EU Directive

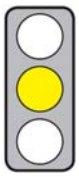
RECAST OF 1ST RAILWAY PACKAGE
1ST PART: COMPETITION REGULATION

Status: 22 November 2010

MAIN ISSUES

Objective of the Directive: By revising the regulatory framework the Commission intends to further open the railway sector to competition and to increase its market share.

Parties Affected: All users of railway services, railway undertakings, infrastructure managers and providers of services related to rail traffic.



Pros: An effective EU-wide regulation and independent regulatory bodies – also independent from other national authorities - are essential for the competition in the European railway market.

Cons: (1) The across-the-board requirement for the separation of service facilities and railway undertakings is a severe intrusion into property rights.

(2) The Commission must not regulate essential aspects of the Directive through delegated acts.

CONTENT

Title

Proposal COM(2010) 475 of 17 September 2010 for a **Directive** of the European Parliament and of the Council establishing a **single European railway area** (Recast)

Brief Summary

- **Background**
  - The first railway package of 2001 consists of three Directives which form the basis for the European railway legislation (see CEP Background Paper, in German only).
  - According to the Commission, the present summary and recast version is to remove any insufficiencies, uncertainties and gaps in the regulatory framework. It further encompasses the removal of barriers to competition and the reform of regulatory oversight (1. Part; see here), as well as questions regarding the development and operation of the railway infrastructure (2. Part; cp. CEP Policy Brief).
  - Its major aim is to provide for a non-discriminatory competition in the railway traffic market.
  - Due to inadequate implementation of the first railway package, the Commission decided in 2010 to sue 13 Member States before the European Court of Justice for, amongst other things, the inadequate independence of infrastructure operators.
- **Definitions: Railway infrastructure, service facilities and railway undertakings**
  - Railway infrastructure, in particular, consists of rail tracks (except for private branch lines), engineering structures (e.g. railway bridges and tunnels) and safety, signalling and telecommunications installations (Annex I).
  - Service facilities are in particular passenger stations, freight terminals, marshalling yards, train formation facilities, storage sidings, port facilities and relief facilities, including towing (Annex III).
  - Railway undertakings are public or private undertakings whose principal business is to transport goods and/or passengers by rail (Art. 3 (1)).
- **Organisational separation of transport services and networks in vertically affiliated companies**
  - Separation of transport services and infrastructure operation
    - As before, separate profit and loss accounts and balance sheets are to be established for transport services on the one hand and the management of railway infrastructure on the other hand, as well as distinct divisions within an undertaking or "separate entities" (Art. 6 (1) and (2)).
    - The accounts must now be kept in such a way that it is possible to monitor the prohibition on transferring public funds paid to one area of activity to another (Art. 6 (4)).
    - Decisions on the allocation of infrastructure and charges (now explicitly including the determination and collection of charges) must be taken by "bodies or firms" which do not provide any railway transport services themselves (Art. 7 (1), Annex II).
  - Separation of transport services and service facilities
    - If a service facility belongs to an undertaking that holds a dominant position in the railway transport services market, the operator must be "independent, in legal, organisational and decision-making terms" (Art. 13 (2)).
    - Where service facilities have not been in use for at least two years, the owner must now publicise it for lease or rent. A sale is implicitly prohibited. (Art. 13 (2))
    - Newly built maintenance facilities specially developed for new trains and wagons may now be reserved for the use of one railway undertaking for a period of five years (Art. 13 (2)).

