



★ ★ ★  
★ Senior  
★ European  
★ Experts

# The Liberalisation of Europe's Railways



# The Liberalisation of Europe's Railways

## Introduction

At the end of January 2013 the European Commission published its proposals for the reform and further liberalisation of the railway sector in the EU (25 Member States have railways; Malta and Cyprus do not). This, the Fourth Railway Package, will adopt common EU standards for rolling stock, open up competition in passenger rail services and ensure proper separation between the ownership of infrastructure and the operation of passenger or freight trains (known as "unbundling"). It continues a process of opening up the railway market in the EU which began in 1991. The UK was an early pioneer of railway liberalisation, and did not find it at all easy, but other EU Member States have opened up their railway sectors more recently with particular benefits for the rail freight sector in Germany and for passengers in Italy, the Czech Republic and elsewhere but only Britain and Sweden have adopted full liberalisation. The Commission's latest proposals are intended to tackle the remaining obstacles to fair competition and to make a reality of the internal market in the railway sector.

## Background

To enable the free movement of goods and people within the internal market there need to be efficient transport systems that easily operate across borders. With the opening up of the road haulage industry in the 1990s – as a result of the single administrative document which enables lorries to drive from one EU Member State to another without having to go through numerous customs and border formalities – the railway sector lagged behind. Rolling stock made in one Member State often could not be used in others because of the requirements of national standards, adding to expense but also making the railway very inefficient. Railway services, freight as well as passenger, were generally provided by monopoly operators who also owned the infrastructure, giving them ample opportunity to discriminate against competitors and place obstacles in the way of cross-border traffic. Railway companies were also often dependent on taxpayer subsidies to operate services but with no transparency as to the real cost of the services provided. In addition to economic benefits, rail liberalisation should also reduce carbon emissions as a result of freight and passenger traffic shifting from roads to a more efficient railway service.

## The First Railway Package

Three pieces of legislation adopted by the Council in 2001 were designed to tackle issues of railway infrastructure access in the EU. The first required the unbundling of infrastructure management from the operation of services. It also opened up access to railway lines across the EU to international freight services, meaning that Member States could no longer

discriminate in favour of national operators. The second directive expanded the licensing system for all railway operators introduced some years earlier in order to ensure that there was an independent regulator in Member States for railway services. The third ensured that Member States set up systems for the allocation of capacity (i.e. train paths) on a fair basis in order to open up railways to new users and required train operators to have a safety certificate.

The effectiveness of this package in opening up railway services in the EU was questioned because of the way Member States implemented the legislation. Several Member States implemented theoretical unbundling (e.g. Germany) but critics claimed that in reality the infrastructure owner was not independent and was giving the incumbent state-owned train operator an unfair advantage. These concerns led the Commission to begin infringement proceedings against 24 Member States (all except the Netherlands, Malta and Cyprus) in 2008. In most cases this led to changes in national policy to ensure compliance (France finally established an independent rail regulator in 2010 for example) but Hungary and Spain were found to be in breach in February 2013. However, the Commission's cases against Austria and Germany were rejected by the European Court of Justice which found that they did comply with the legislation.

### **The Second Railway Package**

The second package of railway liberalisation measures (2004) aimed to open up the rail freight market in the EU. It established the European Rail Agency in order to promote interoperability through the creation of Technical Standards on Interoperability for the internal market and ensured that each Member State had a railway safety authority.

This package proved effective in opening up the European rail freight market to a considerable extent but the apparent bias in favour of state operators continued in some Member States. For example, SNCF was awarded 68 per cent of the freight paths it requested for 2013 by the French infrastructure manager RFF compared to 48 per cent for its (private sector) rivals according to the country's rail regulator.<sup>1</sup>

The European Rail Agency plays a valuable role in promoting interoperability but no less than 11,000 national rules concerning technical specifications remain; in addition, national safety authorities often impose their own requirements.

### **The Third Railway Package**

In September 2007 the Council and the Parliament adopted the third package of railway legislation, this time focusing on opening up international passenger services. This legislation also provides rights for passengers on long distance routes and rights for all disabled passengers. The introduction of cabotage from 2010, that is the right of a train operator to pick up or set down passengers at any station on an international route, including within the same country, was an important step forward in opening up passenger services to competition.

---

<sup>1</sup> *Today's Railways Europe*, April 2013, pp. 50-51

## The Proposed Fourth Railway Package

### Problems with the current system

The opening up of airline services within the EU has been highly successful; fares have fallen and choice of routes improved. But the railways have proved far more difficult, in part because of the natural monopoly problem. The unbundling solution adopted by the EU was necessary but as a liberalisation measure it has been hampered by poor compliance. Political pressure in Member States to maintain national monopolies and a tendency to implement artificial unbundling has meant that little has changed. As the House of Lords EU Select Committee has said:

Continuing disparities between Member States' implementation of the Railway Packages create barriers to entry and discrimination.<sup>2</sup>

The fact that it took almost five years for the infringement proceedings to go through the courts and for the outcome to be unsatisfactory (there is still concern in the Commission and in industry about the way the track and train split operates in Germany) shows that the legislation in the first railway package in particular has not worked as intended.

