Article 16 of the Regulation makes cabotage subject to national legislation, this is the case 'save as otherwise provided in Community legislation'—authorisations may only be declined for a limited set of reasons set forth in Article 8 of the Regulation. As the letter was not followed up by the Dutch authorities, FlixBus did not make much of it.<sup>130</sup>

<sup>127</sup> The two companies eventually merged together in 2015.

<sup>128</sup> Letter from Ministry of Infrastructure dated 25-04-2016.

<sup>129</sup> It is not entirely clear who exactly initiated the letter, however the content of the letter only appeared during the lawsuit between FlixBus and Noord-Brabant.

<sup>130</sup> Interview I.

It appears that for non-resident carriers, the exemption provision does not apply. This is also confirmed on the Kiwa website,<sup>131</sup> which publishes all applications from non-resident carriers with cabotage in the Netherlands for four weeks. During these four weeks, the concession owners and local transport authorities may object. This procedure was introduced in 2018 and is based on a Dutch administrative law which prescribes that before a decision is made, public bodies must permit interested parties to respond to an application.

#### 4.5 Access to Terminals

In addition to the process of obtaining an Article 29 exemption, there is another topic that is related to the system of concession in the Netherlands: access to bus stops and terminals. Although this is not currently regulated under Regulation 1073/2009, it was noted as a problem in the ex post evaluation of the Commission.<sup>132</sup> Access is problematic in the Netherlands because in most cities and municipalities, there is only one entity using the infrastructure: the concession holder. The owners of concessions consider themselves the only ones entitled to use the bus infrastructure and are often supported by the authorities. When local transport authorities grant an Article 29 exemption, they include provisions related to dealing with the bus stops and terminals. For example, they include that the use of bus stops and terminals must be coordinated with the respective municipalities and the concession holder in that region. If one of the parties is unwilling to share facilities with a long-distance bus carrier, a prospective carrier has no option but to seek a different place for a stop. This is not ideal because stops for long-distance bus transport are usually located in central, easy-to-reach areas. In theory, the Dutch system of concessions should lead to problems, but in practice, there are solutions, as is explained by FlixBus BeNeLux' authorisations manager: 'the use of bus stops is not formally regulated in the Netherlands because they are on public roads. Occasionally, there may be conflicts with concession holders about the use of facilities, but in most instances and in

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<sup>131</sup> See <https://www.kiwaregister.nl/Publicaties-internationaal-vervoer-vergunningen/> and see also *Online handboek Communautaire Vergunning en Internationaal Vervoer* published by Kiwa at <https://www.kiwaregister.nl/uploadedFiles/Producten/Bus/online-handboek-communautaire-vergunning-en-internationaal-vervoer.pdf> at p. 9.

<sup>132</sup> Ex-post evaluation of Regulation (EC) No 1073/2009.

agreement with the municipality, a special dedicated bus stop for long-distance services is found'.<sup>133</sup>

## 4.6 Concluding Remarks

In summary, to be able to operate an international bus line within the Netherlands, the first thing that is needed is an international authorisation to provide a regular service under Regulation 1073/2009. Second, if a domestic carrier wants to carry passengers between stops in the Netherlands on an international line, an Article 29 WP 2000 exemption is needed from each concession area in which passengers can enter and exit the bus. Third, coordination with the municipality and/or the concession holder about where to stop is necessary. With regard to what falls under Regulation 1073/2009, the Dutch system of concessions hinders the main goal of the Regulation, which is to make the system more coherent. This is particularly reflected in the fact that resident carriers cannot invoke Article 15 of the Regulation and are thus subject to the national legal framework. This interference is not a breach of the Regulation, because resident carriers are explicitly exempted from the right to offer cabotage, but it is, however, strange that the Commission,<sup>134</sup> in their answer to questions asked by the Dutch transport ministry,<sup>135</sup> would allow exemptions to be demanded from non-resident carriers who do have the right to offer cabotage. Although this was never actually applied for, since 2018, the local public transport authorities have become more involved in applications for cabotage. The applications are published, and Kiwa also tries to inform the local public transport authorities and the concession holders of applications.<sup>136</sup>

### 4.6.1 Possible Solutions

The exemption policy clearly serves the purpose of protecting the rights of concession holders, and this is legitimate because they are bound by contracts. The grounds on which an exemption can be refused are, however, quite limited, especially when accounting for the limited number of Dutch concessions and their overlap with the long-distance lines of carriers. The Noord-

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<sup>133</sup> Interview with the Authorisations and stations manager of FlixBus BeNeLux.

<sup>134</sup> Letter from DG Move dated 05-10-2017.

<sup>135</sup> Letter from Ministry of Infrastructure dated 25-04-2016.

<sup>136</sup> Kiwa. *Voorwaarden voor het indienen van een zienswijze “vergunningaanvragen voor internationaal vervoer”*. Retrieved from: <https://www.kiwaregister.nl/publicaties/voorwaarden-indienen-zienswijze-vergunning-voor-internationaal-vervoer/>.

Brabant case described earlier reveals that public transport authorities are only allowed to take their own concessions into account. There are, however, solutions that could ensure that the interests of concession holders are not violated. Long-distance bus carriers could make sure to not carry passengers between stops within the same concession area by introducing so called ‘operating bans’ into their itinerary. An operating ban would mean, for example, that passengers are not allowed to travel between two stops because they are within a particular concession area. If passengers may not travel between stops within the same concession area, the routes would thus not be overly similar or disproportionately cause harm to an existing concession. It would be possible for Kiwa to treat applications, including for the carriage of passengers domestically, in the same manner for both resident and non-resident carriers. This would mean that they would publish any application on their website and notify the local public transport authorities and concession holder. Then, the concession holder would have four weeks to respond with a reasoned opinion. For non-resident carriers, Kiwa now demands that reasoned opinions (objections) be explained in detail according to Article 8(4)(d), which provides that parties need to prove that the applied-for service would ‘seriously affect the viability of comparable service covered by one or more public service contracts conforming to Community law on the direct sections concerned’.<sup>137</sup> This provision of the Regulation could also be applied to applications submitted by resident carriers. In addition, the application must be tested against the criteria listed in Article 29 WP 2000. This would not require a modification of the EU Regulation; it would just mean that the WP 2000 would need to be adapted. The simplest approach to do this would be by making an exemption and an international authorisation to provide a regular service the same status. A more comprehensive approach would be to have a definition of long-distance coach and bus service included in the WP 2000, thereby creating a legal framework under which these services could operate. An advantage is that other issues, such as purely domestic services and access to terminals, would also be covered. With respect to access to terminal, it is important for a national framework to align with current and future European regulations.

The most serious problem with the current practise in the Netherlands is that it leads to reverse discrimination. Resident carriers become worse off than non-resident carriers; this problem was also acknowledged in the ex post evaluation of the Commission.<sup>138</sup>

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<sup>137</sup> Regulation (EC) 1073/2009. Article 8 (4)(d).

<sup>138</sup> Ex-post evaluation of Regulation (EC) No 1073/2009. P. 27.

Access to terminals could also be a problem, although this problem does not quite interfere with the goals of Regulation 1073/2009 because it makes no mention of access to terminals. When interpreting the objectives more broadly, however, terminals do play a role. For example, one objective is ‘promoting bus and coach transport as a sustainable alternative to individual car transport’.<sup>139</sup> A special Eurobarometer regarding coach service revealed that terminals matter to passengers. Passengers who do not use coach services were asked what would make them more likely to use coach services. After not having a car (37%) and lower prices (26%), terminals were found to be the third and fourth most cited factors (11% said a more extensive network of routes and stations, and 10% said a better connection with another mode of transport [e.g., Rail] is important).<sup>140</sup> In the ex post evaluation, the Commission said the following:

Terminals are vital links in the mobility chain and essential infrastructure required to consolidate large volumes of passengers for transfers over medium to long distances. The refusal of terminal operators to provide access to coach operators limits capacity in the market, denies competitors access to the market and distorts service patterns.<sup>141</sup>

The experiences of FlixBus in the Netherlands demonstrate that after negotiation with municipalities, a stop can usually be found.<sup>142</sup> The city of Amsterdam, which accommodates the most long-distance carriers in the country, has a special hub for long-distance buses,<sup>143</sup> and the city of Maastricht is developing a terminal for long-distance buses that is planned to be in operation in 2020.

The scope of Regulation 1073/2009 regarding cabotage is limited to non-resident carriers, but Member States may choose to offer their resident carriers the same rights. Within the current

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<sup>139</sup> Idem, p. 19.

<sup>140</sup> European Union, Eurobarometer. (2017). *Special Eurobarometer 457 Report: Coach Services*. P. 33. Retrieved from: [https://data.europa.eu/euodp/it/data/dataset/S2144\\_87\\_1\\_457\\_ENG](https://data.europa.eu/euodp/it/data/dataset/S2144_87_1_457_ENG).

<sup>141</sup> Ex-post evaluation of Regulation (EC) No 1073/2009. P. 27.

<sup>142</sup> Interview I.

<sup>143</sup> It should be noted though that this hub is not ideal. The municipality of Amsterdam wants to move the long-distance buses to a new hub in the neighbouring municipality of Ouder-Amstel. See: <http://verslag.ouder-amstel.nl/Vergaderingen/Commissie-Ruimte/2018/01-februari/19:30/171218-Eindrapportage-Verkenning-Touringcarterminal-Duivendrecht-DEF.pdf>

system of concessions and exemptions, exemptions are already usually not denied.<sup>144</sup> Long-distance carriers focus on a different part of the market, which makes it difficult for local transport authorities to prove that they are disproportionately harming the exploitation of an existing concession. For long-distance bus carriers, seeking an exemption is an administrative burden, and local transport authorities have little discretion to deny them. Two possible solutions have been proposed: having Kiwa follow the same procedure they do now with applications for cabotage from non-resident carriers and creating a legal framework for long-distance carriers. Before this thesis examines Germany, a country that has created a legal framework for long-distance carriers, it is important to assess the situation in Flanders because unlike the Netherlands, Flanders has no experience with competitive tendering but has instead introduced novel policies.

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<sup>144</sup> So far, FlixBus BeNeLux which is by far the biggest long-distance carrier in the Netherlands was except for the Brabant case described above never denied an exemption.

## 5 Flanders

In Belgium, since the Third State Reform, all public transport apart from railways is governed by regions rather than the federal government. This means that the regional governments of Flanders, the Brussels-Capital Region, and the Walloon Region have full authority over all modes of public transportation other than rail transport. Because it would be unwieldy to discuss the situation in each of the regions in Belgium and would be beyond the scope of this thesis, this text focuses on the Flemish Region. In the WEF Competitiveness Report, although Belgium ranks in the global top 20, it scores much lower than the Netherlands and is ranked 16.<sup>145</sup> Belgium's modal split is also different, as evident in Table 2.

Table 2: Modal Split of Passenger Transport in Belgium, 2016<sup>146</sup>

Modal split for passenger transport (shares based on passenger-kilometres)				
	Passenger cars	Buses & Coaches	Railways	Tram & Metro
Belgium	81.0%	10.4%	7.7%	1.0%
EU-28	81.3%	9.3%	7.6%	1.8%

What is the most remarkable in comparison to the Netherlands is that the share of buses and coaches is not only higher in Belgium but also slightly above average relative to the EU. Unfortunately, the Commission report does not explain the reasons for this or differentiate between regions on this point.<sup>147</sup> This chapter is structured as follows. First, the legal framework for public transportation in Flanders is described. Because of a recent reform, this text briefly looks at the past situation and compare it with the current situation. This is relevant because according to Roger Kesteloot, Director-General of De Lijn<sup>148</sup>, 'the Flemish model for

<sup>145</sup> This included both passenger and freight transport. World Economic Forum. (2019) *Global Competitiveness Report*. The specific ranking referred to here can be Retrieved from: <http://reports.weforum.org/global-competitiveness-report-2019/competitiveness-rankings/#series=GCI4.A.02.01>.

<sup>146</sup> European Commission. (2019) *Transport in the EU: Current Trends and Issues*. Retrieved from: <https://ec.europa.eu/transport/sites/transport/files/2019-transport-in-the-eu-current-trends-and-issues.pdf>. See p. 114. As a source for the figures they give: EU Transport in figures, Statistical Pocketbook 2018.

<sup>147</sup> This is remarkable as they do acknowledge differences between regions exist. It might well be that due to the lower population density of the Walloon Region, rail infrastructure is too costly and therefore bus transportation is preferred. However, this is speculation on the author's part.

<sup>148</sup> De Lijn is the PSO provider of public transportation in Flanders, more about this below.

public transportation is one of the most regulated in Western-Europe'.<sup>149</sup> Then, the effect of this reform on the De Lijn is briefly discussed. This is followed by an analysis of long-distance carriers in Belgium and how they do or do not align with the 'most regulated model' in Western Europe. This section explains how FlixBus is operating in Flanders, the conflicts between FlixBus and De Lijn, and how access to terminals is regulated. Before concluding, this section also describes the latest proposals for reform aimed at supporting long-distance carriers. Because Flanders is a region, this section illuminates how political goals can influence transport policies.

## 5.1 Legal Framework for Public Transport in Flanders

When authority over public transport was shifted from the federal level to the regional level, federal operations of buses and trams were divided between the regions. In Flanders, De Lijn became responsible for all public transportation other than rail. De Lijn was founded by a decree of the Flemish government<sup>150</sup> as a '*publiekrechtelijk vormgegeven extern verzelfstandigd agentschap*': an external independent agency under public law.<sup>151</sup> This status means that they are not part of any ministry. They are a separate legal entity, but the Flemish Minister of Transport is in charge of De Lijn. The Flemish government exercises control over De Lijn through '*beheersovereenkomsten*', agreements concerning management. These agreements outline the reciprocal rights and duties of De Lijn and the Flemish government. Article 24 §1 of the original founding decree awarded De Lijn a full monopoly over regular services, regardless of its traction<sup>152</sup>. This practise conflicted with EU Regulation 1370/2007<sup>153</sup> in two ways. First, Article 4.3 Regulation 1370/2007 requires public service contracts with exclusive rights to be limited in duration to 10 years for bus and coach services and 15 years for rail and other track-based modes of transport. Second, Article 7 of this Regulation requires

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<sup>149</sup> Roger Kesteloot in meeting with the Parliamentary Committee for mobility dated 07-05-2015. Recording available via <https://www.vlaamsparlement.be/commissies/commissievergaderingen/975636>. The quote can be found at the 3:19:15 mark.

<sup>150</sup> Vlaamse Overheid. (1990). *Decreet betreffende het publiekrechtelijk vormgegeven extern verzelfstandigd agentschap Vlaamse Vervoermaatschappij - De Lijn*. Retrieved from:

<https://codex.vlaanderen.be/Zoeken/Document.aspx?DID=1001627&param=informatie>

<sup>151</sup> Comparable to a statutory corporation.

<sup>152</sup> Traction is used in EU Passenger Transport Regulation, basically it can be road or rail, this means that regardless of traction includes Bus, Tram, Metro etc.

