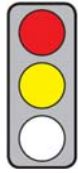


KEY ISSUES

Objective of the Directive: The Commission wants to facilitate competition for rail transport services.

Parties affected: Railway undertakings, infrastructure managers, railway users.



Pro: More competition as a result of opening up the markets for passenger transport services by rail will lead to a fall in prices and better quality rail services.

Contra: (1) The ability to prevent vertically integrated companies (VIU) from having access to railway infrastructure in other Member States is inappropriate and therefore disproportional: it explicitly runs counter to the objective of the Directive of realising the Single European Railway Area. In fact, it protects the established monopolistic structures in a number of Member States.

(2) The ability to refuse VIUs access to other railway markets, even where all the statutory requirements have been met, reduces planning certainty for VIUs and is in breach of the requirement of clarity and the principle of legal certainty arising under the Rule of Law (Art. 2 TEU).

CONTENT

Title

Proposal COM(2013) 29 for a **Directive** of the European Parliament and of the Council to amend Directive 2012/34/EU of the European Parliament and of the Council of 21 November 2012 on the **creation** of a single European railway area as regards the **opening of the market for domestic passenger transport services by rail and the governance of the railway infrastructure**

Brief Summary

► Context and objectives

- EU railway law consists of several legislative acts which have been issued in a number of “packages” and which, to a certain extent, build upon one another ([see Background](#)).
- The 4th Railway Package is intended to increase the quality and efficiency of rail services and further develop the Single European Railway Area (p. 3). It contains a total of six legislative proposals.
- By way of an amendment to the Directive on the creation of a Single European Railway Area (2012/34/EC), which came into force in December 2012, this Directive aims to increase competition between rail transport services by
 - opening the market for domestic passenger transport services by rail and
 - providing for a more strict separation between infrastructure managers and railway undertakings.

► Definitions

- Railway infrastructure refers, in particular, to tracks, structures (e.g. railway bridges and tunnels) and safety, signalling and telecommunications installations (Art. 3 No. 3 in conjunction with Annex I).
- Infrastructure managers are responsible for the development (planning, building, upgrades), operation (incl. train path allocation, determination and collection of infrastructure charges) and maintenance of railway infrastructure (amended Art. 3 (2)).
- Railway undertakings transport goods and/or passengers by rail as their principal business (Art. 3 (1)).
- Vertically integrated undertakings (VIU) own or control both railway undertakings and infrastructure managers (new Art. 3 (31)).

► Opening of the markets for domestic passenger transport services by rail

- Railway undertakings shall be granted access to railway infrastructure and stations in all Member States – not only for cross-border connections but also for purely domestic connections (amended Art. 10 (2)).
- Member States may limit the right of access when (amended Art. 11 (1))
 - one or more public service contracts on the provision of passenger transport services cover the same route (Regulation (EC) No. 1370/2007) and
 - the exercise of this right would compromise the “economic equilibrium” of the public service contract.
- The question whether the “economic equilibrium” is compromised, shall be decided by the relevant regulatory body by way of an “objective economic analysis” and predetermined criteria (amended Art. 11 (2)).

► Principle: Institutional separation of the infrastructure manager and transport services

- The infrastructure manager must (amended Art. 7 (1))
 - be organised in an entity which is legally distinct from any railway undertaking and
 - perform all its functions – development, operation, maintenance - independently.

- No-one is permitted to exercise influence over railway undertakings and infrastructure managers at the same time (amended Art. 7 (2)), particularly by way of financial interests, the exercise of control or the appointment of members to the supervisory board, administrative board or bodies legally representing the infrastructure manager.

► **Exception: “effective independence” from infrastructure managers in existing vertically integrated undertakings (VIU)**

Where, on the date of entry into force of this Directive, the infrastructure manager belongs to a VIU, Member States may decide not to apply institutional separation. In this case, however, it must ensure that the infrastructure manager “has effective organisational and decision-making independence” (new Art. 7 (5)).