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- **Non-discriminatory access to railway infrastructure and service facilities**
  - Access to railway infrastructure: All railway undertakings are entitled, on a non-discriminatory basis, to apply for allocation of infrastructure and that their application be processed, as well as now to the use of electrical supply equipment for traction current and refuelling facilities (Art. 13 (1) and Annex III No. 1).
  - Access to service facilities:
    - Operators of service facilities must provide services in a non-discriminatory manner. This also applies now to ticket sales and travel information. (Art. 13 (2), Annex III No. 2)
    - Requests for access to service facilities may now be rejected only if other service facilities allow for operating the transport service concerned on the same route "under economically acceptable conditions". The burden of proving the existence of such a "viable" alternative lies with the operator of the service facility. (Art. 13 (2))
    - In the case of conflicting requests, the operator must now attempt the "best possible matching of all requirements". If, despite such an attempt, it is not possible to accommodate all requests, the regulatory body takes now on its own initiative or on the basis of a complaint action to ensure that an "appropriate part" of the capacity is allocated to railway undertakings other than the ones which are part of the undertaking to which the operator of the service facility belongs. (Art. 13 (2))
- **Regulatory body: organisation, tasks and rights**
  - Each Member State must establish a regulatory body for the railway sector which is, in organisational, functional, hierarchical and decision-making terms independent not only from any other infrastructure operators but, in future, also from any other public authority – notably from those which manage share rights (Art. 55 (1)).
  - The regulatory body must now explicitly have the "necessary organisational capacity" to carry out its tasks (Art. 56 (2)).
  - Three years before, during and after the term of office of a president and the members of the governing board of a regulatory body, no interest or business relationship may exist between these persons and the regulated undertakings (Art. 55 (3)).
  - Tasks and rights of the regulatory body:
    - From now on, the regulatory body decides, if necessary on its own, on suitable measures for correcting "undesirable developments" in the rail services markets (Art. 56 (5)).
    - From now on, in order to prevent discrimination, the regulatory body has the power to monitor the competition in the rail services markets and to check the network statement of infrastructure providers, the access allocation procedure of capacity for routes and services facilities as well as the charging rules. Moreover, it also checks whether the network statement creates "discretionary powers" that might be used to discriminate applicants (Art. 5 (2)).
    - From now on, the regulatory body has the power to enforce its decisions with the "appropriate sanctions" (e.g. fines) and can demand that the "relevant" information be supplied "without undue delay" from infrastructure managers, applicants and other parties concerned (Art. 56 (4) and (5)).
    - From now on, the regulatory body is entitled to check through "external audits" to see whether or not the separate profit and loss accounts of infrastructure operators and railway undertakings are being fully complied with (Art. 56 (8)). To this end, the parties affected must submit detailed regulatory accounts (cp. Annex X).
- **Appeal procedures before the regulatory body**
  - From now on, applicants for route capacities have the right to appeal to the regulatory body where they believe the infrastructure manager or the operator of a service facility is discriminating against them or infringes their rights in any other way (Art. 56 (1)).
  - Decisions made by the regulatory body continue to have a legally binding effect. In future, they will be no longer subjected to the control of any other administrative instance. A court should be able to review them (Art. 56 (5)).
- **The setting out of the rules through the EU Commission in the form of delegated acts**
  From now on, the Commission is entitled, amongst other things, to complement or amend on its own initiative the rules (delegated acts, Art. 290 TFEU) on the classifications of infrastructure managers and railway undertakings (Annex II) as well as the catalogue of the service facilities covered by the Directive (Annex III). The European Parliament and the Council may revoke delegated acts within a period of two months. (Art. 60 to 62)

Statement on Subsidiarity by Commission

The problems of the railway sector affect cross-border aspects which require EU action.

Policy Context

See CEP Background Paper, in German only.

Legislative Procedure

17 September 2010	Adoption by 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 Tourism (in charge), rapporteur: Debora Serracchiani (S&D Group, I)
Committees of the German Bundestag:	Transport, Building and Urban Affairs
Decision mode in the Council:	Qualified majority (approval by a majority of Member States and at least 255 out 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

Without doubt, railway infrastructure managers do have a monopoly that must be monitored through regulation. This does not apply to service facilities in general, but only if they constitute an "essential facility" regarding the access to transport markets for passengers and goods. In most Member States there is an additional need for regulation due to the circumstance that the management and operation of infrastructure, service facilities and transport services are all incorporated in one undertaking ("vertically affiliated undertakings"). These undertakings can abuse their monopoly regime in infrastructure (and possibly also in service facilities) to gain unfair competitive advantages in the transport of passengers and/or goods.

The readiness to regulate railway companies and to open national railway markets to competitors from other Member States differs significantly from one Member State to the next. **An effective regulation at EU level is** therefore **absolutely necessary**.

The Commission's **disclaimer of an ownership unbundling of infrastructure managers and transport services** as requested by some market participants and market observers, **and the restriction to a merely organisational strict separation**, takes account of basic property rights. This **is an appropriate minor intrusion into basic rights if it ensures the non-discriminatory competition on transport markets,** which is to be reviewed in an unbiased manner.

However, the across-the-board requirement to also separate service facilities and railway undertakings organisationally, provided they have a market dominating position**, is an excessive intrusion into property rights:** not each service facility owned by a market dominating railway undertaking is an "essential facility".

Furthermore, the general obligation to publicise unused service facilities after two years for rent or lease goes too far: the non-use may be rooted in an absence of usage needs. Therefore, the envisaged sale, also to real estate developers, should not be generally prohibited. However, in order to prevent that service facilities are not being used or sold due to a competitive strategy, the regulatory body should be granted an approval reservation right for sales. An approval should be rejected subject to the condition that there is a proved need for further and economically profitable use.

The establishment of a competitive railway transport market stands or falls on the proposed set-up of independent regulatory bodies.

Currently, the regulatory bodies of several Member States are bound by instructions from other authorities. This is problematic, in particular where a Member State as a shareholder of the undertaking subject to regulation has no interest at all in a functional competition.

The proposed **legal separation of the regulatory body from other authorities is absolutely necessary for their independence,** as is the provision that their decisions are no longer subject to the control of other administrative instances.