<sup>153</sup> European Union, European Commission. (2007). 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. Retrieved from: <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A32007R1370>.



the Flemish government to appoint De Lijn as an internal operator and publish its intention to do so one year in advance—the Flemish government did so in 2016.<sup>154</sup> Currently, and until 2020, De Lijn is the appointed internal operator and bound by a public service contract to provide all public transport, other than rail, for the core and supplementary public transport network in Flanders.<sup>155</sup>

## 5.2 Basic Mobility to Basic Accessibility

De Lijn has enjoyed a monopoly over the public transport market since it was founded. While the basic legal framework described previously appears relatively simple, legislation on public transport has become increasingly complex and heavily influenced by political objectives.<sup>156</sup> In the recent history of De Lijn, two concepts have begun to play important roles: ‘*basismobiliteit*’, or basic mobility, and ‘*basisbereikbaarheid*’, basic accessibility. These concepts indicate how Flemish politics concerning public transportation has developed. Although a full and detailed discussion of both concepts falls outside the scope of this thesis, key points are summarised in the following. Because the developments have not yet been studied in detail,<sup>157</sup> this text relies on primary sources. After the discussion of these two concepts, this chapter explores how regular long-distance services fit the Flemish model.

### 5.2.1 Basic Mobility

The principle of basic mobility was introduced in 2001 by the social democratic Minister Steve Steveart, with the goal of making public transport accessible to every citizen of Flanders. It was formally adopted in a decree on 20 April 2001.<sup>158</sup> Central to the concept is a citizen’s right/entitlement to public transport. Depending on the degree of urbanisation, the rights

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<sup>154</sup> The Flemish government published their intention to appoint De Lijn as an internal operator on June 22 2016 in the *Tenders Electronic Daily*, a supplement to the *Official Journal of the EU*: <https://ted.europa.eu/udl?uri=TED:NOTICE:211844-2016:TEXT:NL:HTML&tabId=2>.

<sup>155</sup> In Dutch: “kern en aanvullend net”.

<sup>156</sup> See the quote of Roger Kesteloot at f.n. 150 above.

<sup>157</sup> This may be taken as an encouragement to Transport Economists and others.

<sup>158</sup> Vlaamse Overheid. (2001). *Decreet betreffende de organisatie van het personenvervoer over de weg*. Retrieved from: <https://codex.vlaanderen.be/Zoeken/Document.aspx?DID=1008191&param=inhoud>.

include a minimum proximity to a bus stop and defined service hours and frequencies.<sup>159</sup> An example of a working day service schedule is displayed in Table 3:

Table 3: Normal Basic Mobility for Working Days<sup>160</sup>

Level of urbanisation	'Groot- Stedelijk' Large urban	'Stedelijk' Urban areas	'Rand- stedelijk' Suburban	'Klein- stedelijk' small urban	'Buitengebied' Rural
Amplitude (service hours)	6–21 h				
Max distance to a stop	500 m	500 m	650 m	650 m	750 m
Frequency (peak hours)	12'	15'	20'	20'	30'
Frequency (off-peak hours)	15'	20'	30'	30'	60'

The mobility policy document introduced by Minister Steveart had a stated goal to prevent and combat transport poverty and declared mobility a social right. In addition to the right to mobility, Steveart also introduced a user-fee-free public transport system for citizens above the age of 65.<sup>161</sup> This policy was continued by his successor.<sup>162</sup>

The concept of basic mobility is supply side oriented. Thus, De Lijn had to make sure it adhered to the decree and offer services as prescribed, regardless of whether there was demand for them or not. When the decree was introduced in 2001, the idea was that it would be fully implemented by 2006, meaning that De Lijn would be able to supply the services that citizens were entitled to by that time. Meanwhile, contributions from the Flemish government more

<sup>159</sup> These norms were laid down in a decision of the Flemish Government: (2002) *Besluit van de Vlaamse Regering betreffende de Basismobiliteit in het Vlaamse Gewest Datum 29/11/2002*. Retrieved from: <https://codex.vlaanderen.be/PrintDocument.ashx?id=1010398&datum=&geannoteerd=false&print=false>.

<sup>160</sup> Adapted from: Dusart, C. (2016) *Van basismobiliteit naar basisbereikbaarheid*. Retrieved from: [https://www.crow.nl/downloads/pdf/verkeer-en-vervoer/crow-kpvt/excursie-forum-ov-2016/excursie-forum-ov-2016\\_cecile-dusart.aspx](https://www.crow.nl/downloads/pdf/verkeer-en-vervoer/crow-kpvt/excursie-forum-ov-2016/excursie-forum-ov-2016_cecile-dusart.aspx). The formal norms are laid down in *Besluit van de Vlaamse Regering betreffende de Basismobiliteit in het Vlaamse Gewest* which can be found here: <https://codex.vlaanderen.be/Zoeken/Document.aspx?DID=1010398&param=inhoud>.

<sup>161</sup> See above p. 17. NB Before becoming Minister, Steveart had introduced user-fee free public transport as the major of the city of Hasselt.

<sup>162</sup> The concept of basic mobility and the social goals envisioned with it were also shared by Minister van Brempt in her mobility policy document for 2004-2009. See Brempt van, K. (2004) *Beleidsnota Mobiliteit 2004-2009*. Retrieved from: [https://www.mobielvlaanderen.be/pdf/beleidsnota-brieven/beleidsnota\\_mobiliteit.pdf](https://www.mobielvlaanderen.be/pdf/beleidsnota-brieven/beleidsnota_mobiliteit.pdf).

than doubled between 1997 and 2007.<sup>163</sup> Despite the extra investments, the goals were not fully met at the end of the implementation period (2006).<sup>164</sup> Although the concept of basic mobility is key to the transport policy introduced by Steveart, the original plans also contained provisions for ‘netmanagement’.<sup>165</sup> While basic mobility was focused on creating a minimum supply to guarantee citizens’ right to mobility, netmanagement was more about demand-driven organisation of public transport. The goal was to gather information about demand from subregions to enable De Lijn to offer services while demand existed.<sup>166</sup> Although both basic mobility and netmanagement were formally introduced in 2001, netmanagement only started to receive attention in 2007.<sup>167</sup> Without the extra budget to realise the ideas behind netmanagement, De Lijn argued that the concept had to be abandoned in 2010.<sup>168</sup> Important elements of netmanagement, such as demand-driven public transport and cooperation with subregions, also return in later plans for basic accessibility, which are discussed in the next paragraph.

### 5.2.2 Basic Accessibility

After netmanagement was abandoned due to budget cuts, public transport in Flanders adopted a new focus with the introduction of ‘*basisbereikbaarheid*’, basic accessibility. Although this concept is focused on mobility in general rather than just public transport, the introduction of this new concept had a considerable effect on the organisation of public transport in Flanders.

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<sup>163</sup> Comprehensive and reliable statistics are not easy to retrieve for De Lijn, the Belgian national audit office has issued a report: Belgische Rekenhof. (2009). *Over de evaluatie van de kostprijs en effectiviteit van de basismobiliteit bij De Lijn*. Retrieved from: <https://docs.vlaamsparlament.be/docs/stukken/2008-2009/g37-2.pdf>. A graph with the increase of costs can be found on p. 26.

<sup>164</sup> An estimated average of 85% of services covered by De Lijn complied with the goals of basic mobility. See the report of the Belgian Audit Office p. 31 as cited above.

<sup>165</sup> Netmanagement is part of the same decree introducing basic mobility: *Decreet betreffende de organisatie van het personenvervoer over de weg*, Article 5 and is further defined in a decision by the Flemish government: *Besluit van de Vlaamse Regering betreffende het netmanagement*, available via: <https://codex.vlaanderen.be/portals/codex/documenten/1010400.html>.

<sup>166</sup> Idem.

<sup>167</sup> In a parliamentary evaluation of basic mobility in 2006, Minister Kathleen van Brempt mentioned that the focus for new projects and means would turn from basic mobility to netmanagement: Vlaams Parlement. (2006) *Gedachtewisseling over de evaluatie van basismobiliteit met mevrouw Kathleen Van Brempt, Vlaams minister van Mobiliteit, Sociale Economie en Gelijke Kansen en mevrouw Ingrid Lieten, directeur-generaal van De Lijn*. Retrieved from <https://docs.vlaamsparlament.be/docs/stukken/2005-2006/g841-1.pdf>.

<sup>168</sup> Van Kesteloot, Roger. (07 May 2015) *Hoorzitting over de omschakeling van het principe van basismobiliteit naar basisbereikbaarheid in het openbaar vervoer*. Retrieved from: <https://www.vlaamsparlament.be/commissies/commissievergaderingen/975636#volledige-agenda>. With a new government and a new Minister for mobility De Lijn had to cut costs and the extra budget that had been foreseen to realise netmanagement was cut as well.

First mentioned in the coalition agreement of the previous Flemish government,<sup>169</sup> the concept was introduced as part of a goal to shift to a more demand-oriented public transport policy.<sup>170</sup> A first draft was presented to the Flemish Parliament in 2016 and included the basic ideas and plans for pilots in some regions.<sup>171</sup>

This led to a draft decree ‘*basismobiliteit*’ being sent to the Flemish Parliament in January 2019.<sup>172</sup> The key elements of this decree provide for more influence by local governments and stakeholders on the organisation of public transport through transport regions and a hierarchically layered public transport model with railways governed by the federal government, followed by a core network, a supplementary network and tailor-made<sup>173</sup> public transport initiatives. In a parliamentary hearing about the decree, Mobility Minister Weyts stated that it served two main goals: ‘demand-driven public transport and a bottom-up mobility system’.<sup>174</sup> According to the Minister, these two goals are linked because the local level is most capable of determining where demand is highest.<sup>175</sup> The decree was adopted by the Flemish Parliament on 3 April 2019.<sup>176</sup> It signals a change in Flemish mobility policy and a shift in the role of De Lijn. These changes can be seen both in the decree and in the management agreement

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<sup>169</sup> Vlaamse Regering. (2014). *Regeerakkoord Vlaamse Regering 2014-2019: vertrouwen, verbinden, vooruitgaan*. Departement Kanselarij en Bestuur. Brussel. Retrieved from: <http://ebl.vlaanderen.be/publications/documents/60797>.

<sup>170</sup> Idem, p. 40.

<sup>171</sup> Vlaams Parlement. (2016). *Conceptnota. Met basisbereikbaarheid naar een efficient en aantrekkelijk vervoersmodel in Vlaanderen dat optimaal tegemoetkomt aan de globale en lokale vervoersvraag*. Ingediend door Ben Weyts. Documentnr. 614 (2015-2016) – Nr. 1. Brussel. Retrieved from <http://docs.vlaamsparlement.be/pfile?id=1152283>.

<sup>172</sup> Vlaams Parlement. (2019). *Ontwerp van Decreet betreffende basisbereikbaarheid*. Documentnr.: 1805 (2018-2019 – Nr. 1. Brussel. Retrieved from: <http://docs.vlaamsparlement.be/pfile?id=1454816>.

<sup>173</sup> Tailor-made includes e.g. the transport for people with special needs etc. these are usually not regular service but on demand.

<sup>174</sup> Vlaams Parlement (2019). *Verslag namens de Commissie voor Mobiliteit en Openbare Werken uitgebracht door Karin Brouwers en Joris Vandenbroucke over het ontwerp van decreet betreffende de basisbereikbaarheid*. Documentnr.: 1805 (2018-2019) – Nr. 7. Brussel. P. 14 Retrieved from: <http://docs.vlaamsparlement.be/pfile?id=1472897>.

<sup>175</sup> Idem.

<sup>176</sup> Vlaams Parlement (2019) *Tekst aangenomen door de plenaire vergadering van het ontwerp van decreet betreffende de basisbereikbaarheid*. Documentnr.: 1805 (2018-2019) – Nr. 9. Brussel. Retrieved from: <http://docs.vlaamsparlement.be/pfile?id=1475622>. NB: The adoption of the decree does not mean that basic mobility is abolished immediately, because although the decree contains provisions that revoke both the traces of basic mobility and netmanagement, these provisions will only become active after a date yet to be determined by the Flemish government. See Arts. 58 and 59 revoking the references to basic mobility and netmanagement from the *Decreet betreffende de organisatie van het personenvervoer over de weg*, whereas Article 70 determines that the date of commencement of these articles will be specified later by the Flemish government.

between De Lijn and the Flemish government. Because these changes may affect opportunities for long-distance carriers, they are discussed in the next section.

### 5.3 Effect on De Lijn

With respect to the decree and basic accessibility, for De Lijn and long-distance carriers, the most important change it introduces is formal revocation of De Lijn's exclusive right to offer regular services, as described in its founding decree.<sup>177</sup> This change is more than a formality changing the decree regarding basic accessibility and the current management agreement between De Lijn and the Flemish government place competitive pressure on De Lijn.

In an effort to comply with Regulation 1370/2007, De Lijn was appointed internal operator in 2017.<sup>178</sup> The appointment of the operator for the core and supplementary network already anticipated the introduction of a hierarchical structure.<sup>179</sup> Until the end of 2020, De Lijn is secure in its position as internal operator, and it would like to extend this status; however, retention of the position depends on meeting a performance benchmark. In 2020, the performance of De Lijn will be benchmarked against private operators and De Lijn will need to demonstrate that it is able to come up with a competitive offer.<sup>180</sup> It is not entirely clear why the Flemish government included this benchmark.<sup>181</sup> Some have proposed that the government is attempting to comply with EU law. Although a benchmark is not explicitly required by

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<sup>177</sup> Article 24 of the founding decree of De Lijn, Vlaamse Overheid. (1990). *Decreet betreffende het publiekrechtelijk vormgegeven extern verzelfstandigd agentschap Vlaamse Vervoermaatschappij - De Lijn*. Retrieved from: <https://codex.vlaanderen.be/Zoeken/Document.aspx?DID=1001627&param=informatie>) is revoked by Article 54 of the Decree on basic accessibility: Vlaamse Overheid. (2019). *Decreet betreffende de basisbereikbaarheid*. Retrieved from: <https://codex.vlaanderen.be/Zoeken/Document.aspx?DID=1010398&param=inhoud>.

<sup>178</sup> As has been mentioned (f.n. 188) the intention to appointment of De Lijn as internal operator has been published on June 22 2016 in the *tenders electronic daily*, a supplement to the *Official Journal of the EU*: <https://ted.europa.eu/udl?uri=TED:NOTICE:211844-2016:TEXT:NL:HTML&tabId=2>.

<sup>179</sup> the introduction of such a system could already be foreseen as the first draft for basic accessibility dates from January 14 2016 cf: Vlaams Parlement (2016) *Conceptnota. Met basisbereikbaarheid naar een efficient en aantrekkelijk vervoersmodel in Vlaanderen dat optimaal tegemoetkomt aan de globale en lokale vervoersvraag*. Ingediend door Ben Weyts. Documentnr. 614 (2015-2016) – Nr. 1. Brussel. Retrieved from: <http://docs.vlaamsparlement.be/pfile?id=1152283>.