The following applies in this respect :

– **Requirements of the VIU**

- The infrastructure manager must (new Art. 7a (1), new Art. 7b (1))
 - be legally distinct from all other VIU entities and
 - perform all its functions – development, operations and maintenance – independently.
- Railway undertakings and infrastructure managers cannot hold any direct or indirect shareholdings in one another (new Art. 7a (2)).
- The infrastructure manager’s incomes may only be used to finance its own business and to pay dividends to the ultimate owner of the VIU (new Art. 7a (3)).
- The infrastructure manager must pay for services provided by other VIU entities “at market prices” (new Art. 7a (3)).
- Infrastructure managers and other VIU entities may not grant loans to one another (new Art. 7a (3)).
- Members of the management board and senior staff members of the infrastructure manager may not at the same time be members of the supervisory board, management board or be senior staff in other VIU entities (new Art. 7b (2)).
- For a period of up to three years after ceasing to hold one of the said offices, it is not permitted to hold one of the said offices in another VIU entity (new Art. 7b (4)).
- Contacts between the infrastructure manager and other VIU entities must be limited to “official communications” connected with the exercise of its functions (new Art. 7b (5)).

– **Verification of VIU Compliance**

- Upon the request of a Member State, or on its own initiative, the Commission shall investigate a VIU, established in the requesting Member State or in another Member State and determine (new Art. 7c (1)),
 - whether the requirements applicable to VIUs have been met and
 - whether competition is not distorted even where the requirements have been met.
- The Commission may require “all necessary information” from the Member State where the VIU is established (new Art. 7c (2)).

– **Sanctions**

- A Member State may refuse to allow railway undertakings, which are part of a foreign VIU, to gain access to the market (new Art. 7c (3)),
- pending examination by the Commission of the VIU following a request by a Member State,
 - where no request for an examination of the VIU has been made, or
 - if the Commission decides by resolution that
 - its request for information has not received an adequate reply (new Art. 7c (3) a),
 - the requirements applicable to VIUs have not been met (new Art. 7c (3) b) or
 - the implementation of requirements is not sufficient to ensure a level playing-field for all railway undertakings and establish the absence of distortion of competition in the Member State where the infrastructure manager is established (new Art. 7c (3) c).
 - The Member State concerned may request the Commission to repeal its decision. To do so it must demonstrate that the reasons for the decision no longer exist (new Art. 7c (4)).

Main Changes to the Status Quo

- Until now, infrastructure managers only had to make decisions on train paths and infrastructure charges independently of railway undertakings. In future this will apply to all the functions of the infrastructure manager.
- Until now, railway undertakings only had access to railway infrastructure in all Member States for cross-border passenger transport services by rail. Now they also have it for purely domestic routes.
- Until now, infrastructure management and transport services only had to be in separate corporate divisions. Now they have to be institutionally separate.
- The requirements for the “effective independence” of infrastructure managers in VIUs are new.

Statement on Subsidiarity by the Commission

According to the Commission, national legislation is obstructing the creation of a Single European Railway Area which is why action at EU level is necessary [SWD(2013) 13, p. 2].

Policy Context

[see Background](#)

Legislative Procedure

30 January 2013 Adoption by the Commission
 Open Adoption by the European Parliament and the Council, publication in the Official Journal of the European Union, entry into force

Options for Influencing the Political Process

Leading Directorate General:	DG Mobility and Transport
Committees of the European Parliament:	Transport and long distance transport (leading), rapporteur Said El Khadraoui (S&D Group, BE);
Federal Ministries:	Transport (leading)
Committees of the German Bundestag:	EU Affairs (leading); Economy; Finance, Transport
Decision mode in the Council:	Qualified majority (Rejection with 91 of 345 votes; Germany: 29 votes)

Formalities

Legal competence:	Art. 91 TFEU (Transport)
Form of legislative competence:	Shared competence (Art. 4 (2) TFEU)
Legislative procedure:	Art. 294 TFEU (ordinary legislative procedure)

ASSESSMENT

Economic Impact Assessment

Ordoliberal Assessment

More competition between the railway undertakings as a result of opening up the markets for passenger transport services by rail will lead to a fall in prices and / or better quality rail services, from which both the citizens and the companies will profit.

The Commission does not state why an institutional separation of railway undertakings and infrastructure managers could contribute to the objective of allowing increased competition in the railway sector. Nor does the impact assessment [SWD(2013) 12] contain any empirical evidence for this. The Commission contents itself with a list of anecdotal examples. In addition, the diagrams used by the Commission in order to prove the connection are incomplete as some Member States (e.g. Estonia, Spain) are not mentioned [SWD(2013) 12, p. 24]. The selection of Member States included is apparently arbitrary.

The fact that a Member State may refuse to allow a foreign VIU market access where there is a possibility of market distortions in its home market, **explicitly runs counter to the higher-ranking objective of the Directive of realising the Single European Railway Area: it protects the established monopolistic structures in a number of Member States**, such as France, and reinforces the fragmentation of the internal market.

