

**THE EU'S FOURTH RAILWAY PACKAGE:
A NEW STOP IN A LONG REGULATORY JOURNEY**

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**THE EU'S FOURTH RAILWAY PACKAGE:
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Franklin DEHOUSSE & Benedetta MARSICOLA



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Egmont – The Royal Institute for International Relations
Address Naamsestraat / Rue de Namur 69, 1000 Brussels, Belgium
Phone 00-32-(0)2.223.41.14
Fax 00-32-(0)2.223.41.16
E-mail info@egmontinstitute.be
Website www.egmontinstitute.be

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Eekhout 2
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Tel. 09/233 80 88 Fax 09/233 14 09
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EXECUTIVE SUMMARY

Since the beginning of the twentieth century, railway transport across Europe has been fragmented in a number of national, vertically integrated and self-regulated systems, each of which has its own structure and infrastructure. The railway sector presents very diverse policy and regulatory aspects in each country; the diversification between the various systems has been huge. For example, in the Iberian peninsula, the size of the gauge track (the space between the rails) was different from the European standard, and there have been five different electrification systems across the continent. At the international level, there was a strong tradition of inter-company cooperation and associations.¹

The railway sector also presents peculiarities from political and social points of view. Firstly, this market is quite a complex one. Competition remains highly imperfect. Networks must remain limited in number. Access is by definition restricted. Sunk costs are enormous. Railways bring a reduction of collective nuisances which is not taken into consideration by the pricing policy of the operators. The transport of passengers is essentially local, and freight transport is essentially international. Secondly, Member States remain highly cautious in this domain, since railways play an essential role in local transports of passengers, and since the national companies represent a huge volume of capital and personnel.

Railway policy has thus long been one of the slowest areas of European integration. The first substantial railway directive was only issued in 1991, and the First Railway Package in 2001. There have already been three legislative packages in this domain. Though many Regulations and Directives have been adopted, the evolution of the railway transport system remains slow. According to the Commission's latest assessments, the rail modal share for passenger transport remained fairly constant in the EU between 1995 and 2010. For freight transport, it has substantially diminished between 2000 and 2009.² The opening of the markets remains fraught with various difficulties, so in 2013 the European Commission proposed a fourth legislative package, which has already provoked a lot of resistance.

To examine these questions, we first present a quick overview of the evolution of the regulatory framework from the first railways Directive of 1991 to the three subsequent legislative packages of 2001, 2004 and 2007 (§ 1). Secondly, the innovations of the proposals for the fourth package will be introduced (§ 2). Then, the evolution of the European Railway Agency's powers (§ 3), and the legal framework concerning national subsidies will be analysed (§ 4). A list of all the measures adopted since the 1990s is provided in appendix (p. 57).

¹ For a historical overview, see H. Stevens, *Transport Policy in the European Union*, Palgrave 2008; and CER, *European Railway Legislation Handbook*, Eurail Press, second ed., 2008.

² From 20% to 17% (Eurostat, Energy, transport and environment indicators, 2011, p. 89).

INTRODUCTION

Railway policy has for a long time been among the slowest areas of European integration. The first substantial railway directive was issued only in 1991, and the First Railway Package in 2001. This very cautious approach is explained by two main factors. Firstly, the railway sector market is quite a complex one. It presents highly imperfect opportunities for competition. Networks must remain limited in number. Access is by definition restricted. Sunk costs are enormous. Railways bring a reduction of collective environmental nuisances which is not taken into consideration by the pricing policy of operators. The transport of passengers is essentially local, and freight transport is essentially international. Secondly, Member States remain highly cautious in this domain, since railways play an essential role in local transports of passengers, and since the national companies represent a huge volume of capital and personnel.

Since 2001, however, the European legislator has enacted a series of 'Railway Packages'. At the beginning of 2013, the Commission proposed a fourth railway package. EU railway policy has concentrated on three major areas which are crucial for developing a strong and competitive rail transport industry: (1) opening the rail transport market to competition, (2) improving the interoperability and safety of national networks, and (3) developing rail transport infrastructure. This is a specific adaptation of the sector to the traditional more competition/more harmonization approach (in addition to the added financial support for the European networks provided since the entry into force of the Maastricht Treaty).

Though many Regulations and Directives have been adopted, the evolution of the railway transport system remains slow. According to the Commission's latest assessments, the rail modal share for passenger transport remained fairly constant in the EU between 1995 and 2010.³ The freight transport share has substantially diminished between 2000 and 2009.⁴ The opening of the markets remains fraught with various difficulties. This situation appears surprising, especially when one takes into consideration the growing importance given by the EU to the reduction of greenhouse gases in the fight against climate warming, and to the fight against air pollution in general. An observer could thus wonder about the real impact of the EU measures. The same could broadly be said about the railway industry. It remains quite fragmented in Europe, and this situation is becoming increasingly dangerous. From this point of view, the stakes for the Fourth Railway Package are extremely high.

To examine these questions, first, we give a quick overview of the evolution of the regulatory framework, from the first railways Directive of 1991 to the three subse-

³ It has even slightly diminished from 6.6% to 6.3% (SWD(2013) 10, p. 3).

⁴ From 20% to 17% (Eurostat, Energy, transport and environment indicators, 2011, p. 89).

quent legislative packages of 2001, 2004 and 2007 (§ 1). Secondly, the innovations of the proposals for the fourth package will be introduced (§ 2). Then, the evolution of the European Railway Agency's (ERA) powers (§ 3), and the legal framework concerning national subsidies will be analysed (§ 4). A list of all the measures adopted since the 1990s is provided in appendix.

Franklin DEHOUSSE & Benedetta MARSICOLA⁵

⁵ F. Dehousse is professor (in abeyance) at the University of Liège and judge at the Court of Justice of the European Union (General Court). B. Marsicola is assistant at the same General Court. This comment is strictly personal. The text was updated until 30 November 2014.

1. THE REGULATORY FRAMEWORK

1.1. A very slow beginning

Since the beginning of the twentieth century, railway transport across Europe has been fragmented into a number of national, vertically integrated and self-regulated systems, each of which had its own structure and infrastructure. The railway sector presented very diverse policy and regulatory aspects in each country; the diversification between the various systems was huge. For example, in the Iberian peninsula, the size of the gauge track (the space between the rails) was different from the European standard, and there have been five separate electrification systems across the continent. At the international level, there was a strong tradition of company cooperation and associations.⁶

However, there was very little pressure, both on the governmental and entrepreneurial sides, to change the status quo, given that the existing systems guaranteed the benefits of monopolistic economy in most countries. In addition, given that, among other things, international train services only constituted (and still constitute) a small portion of the total, there was little inclination to invest in them. Despite the fact that the founding treaty aimed to develop a common transport policy, very little legislation was adopted in the first decades of the existence of the Community. Railway transport was exempt from the application of the competition rules from early on, and state aid was considered compatible with the treaty in so far as it compensated operators for the discharge of a public service.

At the end of the 1960s the situation started to change. Regulation 1017/68⁷ eliminated the exemption of the transport sector from the application of competition rules, while exempting certain agreements, decisions and concerted practices from the application of Article 101(1) of the TFEU. In 1969, the Council issued Regulation 1191/69⁸ on action by Member States concerning the obligations inherent in the concept of a public service in transport by rail, road and inland waterway. The Regulation required Member States to terminate all obligations inherent in the concept of a public service in so far as they did not comply with the definition of being essential in order to ensure the provision of adequate transport services. On the other hand, the economic disadvantages of undertaking public services had to be compensated. Regulation 1192/69⁹ on common rules for the normalisation of the accounts of railway undertakings, aimed to level the disparities between railway and other modes of transport caused by the state aid received by the national railway

⁶ For an historical overview, see H. Stevens, *Transport Policy in the European Union*, Palgrave 2008; and CER, *European Railway Legislation Handbook*, Eurail press, 2d ed., 2008.

⁷ OJ L 175, 23/07/1968 p. 1-12.

⁸ OJ L 156, 28/06/1969 p. 1-7.

⁹ OJ L 156, 28/06/1969 p. 8-20.

undertakings. The following year, Regulation 1107/70¹⁰ on the granting of state aid for transport by rail, road and inland waterway defined those cases and circumstances under which state aid would be compatible with the Treaty. Interestingly enough, one of these requirements was subject to the termination condition that common rules on the allocation of infrastructure costs entered into force. However, despite the adoption of new legislation, governments found ways to keep on subsidising their railways as much as they did before. The results the Commission had anticipated were thus not achieved.¹¹

1.2. Developments in the 1990s

The need for a change arose in the 1980s and early 1990s, when the rail sector underwent a deep economic crisis when outperformed by truck and car transport. The famous Commission white paper of 1985 on completing the internal market¹² set the first guidelines on the common European transport policy. Its programme aimed to eliminate the obstacles to free access to land transport and to foster harmonization of competition conditions. However, the fact that the Commission described its approach to the Common Transport Policy as being not of direct relevance to the internal market has to be stressed.¹³

Eventually, the Commission resolved to launch a set of proposals which could at least initiate an internal market in rail services, and issued a first Communication on a Community railway policy in 1989.¹⁴ One of the proposals culminated in Council Directive 91/440/EEC¹⁵ of 29 July 1991 on the development of the Community's railways. The Directive aimed to boost the efficiency of the railway system in order to integrate it into a competitive market, affording railway enterprises the status of independent operators in that market. It also promoted differentiation in management, administration and internal control between the provision of transport services and the operation of infrastructures. Member States retained general responsibility for the infrastructures, had to manage the related payments on a non-discriminatory basis and also ensure solid financial structures for publicly owned undertakings. In addition, undertakings were encouraged to create international groups of operators which would be mutually granted access to the infrastructures of the other Member States on an equitable basis for the operation of international transport.

All in all, Directive 91/440's major innovation was the formal separation of management from accounts of infrastructures and services. It enabled operators to run

¹⁰ OJ L 130, 15/06/1970 p. 1-3.

¹¹ H. Stevens, *Transport Policy in the European Union*, cit. p. 95.

¹² COM(1985) 310.

¹³ *Ibidem*, paragraph 112.

¹⁴ COM(1989) 564, JO C 34/08.

¹⁵ OJ L 237, 24.8.1991, p. 25-28.

businesses on an essentially commercial basis, being charged for the use of infrastructure and compensated for operating uneconomic services in the public interest. This also made it possible for the huge debts of the national companies to be imputed to the infrastructure entities, allowing the services branches to operate commercially. In addition, with the use of infrastructure subject to fees and licences, it was now theoretically possible for rail to compete on an equal footing with road.¹⁶

Even though the impact of the new provisions was modest, Member States had finally acknowledged the possibility of applying market rules in the railway sector and of mutually accessing each other's infrastructure in a non-discriminatory way.¹⁷ This was a great innovation compared to the previous policy of cooperation among monopoly providers.

A white paper¹⁸ was issued by the Commission in 1992 on the future development of the Common Transport Policy, which expanded its scope beyond the Single Market, adopting a global approach. Punctual initiatives concerning rail transport were adopted in the years that followed. Namely, Directives 95/18/EC¹⁹ and 95/19/EC²⁰ on licensing of railway undertakings and on the allocation of railway capacity and the charging of infrastructure fees were adopted in 1995. The former measure did not bring about much innovation; it required Member States to establish licensing bodies setting some general standards, but then only allowed undertakings incorporated in the relevant state to apply for the licences. The latter Directive required Member States to establish allocation bodies that should operate in a non-discriminatory way (except for some allowed prioritizations, for example, for public services) and that charges should also be imposed without discrimination.