<sup>180</sup> The mandatory benchmark is laid down in Article 34 of *Decreet betreffende de basisbereikbaarheid* 26/04/2019 Retrieved from: <https://codex.vlaanderen.be/Zoeken/Document.aspx?DID=1010398&param=inhoud>.

<sup>181</sup> The responsible Minister Ben Weyts often refers to the EU as to why this benchmark is held see e.g. <https://departement-mow.vlaanderen.be/nl/news/met-basisbereikbaarheid-naar-betere-mobiliteit> whereas Belgian newspaper *De Morgen* mentions that the benchmark was included to satisfy a coalition partner: <https://www.demorgen.be/nieuws/de-lijn-moet-bewijzen-dat-ze-beter-is-dan-de-privesector~b02a3999/>.

Regulation 1370/2007, it could serve as a means to prevent overcompensation, which is one of the goals of the Regulation.<sup>182</sup> The most explicit need for a benchmark, however, would be to satisfy the fourth criterion of the *Altmark* judgement:

where the undertaking which is to discharge public service obligations, in a specific case, is not chosen pursuant to a public procurement procedure which would allow for the selection of the tenderer capable of providing those services at the least cost to the community, the level of compensation needed must be determined on the basis of an analysis of the costs which a typical undertaking, well run and adequately provided with means of transport so as to be able to meet the necessary public service requirements, would have incurred in discharging those obligations, taking into account the relevant receipts and a reasonable profit for discharging the obligations.<sup>183</sup>

By organising a benchmark, the Flemish government may indeed be seeking to demonstrate that it is fully compliant with both the Regulation and state aid provisions in EU law. However, it must be noted that in the past, the Flemish government has expressed concerns about overcompensation and state aid in its contracting with De Lijn. The shift signals a change in the manner that the government is thinking about the position of De Lijn, the operations of which will need to become more efficient. This shift is also reflected in the current management agreement for the term of 2017–2020.<sup>184</sup> If De Lijn does not perform well against the benchmark, they risk losing their internal operatorship and the Flemish Department of Mobility may organise a competitive tender instead of directly awarding public transport operations to De Lijn. De Lijn is aware of this threat and is eager to remain the internal operator, as evident in a memorandum published in 2019.<sup>185</sup> It remains to be seen whether De Lijn will maintain

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<sup>182</sup> E.g. in recitals 27, 28; arts. 3 (4), 4 (2) and a special annex to the Regulation (EC) 1370/2007.

<sup>183</sup> §93 *Altmark*, case C-280/00, judgment of 24 July 2003. In the *Altmark* judgement the CJEU set out 4 criteria under which compensation to a public service operator would not classify as State aid prohibited by Article 107 TFEU. For more information on the impact of *Altmark* and Regulation (EC) 1370/2007, see Oxera. (2010). Who's over-compensated and who's not? Implementing state aid regulation in practice. *Agenda*. Retrieved from: [https://www.oxera.com/wp-content/uploads/2018/03/Implementing-state-aid-regulation-in-practice-pub\\_1-1.pdf](https://www.oxera.com/wp-content/uploads/2018/03/Implementing-state-aid-regulation-in-practice-pub_1-1.pdf).

<sup>184</sup> The current management agreement is called a transitional management agreement meant to reform De Lijn to a more (cost) efficient organisation: *Transitie naar De Lijn 2.0*. It can be found here: [https://repertorium.vlaanderen.be/sites/default/files/atoms/files/VVM\\_Beheersovereenkomst%202017-2020.pdf](https://repertorium.vlaanderen.be/sites/default/files/atoms/files/VVM_Beheersovereenkomst%202017-2020.pdf).

<sup>185</sup> De Lijn. (2019). *Memorandum 2019-2024*. Retrieved from: [https://static.delijn.be/Images/Memorandum%202019%20-%202024\\_tcm3-21153.pdf](https://static.delijn.be/Images/Memorandum%202019%20-%202024_tcm3-21153.pdf).

its position as internal operator, regardless of the decision of the Flemish Government, and whether the De Lijn's influence on public transport policy is likely to decrease as the Department of Mobility is declared to be explicitly in charge of mobility policy.<sup>186</sup> Furthermore, this new decree also means that other modalities and operators are to be taken into account as well. With the new policy, the Flanders government is clearly focused on a broader spectrum of passenger transportation than just the services offered by De Lijn.<sup>187</sup> This could offer opportunities for long-distance carriers—their position is the subject of the next section.

#### 5.4 Long-Distance Bus Transportation: The Odd One Out?

Since assuming responsibility for all public transportation via bus and tram, the Flemish government has extensively regulated the market. The question remains how long-distance buses fit into this market. First, it should be noted that after the Third State Reform, regional authorities gained control over public transport via bus, but they are not directly responsible for international route authorisations required by Regulation 1073/2009. These must be requested from the Federal Bureau for Mobility and Transport. This entity is responsible for assessing route applications according to the formal requirements of Article 8 of Regulation 1073/2009. Examples of requirements include conformance with the driving and resting time regulations, community license requirements, and so forth. The Federal Bureau for Mobility and Transport is also responsible for communicating with the competent authorities in other Member States. Federal authorities, however, cannot and do not assess cabotage because regional representatives are responsible for domestic passenger transportation via bus. The regional departments for Mobility (in this case Flanders' Department for Mobility) is only consulted in cases where applications for cabotage are submitted within Belgium. The application not need to be for cabotage within a region. It could also cover cabotage between regions. For example, when an international line stops in Antwerp, Brussels, and Charleroi, all of the regions should be consulted.<sup>188</sup> The weight of this consultation is not clearly defined by law, but the hard separation between the federal and regional levels regarding their roles and

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<sup>186</sup> Vlaamse Overheid. (2019). *Decreet betreffende de basisbereikbaarheid*. Retrieved from: <https://codex.vlaanderen.be/Zoeken/Document.aspx?DID=1010398&param=inhoud>

<sup>187</sup> See for example the explanatory memorandum to the new decree in: Vlaams Parlement. (2019). *Ontwerp van Decreet betreffende basisbereikbaarheid*. Document ID 1805 (2018-2019) – Nr. 1. At p. 3. Retrieved from: <http://docs.vlaamsparlement.be/pfile?id=1454816>.

<sup>188</sup> An employee of the Belgian Federal Bureau for Mobility and Transport confirmed via e-mail that this is the case (E-mail dated 06-09-19).



responsibilities makes the regions quite influential.<sup>189</sup> In the next section, Flanders' position in these consultations will be discussed.

#### 5.4.1 Flanders Response to Federal Consultations

The foregoing means that Flanders is consulted if there is an application to start a regular service with cabotage between stops in Belgium only if one stop is in Flanders. Formally, the Flanders Department of Mobility is responsible for providing a response. However, they should also consult De Lijn.<sup>190</sup> Upon consultation, De Lijn can exercise influence over other regions' opinions, by giving negative opinions to the Flanders Department of Mobility. When FlixBus started to offer cabotage in Belgium,<sup>191</sup> this led to some concerns amongst members of the Flemish Parliamentary Committee for Mobility that reflected political tensions.<sup>192</sup> According to the Minister for Mobility, the Department of Mobility is using the provisions concerning cabotage of Regulation 1073/2009 to test whether cabotage is allowed under Regulation 1073/2009.<sup>193</sup> So far, the department has been consulted, but no negative opinions have been expressed, despite the ties with De Lijn and the political context. Given the highly regulated public transport market in Flanders, this may seem surprising. However, the lines on which FlixBus offers cabotage are not in competition with De Lijn. De Lijn does not offer direct connections between provincial capitals, as this is the core duty of the Federal Railways.<sup>194</sup>

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<sup>189</sup> Application practice shows that comments and objections by Regions are taken over by the Federal level one to one, even when such objections are, following Regulation (EC) 1073/2009, not legitimate grounds to refuse an authorisation (Article 8) or cabotage (Arts. 15-16). The most notable example is a series of applications from and to multiple destinations by multiple entities of FlixBus as well as one application from Eurolines where the Brussels Capital Regions objected against the use of a certain stop. This objection by the Brussels Capital Region was copied one to one by the federal bureau as a formal objection. [Letters from SPF Mobiliteit to Kiwa Register dated 19-03-2019. [Scan\_vanhumbeek\_2019-03-19\_13-29-50-603]

<sup>190</sup> See answer of Minister for Mobility Ben Weyts to questions asked in the Flemish Parliament: Vlaams Parlement. (2018). *Schriftelijke vraag nr. 913 van Karin Brouwers, datum: 22 maart 2018*. Retrieved from: <http://docs.vlaamsparlement.be/pfile?id=1394629>

<sup>191</sup> Although there is no public register for route authorisations from the booking websites, it appears that other providers such as Ouibus/Blablabus and Eurolines do not sell tickets for connections within Belgium.

<sup>192</sup> See e.g. the question by Karin Brouwers as cited in f.n. 186 above. Besides the concerns expressed, one can also observe that political elites and key figures in the Board of De Lijn exchange positions, see e.g. the previous Director General Ingrid Lieten, who started a position at the Flemish Government.

<sup>193</sup> Answer of Minister Weyts in a hearing: 17-05-2018 *Vergadering Commissie voor Mobiliteit en Openbare Werken Vraag om uitleg van Dirk de Kort aan Ben Weyts, Vlaams minister van Mobiliteit, Openbare Werken, Vlaamse Rand, Toerisme en Dierenwelzijn, over de lowcostvervoermaatschappij FlixBus*. Question id: 1667 (2017-2018). Retrieved from: <http://docs.vlaamsparlement.be/pfile?id=1398839>.

<sup>194</sup> Federal Belgian railways have the duty to run hourly services between provincial capitals of Belgium, see: Article 8 Beheerscontract NMBS 2008-2012. Available via [https://cdn.belgiantrain.be/-/media/corporate/entreprise/corporate-governance/beheerscontract-2008-2012.ashx?\\_ga=2.128531976.569486111.1570357441-475047289.1570357440](https://cdn.belgiantrain.be/-/media/corporate/entreprise/corporate-governance/beheerscontract-2008-2012.ashx?_ga=2.128531976.569486111.1570357441-475047289.1570357440). But also, by the Flemish government the Railways are perceived as the backbone of public transport, see *Transitie naar De Lijn 2.0*. at



FlixBus, however, does not sell tickets for the connections directly served by De Lijn within Flanders.<sup>195</sup> Thus, within Flanders, there is no direct competition between De Lijn and FlixBus. However, there is a cross-border connection that both FlixBus and De Lijn serve and sell tickets for: Hasselt–Maastricht. Contrary to what the Minister said, the Department of Mobility went beyond the provisions of the Regulation, and this connection received resistance from Flanders, which is discussed in the following.

#### 5.4.2 De Lijn and FlixBus on the Same Connection: Hasselt–Maastricht

Via the Federal Bureau for Mobility, who does the central applications for all of Belgium, FlixBus received feedback from the Flemish Department of Mobility<sup>196</sup> regarding an application for an international line between Frankfurt am Main and Bruges.<sup>197</sup> FlixBus applied for cabotage on this line in Belgium. In the application, FlixBus took the direct connections of De Lijn into account. An operating ban applied to these routes, which meant that no tickets were being sold for these connections. This meant that within Flanders, the line would not compete with De Lijn. However, when the Flanders Department of Mobility was asked to give their opinion, they commented that the connection between Maastricht in the Netherlands and Hasselt in Flanders was already frequently served by De Lijn. The Flemish Department for Mobility became concerned about FlixBus serving this connection and argued that the service could seriously affect the viability of the services operated by De Lijn. In this case, they first consulted FlixBus regarding their response to the feedback from Flanders. FlixBus argued that Flanders' concerns did not constitute legitimate grounds for a rejection by the Federal Bureau for Mobility. First, in terms of an international connection, the proposed connection did not fall under the definition of cabotage in Article 2(7) of Regulation 1073/2009. Second, even under Flemish law, De Lijn does not possess exclusive rights for cross-border lines.<sup>198</sup> Moreover, Hasselt–Maastricht had already been served by FlixBus in the past. The Belgian authorities were convinced by the arguments proffered by FlixBus, and in the end, they granted authorisation.

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p. 8: [https://repertorium.vlaanderen.be/sites/default/files/atoms/files/VVM\\_Beheersovereenkomst%202017-2020.pdf](https://repertorium.vlaanderen.be/sites/default/files/atoms/files/VVM_Beheersovereenkomst%202017-2020.pdf).

<sup>195</sup> For various reasons, sometimes tickets are not sold between destinations with an indirect connection either.

<sup>196</sup> E-mail from Vlaams departement voor Mobiliteit en Openbare werken dated 15-02-2019.

<sup>197</sup> The application for the concession was in Germany who asked the Federal authorities in Belgium for their opinion, they in turn contacted the Regions as cabotage was involved.

<sup>198</sup> Article 16 of *Decreet betreffende de organisatie van het personenvervoer over de weg [...]* explicitly limited the exclusivity for De Lijn only to “non cross-border regular services for remuneration”. Retrieved from: <https://codex.vlaanderen.be/Zoeken/Document.aspx?DID=1008191&param=inhoud>.

### 5.4.3 Access to Terminals

Due to De Lijn's monopoly in Flanders, they have been the sole user of bus infrastructure, including both bus lanes and terminals in major cities. In 2018, Minister Ben Weyts opened the use of bus lanes to parties other than De Lijn.<sup>199</sup> Access to terminals, however, has not been regulated by Law and this has prompted challenges within Flanders. This is especially true for the city of Antwerp, where FlixBus has a stop in front of the central station. This location is ideal because it possesses many possibilities to transfer to other modalities and is in the centre of the city. However, the station's capacity is limited and the owner of the station square, Belgian Federal Railways, has not given FlixBus formal authorisation to have a stop there. Rather, they simply tolerate FlixBus' service there. The situation is not ideal due to the lack of capacity, and at times, FlixBuses enter the tramway due to a lack of space. Politicians both in the Flemish Parliament<sup>200</sup> and the Antwerp City Council<sup>201</sup> have raised questions about this situation. Although the municipality of Antwerp has been aware of the problem, they did not think to include long-distance buses in the new plans for the major bus terminal at Antwerp Rooseveltplaats.<sup>202</sup> It is possible that before the opening of the new Rooseveltplaats, stop locations for long-distance carriers will be made available, but this remains undetermined. Given that there is no legal framework for the municipalities to work under, it is up to them to take the initiative to incorporate and facilitate these services.

### 5.4.4 A Legal Framework for Long-Distance Bus and Coach Service

The start of cabotage operations within Flanders has caused some political unrest amongst parliamentarians who have expressed concerns about the position of De Lijn<sup>203</sup> as well as the use of bus infrastructure by long-distance bus carriers.<sup>204</sup> In Flanders, the government has

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<sup>199</sup> See <https://www.mobieltvlaanderen.be/persberichten/artikel.php?id=978>; unfortunately the official legal text could not be retrieved.