The ability to refuse a VIU access to other rail transport markets, even where all the statutory requirements specified in the Directive **have been met, reduces legal certainty and thus also planning certainty for VIUs** because it increases the Commission's scope for discretion and allows arbitrary assessments.

Impact on Efficiency and Individual Freedom of Choice

It is necessary to impose requirements on VIUs in order to prevent them from misusing their market position against competitors. Some of the proposed requirements placed on VIUs, however, exceed those applicable to institutionally independent infrastructure managers although they can also be subject to similar problems. This relates e.g. to the ban on members of the supervisory board, management board and of the senior staff of the infrastructure manager (or another VIU entity) being able to take on a senior position in another VIU entity (or in the infrastructure manager) for up to three years after leaving the post. If this requirement is necessary to prevent "cronyism" between infrastructure managers and railway undertakings, then it should also apply to institutionally independent undertakings because cronyism can be just as prevalent there. The Commission has not addressed this point.

Impact on Growth and Employment

Lower prices and higher quality for passenger transport services by rail, which arise from opening up the market, tend to have a positive effect on growth and employment.

Impact on Europe as Business Location

Negligible.

Legal Assessment

Legislative Competency

Unproblematic. The EU is empowered to issue rules in order to realise a common transport policy, particularly those relating to international transport and other “appropriate provisions” (Art. 91 (1) TFEU). This also includes the relevant provisions on the use of transport routes and measures to harmonise competitive relationships and to realise the single market.

Subsidiarity

Unproblematic.

Proportionality

The sanction whereby railway undertakings which are part of a VIU are prevented from having access to the railway infrastructure in other Member States (Art. 7c (3)) represents a reversal of the stated aim of opening up cross-border and domestic railway markets for goods and passengers EU-wide (Art. 10 (1) and (2)). Competition cannot be created by excluding competition. The sanction **is therefore inappropriate for achieving the basic objective of a „single European railway area”** in order to improve rail transport services **and is therefore disproportional** (Art. 5 (4) TEU).

The requirements for limiting the access to infrastructure are also disproportional – both in themselves and as a whole:

Thus railway undertakings can already be refused access to infrastructure before it has been determined whether or not the infrastructure manager of the VIU fulfils the requirements for its “effective independence”: the ability to restrict access already exists as long as no Member State has requested an examination of the VIU requirements and as long as the Commission has not yet begun the examination. The infrastructure manager has no direct influence on either process. This situation is exacerbated by the fact that the Directive does not provide for any time limits for making the request for an examination or for commencing the examination.

In addition, the Commission’s finding that a Member State has not responded appropriately to its request for information can already result in access being restricted (Art. 7c (3)) even though the railway undertaking concerned has no direct influence on this either.

Compatibility with EU Law

The provision that a railway undertaking can be refused access to the infrastructure in another Member States even where it fulfils the requirements laid down in the Directive, is contrary to EU law. According to the Commission, it should also permit the imposition of sanctions even if the Commission itself is not in a position to “confirm that safeguards to protect the independence of the infrastructure manager have been effectively implemented” (p. 5/6). On the one hand, this **violates both the requirement of clarity and the principle of legal certainty** arising from the Rule of Law (**Art. 2 TEU**). These impose a duty on the EU legislator to formulate provisions, which impose an obligation, clearly and precisely so that the party affected is able to identify his rights without ambiguity and make the necessary arrangements (cf. ECJ, Case 169/80, par. 17 – *Grandrand Freres*). On the other hand, the Commission cannot simply sidestep its innate duty to oversee the application of EU law (Art. 17 (1) TEU).

Compatibility with German law

The Directive requires appropriate amendments to the General Railways Act (Allgemeines Eisenbahngesetz – AEG), particularly the provision on the independence of the public operator of the railway lines (Section 9 AEG).

Conclusion

More competition between the railway undertakings as a result of opening up the markets for passenger transport services by rail will lead to a fall in prices and / or better quality rail services. The fact that a Member State may refuse to allow a foreign VIU market access where there “is a possibility of” market distortions in its home market, is in breach of the legal principle of proportionality because it explicitly runs counter to the objective of the Directive of realising the Single European Railway Area. In fact, it protects the established monopolistic structures in a number of Member States. The provision whereby a railway undertaking may be refused access to the market in another Member State, even where all the statutory requirements specified in the Directive have been met, reduces planning certainty for VIUs and is in breach of the requirement of clarity and the principle of legal certainty (Art. 2 TEU).