In the mid-1990s it was thus the case that, other than the well-established arrangements for international cooperation, very few cross-border services were authorized. However, in 1996, following a persistent crisis in the railway sector, the need for more specific action emerged and a new white paper on a strategy for revitalising the Community's railways²¹ was issued. It focused on the opening up of the international freight market. The arrangements of the freight sector were so bad that in 2001 the average speed of cross-border freight services still only amounted to 18 km/h (or 40 km/h).²² The new initiatives were thus mainly addressed at the rail freight market.

¹⁶ See H. Stevens, *Transport Policy in the European Union*, cit.

¹⁷ See F. Dehousse, C. Thiry and P. Van den Brûle, 'Vers le marché unique des transports ferroviaires: les avantages et les dangers de la stratégie européenne', *Studia Diplomatica*, vol. LVII, 2004, No 2.

¹⁸ Document drawn up on the basis of COM(92) 494 final.

¹⁹ OJ L 28, 7.2.1995, p. 8-9.

²⁰ OJ L 143, 27.6.1995, p. 75-78.

²¹ COM(1996) 421.

²² H. Stevens, *Transport Policy in the European Union*, op. cit., p. 99. The 18 km/h has been contested by the operators, who consider this is too negative and far from the average.

The same year, Directive 96/48/EC²³ on the interoperability of the European high-speed network was adopted. It entered into force in 2002 with a view to enabling operators to use the systems in other Member States. The strategy was to introduce more competition and harmonization in a new, developing segment of the market. The high speed segment encountered less reluctance concerning standardization, as infrastructure had to be created from scratch rather than adapted, making the embrace of a common approach less complicated. Interoperability, in ensuring harmonized standards for infrastructure, equipment and rolling stock, would constitute a major contribution to the transport policy in the Single Market. The Directive was subsequently amended in 2001 and 2004.

Efforts to improve interoperability, in particular thanks to the creation of harmonized specifications and standards, have also facilitated the creation of the Trans-European Transport Network (TEN-T).²⁴ The Trans-European Transport Network Executive Agency (TEN-T EA), established in 2006,²⁵ has the task of realizing the technical and financial implementation of the TEN-T programme.

In the 2001 White Paper for European transport policy for 2010: the emphasis was placed on the need to ensure competition within and among the means of transport and to enhance intermodality. A number of structural problems were identified and the priority of opening the markets was established, not only for international goods transport, but also for cabotage and progressively for international passenger transport as well, together with harmonization for interoperability and safety. The main target for the Commission, to be achieved with a series of actions in the run up to 2010, was to create a real single market for rail transport, placing users' needs at the heart of the strategy. In order to achieve these objectives, three 'railway packages' were adopted in 2001, 2004 and 2007 respectively. The fourth package, proposed in 2013 and currently debated by the EU legislative authorities, aims to complete them.

1.3. The Railway Packages adopted

In a nutshell, the First Railway Package (2001) established the basis for the current regulatory system. It required the creation of regulatory bodies, imposed accounts separation, and opened the international freight market to competition. The second package (2004) consolidated these bases. It created the European Railway Agency (ERA) and additionally opened the national freight markets. The third package (2007) began to deal with passenger transport and opened the international passenger

²³ OJ L 235, 17.9.1996, p. 6-24.

²⁴ Trans-European Networks, in the areas of transport, telecommunication and energy, were provided by the Treaty of Maastricht as a means of fostering the establishment of an area without internal frontiers. Action by the Community should aim to promote the interconnection and interoperability of national networks as well as access to such networks.

²⁵ Commission Decision 2007/60/EC of 26 October 2006 establishing the Trans-European Transport Network Executive Agency pursuant to Council Regulation (EC) No 58/2003, OJ L 32, 6.2.2007, p. 88-90.

market. It also harmonized some aspects of passengers' rights and the certification of train drivers. Finally, the recast (2012) reinforced the first package through more separation of accounts and more independence of network management.

1.3.1. The First Railway Package (2001)

The First Railway Package (informally known as the 'infrastructure package') was proposed by the Commission in 1998 and adopted in 2001. It has been recast by Directive 2012/34/EU.²⁶ It aimed to enable rail operators to access the trans-European network on a non-discriminatory basis, to open the international rail freight market to competition and to ensure an efficient use of the infrastructures. The Commission had the general objective of increasing competition in the rail sector, which, despite a slight growth in absolute terms, was still losing market share.²⁷ The package was composed of three Directives.

The first was Directive 2001/12/EC²⁸ on the development of the Community's railways. It sought to introduce a wider framework for competition among railway companies in the international freight market. This competition was limited at the beginning to the Trans-European Rail Freight Network, and at a later stage (2008, anticipated for 2007) extended to the entire network. The Directive set the requirements concerning the relationship between the state and the infrastructure manager on the one hand, and between the infrastructure manager and railway undertakings on the other hand. In particular, it singled out some essential functions, such as granting licences and deciding on allocation and charges, which could not be carried out by any entity or firm providing rail transport services. However, it still allowed vertically integrated companies to continue to operate. It required separate accounting for freight and passenger services.

The second, Directive 2001/13/EC,²⁹ amending Directive 95/18, set out the conditions for freight operators to be granted a licence to operate services on the European rail network, extending the validity of licences throughout the Community. It specified that licencing bodies had to be independent from rail transport undertakings, hence they should not be service providers. The aim of the Commission, by the introduction of this Directive, was to progressively create a 'one-stop shop' to market freeways.

Finally, Directive 2001/14/EC³⁰ replaced Directive 95/12 on the allocation and charging for infrastructure and safety certification. It was intended to increase transparency and ensure that charges were levied and allocation of train path was carried

²⁶ OJ L 343, 14.12.2012, p. 32-77.

²⁷ See CER, *European Railway Legislation Handbook*, cit. p. 30.

²⁸ OJ L 75, 15.3.2001, p. 1-25.

²⁹ OJ L 75, 15.3.2001, p. 29-46.

³⁰ OJ L 75, 15.3.2001, p. 26-28.

out in an economic and non-discriminatory way. Infrastructure managers were required to develop and publish network statements publicising all the information needed by those who were willing to run services. In addition, Member States were required to establish independent regulatory bodies in charge of overseeing the application of rules about charges, allocation, and safety certification. These bodies were meant to decide on appeals based on unfair treatment, discrimination or other grievances. Member States were to ensure that, in normal conditions, the accounts of infrastructure management at least balanced income with infrastructure expenditure, while the manager would have incentives to reduce the costs of infrastructure provision and the level of the charges. Charges were set to offset external costs, such as pollution, between modes.

A few weeks later, Directive 2001/16/EC³¹ on the interoperability of the trans-European conventional rail system was adopted, taking further steps towards the progressive harmonization of technical and operational standards across the EU. It completed the framework introduced by Directive 96/48 covering the high speed network. For the first time it explicitly took into consideration the environmental implications of the scarce use of railways (according to the Kyoto Protocol requirements),³² and aimed to improve compatibility between the characteristics of the infrastructure and those of the rolling stock, as well as efficient interconnection of the information and communication systems of the different infrastructures. As is stated in one of the recitals, performance levels, safety, quality of service and cost depend upon such compatibility and interconnection, as does, in particular, the interoperability of the trans-European conventional rail system. In particular, the Directive, albeit with several exceptions, allows that each of the subsystems should be covered by a Technical Specification for Interoperability (TSI),³³ and that Member States should ensure that interoperability constituents are placed on the market only if they enable interoperability to be achieved within the trans-European conventional rail system, while at the same time meeting the essential requirements. Those interoperability constituents which bear the 'EC' declaration of conformity or suitability for use should be considered as complying.

Compliance with the first package's measures presented serious shortcomings in most of the Member States. In 2008 – the transposition period having expired in 2003 – 24 infringement proceedings were initiated by the Commission, 13 of which resulted in cases before the European Court of Justice.³⁴ The main problems

³¹ OJ L 110, 20.4.2001, p. 1-273.

³² Kyoto Protocol to the United Nations Framework Convention on Climate Change, United Nations 1998, information available on the UNFCCC website http://unfccc.int/kyoto_protocol/items/2830.php.

³³ See Art. 2(g) of Directive 2001/16/EC: "technical specifications for interoperability", hereinafter referred to as TSIs, means the specifications by which each subsystem or part subsystem is covered in order to meet the essential requirements and ensure the interoperability of the trans-European conventional rail system.'

³⁴ In particular, Hungary, Spain, Czech Republic, Slovenia and Italy have recently been found in violation of its provisions: Cases C-473/10; C-483/10; C-545/10, C-627/10 and C-369/11 respectively.

detected were: the lack of independence between the infrastructure managers and the railway undertakings, the inadequate regulation of national authorities and of the fixation of charges.³⁵

Although in the last part of the 1990s the railway sector underwent significant growth, it did not improve its market share, which was especially low for the passenger market. The Commission, therefore, with a view to revitalizing the railways sector and preventing it from losing further market share, launched a second railway package.³⁶

1.3.2. The Second Railway Package

Standardization lay at the core of the Second Railway Package in 2004. Composed of three Directives and one Regulation, it accelerated the liberalization of rail freight services by fully opening the rail freight market to competition from 1 January 2007. The ERA was established in Valenciennes (France) with the aim of developing safety and interoperability in the European rail system and supporting the implementation of community legislation. In addition, the package introduced common procedures for accident investigation and provided for safety authorities to be created in each Member State. A further proposal on international passenger services was ultimately not agreed upon.

Additionally, the package included a Commission recommendation for the accession of the EU to the Convention concerning International Carriage by Rail (COTIF),³⁷ which only entered into force in July 2011.³⁸ COTIF is an inter-governmental agreement between 41 countries which provides a system of international law for the carriage of goods, passengers and luggage by rail on international journeys. In particular, COTIF aims to reduce transaction costs and ensure certainty as to the rights and obligations of the different parties who may be involved in international passenger or freight transport.

The first Directive 2004/49/EC³⁹ of 29 April 2004 (the 'Railway Safety Directive'), amending Directive 95/18/EC and Directive 2001/14/EC, aimed to define common safety objectives for the entire EU railway system. It requires Member States to ensure that safety rules are laid down, applied and enforced in an open and non-discriminatory manner, with the possibility for the Commission to suspend the

³⁵ See J. M. Miguèl Medina, 'Revisión del marco jurídico comunitario del ferrocarril. La Directiva refundición'. *Revista de Derecho de la Unión Europea*, No 25, 2013.

³⁶ CER, *European Railway Legislation Handbook*, cit. p. 37.

³⁷ Recommendation for a Council Decision authorising the Commission to negotiate the conditions for Community accession to the Convention concerning International Carriage by Rail (COTIF) of 9 May 1980, as amended by the Vilnius Protocol of 3 June 1999 (COM(2002) 24 final – not published in the OJ).