<sup>200</sup> *SCHRIFTELIJKE VRAAG nr. 167 van MARINO KEULEN datum 22 november 2018. Retrieved from: <http://docs.vlaamsparlement.be/pfile?id=1446311>.*

<sup>201</sup> Ilse van Dienderen in Council Commission meeting of 23-04-2019 to Elderly Koen Kennis (Mobility) meeting Retrieved from: <https://www.antwerpen.be/nl/overzicht/bestuur/volg-de-commissies-live/gemeenteraadscommissie-kf-april-2019>.

<sup>202</sup> See the design of the area around Rooseveltplaats: [https://www.noorderlijn.be/sites/default/files/inline-files/Operaplein\\_0.pdf](https://www.noorderlijn.be/sites/default/files/inline-files/Operaplein_0.pdf) and the general project website.

<sup>203</sup> *SCHRIFTELIJKE VRAAG nr. 913 van KARIN BROUWERS datum: 22 maart 2018. Retrieved from: <http://docs.vlaamsparlement.be/pfile?id=1394629>.*

<sup>204</sup> *17-05-2018 Vergadering Commissie voor Mobiliteit en Openbare Werken Vraag om uitleg van Dirk de Kort aan Ben Weyts, Vlaams minister van Mobiliteit, Openbare Werken, Vlaamse Rand, Toerisme en Dierenwelzijn,*

become used to working with one provider for bus transportation. Thus, no legal framework for long-distance buses exists. However, the introduction of the concept of basic accessibility and the assignation of a stronger role to the Department of Mobility with regard to De Lijn may change existing practises in the future. Within a multimodal strategy for passenger transportation,<sup>205</sup> long-distance buses could also be integrated. Minister Ben Weyts has stated that he is prepared to develop a Flemish policy framework for long-distance buses that would align with European regulations.<sup>206</sup> So far, however, long-distance bus and coach services have not been incorporated into the scope of the decree on basic accessibility. The inclusion of long-distance buses in the policy would give clarity regarding the position of long-distance buses with respect to access to terminals.

Historically, De Lijn has been the dominant user of bus infrastructure in Flanders. Even if De Lijn is reappointed internal operator, more operators may enter the market. With the decree on basic accessibility, the Flemish government has introduced the possibility of granting domestic authorisation for regular services not operated by the internal operator.<sup>207</sup> This means that not only are non-resident carriers able to exercise cabotage operations on international lines based on Regulation 1073/2009 but resident carriers are also now able to offer domestic transportation. This means that resident carriers would need additional authorisation. The precise conditions for such authorisation have not been established yet. The decree only reads that the Flemish government should determine the conditions for granting authorisation, that authorisations are only granted for regular services not operated by the internal operator, and that the Flemish government can refuse an authorisation if the service would seriously harm the viability of comparable transport on direct connections offered under a public service

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over de lowcostvervoermaatschappij FlixBus. Question id: 1667 (2017-2018). Retrieved from: <http://docs.vlaamsparlement.be/pfile?id=1398839> ; AND *Schriftelijke vraag Haltes voor internationale busmaatschappijen - Veiligheid en doorstroming van Marino Keulen (Open Vld) aan minister Ben Weyts*. nr. 167 (2018-2019) Retrieved from: <http://docs.vlaamsparlement.be/pfile?id=1446311>.

<sup>205</sup> See e.g. Article 3 *Decreet betreffende de basisbereikbaarheid* 26/04/2019 Retrieved from: <https://codex.vlaanderen.be/Zoeken/Document.aspx?DID=1010398&param=inhoud>.

<sup>206</sup> Answer of Minister in a hearing of the parliamentary committee: 17-05-2018 *Vergadering Commissie voor Mobiliteit en Openbare Werken Vraag om uitleg van Dirk de Kort aan Ben Weyts, Vlaams minister van Mobiliteit, Openbare Werken, Vlaamse Rand, Toerisme en Dierenwelzijn, over de lowcostvervoermaatschappij FlixBus*. Question id: 1667 (2017-2018). Retrieved from: <http://docs.vlaamsparlement.be/pfile?id=1398839>

<sup>207</sup> Article 60 *Decreet betreffende de basisbereikbaarheid* 26/04/2019 Retrieved from: <https://codex.vlaanderen.be/Zoeken/Document.aspx?DID=1031764&param=informatie&ref=search&AVIDS=> which changes Article 16 of *Decreet betreffende de organisatie van het personenvervoer over de weg [...]* available via: <https://codex.vlaanderen.be/Zoeken/Document.aspx?DID=1008191&param=inhoud>.

contract.<sup>208</sup> It is not yet possible to apply for such an authorisation. It remains to be seen how many authorisations will be granted and how these authorisations will affect long-distance bus transportation in Flanders. Based on the new Flemish coalition agreement, it can be inferred that the newly installed government will continue building on this plan.<sup>209</sup>

## 5.5 Concluding Remarks

The development in public transport policies, entailing the transition from basic mobility to basic accessibility as the guiding principle, is likely to benefit long-distance carriers. However, a definition of long-distance bus service is lacking within the legal framework for public transport in Flanders. Moreover, under the new decree, Flanders now has a system for granting domestic authorisations, but resident carriers are still at a disadvantage. In addition, the new system, in which the federal-level authority is responsible for issuing EU authorisations for cabotage only to non-resident carriers, is complicated. Resident carriers may apply for EU authorisation, but this would likely not include domestic transportation as the Federal Bureau is not competent for that. A workaround for this would involve coordination between the federal and Flemish departments for mobility; this would entail Flemish authorities deeming EU authorisations to have same status as domestic authorisations. In addition, by moving to a more open market, Flanders may distance itself from other regions in Belgium. Although Flanders may be considered progressive, if the reform is a success, other regions may follow.

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<sup>208</sup> Article 16 of *Decreet betreffende de organisatie van het personenvervoer over de weg [...]* available via: <https://codex.vlaanderen.be/Zoeken/Document.aspx?DID=1008191&param=inhoud>.

<sup>209</sup> Vlaamse Regering (2019) *Regeerakkoord 2019-2024*. Retrieved from: <http://ebl.vlaanderen.be/publications/documents/138970>.

## 6 Germany

Germany scored in the top 10, with a ranking of 7, of the 2019 WEF transport infrastructure ranking.<sup>210</sup> As has been mentioned already, Germany is the only country from this sample that has liberalised its market for long-distance bus and coach transportation. Nonetheless, according to the EU figures regarding the modal split of transport, it is not the country with highest share of buses and coaches.

Table 4: Modal Split for Passenger Transport in Germany, 2016<sup>211</sup>

Modal split for passenger transport 2016 (shares based on passenger-kilometres)				
	Passenger cars	Buses & Coaches	Railways	Tram & Metro
Germany	84.3%	5.7%	8.5%	1.5%
EU-28	81.3%	9.3%	7.6%	1.8%

In the previous discussion of Flanders, it was noted by Roger Kesteloot that the region is the most heavily regulated transport market in Western Europe.<sup>212</sup> However, Germany is also heavily regulated. For long-distance carriers, the domestic market has long been closed. This chapter first presents the German regulatory framework, discussing the basic provisions of the Federal Passenger Transport Act. Then, the chapter briefly introduces the old system and describes how Germany made a shift to a new system, explaining the effect this has had on long-distance carriers and whether the new system accords with Regulation 1073/2009.

### 6.1 The German Passenger Transport Act

In Germany, passenger transportation is regulated by the Federal Passenger Transport Act, the ‘*Personenbeförderungsgesetz*’ (PBefG). According to Article 74 nr. 22 of the German Basic

<sup>210</sup> This included both passenger and freight transport. World Economic Forum. (2019) *Global Competitiveness Report*. The specific ranking referred to here can be Retrieved from: <http://reports.weforum.org/global-competitiveness-report-2019/competitiveness-rankings/#series=GCI4.A.02.01>.

<sup>211</sup> European Commission. (2019) *Transport in the EU: Current Trends and Issues*. Retrieved from: <https://ec.europa.eu/transport/sites/transport/files/2019-transport-in-the-eu-current-trends-and-issues.pdf>. See p. 114. As a source for the figures they give: EU Transport in figures, Statistical Pocketbook 2018.

<sup>212</sup> See f.n. 150 above.

Law<sup>213</sup>, road traffic is a matter that falls concurrently under the legislative powers of the federal administration and the Länder (the federal states of Germany).<sup>214</sup> However, this does not mean that both the federal and state levels enjoy equal legislative authority. Article 72(1) prescribes the following: ‘On matters within the concurrent legislative power, the *Länder* shall have power to legislate so long as and to the extent that the Federation has not exercised its legislative power by enacting a law’.<sup>215</sup> Thus, the Länder can only legislate if the Federation has not already implemented legislation. Another relevant article for the PBefG is Article 72(2), which aims at maintaining legal and economic unity.<sup>216</sup> In discussing this article, Maier reasons that ‘A federal regulation for passenger transportation therefore contributes to guaranteeing a functional economic and legal space and is therefore necessary in the sense of Article 72 (2) of the German Basic Law’.<sup>217</sup>

### 6.1.1 Scope and Definitions

The scope of the PBefG is described in § 1,<sup>218</sup> which explains that the PBefG applies to all passenger transportation via trams, trolleybuses, and motorised vehicles for which remuneration is received or which is conducted in a business-like manner, which encompasses regular passenger transport without the aim of making money; for instance, a shuttle service<sup>219</sup>. Although § 1 of the PBefG and a special exemption law exclude some forms of passenger transportation from the scope of the PBefG, long-distance coach and bus service is not included. This means that long-distance coach and bus service is subject to the PBefG and, in particular, one of the key principles of the PBefG found in § 2: the obligation to have an authorisation when conducting passenger transportation activities covered by § 1. This means

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<sup>213</sup> As opposed to Constitution (Verfassung in German), Basic Law is the correct translation of the German Grundgesetz. For a brief explanation about the history and the reason why it is called a Basic Law instead of Constitution please consult: <https://www.zeit.de/news/2019-05/23/grundgesetz-warum-heisst-es-nicht-verfassung-190523-99-342782>.

<sup>214</sup> Konkurrierende Gesetzgebung Article 74 nr 22. Grundgesetz. See for an extensive discussion about the division of competences of the PBefG: Maier, E. (2015). *Die Liberalisierung des Fernlinienbusverkehrs: Eine personenbeförderungsrechtliche Analyse der Marktöffnung im Fernbusverkehr mit Berücksichtigung der europäischen Vorgaben* (Schriften zum Verkehrsmarktrecht, v. 1). Nomos Verlagsgesellschaft. pp. 131 ff.

<sup>215</sup> See English translation of the German Grundgesetz available via [https://www.gesetze-im-internet.de/englisch\\_gg/](https://www.gesetze-im-internet.de/englisch_gg/).

<sup>216</sup> Idem.

<sup>217</sup> Maier, E. (2015). *Die Liberalisierung des Fernlinienbusverkehrs: Eine personenbeförderungsrechtliche Analyse der Marktöffnung im Fernbusverkehr mit Berücksichtigung der europäischen Vorgaben* (Schriften zum Verkehrsmarktrecht, v. 1). Nomos Verlagsgesellschaft. p. 134.

<sup>218</sup> Unlike the Basic Law, the PBefG is divided in paragraphs, here I use § for singular and §§ for plural.

<sup>219</sup> See e.g.: <https://www.ito.de/recht/hintergruende/h/bverwg-urteil-3-c-14-14-taxi-shuttle-uber-verbraucherschutz/2/>.

that long-distance bus and coach service is also covered by the PBefG. Having established the scope of the PBefG and key definitions used, neither of which have changed since enactment, this study now moves into a discussion of the major shift Germany made in its approach to long-distance carriers.

## 6.2 § 13 of the PBefG: The Key to Change?

### 6.2.1 Old § 13: Restrictive Provisions to Offering Long-Distance Services

Long-distance coach services are covered by the regular service regime and are thus subject to the provisions and conditions of authorisation given according to § 13 of the PBefG.<sup>220</sup> Section 13(2) of the pre-2013 PBefG contains the following conditions under which an authorisation can be denied:

- 1) When the service makes use of roads that are not suitable for reasons of road safety or their condition.
- 2) When due to the application, the interests of public transport would be harmed, especially when
  - a) The service can already be provided in a satisfactory manner with existing transport services<sup>221</sup>
  - b) The applied service, without meaningful improvement in the transport service, takes up the same transport tasks already provided for by existing companies or railway operators
  - c) When existing companies or railway operators are willing to enhance their services within a reasonable term to be determined by the authority and as far as local public transport is concerned subject to § 8.<sup>222</sup>

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<sup>220</sup> Maier, E. (2015). *Die Liberalisierung des Fernlinienbusverkehrs: Eine personenbeförderungsrechtliche Analyse der Marktöffnung im Fernbusverkehr mit Berücksichtigung der europäischen Vorgaben* (Schriften zum Verkehrsmarktrecht, v. 1). Nomos Verlagsgesellschaft. p. 157.

<sup>221</sup> This contained a variety of transport types which did not need to be similar to the service an application was made for, e.g. ferries, rail services and special services also count towards existing means of transport services. See Maier (2015), p. 165.

<sup>222</sup> Own translation, see for the exact German wording §13 (2) of the PBefG.



According to Maier, road safety or condition was not often cited as the reason to refuse authorisation in practice,<sup>223</sup> but the rest of the conditions were important factors in decisions whether to grant authorisation in response to applications.<sup>224</sup> The reasons presented in § 13(2) are not exhaustive. Additionally, if an application might harm public transportation interests,<sup>225</sup> an application can be denied. Authorities had to assess these reasons in the order given by the PBefG. If one of the conditions was met, the others did not matter anymore and the application would be refused.<sup>226</sup> When there were existing services under a) or when the service applied for did not constitute a meaningful improvement under b), an application for an authorisation was refused. These two provisions constitute the so called ‘*Doppelbedienverbot*’, a ban on connections that were already being served by other operators.<sup>227</sup> These conditions made it practically impossible to apply for a long-distance coach line service. The extensive rail network in Germany made it difficult to meet all criteria.<sup>228</sup> The rules and conditions of § 13 demonstrate how regulation can interfere with Regulation 1073/2009 as well as how vested interests of concession holders can be protected by national law. Before the PBefG was reformed in 2013, there were many court interpretations of the restrictions regarding their interaction with both European legislation and domestic policies. These are discussed in the next section.

#### 6.2.1.1 Old § 13 in Relation to EU Legislation

The restrictive provisions in the old § 13(2) of the PBefG presented considerable hurdles for parties seeking entry to the market for long-distance coach lines in Germany. However, due to Regulation 1073/2009 and preceding Regulations 11/98 and 684/92, the applicability of the

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<sup>223</sup> If the road conditions would not allow for a service from the application, they would probably not be suitable for any kind of passenger transportation. See for this Maier, E. (2015). *Die Liberalisierung des Fernlinienbusverkehrs: Eine personenbeförderungsrechtliche Analyse der Marktöffnung im Fernbusverkehr mit Berücksichtigung der europäischen Vorgaben* (Schriften zum Verkehrsmarktrecht, v. 1). Nomos Verlagsgesellschaft. P. 160.

<sup>224</sup> Idem, p. 161.