The powers provided to the regulatory body are to be evaluated as follows: the right to "external control" in vertically affiliated undertakings, in order to check the prescribed separated profit and loss accounts, reduces in particular the threat of anti-competitive conduct. Moreover, it is appropriate that the regulatory body has the power to become active on its own initiative where anti-competitive developments occur. For railway undertakings sometimes forego lodging a complaint before the regulatory body for fear of being put at a disadvantage, for example in the procedure of train path allocation.

The power provided to the regulatory body to check whether the network statement contains "discretionary powers" that might facilitate discrimination is somewhat ambiguous: on the one hand, it leads to a massive interference with the entrepreneurial freedom of infrastructure operators, as it means the network statements can only be set out in close and exhaustive coordination with the regulatory body. On the other hand, it increases legal certainty for the remaining market players as the potential for discrimination is reduced.

The across-the-board right of the regulatory body to ensure that when requests for access to service facilities collide an "appropriate part" of capacities is allocated to railway undertakings other than those which are part

of the undertaking to which the operator of the service facility belongs, constitutes an inappropriate intrusion into property rights. Hence such power should be limited to "essential facilities".
At the same time, it should be ensured that their own rolling stock may be treated with priority where this is necessary for the operation. The German legislator takes explicit account of such operational requirements in regulating the access to service facilities (§ 10 (6) p. 2 Regulation of Railway Infrastructure Usage, *Eisenbahninfrastruktur-Benutzungsverordnung, EIBV*). The Commission Proposal has so far failed to do this; clarification is needed here.

Impact on Efficiency and Individual Freedom of Choice

On the one hand, according to the Commission's calculation [SEC(2010) 1042, p. 159], the average operational transport costs of goods could drop per train kilometre by 6% from EUR 13.40 down to EUR 12.50. On the other hand, a stricter regulation increases administrative costs significantly – notably for infrastructure managers, for operators of service facilities and for Member States. For instance, on top of the one-off switching costs to the amount of EUR 30 million, annual additional costs of EUR 28 million are expected [SEC(2010) 1042, p. 34].

Impact on Growth and Employment

Lower transport costs facilitate the division of labour and thus stimulate overall economic growth. The Commission estimates that throughout the EU 1,000 jobs will be created in the railway sector and, at the same time, jobs will be lost in the field of road freight transport [SEC(2010) 1042, p. 36]. The overall effect is uncertain, but in any case negligibly low.

Impact on Europe as a Business Location

Low transport costs as a consequence of competition in railway transport increase the quality of Europe as a business location.

Legal Assessment

Legislative Competence

The proposed new measures can be based on Art. 91 (1) TFEU empowering the EU to adopt measures related to international transport and other "appropriate rules".

Subsidiarity

Unproblematic.

Proportionality

It infringes the principle of proportionality if an operator of a service facility when refusing to provide a service is obliged to prove that a "viable" alternative exists under "economically acceptable conditions". The evaluation – including all consequential issues of judicial review – of what "economically acceptable conditions" and "viable alternatives" are must not be imposed on the operator.

Compatibility with EU Law

Although the Commission is empowered to adopt legal acts to complement or amend "non-essential provisions" in directives ("delegated acts"), "essential aspects" are explicitly excluded from this rule (Art. 290 (1) TFEU). The organised separation of railway undertakings and infrastructure operators, as well as the regulation of access to service facilities, are key targets of the 1st railway package. Therefore, **it infringes EU Treaties (**primary law) **that the Commission is planning to regulate** executively **through a delegated act the rules on the classification of infrastructure operators and railway undertakings**, which are necessary for the separation, **and the catalogue of the service facilities covered by the Directive.** Both should be regulated legislatively.

Compatibility with German Law

According to German law, transport service providers are already entitled to non-discriminatory access to traction current (§ 3 (1) p. 2 and Annex 1 No. 1b EIBV) and to the publication of their timetables on railway stations (§ 3 (3) EIBV). Newly introduced are ticket sales. The German regulatory authority is already monitoring access to service facilities (§ 14b (1) No. 3 A*llgemeines Eisenbahngesetz, AEG*).

Possible Future EU Action

Should the ECJ, unlike the Commission, during the contract infringement proceedings conclude that infrastructure operators are sufficiently independent, the Commission would have to submit a legislative proposal for the ownership unbundling of infrastructure managers and transport services.

Conclusion

An effective regulation of the railway sector through the EU is absolutely necessary. The proposed restriction to an organisational separation rather than an ownership unbundling of infrastructure managers and transport services is appropriate (only) if it ensures non-discriminatory competition. The across-the-board requirement that service facilities and market-dominating transport services be separated organisationally interferes excessively with property rights. The establishment of independent regulatory bodies – also independent from other national authorities – is absolutely necessary. The Commission must not regulate essential aspects of the Directive through delegated acts.