³⁸ See European Commission Press Release –Transport: EU to join international rail organization, available at: http://europa.eu/rapid/press-release_IP-11-784_en.htm.

³⁹ OJ L 164, 30.4.2004, p. 44-113.

implementation of national safety rules in case of serious doubts as to their compatibility with Community legislation. It creates a clear procedure for issuing safety certificates that rail companies have to acquire in order to be able to operate on the European network. In addition, it introduces the principle of independent accident investigation, which has to be conducted in each Member State by a permanent body, and sets some requirements for staff training and access to training facilities.

The second Directive, 2004/50/EC⁴⁰ of 29 April 2004, unifies the rules on interoperability of high speed railways and of the standards system, amending Directives 96/48 and 2001/16. The scope of the provisions is extended to include the entire European conventional railway network, both conventional and high speed. It also establishes the conditions, in the form of TSIs drafted under the responsibility of the ERA, to achieve the interoperability of the trans-European railway network within the Community, with the possibility of making exceptions. Each constituent is required to have a certificate of conformity to all the relevant TSI and an identification code for safety reasons. All the identification codes should be logged in a register available for consultation by other Member States.

The third Directive 2004/51/EC⁴¹ of 29 April 2004, amending Directive 1991/440, provided full liberalization of freight from 1 January 2007. It has been repealed by Directive 2012/34/EU.

Finally, Regulation 881/2004/EC⁴² of 29 April 2004 established the ERA to develop railway safety and interoperability. The agency mainly drafts TSIs and addresses recommendations and opinions to the Commission. Until now, it has only been entrusted with limited powers (see § 3 for further detail).

Since 2001, the results of the liberalization and harmonization have started to show some encouraging signals. For example, the modal share of rail freight slightly increased and the undertakings showed a growth in productivity. By 2008, one year after the full opening of the freight market, an increase in competition could also be observed, especially in those countries where the market opening process had started on an earlier date.⁴³

1.3.3. The Third Railway Package

It took quite some time and effort before the proposals set forth by the Commission in 2004 in the framework of the Third Railway Package were adopted. Agreement was finally reached in October 2007. The package introduced open access rights for international rail passenger services by 2010. This liberalization was extended to

⁴⁰ OJ L 164, 30.4.2004, p. 114-163.

⁴¹ OJ L 164, 30.4.2004, p. 164-17.2

⁴² OJ L 164, 30.4.2004, p. 1-43.

⁴³ CER, European Railway Legislation Handbook, cit. p. 43-44.

include 'cabotage', meaning that operators may pick up and set down passengers at any station, including those located in the same Member State. Furthermore, it introduced a 'European driving licence' for train drivers, allowing them to circulate on the entire European network. Finally, the new package aimed to strengthen passengers' rights. In particular, minimum quality standards (non-discrimination against handicapped travellers or persons with reduced mobility, liability in case of accidents, availability of train tickets, and personal security of passengers in stations) were guaranteed to all passengers on all lines, and long-distance travellers were assured a wider range of rights. A further proposal on compensation in cases of non-compliance with contractual quality requirements for rail freight services was not ultimately adopted, mainly due to pressure from stakeholders. Four measures were adopted.

The first of them is Regulation 1370/2007/EC⁴⁴ of 23 October 2007, concerning public passenger transport services by rail and by road, repealing Regulations 1191/69 and 1107/70. It sets down the conditions under which the competent authorities were required to conclude public service contracts with the operators to whom they granted an exclusive right and/or compensation in exchange for discharging public service obligations (PSOs).⁴⁵ The duration of public service contracts was given upper thresholds by the Regulation. It also established rules for the awarding of the PSOs by means of transparent and non-discriminatory competitive procedures which might be subject to negotiation. Low level or budget contracts were, however, exempt from these rules. Member States should provide the Commission with all the information necessary to determine whether the compensation allocated is compatible with this Regulation. Member States were meant to implement the Regulation gradually, as the end of the transition period was fixed at December 2019.

Regulation 1371/2007/EC⁴⁶ of 23 October 2007 on rail passenger rights and obligations was the second measure, setting out minimum quality standards that should be guaranteed to all passengers on all lines. The Regulation was mainly built on the existing international law system of COTIF. It established rules concerning information, both before and during the journey, to be provided by railway undertakings, the issuing of tickets and the adaptation of computerized systems. Undertakings must be insured for their liability towards passengers in the event of an accident. On the other side, the regulation strengthens the safeguards for passengers to get compensation and assistance in the event of delay, misconnection or cancellation of a

⁴⁴ OJ L 315, 03.12.2007, p.1-13.

⁴⁵ For a definition, see Art. 2(i): "public service contract" means one or more legally binding acts confirming the agreement between a competent authority and a public service operator to entrust to that public service operator the management and operation of public passenger transport services subject to public service obligations; depending on the law of the Member State, the contract may also consist of a decision adopted by the competent authority:
– taking the form of an individual legislative or regulatory act, or
– containing conditions under which the competent authority itself provides the services or entrusts the provision of such services to an internal operator.'

⁴⁶ OJ L 315, 03.12.2007, p.14-41.

service. It also provides special rules for disabled and reduced-mobility people. Member States were allowed special arrangements for the entry into force of the provisions.

In 2013, the Commission issued a report⁴⁷ on the implementation of this regulation. According to this report, while the protection of rail passengers has improved since the Regulation became applicable, around 61% of all national long distance services and 83% of regional and suburban services were not yet applying the full range of rail passenger rights. This was due to the fact that Member States largely opted for transitional periods and exemptions. This practice is likely to become an obstacle to the achievement of a complete rail passenger rights regime in the EU.

The third measure is Directive 2007/58/EC⁴⁸ of 23 October 2007, on market opening for international rail passenger services. It amended Directives 440/1991 and 2001/14. Member States were still free to limit the right of access related to the picking up and setting down of passengers within the same Member State where the international route was also covered by one or more national public service contracts. In addition, conditions for the grant of levies on passenger services were set. This Directive has been partially repealed by Directive 2012/34/EU, a recast of the first package.

Finally, Directive 2007/59/EC⁴⁹ of 23 October 2007 concerns the certification of train drivers. It harmonizes train driver certification within the EU with the aim of fostering safety. It lays down the procedures for obtaining and withdrawing licences and certificates as well as specifying the tasks to be carried out by the competent authorities in EU countries. By October 2018, all train drivers should hold licences and certificates in conformity with this Directive.

1.3.4. *The Recast Directive 2012/34/EU on the European Railway Area*

In 2008, a recast of the texts concerning railway interoperability was made by Directive 2008/57/EC.⁵⁰ The new Directive established the conditions to be met to achieve interoperability within the Community rail system. In particular, it regrouped the procedures for developing the technical specifications for interoperability concerning conventional and high speed rail. It also clarified the relationship between TSIs and European standards. The conditions encompass the design, construction, placing in service, upgrading, renewal, operation and maintenance of

⁴⁷ COM(2013) 587.

⁴⁸ OJ L 315, 3.12.2007, p. 44-50.

⁴⁹ OJ L 315, 3.12.2007, p. 51-78.

⁵⁰ OJ L 191, 18.7.2008, p. 1-45.

the parts of this system as well as the professional qualifications and health and safety conditions of the staff who contribute to its operation and maintenance.

In 2010, following a European Parliament Resolution⁵¹ which stressed the shortcomings in the application of the First Railway Package in the Member States and the lack of effectiveness of its measures, the Commission made a proposal to recast the package. The purpose was to improve the transparency of rail market access conditions and access to rail-related services – for example, station, freight and maintenance facilities. A merging of the first three Directives of the package was proposed, along with the clarification of some of the terminology and an update for the legislation to accommodate new market conditions.⁵² In its turn, the recast Directive, whose transposition time elapses in June 2015, is already subject to the amendment proposals of the Fourth Railway Package.

The main objectives of the Recast were largely focused on three areas: firstly, competition issues and the need to improve transparency of the rail market access conditions; secondly, strengthening the power of national rail regulators and establishing the obligation on these bodies to cooperate with their counterparts on cross-border issues; thirdly, supporting the financial structure to encourage investment.⁵³ Directive 2012/34/EU⁵⁴ thus establishes a single European railway area.

The efforts of the Commission to put forward proposals to enhance competition in the transport sector had led to the adoption in 2011 of a new white paper,⁵⁵ conceived as a roadmap, which included 40 concrete initiatives to create a true single European transport area through a competitive and efficient transport system. For the railways sector, the major objectives were the creation of a real internal market for rail transport and the increase of the modal share of rail transport in the market.

1.4. A global appraisal until 2013

What have the consequences of the EU regulatory changes been for the railway sector? This is a difficult question, and it has continued to be much debated until now. The sector is, of course, characterized by strong network effects. It is also divided into different segments and sub-segments. Freight traffic is essentially international; passenger traffic is mainly national. Interoperability across national borders remains a huge challenge in many aspects. From an economic point of view, it is certainly difficult to find the correct balance in regulation.

⁵¹ Resolution of the European Parliament of 17 June 2010, JO C 236 of 12.08.2011.

⁵² See L. Butcher, *Railways: EU Policy*, Standard note of the House of Commons Library, February 2013, available at: <http://www.parliament.uk/briefing-papers/SN00184>, p. 7.

⁵³ See *ibidem*.

⁵⁴ OJ L 343, 14.12.2012, p. 32-77.

⁵⁵ COM/2011/0144 final.

Environmental considerations make it still more difficult. Railway transport, as opposed to road transport, benefits from weak externalities. This is, however, difficult to reflect because environmental externalities are not correctly priced. Furthermore, the infrastructure costs are not similarly accounted for in rail transport and road transport. Finally, CO² pricing remains far too weak. There can be no fair competition as long as externalities are not taken into consideration. From this point of view, there remains some imbalance in the present EU railway regulatory framework.

In this context, it is extremely interesting to read the Opinion of the European Economic and Social Committee (EESC) concerning the Fourth Railway Package:

‘A review of the statistical data provided by the Commission ... shows that there is no automatic correlation between this separation, the opening-up of the market and improved railway results, but the latter would appear to be linked directly to funding levels and toll prices. Furthermore, the McNulty report provides a very mixed picture of the situation in the United Kingdom, recognising that the UK rail system is proving to be more costly both for the State and for the user, and suffers as a result of the various stakeholders not being aligned, which requires greater State involvement in bringing the different aspects into line (such as charges, distribution, timetabling, etc.), which is essential. ... The above observations lead the EESC, despite the obvious need for market reform, to suggest that the Commission adopt a prudent approach to the liberalisation of domestic passenger traffic, in the light of the current experience of the liberalisation of international traffic. ... the inadequacy of the results of the proposed solutions is clear, particularly because in the absence of adequate investment and a suitable political impetus, the market cannot address the issues raised. However, ensuring that areas on the fringes of national territories are served by modern, environmentally-friendly means of transport is a particular issue here.’⁵⁶

⁵⁶ EESC, Fourth Railway Package, TEN/505, 11 July 2013, §§ 5, 20 and 22.

2. THE FOURTH PACKAGE PROPOSALS

In 2013, the European railways formed an internal market that was still highly fragmented, and the openness of the national markets varied considerably. Divergences concerning the system's efficiency and the consumers' satisfaction were also growing. Competition levels were still low and access to the market was characterized by discrimination and excessive bureaucracy. Despite being one of the most environmentally friendly modes of transport, rail only covered 6% of the passenger transport market share, and consumer satisfaction across the EU was poor.