<sup>225</sup> In German “öffentliche Verkehrsinteressen”, this however cannot be translated as public transport interest because emphasis is on the public interest with regards to transport. See to the meaning and interpretation of this Idem, p. 161, especially f.n. 743.

<sup>226</sup> Idem, p. 161 ff.

<sup>227</sup> Idem, p. 173. See also the German Federal Administrative court e.g. Bundesverwaltungsgericht Urt. v. 25.10.1968, Az.: BVerwG VII C 12.67 especially §30: “a relation best be in the hands of a single carrier as allowing multiple carriers on the same connection bears the risk of inconveniences for the users.”

<sup>228</sup> In this respect Eugenia Maier speaks of a quasi-monopoly see above p. 174 and also Maertens, S. (2012). *Buslinienfernverkehr in Deutschland—effiziente Ausgestaltung einer Liberalisierung*. *Wirtschaftsdienst*, 92(8), 554-562. P.554.



restrictive provisions of §13(2) of the PBefG to services offered on the basis of these regulations has been questioned. In § 52 of the PBefG, it is stated that the PBefG also applies to cross-border traffic as far as no other legislation applies. In a case where a railway company challenged an authorisation for a cross-border coach line, referencing § 13 of the PBefG, the Administrative Court of Ansbach held that the existing European framework preceded the provisions of the PBefG. The Court held that § 52 of the PBefG would only apply where no other legal framework existed.<sup>229</sup>

Regulation 1073/2009, specifically Article 15, explicitly allows for cabotage, and this opened a backdoor for offering cabotage services in Germany as part of international lines. However, this opening was only be available to EU carriers not registered in Germany because Article 15(c) gave the right to offer cabotage to non-resident carriers only. This led to reverse discrimination against German carriers because they were not allowed to invoke Article 15 of the Regulation. Although German carriers could apply for an international license for regular transportation under Regulation 1073/2009, carrying passengers within Germany would be subject to the restrictions of the PBefG.<sup>230</sup> However, due to a new interpretation of these provisions by the German Federal Administrative Court, some shifts have taken place, even in the domestic sphere.

In 2010, a ruling by the German Federal Administrative Court<sup>231</sup> changed the restrictive interpretation of § 13(2) a) and b). The German Railways appealed the decision of a regional authority to permit a carrier to operate services between the cities of Frankfurt am Main and Dortmund. In the end, the dispositive issue was whether lower costs constituted meaningful improvement. The Federal Court held that regarding their understanding of a) and b) of § 13, the authority and lower courts were correct and reached proper decisions. They held that the existing offer of the German Railways was not satisfactory and that the proposed coach service would provide a means of transport to those who could not afford the train. In this case, they

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<sup>229</sup> VG Ansbach, Urteil vom 20.12.2010 - AN 10 K 09.00754 at §49. Please also note that at the time of this ruling regulation 11/98 applied which in Article 7 4 (f) did allow competent authorities to take existing railways into account. See for the applicability of § 13 PBefG also a Decision from the Bavarian administrative court: Bayerischer VGH, Beschluss vom 22.12.2009 - 11 CS 09.2081 at (77).

<sup>230</sup> See here Maier, E. (2015). *Die Liberalisierung des Fernlinienbusverkehrs: Eine personenbeförderungsrechtliche Analyse der Marktöffnung im Fernbusverkehr mit Berücksichtigung der europäischen Vorgaben* (Schriften zum Verkehrsmarktrecht, v. 1). Nomos Verlagsgesellschaft. p. 223. It is not entirely clear how often this possibility to offer cabotage in Germany by non-resident carriers has been used. Eugenia Maier gives examples of two international lines with cabotage in Germany.

<sup>231</sup> BVerwG, Urteil vom 24.06.2010 - 3 C 14.09 [ECLI-DE-BVerwG-2010-240610U3C14.09.0].

said that a) did not constitute a reason to decline the authorisation and that b) did not apply because offering a more affordable transport mode did constitute meaningful improvement. In addition, the Court determined that the coach service would not serve the same transportation task because transport task is not only defined by the connection served but also the users served.

However, the Court ended up reversing the decision of the authority and the lower courts because they had not taken into account the right to enhance services under c). The Court ruled that the authorities should have given the German Railways an opportunity to devise and propose an enhancement plan within a given term. Still, by ruling that price may be a reason for which a connection is not being served in a satisfactory manner, the Court extended previous interpretations of the provisions of § 13. Also crucial to this ruling is that the Court held that long-distance coach services performed a certain task: transporting people who might not be able to afford a railway ticket. The critical change, however, came when the PBefG was renewed in 2013.

### 6.3 Renewed PBefG

When a renewed PBefG entered into force in 2013, the market access conditions for long-distance coach carriers changed dramatically. With the new PBefG, a definition of long-distance line services was included in the law in § 42a. According to this definition, long-distance line services were services conducted by motorised vehicles not belonging to local public transport (§ 8) or to the special line services (§ 43). In addition, § 42a does not allow long-distance line services to carry passengers between stops that are 50 kilometres or less apart or between stops that can be reached by local train services within an hour.<sup>232</sup>

The distinction drawn between long-distance line services and local public transport also had an effect on the restrictive conditions of § 13(2) of the old PBefG. Since the renewed PBefG entered into force, long-distance regular line services are no longer subject to these restrictions because they are explicitly exempted from those restrictions in § 13(2). This means that for line applications, it is no longer relevant whether a connection is already served by another operator or whether a new service might offer a meaningful improvement to an existing service.

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<sup>232</sup> These conditions are not cumulative: either 50 kilometres or 1 hour by local train see to this extensively Maier as cited above in f.n. 231, p. 339.

This also places German carriers on equal footing with their EU non-resident counterparts with regard to domestic transportation. Before, non-residents could not invoke Article 15 of Regulation 1073/2009, but with the renewed PBefG, they can now apply for domestic services without being restricted by the provisions of § 13.

#### 6.3.1 Remaining Provisions Under the New PBefG

By 2013, long-distance coach and bus services had been exempted from market access restrictions, but they have continued to be subject to other provisions of the PBefG. One of the most notable provisions is the so called ‘*Betriebspflicht*’, the obligation to operate a line for which authorisation has been granted.<sup>233</sup> This obligation is explained in § 21 of the PBefG and means that carriers must notify the competent authority if they wish to stop operating a certain line. For international lines subject to Regulation 1073/2009, carriers always must provide a reason for cessation and wait for a confirmation from the authority.<sup>234</sup> The European Regulation does not explicitly obligate a carrier to operate a service. However, Article 11, which describes the obligations of carriers, states the following:

Save in the event of force majeure, the operator of a regular service shall, until the authorisation expires, take all measures to guarantee a transport service that fulfils the standards of continuity, regularity and capacity and complies with the other conditions laid down by the competent authority in accordance with Article 6(3).

This article suggests that the provision in § 21 of the PBefG specifies what has been prescribed in the European Regulation.<sup>235</sup>

Another limitation is entailed by the definition of long-distance line service in the renewed PBefG in § 42a. Long-distance line services are not allowed to carry passengers between two stops that are 50 kilometres or less apart or that can be reached by local train in less than 1

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<sup>233</sup> Interview II, this “*Betriebspflicht*” is something that is very particular for Germany (in comparison with other EU countries where FlixBus operates).

<sup>234</sup> Interview II.

<sup>235</sup> See also Maier, E. (2015). *Die Liberalisierung des Fernlinienbusverkehrs: Eine personenbeförderungsrechtliche Analyse der Marktöffnung im Fernbusverkehr mit Berücksichtigung der europäischen Vorgaben* (Schriften zum Verkehrsmarktrecht, v. 1). Nomos Verlagsgesellschaft. P. 329.

hour. This rule is equally applied to resident and non-resident carriers offering cabotage services in Germany under Regulation 1073/2009.

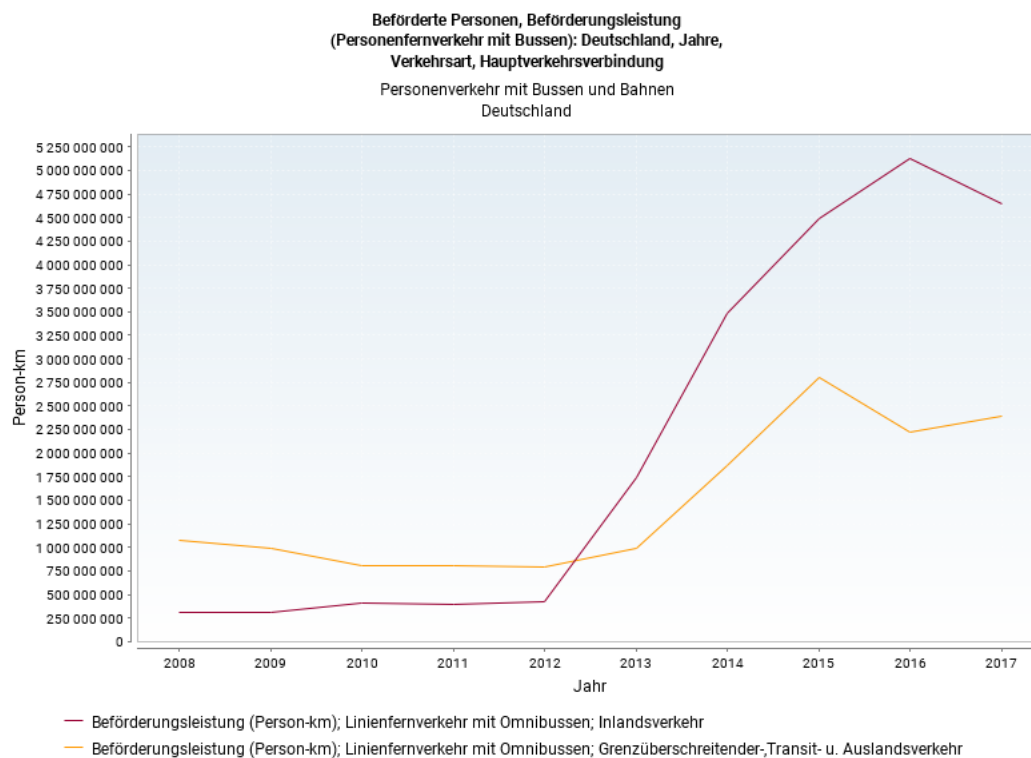
### 6.3.2 Impact of the Reform

The reform of the PBefG, the national legal framework concerning public transportation, had a major effect on the transport market in Germany. Various studies have demonstrated that the market for long-distance bus and coach services has grown expansively since liberalisation.<sup>236</sup> By introducing a definition of long-distance line services and simultaneously exempting them from the protective provisions of § 13 of the PBefG, Germany created a legal framework under which carriers could offer their services. This applies in particular to German carriers, as they previously had a comparative disadvantage vis-à-vis non-resident carriers; following Regulation 1073/2009 and German court rulings, such carriers had the possibility to offer cabotage services. While the European Regulation concerning bus and coach services had already entered into force in 2011, the impact of the change of the domestic legal framework appears to have been larger, as evident in Figure 3:

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<sup>236</sup> E.g. IGES (2018) *Der Fernbusmarkt in Deutschland IV/2018. IGES Kompass Mobilität –Fernbusmarkt Deutschland, Marktstand Oktober 2018*. Retrieved from: [https://www.iges.com/sites/iges.de/myzms/content/e6/e34/e10216/e23697/e23698/e23700/attr\\_objs23702/IGES\\_KompassFernbus\\_IV\\_2018\\_ZusammenfassungI ger.pdf](https://www.iges.com/sites/iges.de/myzms/content/e6/e34/e10216/e23697/e23698/e23700/attr_objs23702/IGES_KompassFernbus_IV_2018_ZusammenfassungI ger.pdf). Alternatively also: Statistisches Bundesamt. (2016). *Pressemitteilung 7. Oktober 2016, Boom bei Linienfernbussen hält an: 23 Millionen Fahrgäste im Jahr 2015*. Retrieved from: [https://www.destatis.de/DE/Presse/Pressemitteilungen/2016/10/PD16\\_361\\_461.html](https://www.destatis.de/DE/Presse/Pressemitteilungen/2016/10/PD16_361_461.html).

Figure 3 Development of Long-Distance Bus and Coach Transportation in Germany<sup>237</sup>



(Copyright Statistisches Bundesamt (Destatis), 2019 | Stand: 24.09.2019 / 17:04:16)

Despite the liberalisation of the market for long-distance bus and coach transportation, there are still some points where the renewed German PBefG intersects with Regulation 1073/2009. One important aspect of the process of applying for regular international service authorisation is that in Germany, there is no single competent authority that issues these authorisations. Each federal state decides the level at which competent authority is vested, this may be the state government themselves or delegated to lower levels of government, as low as a municipality<sup>238</sup>. This has led to a practise where various authorities must apply federal law and the European Regulation. Based on information drawn from an interview,<sup>239</sup> the interpretations of domestic law and the EU Regulation vary according to the authority. In addition, Germany is also quite strict regarding two provisions from the PBefG, which also apply in the case of regular international services covered by the European Regulation: the obligation to run a service when

<sup>237</sup> Data German statistical office: Bundesamt für Statistik, data selection code: 46100-001 restricted to regular services for the period 2008-2017. The y-axis shows the person kilometres: the distance passengers covered multiplied by the number of passengers. The red line indicates domestic traffic, the orange one international traffic. Available via [www.destatis.de](http://www.destatis.de).

<sup>238</sup> A discussion of the German Federal system is out of scope here, for those interested I suggest: Vierecke, A.; Mayerhofer, B. and Franz Kohut, F. (2011). dtv-Atlas Politik. München.

<sup>239</sup> Interview II.

a party has an authorisation (the ‘*Betriebspflicht*’) and the ban on carrying passengers between stops that are 50 kilometres or less apart or that can be reached within 1 hour by local train.

#### 6.4 Encounters with Growth: The Terminals

As evident in Figure 3, the renewal of the PBefG, which opened the German domestic market, caused a huge increase in passenger-kilometres. This sudden increase also caused problems, especially with respect to access to terminals. In her analysis, Maier underlines problems regarding access to terminals, especially in larger cities. Municipalities have been confronted with increasing numbers of buses that want to make use of inner city infrastructure. Immediately after the renewal, this sometimes led to conflict between carriers and municipalities.<sup>240</sup> Maier suggests that the municipalities refusing long-distance buses in some places are obliged to find alternatives for the buses to stop. This is because they must adhere to the German doctrines of federalism and responsibilities under which the lower government is obliged to follow Federal provisions.<sup>241</sup> This, however, does not mean that they are financially responsible for creating a terminal. Financing can take various forms: public, private, or public–private partnerships.<sup>242</sup> The responsibility of municipalities was also reduced in a statement issued by the German Ministry of Transport, which argued that carriers themselves are primarily responsible for terminals.<sup>243</sup>

In addition to the question of who is responsible for building infrastructure, there is the question of who is responsible for operating it. The first terminal in Germany operated by a long-distance carrier opened in April 2019 at Frankfurt am Main. FlixBus is responsible for operating the terminal, but other carriers may use it.<sup>244</sup>

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<sup>240</sup> Maier, E. (2015). *Die Liberalisierung des Fernlinienbusverkehrs: Eine personenbeförderungsrechtliche Analyse der Marktöffnung im Fernbusverkehr mit Berücksichtigung der europäischen Vorgaben* (Schriften zum Verkehrsmarktrecht, v. 1). Nomos Verlagsgesellschaft. P. 393 ff.