Unfair competition remains a real obstacle to liberalisation. The Italian competition authority fined the national rail company after finding that it had used underhand methods to keep a potential private rival off the lucrative Turin-Milan route (the competitor went bankrupt). The Germany infrastructure manager was found to be charging the state railways less for track access than private operators; and the Austrian railways increased track access charges as soon as a private operator announced the commencement of services. All these examples, cited by the Commission, demonstrate that the law needed to be tightened to prevent market abuses of this type.<sup>3</sup>

The system for the verification of new rolling stock, particularly locomotives, has proved a major problem for train operators. National technical standards and national safety rules mean that rolling stock has to comply with different rules for different Member States, making the introduction of crossborder services difficult and giving national rolling stock builders a competitive advantage.<sup>4</sup>

The Commission sees a connection between the stagnation or decline in railway usage and the failure to liberalise the sector. The railways have had around six per cent of the modal share in intra-EU passenger transport since 2000 and rail freight has actually declined but in areas where services have been made competitive, passenger numbers have increased by as much as 50 per cent. The Commission also highlights under-investment, the debt burdens of several national railway companies and the fact that a third of the railway workforce is due to retire in the next decade.<sup>5</sup>

<sup>2</sup> House of Lords European Union Select Committee, *24<sup>th</sup> Report of Session 2010-12: Tunnel vision? Completing the European rail market*, HL 229, p. 15, para 30

<sup>3</sup> See European Commission, *European Rail: Challenges Ahead*, MEMO/13/45, 30 January 2013

<sup>4</sup> European Commission, *Report from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions on the implementation of the provisions of Directive 2007/58/EC on the opening of the market of international rail passenger transport accompanying the Communication to the Council and the European Parliament on the fourth Railway Package*, COM(2013) 34 final, 30 January 2013, p. 8

<sup>5</sup> See European Commission, 'European railways at a junction: The Commission adopts proposals for a fourth railway package', 20 January 2013

## The Channel Tunnel

The Commission has concerns relating to the joint management by the UK and France of the tunnel and rail services through it because they are the owners as well as the regulators of the tunnel under the Treaty of Canterbury. It began infringement proceedings against the UK and France in September 2011 but seemed satisfied with the British Government's response; a reasoned opinion was issued against France in November 2012.

Less than 50 per cent of the capacity of the tunnel is currently being used with just one passenger service operator (Eurostar), which is jointly owned by national governments. For freight the situation is worse: against predicted demand of 8-10 million tonnes a year passing through the tunnel, it only ever reached three million tonnes in 2001, declined after that and then nearly collapsed in 2007 to barely a million tonnes. Freight tonnage dipped again in 2010 but rose in 2011.<sup>6</sup> Deutsche Bahn has proposed opening passenger services from London to Frankfurt via Amsterdam but the start of these services has been delayed partly by difficulties in getting the rolling stock approved for operation through the tunnel.

### Details of the proposed legislation

The Commission proposes three potentially significant changes to current EU law:

- all rolling stock would be built and certified once to run everywhere in the EU; each railway undertaking company would have one EU-wide safety certificate;
- the degree of separation between infrastructure managers and operators would be widened to prevent discrimination and increase efficiency;
- all passenger services would be opened up to competition by 2019, with the 90 per cent of services currently subsidised subject to competitive tendering

The European Railway Agency would become the single certifier for rolling stock under these plans, issuing a vehicle licence valid across the EU, and the provider of company safety authorisations in co-operation with national safety authorities.

The greater separation proposed between track and train is the most controversial element of the proposals and one that does not go far enough for some (see below). Infrastructure managers would in future not be merely separate from operators in accounting terms but properly responsible for the day to day management of the railway, including investment, timetabling and maintenance. If a Member State did not implement effective unbundling in the opinion of the Commission, then train operating companies within a national holding company would not be able to operate services in other Member States.

The opening up of all passenger services would mean a dramatic change, as in 16 of the Member States there is an incumbent operator with a market share greater than 90 per cent, and greater transparency in terms of the costs of the railway. The Commission says that tendering exercises so far have yielded savings of 20-30 per cent over the incumbent.

---

<sup>6</sup> House of Lords European Union Select Committee, *supra* n. 2, p. 28, para 73

The Channel Tunnel is not specifically mentioned in the Commission's proposals but may well, depending the final legislation, be affected by the requirement for greater separation between infrastructure management and train operations.

Issues to be resolved

The Commission has a major role to play in opening up competition for both passenger and freight service on the railways – as it had in the liberalisation of civil aviation in the EU. There has been some dismay in the railway sector, particularly from freight operators, at the Commission's apparent retreat on the unbundling issue. It had been understood that the Commission was going to propose a more rigid system of unbundling which would not have permitted national holding companies owning both track and trains. It is claimed that the Commission retreated in the face of German opposition and its proposals now allow for national holding companies but with "Chinese walls" between infrastructure management and train operations.

There will be much debate about this aspect of the proposals in the European Parliament; the Commission's caveat that national holding companies will not be able to operate train services in other Member States if they do not adopt effective unbundling is a clever move as the two companies most affected (Deutsche Bahn and SNCF) are owners or part owners of train operating companies in other Member States, including the UK.

***April 2013***



## Senior European Experts

The Senior European Experts Group is an independent body consisting of former high-ranking British diplomats and civil servants, including several former UK ambassadors to the EU, and former officials of the institutions of the EU.

The group provides high-quality, fact based briefing materials on EU issues.

 [senioreuropeanexperts.org](https://senioreuropeanexperts.org)

 [info@senioreuropeanexperts.org](mailto:info@senioreuropeanexperts.org)

 [@SEE\\_Group](https://twitter.com/SEE_Group)