The proposals for a Fourth Railway Package, presented by the Commission in January 2013, are to be framed within this context. This new package consists of three Directives⁵⁷ and three Regulations,⁵⁸ along with a general communication, three impact assessments, three reports and three Staff Working Documents⁵⁹. Its overall objective is to enhance the quality and efficiency of rail services by removing any remaining legal, institutional and technical obstacles, and fostering the performance of the railway sector and its competitiveness, in order to further develop the single European railway area. Its object can be grouped in three 'pillars'. The **technical pillar** covers rail interoperability and safety under the responsibility of a strengthened ERA. The **liberalization pillar** is meant to open the domestic passenger markets by granting access to all operators and introducing mandatory tendering from December 2019. The **infrastructure pillar** aims to improve the structures and governance for infrastructure managers, in particular by introducing a (tempered) obligation to unbundle infrastructure managers from services operators.

According to the Commission, the opening of the market should generate new and better jobs, and give Member States the possibility to protect workers by requiring

⁵⁷ Proposal for a Directive of the European Parliament and of the Council on railway safety (Recast), COM(2013) 31 final; Proposal for a Directive of the European Parliament and of the Council on the interoperability of the rail system within the European Union (Recast), COM(2013) 30 final; Proposal for a Directive of the European Parliament and of the Council amending Directive 2012/34/EU of the European Parliament and of the Council of 21 November 2012 establishing 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, COM(2013) 29 final.

⁵⁸ Proposal for a Regulation of the European Parliament and of the Council repealing Regulation (EEC) No 1192/69 of the Council on common rules for the normalisation of the accounts of railway undertakings, COM(2013) 26 final; Proposal for a Regulation of the European Parliament and of the Council amending Regulation (EC) No 1370/2007 concerning the opening of the market for domestic passenger transport services by rail, COM(2013) 28 final; Proposal for a Regulation of the European Parliament and of the Council on the European Union Agency for Railways and repealing Regulation (EC) No 881/2004, COM(2013) 27 final.

⁵⁹ All the documents are available at http://ec.europa.eu/transport/modes/rail/packages/2013_en.htm.

new contractors to take them on when public service contracts are transferred, which goes beyond the general EU requirements on transfers of undertakings.⁶⁰

2.1. The technical pillar – ERA as an authorization body

The adoption of the technical pillar is expected to increase economies of scale for railway undertakings across the EU, reduce administrative costs and speed up procedures. It should also help to avoid any covert discrimination in the issuing of safety certificates and vehicle authorizations.⁶¹ The current problems can be illustrated by the enormous variations among the Member States in the fees required for the operators' safety certificates (from nothing to €70,000). The same applies to vehicle authorizations. This kind of procedure can additionally be very time consuming, taking up to two years in some cases. The amount and legal status of the human resources dedicated to this task are particularly varied. Consequently, huge assets are currently immobilized and investments are certainly not encouraged.⁶²

To put an end to the diversification of authorizations and safety certificates procedures, the proposal aims to give the ERA new powers. It would become a 'one-stop shop' issuing single (EU-wide) authorizations for placing vehicles on the market as well as single safety certificates for operators. This is achieved by three legislative actions: a proposal to amend Regulation 881/2004 establishing an ERA, another one recasting the interoperability legislation, and one amending Directive 2004/49/EC on safety of the EU railways. Concerning safety, the proposals also aim to ensure that risk controls are duly implemented, due to the possible worsening of these controls as a consequence of the fragmentation of the responsibilities and the recurrent recourse to outsourcing.

According to the Commission, the proposed measures pursue a 20% reduction in the time to market for new railway undertakings and a 20% reduction in the cost and duration of the authorization of rolling stock. Overall, this is supposed to lead to a saving for companies of €500 million by 2025.⁶³

⁶⁰ On the Fourth Railway Package in general, see: Commissioner Siim Kallas' note of 30 January 2013 'European Railways at a Junction: the Commission Adopts Proposals for a Fourth Railway Package' available at: http://ec.europa.eu/commission_2010-2014/kallas/headlines/news/2013/01/fourth-railway-package_en; and Slides by O. Coppens (European Commission, DG MOVE): The Fourth Railway Package presented at the Danish Railway Conference 2013, available at http://www.banekonference.dk/sites/default/files/slides/8/13_2_4_4RP%20Copenhagen_0.pdf.

⁶¹ See: Council reaches political agreement on railway interoperability and safety and the European Railway Agency, Council Press Release 1401/14, available at http://www.consilium.europa.eu/uedocs/cms_Data/docs/pressdata/en/trans/143080.pdf.

⁶² See: Commission SWD Impact Assessment Accompanying the documents Proposal for a Regulation of the European Parliament and of the Council on the European Union Agency for Railways and repealing Regulation (EC) No 881/2004 Proposal for a Directive of the European Parliament and of the Council on the interoperability of the rail system within the European Union (Recast) Proposal for a Directive of the European Parliament and of the Council on railway safety (Recast) / SWD/2013/08 final.

⁶³ Commissioner Siim Kallas' note of 30 January 2013 'European Railways at a Junction: the Commission Adopts Proposals for a Fourth Railway Package' available at http://ec.europa.eu/commission_2010-2014/kallas/headlines/news/2013/01/fourth-railway-package_en.

It is interesting to notice that nobody is at present defending a system of mutual recognition of national authorizations and safety certificates. Theoretically, this could be an option. However, its general neglect seems to reflect a broad lack of trust in the decisions taken in other Member States. This lack of trust comes partly from the hidden protectionist thrust of a lot of national decisions. Hence the absolute need to boost the powers of the ERA.

2.2. The opening of domestic passenger transport

According to the impact assessment to the proposal to amend the Recast First Package Directive 2012/34,⁶⁴ national domestic passenger markets remain largely closed. Moreover, the great majority of domestic passenger services are not provided under a commercial basis but under public service contracts.⁶⁵ 'Directly awarded public service contracts constitute 42% of all EU passenger-kilometres, contributing to the fact that in 16 out of 25 member States with rail, the incumbent holds above 90% market share.'⁶⁶ Former Commissioner Kallas has also explained that, in the markets which are open, improvements in quality and availability of services have been observed, along with passenger satisfaction and growth, to rise year on year, amounting in some cases to over 50% over ten years.⁶⁷

The fourth package proposals – namely the one⁶⁸ to amend Directive 2012/34 and the one⁶⁹ to amend Regulation 1370/2007 – intend to open the access for all EU operators on all domestic passenger markets. Year 2019 is maintained as the date from which competitive tendering will be compulsory, but the exceptions to this rule are circumscribed. Companies should thus be able to offer domestic rail passenger services across the EU: either by offering competing commercial services within the market, or through bidding for public service rail contracts.

In particular, according to the proposal⁷⁰ to amend Directive 2012/34, railway undertakings should be guaranteed open access for the purpose of operating domestic passenger services, which comes as a major innovation. This opening up is subject to the possibility of restrictions when the economic equilibrium of a public service

⁶⁴ Commission SWD, Impact Assessment Accompanying the document Proposal for a Directive of the European Parliament and of the Council amending Directive 2012/34/EU of the European Parliament and of the Council of 21 November 2012 establishing 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 (COM(2013) 29 final); (SWD(2013) 13 final), available at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=SWD:2013:0012:FIN:EN:PDF>, p. 66.

⁶⁵ COM(2013) 28 final.

⁶⁶ COM(2013) 25 final, p. 6-7.

⁶⁷ Commissioner Siim Kallas' note of 30 January 2013 'European Railways at a Junction: the Commission Adopts Proposals for a Fourth Railway Package' available at http://ec.europa.eu/commission_2010-2014/kallas/headlines/news/2013/01/fourth-railway-package_en.

⁶⁸ COM(2013) 29 final.

⁶⁹ COM(2013) 28 final.

⁷⁰ COM(2013) 29 final.

contract is compromised. The relevant test should be carried out by national regulatory bodies, as is currently the case for international services. The proposal also enables Member States to establish information exchange and integrated ticketing schemes common to all railway undertakings operating domestic passenger services, provided that competition is not distorted. In addition, it provides for the adoption of coordinated contingency plans by railway undertakings to provide assistance to passengers in case of a major disruption of traffic.

The proposal to amend Regulation 1370/2007 introduces public tendering as the general rule for the allocation of public service contracts starting from 2019. Direct award would only be permitted for small-scale contracts. The proposal provides for a procedure for defining PSOs and the geographical scope of public service contracts. It requires competent authorities to establish public transport plans in order to define the objectives of public passenger transport policy and supply, and performance patterns for public passenger transport. In addition, it sets in a flexible manner a threshold for the maximum volume of passenger transport by rail under each public service contract. In so far as rolling stock is concerned, the proposal introduces an obligation for Member States to ensure effective and non-discriminatory access to suitable rolling stock for operators:⁷¹

‘The proposals seek to increase passengers’ benefits, in terms of improved services and choice. Combined with structural reforms, they aim, in the view of the Commission, to produce more than 40 billion of financial benefits for citizens and companies involved by 2035 and would allow provision of up to about 16 billion additional passenger/km according to Commission estimates.’⁷²

In this regard, however, the research services of the European Parliament have detected important defects in the impact assessment:

‘DG MOVE admits that quantification of the impacts of market opening is very challenging and “results [of an attempt to quantify impacts on investments, profits and public savings] were rather illustrative estimates with up to 50% uncertainty range” (Impact Assessment or IA, p. 58), because Member States have different baseline situations, experience of market liberalisation is limited and exogenous factors affecting the passenger rail demand are uncertain. But the qualitative analysis shows deficiencies, too. While the results of stakeholder consultations and experiences from Member States are continuously referred to, the argumentation of the IA lacks a foundation of scientific evidence. Assumed impacts of the different options are well illustrated and described, but the reasoning as to why these impacts occur as a result of a

⁷¹ See *infra*, § 4.4.

⁷² Commissioner Siim Kallas’ note of 30 January 2013, *cit.*

specific policy does not appear to be based on facts, academic literature or existing evidence. Especially the assumed reduction in costs of RUs as a result of market opening is not science-based or further explained in detail. Hence, DG MOVE has to admit that “there is a certain degree of uncertainty in the assessment of impacts of some options, as some evidence for instance is fairly recent (competition in the market in open access services) and sometimes ambiguous (evidence is provided only by specific stakeholders)” and that therefore “the choice to move forward with the aforementioned combination remains a political choice” (IA, p. 100). Moreover, some of the charts presented in the IA are illegible.⁷³

2.3. Infrastructure governance and separation

The third pillar of the proposed reform concerns the institutional separation (‘unbundling’) between infrastructure management and rail services operators. It is introduced through a proposal⁷⁴ amending the Recast First Package Directive 2012/34. Rail undertakings, independent of infrastructure managers, should have immediate access to the internal passenger market by 2019.

The proposal aims to strengthen infrastructure managers so that they can control all the functions at the heart of the rail network. To that end, it sets out all the relevant functions of infrastructure management that are to be performed in a unified way. The proposal creates a forum for the cooperation of infrastructure managers across borders, with a view to developing the European rail network. This includes cooperation on the establishment of the core network corridors, the rail freight corridors and the implementation of the European Rail Traffic Management System (ERTMS) deployment plan.