<sup>241</sup> Idem, p. 394-395.

<sup>242</sup> Idem, p. 395 ff.

<sup>243</sup> Deutscher Bundestag (2014) *Drucksache 18/742* Retrieved from:

<http://dipbt.bundestag.de/dip21/btd/18/007/1800742.pdf>. See also the position of the German Federation of cities and Municipalities at:

<https://www.dstgb.de/dstgb/Homepage/Aktuelles/Archiv/Archiv%202015/Fernbusse%3A%20Lust%20oder%20Last%20f%C3%BCr%20die%20St%C3%A4dte%20und%20Gemeinden%3F/Fernbushaltestellen%20E2%80%93%20Kooperation%20erforderlich/>.

<sup>244</sup> See <https://www.flixbus.de/fernbusterminal-frankfurt>.

Carriers and municipalities do not always agree on what constitutes an adequate terminal. This was the case in Cologne, where the city banned all long-distance buses from the inner city and forced them to move to a terminal at the Cologne Bonn Airport.<sup>245</sup> By contrast, two other major German cities invested heavily in terminal infrastructure.<sup>246</sup> In Germany, industry also uses a different instrument to raise awareness amongst municipalities that investing in terminal infrastructure is rewarded: the German Federation for Bus Enterprises organises a yearly contest for the best mobility hub, with prizes for cities of different sizes.<sup>247</sup>

## 6.5 Concluding Remarks

Under the renewed PBefG, the market size for long-distance regular services increased tremendously (See Figure 3). The old restrictions of § 13 had greatly restricted carriers' abilities to provide services. The old situation in Germany serves as a useful example of how national regulation can conflict with the goals of EU regulations. Although this section had already been carefully interpreted by various Courts, it was not until the 2013 PBefG renewal that the market started to flourish. Both the domestic and international markets for transportation benefitted from renewed provisions in the PBefG. It should, however, be mentioned that the renewal did not leave the sector entirely unregulated. Even under the new PBefG, long-distance carriers are obligated to comply with provisions in the PBefG such as the 50 kilometre or 1 hour criterion and the '*Betriebspflicht*'. However, these provisions apply equally to resident and non-resident carriers. To some extent, these provisions can also be said to conflict with the broader goals of Regulation 1073/2009. For example, the 50 kilometre/1 hour criterion might be arbitrary if a modal shift from car to collective transport is achieved. This is a purely quantitative criterion that does not say anything about the quality of the local train service—how often it operates, whether WiFi is provided, and so forth. Additionally, local competent authorities may grant permission to parties to operate certain lines that do not fulfil this criterion.

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<sup>245</sup> See to this: Verwaltungsgericht Köln, Urteil vom 25.08.2017 - 18 K 6887/15  
ECLI:DE:VGK:2017:0825.18K6887.15.00. Retrieved from:  
[https://www.justiz.nrw.de/nrwe/ovgs/vg\\_koeln/j2017/18\\_K\\_6887\\_15\\_Urteil\\_20170825.html](https://www.justiz.nrw.de/nrwe/ovgs/vg_koeln/j2017/18_K_6887_15_Urteil_20170825.html).

<sup>246</sup> <sup>246</sup> See e.g. the examples of Hamburg, Hannover and Munich given in Bange, C. (2013). *Planung, Finanzierung und Betrieb von Fernbusterminals in Deutschland*. Presentation at: Konferenz „Kommunales Infrastruktur-Management“ Berlin, 21.06.2013. Retrieved from: [https://www.kim.tu-berlin.de/fileadmin/fg280/veranstaltungen/kim/konferenz\\_2013/vortraege/seminarraum\\_1-bange\\_Planung\\_Finanzierung\\_und\\_Betrieb\\_von.pdf](https://www.kim.tu-berlin.de/fileadmin/fg280/veranstaltungen/kim/konferenz_2013/vortraege/seminarraum_1-bange_Planung_Finanzierung_und_Betrieb_von.pdf).

<sup>247</sup> See: <https://bdo.org/zahlen-fakten-positionen/mobilitatsknoten-des-jahres>.

The growth of the market also introduced problems with regard to the capacities of terminals. This is an aspect that is not covered in the renewed PBefG or in current Regulation 1073/2009. Some municipalities have invested in adding terminal capacity for long-distance carriers, but this appears to be because they perceive this as a valuable step towards increasing the accessibility of their cities<sup>248</sup> rather than because of a legal obligation. Overall, it can be said that in their Federal Passenger Transport Act, Germany has managed to separate PSO-operated services from long-distance bus services, thereby strengthening the market. This does not mean that the new framework reflects a panacea. There are still problems and conflicts in Germany as well.<sup>249</sup> However, the position regarding long-distance carriers has been made clearer.

The next chapter compares the three countries previously discussed, explaining similarities and differences between the various frameworks and their relations to Regulation 1073/2009.

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<sup>248</sup> The best example is perhaps Hamburg, see:

[https://bdo.org/uploads/assets/533bd39b8c43ad2db7000099/original/ZOB\\_Hamburg\\_Wolfgang\\_Marahrens.pdf?1396429723](https://bdo.org/uploads/assets/533bd39b8c43ad2db7000099/original/ZOB_Hamburg_Wolfgang_Marahrens.pdf?1396429723).

<sup>249</sup> An example of recent interference is lowering the VAT for long-distance trains whereas the long-distance buses still subject to the high VAT. See for example: <https://www.faz.net/aktuell/wirtschaft/klima-energie-und-umwelt/mehrwertsteuer-auf-fernbus-tickets-soll-wohl-nicht-sinken-16538756.html>.



## 7 Comparison of the Three Countries

This chapter presents a comparison of the three countries on which this thesis is focused. Table 5 presents a summary of the findings with regard to four elements that influence market access. The first row provides information about whether national legal frameworks differentiate long-distance bus and coach service from local bus service, which are mostly PSO operated. This is relevant because recognizing these services in a transport act may mean that there is less of an interference between the EU Regulation and national policy. The second row concerns who is responsible for granting authorisations and at what level of hierarchy they are positioned. This is meaningful in the sense that the EU Regulation only refers to competent authorities; this plural may mean multiple authorities in the EU (at least one per Member State) or multiple authorities within Member States. The third row presents the situation concerning cabotage and domestic transportation. This is where the most interferences are likely to be found. Finally, the last row addresses access to terminals, a point that the current EU Regulation does not account for but that has been identified as one of the factors that hinders the growth of a flourishing market.

Table 5: Comparison at a Glance

<b><i>Element for Market access</i></b>	<b>The Netherlands</b>	<b>Germany</b>	<b>Flanders</b>
<i>Differentiation between long-distance bus and coach transportation and local public transportation?</i>	No	Yes, definition of long-distance bus and coach transportation in the National Public Transport Act.	No
<i>Who's responsible for giving</i>	Central level, private company mandated by the	Local authorities, subject to federal and EU law but with	Federal Bureau for Mobility; however, consultation with

<i>authorisations? Which level?</i>	Ministry of Transport	street-level discretion over interpretation.	Regions in the case of cabotage
<i>Situation concerning cabotage (Article 15) and domestic transportation for resident carriers</i>	Yes, cabotage is possible. In theory, non-resident carriers would need an exemption, but in practice, the authorisation is sufficient.  Resident carriers always need an exemption	Yes, both cabotage and domestic transportation are allowed on the condition that no passengers are carried between stops that are 50 kilometres or less away or that could be reached by local train within 1 hour	Yes, cabotage is possible under the condition that the regions agree.  In Flanders, the new decree theoretically allows for domestic transportation subject to an authorisation.
<i>Terminal access</i>	In most cases, pragmatic solutions are found with municipalities; no legal framework	Initial problems after liberalisation and market expansion.  Municipalities are obliged to accommodate long-distance bus services.	Some sharing with De Lijn; however, sometimes conflicts

## 7.1 Goals and Objectives

It is important to first review the goals of the EU Regulation. The formal aim of Regulation 1073/2009 is as follows: ‘To ensure a coherent framework for the international carriage of passengers by coach and bus throughout the Community [...]’.<sup>250</sup> This rather formal

<sup>250</sup> Recital 3 Regulation (EC) 1073/2009.

statement can be complemented by the following broad goal stated elsewhere by the Commission:

The international market for coach and bus services, although small compared to national markets, plays an important role. Indeed, it provides collective transport which, as a sustainable alternative to private cars, can contribute to reducing emissions from transport and to improving accessibility to isolated and low population density regions'.<sup>251</sup>

Reading these goals does not quite elucidate the concrete problems the Regulation intends to solve. These challenges are presented earlier in Figure 1 concerning the Commission's ex post evaluation and are summarised below:

- There is no single market for bus and coach services.
- Nonnational providers face discrimination by Member State authorities.
- There is an unnecessary administrative burden.
- There is a suboptimal mix of transport modes for the transport of passengers.<sup>252</sup>

The solution of the Commission was to draft and promulgate a regulation that applied directly to all Member States. The objective was to create a single market for coach and bus services, but one thing was overlooked, as described by the Commission:

The intervention did not aim at integrating national markets for regular services, but national markets are recognised as a critical factor in the provision of international services. The evolution of the market, in terms of different and divergent rules on access to national markets in Member States, is a problem that was not previously apparent or considered when the intervention was designed. This patchwork of regulatory systems in the EU makes it difficult

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<sup>251</sup> Ex-post evaluation of Regulation (EC) No 1073/2009) p. 13.

<sup>252</sup> Idem, p. 3.

for carriers to exploit the full potential of operating in an Internal Market and contributes to the inability of coach and bus services to capture significant modal share from passenger car.<sup>253</sup>

As they draw upon the doctrinal work, the comparisons in this chapter may illuminate how different and divergent the rules regarding market access are in the Netherlands, Germany, and Flanders. Four elements that play important roles in market access for long-distance bus carriers structure this chapter. First, the existence of a national legal framework for long-distance coaches and buses is addressed. This constitutes the major difference between Germany and Flanders and the Netherlands. Three additional elements that are more concerned with the practical effect of legislation are discussed: the responsible authorities, the situation regarding cabotage and domestic transportation, and finally, access to terminals.

## 7.2 A Legal Framework for Long-distance Bus and Coach Service

Although Regulation 1073/2009 established the rules and conditions for international carriage between EU Member States, neither it nor the new Regulation did not require Member States to specify and distinguish long-distance bus and coach services within their domestic regulatory systems from public transport. The lack of a legal framework contributes to a sense of *legal fuzziness*.<sup>254</sup> The lack of *lex specialis* makes long-distance carriers subject to the general national legal framework for regular bus services. This is critical because urban, suburban, and local bus services are often subject to public service contracts, which are covered by Regulation 1370/2007 and long-distance carriers are private companies. Since the renewal of the PBefG, a clear separation exists between short- and long-distance passenger services. Long-distance services are those for which the distance between stops is 50 kilometres or the journey time by regional train exceeds 1 hour.<sup>255</sup> In Germany, this distinction was essential because it enabled the exemption of long-distance services from some of the most restrictive provisions of § 13 of the PBefG

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<sup>253</sup> Idem, p. 47.

<sup>254</sup> See for a deep analysis of legal fuzziness: Peczenik, A., & Wróblewski, J. (1985). Fuzziness and transformation: Towards explaining legal reasoning. *Theoria*, 51(1), 24-44.

<sup>255</sup> This is defined in §42 of the German “Personenbeförderungsgesetz” (PBefG) which can be retrieved from: <https://www.gesetze-im-internet.de/pbefg/index.html>.

and thereby opened up the domestic market. These restrictive provisions were meant to secure public interest in public transportation.<sup>256</sup> In pursuing this aim, Germany is certainly not unique. In both the Netherlands and Flanders, the market for public transportation is extensively regulated with the purpose of securing the interests of concession holders. However, the scope of the restrictive provisions present in Germany before the renewal was much broader. The restrictions protected not only local urban and suburban public bus transport carriers but all existing public transport carriers regardless of their modality.<sup>257</sup> This created a context where the status quo was protected and the railways held a quasi-monopoly. Even though previous court rulings had already reduced the scope, the renewal of the PBefG represented a real breakthrough for long-distance bus transportation in Germany, not only for domestic lines but also for international lines.<sup>258</sup> In the Netherlands and Flanders, provisions as strict as those in the old PBefG do not exist. Still, however, the absence of a legal framework leaves long-distance coach service subject to existing legislation that is not specifically tailored to it. The problem of an emerging market for long-distance carriers is solved by the same regulatory framework that applies to local buses. This is inconsistent with EU regulations, which separately cover local buses operated under a public service contract and privately operated long-distance carriers.<sup>259</sup> The services offered under a public service contract are those with a specific general economic interest, whereas long-distance international carriers are private companies operating for profit without subsidies. It can be concluded that there is a misfit between the EU and national-level regulations insofar as the national-level regulations do not differentiate between two different modes of transport that serve different passengers and also are financed differently and national legislation treats different elements similarly. This has an effect on all the subsequent points of comparison.

### 7.3 Responsible Authorities

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<sup>256</sup> For more about this see Maier, E. (2015). *Die Liberalisierung des Fernlinienbusverkehrs : Eine personenbeförderungsrechtliche Analyse der Marktöffnung im Fernbusverkehr mit Berücksichtigung der europäischen Vorgaben*. Nomos Verlagsgesellschaft

<sup>257</sup> Idem. P.165

<sup>258</sup> See Figure 3 above.

<sup>259</sup> 1370/2007 for PS operated and 1073/2009 for long-distance regular services.

This is perhaps the most practical point of comparison because any carrier that wants to operate a line needs to know from whom it can obtain authorisation to do so. Authorisation to provide regular service must be issued by a competent authority. Member States may designate such an authority, but they must follow the authorising procedure described in Article 8 of the Regulation.

Table 6: Overview of Authorities

	Netherlands	Flanders	Germany
<i>Level</i>	Centralised for authorisations, decentralised for exemptions.	Centralised but with input from decentralised level.	Decentralised but based on federal law. One-stop-shop approach.
<i>Private/Public</i>	Private company	Public authority	Public authority
<i>Costs for a new line</i>	€2053; <sup>260</sup> fixed cost per new application	Free of charge	Legally, they may vary between €100 and €2440 <sup>261</sup>

The Netherlands is unique in that it has chosen to mandate a private company, Kiwa, to assess applications for regular international service under the Regulation. Although it is a private company issuing the authorisations, it does so under the delegated authority of the Ministry of Infrastructure and is not free to impose its own tariffs. These tariffs are established by the Ministry on an annual basis. The fees are, however, the highest of all countries in which FlixBus operates within the EU (the fees could be higher in Germany, but in practice, they never are). Despite the decentralisation of the responsibility for governing public transport, Kiwa is the only entity responsible for the applications for

<sup>260</sup> Cf. <https://www.kiwaregister.nl/bus/tarieven>.