The ERTMS is a system for the standardization of rail signalling. It was developed as a ‘major European industrial project’ by eight UNIFE (Association of the European Rail Industry) members in cooperation with the EU, railway stakeholders and the Global System for Mobile Communications-Railway (GSM-R) industry. It is composed of two parts. The first is the European Train Control System (ETCS), which is in turn divided into two modules, namely track and train. It allows data transmission in the cabin from the rail signalling system and further data processing by the on-board computers. The second part is the GSM-R, a radio system providing for the exchange of information between the track and the train. It is based on the standards applied to the public GSM network and also covers both trackside and on-board equipment. The ERTMS is intended to replace the – currently more than 20 – national train control and command systems with a unique system fully interoperable across the

⁷³ Doc. 508.962, p. 13.

⁷⁴ COM(2013) 29 final.

EU, with the ultimate target of improving the competitiveness of the rail sector. The project was initiated in the 1980s through a series of projects financially and technically backed by the Commission.⁷⁵ Directive 96/48/EC⁷⁶ (interoperability Directive) – now recast by Directive 2008/57/EC⁷⁷ – provides that compliance with the system is one of the basic parameters that the TSIs should respect to meet the essential requirements to achieve interoperability of the trans-European high-speed rail system.⁷⁸

The introduction of the institutional separation of the infrastructure manager from transport undertakings would operate by prohibiting the same legal or natural person from having the right to control or exercise influence over an infrastructure manager and a railway undertaking at the same time.

However, this requirement allows for a number of exceptions. Member States should have the possibility of being the owners of both legal entities, while control should be exercised by public authorities that are separate and legally distinct from each other. In addition, the proposal allows vertically integrated undertakings, including those with a holding structure, to maintain ownership of the infrastructure manager. Nonetheless, it is clarified that this is only permissible if certain conditions are fulfilled ensuring that the infrastructure manager is fully independent and has effective decision-making rights for all its functions. This control system has been called the 'Chinese walls' and is somewhat based on the Independent Transmission

⁷⁵ More specific information at ERTMS website, ERTMS History section: http://www.ertms.net/?page_id=49.

⁷⁶ OJ L 235, 17/09/1996, p. 6-24.

⁷⁷ OJ L 191, 18.7.2008, p. 1-45.

⁷⁸ In 2001 the Commission issued Decision 2001/260/EC, notified under document number C(2001) 746 'on the basic parameters of the command-control and signalling subsystem of the trans-European high-speed rail system referred to as "ERTMS characteristics" in Annex II(3) to Directive 96/48/EC.' The Decision gave a definition of the ERTMS and established that the basis for the control-command and signalling subsystem shall be the set of specifications listed thereafter. The specifications could be revised after the ERTMS master plan pilot tests; such a revision was prepared by the joint representative body (the AEIF at the time) under a change control procedure, then submitted to the Committee as provided in Art. 6 of Directive 96/48/EC. It required that the specifications should be available online or from the EC services on request.

The 'Agency Regulation' 881/2004/EC (as amended by Regulation 1335/2008/EC) provides that the ERA shall act as the system authority for ERTMS project, in the sense that it is responsible for the organization and the process of the change control management.

The development of the ERTMS specifications is taken over by the ERA, but the drafting is done in close cooperation with both European Railways (gathered in the ERTMS users' group) and the rail industry (under the umbrella of UNISIG).

On the basis of the interoperability Directive, the Commission has issued a series of Decisions, based on ERA recommendations, concerning the TSIs relating to the control command and signalling subsystems of the trans-European rail system, the latest of which is Commission Decision 2012/691/EU of 6 November 2012, amending Commission Decision 2012/88/EU (OJ L 311 of 10.11.2012, p. 3-13).

In 2005 the Commission issued a Communication on the deployment of the European rail signalling system ERTMS/ETCS (COM(2005) 298). In 2005 and then in 2008, the Commission and the representatives of the European Railway sector signed two successive dedicated Memorandums of Understanding concerning the strengthening of cooperation for speeding up the deployment of ERTMS.

The Commission has created a dedicated ERTMS Memorandum of Understanding Steering Committee, which gathers the signatories of the Memorandum. In addition, it has appointed a European ERTMS Coordinator, Karel Vinck. Partly because of the instability of the ERTMS standards, due to the possibility of filing change requests, some Member States have been reluctant to adopt them. However, the system has also been adopted outside Europe.

Operator-ITO model in energy. These safeguards should be in place with regard to the structure of the undertaking, including the separation of financial circuits between the infrastructure manager and other companies of the integrated group, and also the setting out of rules on the management structure of the infrastructure manager.⁷⁹

A further safeguard is provided by the provision that, through a 'procedure of verification of compliance', 'upon request of a Member State or on its own initiative, the Commission shall decide whether infrastructure managers which are part of a vertically integrated undertaking fulfil the requirements set by the Directive and whether the implementation of these requirements is appropriate to ensure a level playing field for all railway undertakings and the absence of distortion of competition in the relevant market and take a decision thereof.'

This separation concept has provoked copious discussions between the stakeholders. It appears that the initial proposal on the table did not provide for the above-mentioned exceptions granting the possibility for integrated undertakings to own both sides of the rail system, though with the relevant guarantees. Bundling is perceived by the Commission and some governments as facilitating discrimination leading to the possibility that infrastructure managers, who are mainly state-owned entities, cross-subsidize the commercial activities, for instance, by diverting state funds.⁸⁰ However, separation is not itself a guarantee for competition, regulatory bodies should be appointed to enforce the implementation of the legislation. A typical example of how this can happen in practice is that of the SNCF being fined in December 2012 for anticompetitive behaviour – using confidential information for commercial purposes and attempting to prevent competitors from accessing the freight and other markets through predatory pricing. Also, the possibility given to Member States to prevent integrated operators from entering the market without the clearance of the Commission is considered to be a possible deterrent to investors.⁸¹

Different commentators, however, maintain serious doubts about this strict approach. According to Roland Berger Strategy Consultants, for example, after analysing the situation in different third markets,

'both the findings from data analysis and comments by CEOs, ministry officials and experts in the study raise doubts as to whether the separation of infra-

⁷⁹ See Commission SWD Impact Assessment Accompanying the document Proposal for a Directive of the European Parliament and of the Council amending Directive 2012/34/EU of the European Parliament and of the Council of 21 November 2012 establishing 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, / SWD/2013/012 final /, p. 10-11.

⁸⁰ See <https://www.theparliamentmagazine.eu/articles/eu-monitoring/ministers-discuss-4th-railway-package>.

⁸¹ T. Berkeley, Germany rewrites the Fourth Railway Package, available at <http://www.railjournal.com/index.php/blogs/tony-berkeley/germany-rewrites-the-fourth-railway-package.html>.

structure and transport services is the right way to increase intramodal competition and railway performance. A viable alternative would be to facilitate intramodal competition in an integrated railway system. In this case, the regulator would have to be able to use important levers to achieve rail competition, for instance by safeguarding third-party access and fair-track access charges. Intermodal competition would remain a main driver for performance and efficiency improvements at railways, as confirmed by the countries under review.⁸²

For J. Drew and C. Nash,

‘academic literature provides no evidence that vertical separation leads to efficiency gains although one study indicates that, if vertical separation is necessary for introducing competition, it may increase efficiency indirectly. ... The analysis shows no correlation between vertical separation and the growth in rail freight traffic or rail’s share of total freight traffic (two surrogate measures of attractiveness of rail services to customers which should reflect efficiency and service quality). Indeed, if the key objective is to promote the efficiency and growth of rail freight, vertical separation may in some circumstances, particularly those in some Central and Eastern European countries where adequate government funding for infrastructure is not available, impede rail growth. Also, despite the higher passenger growth in some countries which have introduced vertical separation, this cannot be attributed to vertical separation.’⁸³

Consequently, an integrated structure can enhance coordination of tracks and rolling stock as well as efficiency, and that could be maintained by reinforcing the anti-discrimination measures and enforcement, or by placing some functions such as allocation and charges with a third body.⁸⁴

Furthermore, here, too, the services of the European Parliament have underlined substantial weaknesses in the impact assessment (IA):⁸⁵

‘The IA seems to lack consistent references to robust evidence supporting the reasoning, arguments and conclusions (for example, regarding the correlation between the level of separation and alleged positive impacts on the intensity of infrastructure use, investments in infrastructure and transport operations, service quality etc). DG MOVE itself admits that “evidence used to support the

⁸² Roland Berger Strategy Consultants, *The optimal setup of a rail system – Lessons learned from outside Europe*, 2012, p. 27.

⁸³ J. Drew and C. Nash, *Vertical separation of railway infrastructure – does it always make sense?* Institute for Transport Studies, University of Leeds, Working Paper 594, 2011, p. 59.

⁸⁴ C. Nash, ‘Unravelling the Fourth Railway Package’, *Railway Gazette International*, November 2012.

⁸⁵ Initial appraisal of a European Commission Impact Assessment Fourth Railway Package, May 2013, Doc. 507.508, p. 9.

problem definition is mostly anecdotal” and expresses concern about comparability of IM governance and efficiency and infrastructure access between Member States and with other economies outside Europe (IA, p. 16). The examples and case studies put forth in the IA lack thus assignability to all EU countries. The Commission further recognizes that, due to constraints of limited empirical evidence, of data access and measurability of benefits, “no full cost benefit analysis can be provided” (IA Annex V, p. 109). The cost benefit analysis in the annexes is thus based on estimates derived from case studies on single countries and similar sectors and is therefore not generalizable: “These figures should be treated with care, given the uncertainties surrounding the estimations and differences between the sectors.” (IA Annex V, p. 113) In addition, misalignment costs are not calculated with the argument that the establishment of coordination bodies foreseen in the proposal will prevent those.’

Some trade unions have stressed that the fragmentation of employer responsibility may lead to less safety for the workers, as less money would be invested in risk control and maintenance. These concerns do not seem to be unsubstantiated, as they have been the direct targets of some of the new provisions proposed for the safety Directive.⁸⁶

Anyway, it is important to notice that the Commission had already been obliged to weaken its original project. Its draft directive regarding governance was based on a strict separation between infrastructure and transport operators. Due to pressure from various sources, and especially due to the Deutsche Bahn intervention relayed by the German chancellor, this orientation was watered down in the final 2013 proposition.⁸⁷

2.4. The legislative procedure until December 2014

The European Parliament Transport Committee (TREN) adopted on 16 December 2013 six reports concerning the related Fourth Railway Package Commission proposals.⁸⁸

⁸⁶ In this framework, one must also recall that at the end of 2011 the Commission presented a series of proposals on simplification of public procurement, which included a directive on public concessions. The directive proposal aims to increase legal certainty and transparency, including an obligation to publish the contracts above a certain threshold in the OJ, both in the works and services sectors (COM(2011) 897). See Directive 2014/23/EN on the award of concession contracts (OJ 28.3.2014, p. 1-64).

⁸⁷ See the interesting comments and references of A. Perier, ‘Le quatrième paquet ferroviaire: l’impossible libéralisation?’, *Bruges Political Research Papers* 33/2014, pp. 9-12.

⁸⁸ Documents and information are available on the website of the European Parliament at this address: <http://www.europarl.europa.eu/oeil/popups/thematicnote.do?id=2056000&l=en>.

Meanwhile, the opinion of the Economic and Social Committee on the whole railway package had been issued on 11 July 2013⁸⁹ and the opinion of the Committee of the Regions on 7 October 2013.⁹⁰

On 26 February 2014, the European Parliament Plenary adopted with several amendments its first reading position on the legislative proposals of the package.⁹¹ According to the Parliament services, the amendments aimed to find a balance between market opening and protecting PSOs, enhancing the protection of workers' rights, creating a European vehicle registry, and laying down certain limits concerning public service contracts. All operators should have access to rail infrastructure; new operators should be given more opportunities to compete for public service contracts; safety certification and vehicle authorization procedures should be harmonized.⁹²

In the technical pillar in particular, the proposed amendments to the Agency Regulation aim to clarify the objectives of the Agency, extending its application regarding certification to all staff entrusted with safety-critical tasks.

As far as the interoperability Directive is concerned, the Parliament underlined the need to improve the interlinking and interoperability of the national rail networks, as well as access for all. Concerning the granting of authorizations for placing vehicles on the market, the Parliament proposed a single type authorization operation.

The Parliament's proposal to amend the railway safety Directive clearly defines the tasks and responsibility of the Agency and the national safety authorities (NSAs). The Agency should become a one-stop shop for safety certificates. However, according to the Parliament, for railway undertakings operating exclusively on isolated networks within one Member State, safety certificates should also be granted by the relevant NSA at the choice of the applicant.

Concerning the proposal to amend Regulation 1370/2007, the Parliament put the accent on the social aspects of the reform, requiring the selected PSOs to grant staff working conditions on the basis of binding national, regional or local social standards, to respect collective agreement and ensure social standards. Similarly, the Parliament proposed various amendments to the Commission proposal to amend Directive 2012/34, entailing the strengthening of social provisions, social dialogue and guarantees against social dumping.

⁸⁹ Economic and Social Committee TEN/505, available at <http://www.eesc.europa.eu/?i=portal.en.ten-opinions.27187>.

⁹⁰ Committee of the Regions, COTER-V-36, available at <http://coropinions.cor.europa.eu/coropiniondocument.aspx?language=fr&docnr=27&year=2013>.

⁹¹ European Parliament website; the document references are of the texts adopted at first reading are P7_TA(2014)147 to P7_TA(2014)151, European Parliament website, available at <http://www.europarl.europa.eu/oel/popups/thematicnote.do?id=2056000&l=en>.

⁹² European Parliament website, available at <http://www.europarl.europa.eu/oel/popups/thematicnote.do?id=2056000&l=en>.

Finally, for one of the most controversial issues – separation between infrastructure management and rail undertakings – the Parliament suggested that, provided that no conflict of interest arises and that confidentiality is guaranteed, Member States should not be prevented from authorizing the infrastructure managers to engage in cooperation agreements in a transparent, non-exclusive and non-discriminatory way with one or more applicants for a specific line or a local or regional part of the network. The Parliament considered that reciprocity should be a condition for Member States required to open their market to undertakings established in third countries.

The Commission expressed its open disappointment with the texts approved by the Parliament; it affirmed that the new texts would limit effective competition. For Commissioner Kallas, the Parliament Plenary's vote was yet another demonstration of the tenacity of vested national interests. According to the Commission, the Parliament adopted an unambitious stance that could put at risk the development of a single European rail area. In particular, it criticized the fact that the compulsory competitive tendering procedures for public service contracts had been postponed to 2022 and had been subject to very significant exceptions. The amendments adopted by the Parliament would also fail, for the Commission, to ensure an effective independence of the infrastructure manager and financial transparency within vertically integrated structures, – both of which are essential to ensure equal and non-discriminatory access to the network.⁹³

The Council had adopted three general approaches concerning solely the three proposals of the technical pillar in June 2013 (interoperability),⁹⁴ October 2013 (safety)⁹⁵ and March 2014 (ERA) respectively.⁹⁶

During the meeting of 5 June 2014, the Council approved a political agreement on the three technical pillar proposals.⁹⁷ The political agreement includes the general approach texts previously agreed and encompasses some relevant Parliamentary amendments.

In particular, the Council advocated a dual system for granting vehicle circulation authorizations and safety certificates. The competent NSAs should remain in charge of the procedures for rolling stock used exclusively for domestic transport. After a

⁹³ European Commission Press Release, Transport: European Parliament adopts equivocal first reading position on Fourth Railway Package, IP/14/192 26/02/2014, available at http://europa.eu/rapid/press-release_IP-14-192_en.htm.

⁹⁴ See Council Press Release 10457/1/13 REV 1, available at http://www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/en/trans/137408.pdf p. 20.

⁹⁵ See Council Press Release 14602/13, available at http://www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/en/trans/138961.pdf.

⁹⁶ See Council Press Release 7665/14, available at http://www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/en/trans/141522.pdf.

⁹⁷ See Council Press Release Council reaches political agreement on railway interoperability and safety and the European Railway Agency, 10401/14, available at http://www.consilium.europa.eu/uedocs/cms_Data/docs/pressdata/en/trans/143080.pdf.

transitional period of five years, the ERA will be competent in the procedures for international railway transport vehicles. Both the NSAs and the Agency will take full responsibility for the certificates issued. The Council provided for specific settlement solutions in case of disagreement between an NSA and the Agency concerning the assessment of an undertaking or of a vehicle.

The amended texts allow for the possibility that if a single safety certificate or a vehicle authorization is not in compliance with the requirements for a safety management system or for interoperability, they can be revoked by the Agency or the NSA respectively. As for the TSI, the Council proposals include a generous list of exceptions under which Member States can suspend TSI requirements. In addition, the Council proposals provide more powers for the Agency concerning the examination of draft national rules on safety and interoperability and the monitoring and audit of the NSAs. As per the governance, the Council introduced various amendments, in particular concerning the role of the Management Board over the newly introduced Executive Board, and provide for more flexibility in the establishment of Boards of Appeals within the Agency.

Commissioner Kallas welcomed the adoption of a political agreement by the Council, but he regretted that the Council had weakened the role of the ERA compared to the Commission's initial proposals, which sought to concentrate all the different tasks and competencies in the hands of the Agency. He also regretted that the transition period had been extended from two to five years.⁹⁸

The Programme of the Italian Presidency of the Council, in charge for the second semester of 2014, indicated that it would encourage progress on the Fourth Railway Package and promote a policy discussion in order to seek a common position among Member States. The Presidency affirmed that it planned to negotiate with the Parliament over the technical pillar of the Fourth Railway Package and intended to pursue a holistic approach to the whole package.⁹⁹ Apparently, the Commission pushed the Presidency to deal with the opening up of the domestic passenger market and the governance of infrastructure as a single project and not separately.¹⁰⁰

As of December 2014, no substantial advance in the legislative procedure seems to have been achieved by the Italian Presidency. Starting from January, it has been Latvia's turn to lead the Council; it remains to be seen whether some progress, at least concerning the technical pillar, will take place under the presidency of the Baltic state.

⁹⁸ European Commission Rail Transport: Simplifying procedures to achieve a single European railway area, Press Release, IP/14/643 of 05/06/2014, available at: http://europa.eu/rapid/press-release_IP-14-643_en.htm.

⁹⁹ Europe, a Fresh Start, Programme of the Italian Presidency of the Council of the European Union, available at: http://italia2014.eu/media/1349/programma_en1_def.pdf.

¹⁰⁰ Agence Europe, Bulletin No 11104 of 20 June 2013, available at <http://www.agenceurope.com/danteweb/>.

3. ERA POWERS: PRESENT AND FUTURE

3.1. The present situation

The ERA was established by Regulation 881/2004/EC¹⁰¹ of 29 April 2004 and was operational by mid-2006. Article 1 of the Regulation sets its objectives, which are to contribute, on technical matters, to the implementation of the EU legislation aimed at improving the competitive position of the railway and at developing a common approach to safety on the European railway system, in order to contribute to creating a European railway area without frontiers and to guarantee a high level of safety. In pursuing these objectives, it will take account of the process of enlargement and of links with third countries.

In practical terms, the Agency was established to provide the EU Member States and the Commission with technical assistance in the fields of railway safety and interoperability. This involves the development and implementation of TSIs and a common approach to questions concerning railway safety. The Agency's main task is to manage the preparation of these measures.¹⁰²

In addition, the Agency acts as the system authority for the European Rail Traffic Management System (ERTMS) project, in the sense that it is responsible for the organization and the process of the control management change, ensuring the quality and completeness of the ERTMS specifications.

Regulation 881/2004/EC, which is currently in force, does not provide the Agency with specific decision-making powers.¹⁰³ The ERA is in fact only entitled to address recommendations and to issue opinions to the Commission and the relevant national regulatory bodies.¹⁰⁴ The Commission implements the recommendations through a Regulatory Committee involving the Member States.¹⁰⁵ The Agency is conferred mandates by the Commission, namely concerning the development and revision of TSIs, common safety methods (CSMs), common safety targets (CSTs) and common

¹⁰¹ OJ L 164, 30.4.2004, p. 1-43.

¹⁰² See the Agency's website://www.era.europa.eu/The-Agency/Pages/home.aspx.

¹⁰³ Only a limited number of acts of the Agency can therefore be challenged in front of the CJEU. In particular, the Court is competent to decide on any arbitration clause contained in a contract concluded by the Agency and on compensation for damage deriving from non-contractual liability (Art. 34). In addition, Art. 37 of the Regulation provides that the Agency shall be subject to Regulation 1049/2001 regarding public access to documents, and that it shall therefore be subject to the control of the Ombudsman and of the CJEU according to the provisions thereof. To date, no legal challenge against such acts by the ERA has been brought before the CJEU. Revealingly, for example, the conclusion of agreements with third countries authorities has happened without any specific legal basis.

¹⁰⁴ Art. 2.

¹⁰⁵ See Regulation (EU) No 182/2011 of the European Parliament and of the Council of 16 February 2011 laying down the rules and general principles concerning mechanisms for control by Member States of the Commission's exercise of implementing powers (OJ L 55, 28.2.2011, p. 13-18).

harmonized requirements for safety certifications.¹⁰⁶ It also cooperates with and coordinates NSAs, and monitors the overall safety performance of the railway system. The Agency is managed by its Executive Director and is provided with an Administrative Board which is composed of Commission and national representatives, and is assisted by interest-groups and a Norwegian representative. The Administrative Board adopts the general report of the Agency and its yearly work programme, adopts the budget, establishes its rules of procedure and appoints the Executive Director, over whom it exercises disciplinary authority.¹⁰⁷ The Executive Director represents and manages the Agency by preparing the work programme, adopting instructions and orders, establishing a performance-assessment system, preparing a report that is submitted to the Administrative Board, appointing staff, preparing a draft statement on revenues and expenditure and implementing the budget.¹⁰⁸

3.2. The new proposed powers

The Commission proposals of January 2013 which constitute the Fourth Railway Package and the technical pillar in particular, seek to introduce a considerable expansion in the competencies and powers of the Agency. They intend to transform it into a 'one-stop shop' mainly for the issuing of safety and interoperability-linked authorizations for the whole EU, with the aim of making it easier to access the market on an ideal common playing-field. The Agency should contribute to the creation and effective functioning of a single European railway area without frontiers, and to guaranteeing a high level of safety, while improving the competitive position of the railway sector. The Agency's powers are concerned with the amendments to the ERA Regulation, the safety Directive and the interoperability Directive.