<sup>261</sup> Cf Kostenverordnung für Amtshandlungen im entgeltlichen oder geschäftsmäßigen Personenverkehr mit Kraftfahrzeugen (PBefGKostV) Retrieved from: <https://www.gesetze-im-internet.de/pbefgkostv/BJNR216800001.html>.

international regular services. Local transport authorities are responsible for granting exemptions.

Flanders, as one of the Belgian regions, has considerable autonomy with regard to public (road) transport. However, it is the Federal Bureau for Mobility that is considered competent for granting authorisations under Regulation 1073/2009. In practice, this might lead to objections from regions because the process leads to a relatively lengthy authorisation procedure. However, authorisations are free of charge in Belgium.

In Germany, although the PBefG is a federal law, the federal government does not issue authorisations themselves. This is left to the federal states in Germany, which sometimes even delegate this power further down the bureaucratic hierarchy. Nevertheless, they all must apply the same EU Regulation and federal law. However, in practice, differences are evident when it comes to the interpretation of these regulations.<sup>262</sup> The fees are also determined at the federal level.<sup>263</sup> Although, theoretically, the fees could exceed those in the Netherlands, these fee amounts are considered an upper limit. While the fees in the Netherlands are fixed, in Germany, authorities are only allowed to charge the costs associated with processing the application. For carriers, however, the advantage in Germany is that there is a one-stop-shop process. The responsible authority contacts other competent authorities within Germany in the case of cabotage and domestic transportation.

#### 7.4 Cabotage and Domestic Transportation

Among the provisions in Regulation 1073/2009, those regarding cabotage are probably the most likely to conflict with national legal frameworks. Cabotage, as it is defined in the Regulation, refers to the part of an international line for which non-resident carriers are allowed to carry passengers between stops in another Member State. Two key points of comparison are how cabotage is dealt with by each country and how national legal frameworks deal with resident carriers who have no right to offer cabotage.<sup>264</sup>

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<sup>262</sup> Interview II. See for more information the respective Chapter about Germany.

<sup>263</sup> See f.n. 262 above.

<sup>264</sup> For this reason this is referred to as domestic transportation.

**Characteristic of The Netherlands Flanders Germany**  
**Cabotage**

<i>Cabotage (Article 15)</i>	Yes	Yes	Yes
<i>Domestic transportation</i>	Yes, under provisions (Art. 29 WP 2000 Exemption	Should be, but not implemented in full yet.	Yes
<i>Provisions</i>	For cabotage, one-stop shop; the burden of proof falls on the regional transport authorities and concession holders  For domestic transportation, carriers need to apply at each regional authority separately	Cabotage: Regions have to give their consent, and regions frequently ask their PSO for their opinion  Domestic transportation is still very much in the infancy stage	For both cabotage and domestic transportation the same criteria hold; most important are the 1 hour/ 50 kilometre rule. German authorities allow cabotage in an authorisation for a domestic carrier.
<i>Level playing field between domestic and international carriers?</i>	No, there are fewer administrative burdens for international carriers.	No	Yes

In Germany, the distinction between a resident and non-resident carrier is not so important when it comes to transporting a passenger between domestic stops on an international line. Although there is a formal distinction between domestic authorisations and authorisations under Regulation 1073/2009, in practice, German carriers can also apply for international



authorisations, including transport between domestic stops. For all carriers, authorities simply apply the rule that, with some exceptions, there should be no carriage between stops that are less than 50 kilometres or 1 hour apart by local train. This policy creates a level playing field between resident and non-resident carriers in Germany. In the Netherlands and Belgium, the frameworks are different. In both Flanders and the Netherlands, the authorities needed to be convinced that the Regulation allowed for cabotage.<sup>265</sup> For Flanders, this introduced the problem of the Federal Bureau for Mobility issuing the authorisations despite not being the competent authority for domestic bus transportation; this problem was solved with the implementation of consultations with regions. With the new decree on basic accessibility, the Flemish government now allows resident carriers to apply for domestic authorisations (for Flanders only), enabling them to serve cities within Flanders not directly served by De Lijn. It remains to be seen how this will unfold in the future; so far, no such authorisation has been granted.<sup>266</sup> Implementing this new policy would put Flanders on equal footing with the Netherlands, where carriers are not allowed to carry passengers unless they qualify for an Article 29 exemption. To some extent, it seems that Flanders is replicating policies of the Netherlands, but it is unclear whether a system requiring application for extra authorisation (Flanders) or exemptions (the Netherlands) is the optimal approach to dealing with long-distance carriers. The situation in the Netherlands, which will soon be that in Flanders as well, is that the local public transport authorities have considerable discretion whether to allow domestic long-distance carriers to transport passengers within their territories. However, the interpretation of the Administrative Court (CBb) in the case between FlixBus and Noord-Brabant partly pre-empted this as the Court found that Noord-Brabant had not provided sufficient proof to refuse an exemption. Although this ruling may lead to a reduction in refusals, Dutch carriers are still required to apply for an authorisation. This has created a dual system where non-resident carriers are privileged over resident carriers.

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<sup>265</sup> Interview I.

<sup>266</sup> It should be mentioned that there is a project called “Office Bus” which operates between cities in Flanders; however, these are not regular service that are open to everyone, Employers should contract them in order for their employees to be able to use the office buses. See for more information <https://www.officeonwheels.be/>.

Germany, the Netherlands, and Flanders all want to protect their local public transport systems. The Regulation also allows for these protective measures, specifically in Arts. 8 and 15. The countries differ, however, in how they go about doing this. Germany does not differentiate between resident and non-resident carriers, but in Flanders and the Netherlands, resident carriers require extra authorisation or an exemption. This has led to reverse discrimination against resident carriers.

## 7.5 Access to Terminals

For the successful operation of long-distance bus or coach services, access to terminals where passengers can start/end their journey is essential. This is not covered under the Regulation, but was, in the Commission's evaluation of the Regulation, found to be a possible barrier to entry.<sup>267</sup> The Netherlands, Flanders, and Germany all face problems accommodating long-distance carriers to some degree, especially in their major cities. Problems with terminal access became apparent in Germany after liberalisation, as the number of long-distance buses rapidly increased, exceeding the capacities of existing terminals. In a study KCW published in 2014, two key criteria are mentioned: there should be sufficient local transport connections for passengers to enter a terminal and continue on further travels and sufficient regional connections for coaches to approach the terminal.<sup>268</sup> Most passengers travel to and from a terminal via public transport, as can be seen in Figure 4.<sup>269</sup>

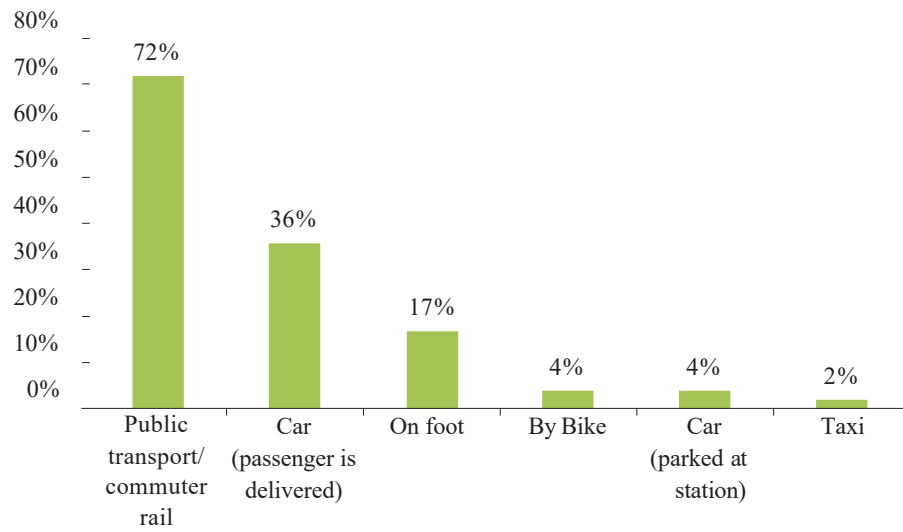
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<sup>267</sup> Ex-post evaluation of Regulation (EC) No 1073/2009. p. 22 ff. See for an overview of terminals in the EU also Steer Davies Gleave. (2017). *Support study for an Impact Assessment for the revision of Regulation (EC) No 1073/2009 on access to the international market for coach and bus services*. Retrieved from: <https://ec.europa.eu/transport/sites/transport/files/studies/2017-12-support-study-ia-revision-access-intl-market-bus-coach.pdf>. P. 37.

<sup>268</sup> Augustin, K. & Wanner, K. (2014). *New Long-distance Coach Stations and Licensing Practices Opportunities for Municipalities*. Studie KCW GmbH: Berlin. Retrieved from: <https://www.kcw-online.de/content/6-veroeffentlichungen/38-neue-fernbushalte-und-genehmigungspraxis-chancen-fur-die-kommunen/study-new-long-distance-coach-stations-and-licensing-practices.pdf>.

<sup>269</sup> Idem, p. 13. As a source they give MeinFernbus (2013), a survey in which passengers could give multiple answers.

Figure 4: Arrival and Departures from Coach Stations in Germany (2013)



The two criteria are in tension. Passengers want to be close to a major public transport hub, which are often located in the inner part of a city. Yet, it is also important that a coach does not get stuck in a congested city centre.

Although long-distance carriers are recognised in the PBefG, this does not mean that they are entitled to terminal access provided by municipalities. In response to parliamentary questions, the Federal Transport Ministry of Germany said that establishing terminals was a prime responsibility of the carriers but municipalities should adapt their infrastructure to prevent traffic congestion.<sup>270</sup> Long-distance carriers are private companies, but they rely on public infrastructure, and this may cause tensions. In Germany, most major cities have one or multiple dedicated long-distance terminals, with different models of financing for building and exploiting them.<sup>271</sup> The legal framework in Germany does not seem to have been decisive. Instead, the dispositive question in Germany appears to be whether municipalities see the added value of a dedicated terminal.<sup>272</sup> Examples of added values are depicted in Figure 5.

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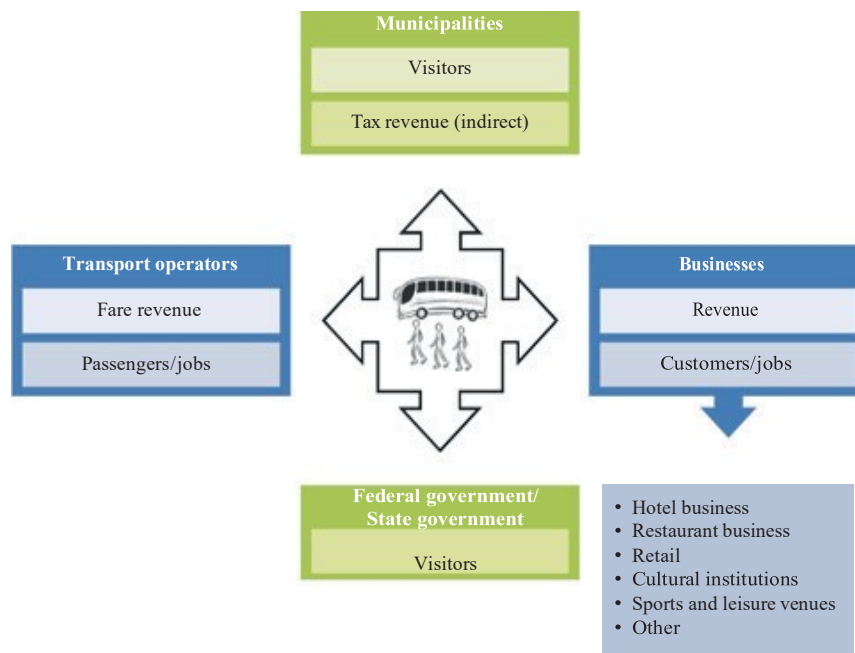
<sup>270</sup> See f.n. 161.

<sup>271</sup> See e.g. Bange, C. (21 June 2013). *Planung, Finanzierung und Betrieb von Fernbusterminals in Deutschland*. Presentation at: Konferenz „Kommunales Infrastruktur-Management“, Berlin. Retrieved from: [https://www.kim.tu-berlin.de/fileadmin/fg280/veranstaltungen/kim/konferenz\\_2013/vortraege/seminarraum\\_1-bange\\_Planung\\_Finanzierung\\_und\\_Betrieb\\_von.pdf](https://www.kim.tu-berlin.de/fileadmin/fg280/veranstaltungen/kim/konferenz_2013/vortraege/seminarraum_1-bange_Planung_Finanzierung_und_Betrieb_von.pdf).

<sup>272</sup> See e.g. the City of Hamburg that invested 12 million euros in a terminal: [https://bdo.org/uploads/assets/533bd39b8c43ad2db7000099/original/ZOB\\_Hamburg\\_Wolfgang\\_Marahrens.pdf?1396429723](https://bdo.org/uploads/assets/533bd39b8c43ad2db7000099/original/ZOB_Hamburg_Wolfgang_Marahrens.pdf?1396429723).

Figure 5: Areas of Added Value from Coach Travel  
above)

(Figure 8 at p. 9 in f.n. 265



It is up to the carriers to argue the advantages of a terminal to municipalities.

This also applies to Flanders and the Netherlands, where there are possibilities to negotiate with the municipalities. In general, long-distance carriers are willing to pay for the use of dedicated infrastructure, as is reflected in examples in Germany. In Flanders, this model has not yet been applied. In the Netherlands, Maastricht will be the first terminal where carriers pay for facilities provided by the municipality.<sup>273</sup> It should be noted that access to bus infrastructure is not always problematic and that a legal solution is not always required. The example of the Netherlands demonstrates that through negotiation with municipalities, pragmatic solutions can be found. For carriers, it is beneficial when municipalities see long-distance buses as providing added value to their city and include it as a modality in the spatial planning of their public transport hubs. In Germany, where there is currently a competition for the best mobility hub,<sup>274</sup> industry uses a soft legal instrument to reward terminals that provide positive conditions for both carriers and passengers. The new proposal for the Regulation contains provisions regarding terminals: The idea is for long-distance carriers to gain unfettered

<sup>273</sup> Gemeente Maastricht. (2019.) *Internationale Bushalte Meerssenerweg*. Retrieved from:

<https://www.gemeentemaastricht.nl/stad/stadsontwikkeling/internationale-bushalte-meerssenerweg>

<sup>274</sup> Bundesverband Deutscher Omnibusunternehmen. (n.d.). *Mobilitätsknoten des Jahres*. Retrieved from:

<https://bdo.org/zahlen-fakten-positionen/mobilitatsknoten-des-jahres>

access to public transport infrastructure measuring over 600 square metres.<sup>275</sup> Although the scope of this proposal has been substantially reduced by the European Parliament<sup>276</sup> the Council has still not tabled it for discussion. In addition, the Regulation would only apply to non-resident carriers.<sup>277</sup>

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<sup>275</sup> Regulation (EC) 1073/2009.

<sup>276</sup> Amendments 29 ff. in European Union, European Parliament. (2019). *European Parliament legislative resolution of 14 February 2019 on the proposal for a regulation of the European Parliament and of the Council amending Regulation (EC) No 1073/2009 on common rules for access to the international market for coach and bus services*. Retrieved from: [https://www.europarl.europa.eu/doceo/document/A-8-2019-0032\\_EN.html](https://www.europarl.europa.eu/doceo/document/A-8-2019-0032_EN.html).

<sup>277</sup> See Article 1 § 4 in Ex-post evaluation of Regulation (EC) No 1073/2009. p. 22 ff. See for an overview of terminals in the EU also Steer Davies Gleave. (2017). *Support study for an Impact Assessment for the revision of Regulation (EC) No 1073/2009 on access to the international market for coach and bus services*. Retrieved from: <https://ec.europa.eu/transport/sites/transport/files/studies/2017-12-support-study-ia-revision-access-intl-market-bus-coach.pdf>

## 8 Conclusion

The aim of this thesis was to demonstrate the extent to which national regulatory frameworks may conflict with the goals of Regulation 1073/2009 as well as to explain in what respects Member States diverge from each other and from the European Regulation.

As found by the European Commission in its ex post evaluation<sup>278</sup> and the support studies carried out by Steers Davies Gleave,<sup>279</sup> this study identified considerable differences between countries. It is thus reasonable to conclude that a regulatory patchwork governs the market for long-distance bus and coach services in Europe. This study differed from previous ones in that it closely examined national regulatory frameworks and took into account practical experience.

The confirmation of a regulatory patchwork is unsurprising. However, it is somewhat remarkable that this was ‘not previously apparent and considered when the intervention (the Regulation) was designed’.<sup>280</sup> Although regulations allow less leeway for Member States than directives, regulations are also known to not operate in a vacuum. This is especially true for a sector as heavily regulated as public transport.<sup>281</sup>

The development of a regulatory patchwork can largely be attributed to the Regulation itself; the scope of the Regulation is limited to international carriage, and cabotage only applies to non-resident carriers, which means that non-compliance is absent, as was reflected in Toshkov studies. The Regulation aims to achieve minimum harmonisation and focuses on non-resident carriers. This makes resident carriers subject to different rules than non-resident carriers are and does not include the domestic market as part of the EU internal market. The EU has surely intervened in domestic public transportation enough to recognise this.

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<sup>278</sup> Ex-post evaluation of Regulation (EC) No 1073/2009.

<sup>279</sup> Steer Davies Gleave. (2017). *Support study for an Impact Assessment for the revision of Regulation (EC) No 1073/2009 on access to the international market for coach and bus services*. Retrieved from: <https://ec.europa.eu/transport/sites/transport/files/studies/2017-12-support-study-ia-revision-access-intl-market-bus-coach.pdf>; Steer Davies Gleave. (2016). *Comprehensive Study on Passenger Transport by Coach in Europe*. Retrieved from: <https://ec.europa.eu/transport/sites/transport/files/modes/road/studies/doc/2016-04-passenger-transport-by-coach-in-europe.pdf>.

<sup>280</sup> Ex-post evaluation of Regulation (EC) No 1073/2009. P. 223.

<sup>281</sup> On the national as well as the EU level, in this assessment Flanders is probably the best example of how heavily regulated public transport can be.

One example of the impact of Regulation 1370/2007 is that on Flanders. Although resident carriers in the Netherlands can apply for an exemption and residents in Flanders, under the new Decree, can obtain a national authorisation, they are still at a disadvantage. This does not mean, however, that it is not possible to protect local public transport while also allowing for long-distance transport. The example of Germany demonstrates that it is possible to clearly distinguish the two. Moreover, the market for long-distance transportation is not fully liberalised or subject to any rules. Carriers are still subject to the provisions of the PBefG, which not only protects local public transport but also promotes user-friendly aspects such as reliability, accessibility, and similar. The distinction made in Germany renders market access clear and equal for resident and non-resident carriers.

With regard to the gold-plating literature, which is concerned with Member States exceeding what is necessary to comply with a directive, resident carriers would benefit if Member States incorporate the Regulation into their national legal frameworks and extend its scope to their resident carriers. Suggestions for approaching this are presented in the following.

### 8.1 Adapting by Adopting and Current Practices

In the Netherlands, such an adaption could easily be made to the National Transport Act (WP 2000) by removing long-distance carriers' need for an exemption and making them subject to the same procedure in place for non-resident carriers. It would also make sense to introduce national authorisations for purely domestic long-distance services and designate one authority, such as Kiwa, to be responsible, thereby creating a one-stop shop similar to that for international authorisations.

Such national changes are difficult for Flanders, as they are not responsible for international authorisations. Although both Belgium and Germany have a federal system, the difference here is that in Germany, the federal authority has delegated the authorisation process to lower government units under federal law. In Belgium, the federal government has not been given responsibility with regard to domestic transportation. This would require coordination with other regions. Cabotage and domestic transportation also have somewhat different meanings in Belgium. There is transportation within a region (being cabotage or domestic transportation) and cabotage between regions but within Belgium. In this case, a 'Belgian compromise' might need to be found.



In all the countries, some powers are delegated to local governments. Germany and Belgium have a formal federal structure, and the Netherlands has delegated the granting of exemptions to regional public transport authorities. Although other measures of compliance in the Toshkov database are not easy to relate to a regulation, it may be that federalism and regionalism can explain the findings in this study as well. Although Toshkov found that federalism and regionalism have a negative effect on compliance with directives,<sup>282</sup> in this study, no such an effect was apparent: it has not emerged as a factor interfering with market access for long-distance buses and coaches. In Both Lijphart's measure of federalism as well as Hooghe and Mark's index of regionalism, Germany and Belgium score high and the Netherlands scores somewhat lower.

	The Netherlands	Germany	Belgium
Lijphart <sup>283</sup> 5 = highest	3 (= Semifederal)	5 (= Federal)	5 (= Federal)
Hooghe, Marks <i>et al.</i> <sup>284</sup> A score of 30 is highest at the regional level but for countries, it is aggregated	17.5	37	33.1

Germany, the country that is most federal and regional according to the indices, has the smoothest market access system for long-distance carriers, despite the differences in interpretation that persist. It is somewhat different for Flanders and Belgium due to the unique type of federalism found in Belgium, where there is no hierarchy between the federal and the regional levels.

<sup>282</sup> See Theoretical Framework above.

<sup>283</sup> Lijphart A (2012 [1999]) *Patterns of Democracy: Government Forms and Performance in Thirty-Six Countries*. Yale University Press. Especially Chapter 10 and table 10.1 at p. 178, as well as the appendix.

<sup>284</sup> Data for 2010 dataset citation: Hooghe, L., Marks, G., Schakel, A.H., Osterkat, S.C., Niedzwiecki, S., Shair-Rosenfield, S. (2016). *Measuring Regional Authority. A Postfunctionalist Theory of Governance*, Volume I. Oxford: Oxford University Press. Data retrieved from: <http://garymarks.web.unc.edu/data/regional-authority/>.

Although a regulation does not require transposition, it does not function in isolation. This is something for the EU and Member States to bear in mind. With Regulation 1073/2009, this seems to have been overlooked by the EU, which has not achieved its market access and harmonisation goals, as well as some Member States, where the combination of the Regulation and national legal frameworks has led to a rise in reverse discrimination.

## 8.2 Access to Terminals

Another problem that was found in all three countries is access to terminals. This challenge may initially appear unrelated to market access. However, access to terminals is essential for the quality of the service provided after access to the market is gained. If the EU and Member States perceive long-distance carriers as a valuable form of collective transport, there is a need to increase access to terminals. This has not been addressed in current regulations but is part of a new proposal that is briefly discussed in the next section.

## 8.3 Outlook: Fit for the Future?

The ex post evaluation of Regulation 1073/2009 prompted the Commission to develop a proposal for amending the Regulation,<sup>285</sup> which was discussed, amended, and adopted by the European Parliament in February 2019.<sup>286</sup> If, how, and when it will enter into force remains unclear. The European Parliament amended the Commission's proposal substantially, mainly watering it down, and it is likely that the Council will do the same. The practical application of the new proposal cannot be studied in context. However, a theoretical assessment of its impact can be made and has been, as in the Netherlands.<sup>287</sup> This assessment is outside of scope of this thesis, but some important findings are introduced here.

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<sup>285</sup> Regulation (EC) No 1073/2009.

<sup>286</sup> European Union, European Parliament. (2019). *European Parliament legislative resolution of 14 February 2019 on the proposal for a regulation of the European Parliament and of the Council amending Regulation (EC) No 1073/2009 on common rules for access to the international market for coach and bus services*. Retrieved from: [https://www.europarl.europa.eu/doceo/document/A-8-2019-0032\\_EN.html](https://www.europarl.europa.eu/doceo/document/A-8-2019-0032_EN.html).

<sup>287</sup> MuConsult (2018) *Impact-analyse herziening Verordening (EU) 1073/2009: Eindrapport MuConsult*. Dutch Ministry of Infrastructure. Retrieved from: <https://www.rijksoverheid.nl/binaries/rijksoverheid/documenten/rapporten/2018/12/20/impact-analyse-herziening-verordening-eindrapport-muconsult/impact-analyse-herziening-verordening-eindrapport-muconsult.pdf>.

In the new proposal, the scope remains limited to non-resident carriers, which means reverse discrimination may continue.<sup>288</sup> This is especially relevant because the new proposal contains some provisions that would enhance conditions for carriers. One of the most crucial conditions is that not only cabotage be allowed but domestic transportation by resident carriers would not be part of an international line and not covered. The proposal would allow non-residents to apply for authorisation to offer national regular services between stops more than 100 kilometres apart.<sup>289</sup> This would liberalise national markets for non-resident carriers, but it would expand the division between resident and non-resident carriers in countries such as the Netherlands and Belgium, increasing reverse discrimination.<sup>290</sup>

Second, the new proposal also provides for non-discriminatory access to terminals over 600 square metres.<sup>291</sup> The essence of the provision is that when long-distance carriers apply for access, the terminal owner should make an effort to accommodate the request. Requests may only be refused because of a lack of capacity, and upon refusal, a viable alternative must be suggested. The new proposal may improve conditions, but the European Parliament has already amended articles considerably in relation to terminal access, such as by excluding terminals that are solely used for passenger services by the operator.<sup>292</sup> The new proposal would mean that long-distance carriers could still be denied access to terminals used by a concession holder; thus, this solution is not complete.

My findings suggest that the goodness-of-fit could be an explanatory variable, one that is predictive in the sense that Member States with a regulatory framework for long-distance services are better fit. In Germany, the market only really started to grow after the 2013 reform and not after the EU Regulation entered into force. In terms of national legislation, a conflict may arise between a public transport network organised and (partly) funded by governments at the local and regional levels and privately-owned long-distance carriers. In general, long-distance carriers have no interest in carrying passengers over short distances.<sup>293</sup> It is important

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<sup>288</sup> See Article 1 § 4 in European Union, European Commission. (2017). *Proposal for a Regulation of the European Parliament and of the Council Amending Regulation (EC) No 1073/2009 on common rules for access to the international market for coach and bus services*. Retrieved from: <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:52017PC0647>.

<sup>289</sup> See Article 8 Commission Proposal in f.n. 289 above as well as amendments 38-66 of the EP as in f.n. 286.

<sup>290</sup> The dual regime is also concluded in the MuConsult report from f.n. 288 at p. 37 ff.

<sup>291</sup> Article 5 Commission Proposal in f.n. 285 and amendments 29-37 of the EP as in f.n. 287.

<sup>292</sup> Amendment 34 of the EP as in f.n. 287.

<sup>293</sup> Interview I, as a general rule FlixBus does not sell tickets for connections served by local and urban transportation.

to determine where genuine protection turns into an unnecessary burden. Regulatory fit is based on whether Member States can accommodate long-distance carriers and create clear legal frameworks for them. This does not preclude the existence of differences.<sup>294</sup> The use of this variable can help countries get closer to attaining the goals set in the Regulation.

The Commission could also determine whether the regulatory instrument is the best tool for achieving the specific goals of Regulation 1073/2009. It appears that the provisions in the Regulation itself are not sufficient to create a true single market. This could also apply to other regulations with similar aims in other domains. The key point is that such regulations do not operate in a vacuum. With Regulation 1073/2009, two levels of regulatory patchworks can be observed: that between Member States and that within Member States due to the different treatment of resident and non-resident carriers. At the EU level, such patchworks could be prevented either through a higher level of harmonisation generated by the Regulation or through the implementation of certain standards in a complementary directive. This would not be unique to the system of EU law: An example of a complementary regulation and directive is the market pillar of the fourth railway package.<sup>295,296</sup> Although it is not immediately binding and generally applicable, a directive could be even more appropriate for attaining the objective of harmonisation. Directives force Member States to adapt their national framework to EU policies. It would be interesting for future studies to explore the circumstances under which a particular legal instrument is better suited to harmonise legislation for the benefit of the internal market.

With regard to the new proposal and the findings of this study, it must be concluded that, although problems are addressed in the new regulation, it is unlikely that the patchwork system will be completely eradicated. Member States should be aware that without modifying their

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<sup>294</sup> See a recent comparison of France, Germany and Italy, three liberalised markets with domestic frameworks: Calise, R., Ladogana, C., & Garofani, G. (2019). Il processo autorizzativo per i servizi passeggeri di media-lunga percorrenza su gomma: un confronto fra Italia, Germania e Francia. *Rivista di Economia e Politica dei Trasporti*, n. 1, Art. 4. Retrieved from: <http://hdl.handle.net/10077/29077>.

<sup>295</sup> European Union, European Commission. (2016). Regulation (EU) 2016/2338 of the European Parliament and of the Council of 14 December 2016 amending Regulation (EC) No 1370/2007 concerning the opening of the market for domestic passenger transport services by rail. Retrieved from: <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A32016R2338>.

<sup>296</sup> Directive 2016/2370/EU amending Directive 2012/34/EU, which deals with the opening of the market of domestic passenger transport services by rail and the governance of the railway infrastructure ('Governance Directive').

national legal frameworks, resident carriers may have face huge disadvantages. The findings are still relevant and will remain relevant even when the new Regulation enters into force. For future research, it would be beneficial if more statistics were available. This is also a point lamented by Steer Davis Gleave: There are few, if any, statistics available on the topic. Given the importance of collective long-distance transport, it would also be interesting to determine the extent to which patchworks arise in other modalities and what can be done to overcome them.

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Although all sources are also in the footnotes, here follows a bibliography of the most cited literature. As has been noticed, this study relies heavily on legal documents, EU Regulations and Laws as well as some non-public letters. All sources are available upon request; the author tried hard to verify all links, for most documents, pdf files are available, this also holds for the Interviews which were video recorded.

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Bellis, R. (2003) *Improving implementation of EU legislation*. Foreign and Commonwealth Office. *betreffende de basisbereikbaarheid*. Documentnr.: 1805 (2018-2019) – Nr. 9. Brussel. Retrieved from: <http://docs.vlaamsparlement.be/pfile?id=1475622>.

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