This reform now appears essential. In fact, for many decades, Europe has remained the biggest market in the world for the railway industry.¹⁰⁹ It has also remained quite fragmented. During the last ten years, however, the growth of the Asian market has been considerable, and it has now become the biggest in the world. Asian producers have also begun to invest more in Europe. Consequently, the extreme fragmentation of the European market has become increasingly costly. The railway industry

¹⁰⁶ See Commission Decision of 9 February 2006 concerning mandates to the European Safety Agency for developing technical specifications for interoperability under Directive 2001/16/EC and common safety targets, common safety methods and common harmonised requirements for safety certification under Directive 2004/49/EC (C (2006)124 final); Commission Decision of 13 July 2007 concerning a framework mandate to the European Railway Agency for the performance of certain activities under Directives 96/48/EC and 2001/16/EC (C (2007)3371 final); Commission Decision of 29 April 2010 concerning a mandate to the European Railway Agency to develop and review Technical Specifications for Interoperability with a view to extending their scope to the whole rail system in the European Union (C (2010)2576 final).

¹⁰⁷ Art. 25.

¹⁰⁸ Art. 22 and 30.

¹⁰⁹ For a very good description, see Ecorys, *Sector overview and competitiveness survey of the railway supply system*, 2012.

threatens to become a lot like the defence industry, with the inevitable shrinking evolution. If the industry wants to survive in the long term, it must grow in scale.

Furthermore, it needs to develop its advantages. The European railway industry

'has a number of key strengths which provide a comparative advantage in non-EU countries. A great advantage of European rail electrification industry is the deployment of the European Rail Traffic Management System (ERTMS). The ERTMS is being implemented also outside the EU. Another selling point relates to high integrated solutions, i.e., merging of vehicle technology with intelligent track/signalling and optimum operations and service management. In addition, EU suppliers have high qualified key components like brakes delivered by specialized, long term experienced suppliers. In infrastructure the EU is leading in developing special long-life steel for rail, fastening systems and turnouts and high quality concrete or plastic sleepers to keep maintenance cost within limits and to guarantee safe operation.'¹¹⁰

3.2.1. The proposal to recast the Agency Regulation

According to the recast proposed Agency Regulation,¹¹¹ the Agency is established as a body of the Union with legal personality.¹¹² The types of acts that the Agency can adopt, in addition to opinions and to recommendations, are decisions – concerning safety certificates, vehicle and vehicle type authorization and the putting into service of trackside control-command and signalling subsystems – technical documents, audit reports, guidelines and other non-binding documents.¹¹³ It will conduct an impact assessment of its recommendations and opinions. More specifically, the recommendations involve in particular TSIs, common safety methods that are adopted by the Commission. The Agency will set up a limited number of working parties for drawing up recommendations. When relevant, the social partners, or freight customers and passengers, will be consulted. The Commission will be empowered to adopt delegated acts concerning fees and charges in relation to the certificates and authorizations issued by the Agency.¹¹⁴

The Agency is entrusted, with a view to their reduction, with the task of examining draft national rules and rules currently in force in the field of safety and interoperability,¹¹⁵ while the Safety and Interoperability Directives establish the procedure for their notification. If it considers that all the requirements are fulfilled, the Agency will inform the Commission and the Member State concerned about its positive assess-

¹¹⁰ Ecorys, *Sector overview and competitiveness survey of the railway supply system*, 2012, p. 93.

¹¹¹ COM(2013) 27 final.

¹¹² Art. 2.

¹¹³ Art. 3.

¹¹⁴ Art. 73 and 74.

¹¹⁵ Art. 21 and 22.

ment. When no action is taken by the Member State within two months, the Commission, after having heard the reasons of the relevant Member State, may adopt a Decision requesting it to modify the rule and in the meantime suspend its application.

The same procedure will apply, *mutatis mutandis*, in cases where the Agency becomes aware of any national rule, notified or not, being redundant or in conflict with the CSMs, CSTs, TSIs or any other EU legislation in the railway field.¹¹⁶

The Agency also has the task of acting as the system authority for ERTMS, maintaining its technical specifications to ensure its coordinated development in the EU. The Agency will define, publish and apply the procedure for managing requests for changes to those specifications. It will contribute to ensuring that ERTMS equipment complies with the specifications in force and to ensuring that ERTMS-related European research programmes are coordinated with the development of ERTMS technical specifications.¹¹⁷ In addition, it will act as the system authority for the telematics applications, being responsible for maintaining their technical specifications, in accordance with relevant TSIs.¹¹⁸

One chapter¹¹⁹ of the proposed regulation is dedicated to the monitoring tasks of the Agency in relation to the Single European Area. In particular, the Agency should be entitled to monitor and audit the performance and decision making of NSAs, which it can also inspect. If the Agency finds that the NSA presents deficiencies concerning its tasks related to safety and interoperability, it will prevent it from performing such tasks and recommend appropriate steps. In the event that the NSA disagrees, or if it takes no action within three months, the Commission may take a decision.

Besides NSAs, the Agency will monitor the notified conformity assessment bodies¹²⁰ through assistance to accreditation bodies, audits and inspections. If the Agency considers that one of these bodies presents deficiencies that could prevent it from effectively performing its tasks in relation to railway safety and interoperability, the Agency will adopt a recommendation requesting the relevant Member State to take appropriate steps. In a case where the Member State disagrees with the recommendation or takes no action within three months, the Commission may adopt an opinion.¹²¹

The Agency will monitor the overall safety performance of the railway system and the improvement of the interoperability. It will also collect relevant data on accidents and incidents, with the contribution of the national investigation bodies.¹²²

¹¹⁶ Art. 22 (5).

¹¹⁷ Art. 24-28, Recital 13.

¹¹⁸ Art. 19.

¹¹⁹ Chapter 7, Art. 29-31.

¹²⁰ See *infra*, § 3.2.2, these are bodies in charge of conformity assessment activities regarding subsystems.

¹²¹ Art. 30.

¹²² Art. 31.

A series of 'other tasks' of the Agency, provided by the proposal, include certification of drivers, acting as the system authorities for registers and databases, establishing networks of NSAs, investigating bodies and representative bodies in order to exchange information, promote good practices and exchange data on railway safety indicators. The Agency will be in charge of communicating, disseminating and providing training to stakeholders and information on the railway legislation, developing standards and guidance. It will contribute to research activities, and to promoting innovation. In addition, the Agency will provide technical assistance to the Commission with the implementation of the legislation and the assessment of a rail project for which EU financial support has been submitted.¹²³ These 'soft tasks' already largely exist, but will be strengthened by a specific legal basis.

Another additional task, introduced by the recast proposal, is the possibility for the Agency to develop contacts and enter into administrative arrangements with supervisory authorities, international organizations and the administrations of third countries. Such agreements would be subject to prior discussion with the Commission and should not create legal obligations for the EU.¹²⁴

Finally, the Agency may conclude cooperation agreements with relevant national authorities, in particular NSAs, in relation to the safety certificates and vehicle authorizations. The agreements may include contracting of some of the tasks of the Agency to the national authorities, but are without prejudice to the overall responsibility of the Agency for performing its tasks.¹²⁵

3.2.2. Safety

The Commission proposal¹²⁶ to amend the safety Directive 2004/49/EC aims to develop the safety of the EU's railways and improve access to the market for rail transport services. It provides that the Agency will become the only body entitled to grant the single safety certificates allowing access to the railway infrastructure to railway undertakings, which should ensure a high level of railway safety and equal conditions for all railway undertakings.

Safety certificates will be granted by the Agency on the basis of the evidence that the railway undertaking has established its safety management system and meets the requirements laid down in the TSIs and in the relevant legislation in order to control risks and provide transport services safely on the network.¹²⁷ The single safety certificate will specify the type and extent of the railway operations covered. It will be valid throughout the Union for equivalent operations. Certificates will be renewed at

¹²³ Art. 32-39.

¹²⁴ Art. 40.

¹²⁵ Art. 69.

¹²⁶ COM(2013) 31 final.

¹²⁷ Art. 10.

intervals not exceeding five years. The Agency will receive applications and decide within four months. An application guidance document will publicly be available free of charge.

Before any new service commences operation, the railway undertaking will notify the relevant NSA with the documentation confirming compliance with safety requirements. If the NSA finds evidence that one or more conditions are not met, it will refer the matter to the Agency, which will take the appropriate measures, including revocation of the certificate.¹²⁸ As far as the infrastructure managers are concerned, in order to be allowed to manage and operate rail infrastructure, they will obtain a renewable safety authorization from their NSA.

The proposed amended Directive provides that each railway undertaking, infrastructure manager and entity in charge of maintenance should ensure that its contractors and other parties implement risk control measures.¹²⁹ It largely maintains the former provisions providing for fair and non-discriminatory access of railway undertakings and infrastructure managers to training facilities for train drivers and other staff.¹³⁰

It also provides that each vehicle, before it is used on the network, will have an entity in charge of maintenance assigned to it and that this entity will be registered in the national vehicle register.¹³¹ The proposal requires Member States to lay down a series of tasks that the NSA will be entrusted with by Member States. Among them: authorizing the placing in service of the energy and infrastructure subsystems; issuing, renewing, amending and revoking safety authorizations of infrastructure managers; making sure that the interoperability constituents are in compliance with the essential requirements provided in the interoperability Directive; supporting the Agency in the issue, renewal, amendment and revocation of single safety certificates; supervising the railway undertakings; and monitoring, promoting, and, where appropriate, enforcing and updating the safety regulatory framework. NSAs will cooperate, together with the Agency, to ensure information for railway undertakings, particularly concerning risks and safety performance, is shared.

As provided by the transitional provisions, NSAs will continue to grant safety certificates until two years after entry into force of the new text. Finally, the Agency is asked to provide recommendations and opinions that may be taken into account when the EU adopts measures pursuant to the Directive.

¹²⁸ Art. 10.

¹²⁹ Recital 7.

¹³⁰ Art. 13.

¹³¹ Art. 14.

3.2.3. *Interoperability*

The proposal for a recast Directive on the interoperability¹³² of the rail system within the EU has the objective of achieving technical harmonization and facilitating, improving and developing international rail transport services within the Union and with third countries, and contributing to the progressive creation of the internal market in equipment and services for the construction, renewal, upgrading and operation related to the rail system.¹³³ The revised Directive will apply to the entire rail system within the EU, and the scope of the TSIs is being extended to cover the vehicles and networks not included in the trans-European rail system.

The proposed Directive provides that the Agency will draft TSIs and their amendments, along with relevant recommendations, according to a mandate conferred by the Commission, which, in its turn, should be empowered to adopt delegated acts in this regard.¹³⁴ Each subsystem – defined as the structural or functional parts of the rail system¹³⁵ – will be covered by a TSI.¹³⁶ The drafting, adoption and renewal of the TSIs will take account of the opinion of the social partners and of the users. The TSIs should be revised at regular intervals. When deficiencies are discovered in the TSIs, they can be amended on the basis of drafts of the Agency; in case of urgency, the Commission may adopt delegated acts which enter into force without delay.¹³⁷ The Commission, when adopting implementing acts, will be assisted by a comitology committee.¹³⁸

The proposal provides for a wide range of exceptions, according to which Member States may allow the applicant not to apply one or more TSIs or parts of them. In particular, this applies for a proposed new subsystem or part of it, for the renewal or upgrading of an existing subsystem; for urgent preventive measures following an accident or a natural disaster; for a new proposed subsystem or part of it when the application of these TSIs would compromise the economic viability of the project.¹³⁹

A whole chapter of the recast Directive is dedicated to interoperability constituents.¹⁴⁰ Member States have the responsibility to ensure that these constituents enable the interoperability and meet the essential requirements (as set out in Annex III of the Directive) and that they are used in their area of use and are suitably installed and maintained. Member States will not prohibit, restrict or hinder the

¹³² COM(2013) 30 final.

¹³³ See Recital 3.

¹³⁴ Art. 5.

¹³⁵ Art. 2 (5).

¹³⁶ The definition of 'technical specifications for interoperability' is, according to Art. 2(9) of the Directive proposal, a specification adopted in accordance with this Directive by which each subsystem or part of a subsystem is covered in order to meet the essential requirements and ensure interoperability of the rail system.

¹³⁷ Art. 5 and 47.

¹³⁸ Art. 48.

¹³⁹ Art. 7.

¹⁴⁰ Art. 8-17.

placing on the market of interoperability constituents where they comply with this Directive. In particular, they may not require checks which have already been carried out as part of the procedure of 'EC-Declaration of conformity or suitability for use'.

Similarly, concerning the subsystems, the proposal provides that Member States may not prohibit, restrict or hinder the construction, placing in service and operation of structural subsystems constituting the rail system which meet the essential requirements.¹⁴¹ Those covered by the EC declaration of verification will be considered interoperable and to meet the essential requirements. The Commission will establish, by means of implementing acts, the verification procedures for subsystems and the relevant templates, which will be assessed by the notified conformity assessment bodies. The notified conformity assessment bodies are legal persons responsible for conformity assessment activities; they are notified by 'notifying authorities' which are designated by Member States and have the full responsibility for the tasks performed by such bodies.

Concerning the placing on the market and the placing in service of fixed installations, such as the trackside control-command and signalling, energy and infrastructure subsystems, they will be placed in service only if they are designed, constructed and installed in such a way as to meet the essential requirements, and the relevant authorization is received.¹⁴² NSAs have the responsibility of authorizing the placing in service of the energy, infrastructure and trackside control-command and signalling subsystems which are located or operated in the territory of their Member States. The Agency shall grant "decisions authorising the placing in service of the trackside control command and signalling subsystems located or operated throughout the Union".¹⁴³ The Agency and the NSAs will cooperate in disseminating information concerning the procedures to obtain the relevant authorization.

Likewise, the mobile subsystems such as the rolling stock subsystem and the on-board control-command and signalling subsystem will be placed on the market only if they are designed, constructed and installed in such a way as to meet the essential requirements.¹⁴⁴

In order to be able to place a vehicle on the market, a vehicle authorization for placing on the market must be issued by the Agency.¹⁴⁵ The applicant will produce a file indicating evidence of the placing in the market of the mobile subsystem composing the vehicle, and its compatibility with such subsystems and their safe integration within the vehicle. The authorizations will be issued within a predetermined, reasonable time, and, in any case, within four months; they will be valid in all

¹⁴¹ Art. 12

¹⁴² Art. 18.

¹⁴³ Art. 18.

¹⁴⁴ Art. 19.

¹⁴⁵ Art. 20.

Member States, and could also concern a series of vehicles. After authorization is granted, vehicles should be registered in the European register of authorizations, kept by the Agency. Railway undertakings can only place vehicles in service after they have received the relevant authorization. The applicant may bring an appeal before the Board of Appeal designated according to the Agency Regulation against decisions of the Agency or its failure to act within the time limits.

The Agency will issue also vehicle type authorizations and provide detailed guidance on how to obtain such authorization. When it issues a vehicle authorization, it will at the same time issue a vehicle type authorization.¹⁴⁶

Any vehicle placed in service in the EU's rail system will carry a European vehicle number (EVN) assigned by the NSA competent for the relevant territory, before the first placing in service of the vehicle.¹⁴⁷ Each Member State will keep a register of the vehicles placed in service in its territory. The Agency will keep a register of authorizations to place vehicle types on the market.¹⁴⁸

According to the proposal, the new Directive will be transposed two years after its entry into force, and Member States may continue to apply the old provisions concerning the placing in the market and in service for two years after entry into force. In addition, authorizations for placing in service of vehicles which have been granted during this period and all other authorizations granted prior to the entry into force of this Directive, including authorizations delivered under international agreements, will remain valid in accordance with the conditions under which the authorizations have been granted. However, the extension of such existing vehicle authorizations in order to operate on one or more networks not covered by their authorization will be subject to the new provisions.¹⁴⁹

3.2.4. The new organs

The proposal provides a modified administrative and management structure. The new structure will comprise a Management Board, a newly created Executive Board, an Executive Director and one or more Boards of Appeal.¹⁵⁰

The Management Board will be composed of one representative from each Member State and four representatives of the Commission, all with a right to vote, along with six representatives of interest groups,¹⁵¹ without the right to vote, who are appointed by the Commission. Each Member will be in charge for four years and can

¹⁴⁶ Art. 22.

¹⁴⁷ Art. 42.

¹⁴⁸ Art. 43-45.

¹⁴⁹ Art. 51.

¹⁵⁰ Art. 42.

¹⁵¹ In particular: railway undertakings; infrastructure managers; the railway industry; trade unions; passengers and freight customers.

be renewed; each of them will have an alternate. The participation of representatives of third countries may also be arranged. The Board will take its decisions at the absolute majority of its members entitled to vote. It will elect a Chairperson from among the representatives of the Member States and a Deputy Chairperson. The Executive Director will participate in the meetings.¹⁵²

Among the many functions of the Management Board, a few deserve to be cited: the adoption by qualified majority of the annual work programme and of the budget of the Agency, the adoption of the Annual Report, the establishment of the rules of procedure, the appointment of the Executive Director and establishment of related decision-making procedures, appointment of staff, the appointment of the members of Executive Board and of the Board of Appeals.¹⁵³

The above-mentioned work programme will identify the objectives of each activity; it will be adopted, taking into account the opinion of the Commission, which is entitled to make the Management Board re-examine it.¹⁵⁴

A new organ introduced by the Commission proposal is the Executive Board. It will prepare decisions to be adopted by the Management Board and assist the Executive Director in their implementation. The Executive Board is entitled, in case of urgency, to take certain provisional decisions. It will be composed of the Chairperson of the Management Board, one representative of the Commission and four other members of the Management Board, which appoints them for the same term of office as itself. The Management Board will lay down its rules of procedure.¹⁵⁵

The Agency will be managed and represented by its Executive Director, who will be completely independent, and will be accountable to the Management Board. S/he is the legal representative of the Agency and will adopt decisions, recommendations, opinions and other formal acts. S/he is in charge of the administrative management of the Agency and is responsible for, in particular, the implementation of the decisions of the Management Board, for the drafting of the annual work programme and of the strategic multi-annual work programme and their implementation, for the drafting of the financial regulation and for the preparation of the annual report to be submitted to the management board.¹⁵⁶

¹⁵² Art. 43-46.

¹⁵³ Art. 47.

¹⁵⁴ Art. 48.

¹⁵⁵ Art. 49.

¹⁵⁶ Art. 50.

3.2.5. *The Board of Appeals*

As explained in the proposal for the new Agency Regulation, its IA report¹⁵⁷ provided for the creation of an independent appeal body separate from the Agency. However, it was considered that the solution already in place at the European Aviation Safety Agency (EASA) would be more appropriate, and it was decided to take inspiration from the relevant provisions of the EASA Regulation.¹⁵⁸

In particular, the proposal provides that any natural or legal person will be legitimated to appeal to a Board of Appeals against a decision addressed to that person by the Agency pursuant to its new certification and authorization powers. Once all appeal procedures within the Agency have been exhausted, actions for the annulment of such decisions may be brought before the Court of Justice of the European Union.

A Board of Appeal should be composed of a Chairperson and two other members appointed by the Management Board from a list of qualified candidates established by the Commission. Its rules of procedure should be established by the Commission after consultation with the Management Board. The appeals should not have a suspensory effect. However, if the Agency considers that circumstances so permit, it may suspend the application of the decision appealed against.¹⁵⁹

The Parliament had suggested accentuating the independence of the members of the Boards. The Council had proposed the possibility of having either permanent Boards or Boards established on a case by case basis, and which, when deciding on the disagreement between the Agency and the NSA, will act as arbitration authorities.

3.3. **The ERA in the general framework of the development of the EU Agencies**

The creation of agencies has developed during the last two decades in the EU, mainly with the purpose of integrating the European market for potentially dangerous products, of creating a level playing-field for some technical sectors, or disseminating and helping the implementation of EU policies in certain areas. There are now around 30 agencies across the EU, and they have varied structures and powers.¹⁶⁰

¹⁵⁷ SWD (2013) 8 final.

¹⁵⁸ The EASA 'Basic Regulation' 216/2008/EC, OJ L 79, 19.3.2008, provides for the establishment of a Board of Appeals competent to decide on appeals against the decisions of the Agency concerning the certifications it is empowered to issue. Its members are appointed by the Management Board from a list of qualified candidates adopted by the Commission. The decisions of the EASA Board of Appeal may be challenged before the Court of Justice.

¹⁵⁹ Art. 51-57.

¹⁶⁰ For a comprehensive overview, see M. Busoic, M. Groenleer and J. Trondal, Eds, *The agency phenomenon in the European Union, Emergence, institutionalisation and everyday decision-making*, Manchester University Press, 2012.

There was an attempt by the Commission to create a common framework for all of these bodies through a proposal for an interinstitutional agreement in 2005,¹⁶¹ setting out the conditions for the creation of regulatory agencies. It was not approved, mainly because the Council was not convinced that an interinstitutional agreement would be the appropriate instrument for such a framework. It was concerned that the legislature would then be bound by a procedure that is not provided for in the Treaties.¹⁶²

The possibility of delegating powers to the Agencies is limited by the necessity to apply the Meroni doctrine, which takes its origin in the judgment of the ECJ of 23 April 1956 in Case 9/56.¹⁶³ The Court stated in that judgment that it is only when delegated powers are clearly defined and executive, and can, therefore, be subject to strict review in the light of objective criteria determined by the delegating authority, that they can be authorized, as they wouldn't be able to appreciably alter the consequences involved in the exercise of the powers concerned.¹⁶⁴ Should the proposals be approved, the ERA will be given direct decision-making power in a technical field, which will presumably involve considerable investments, rendering it a very important actor in a sector which is crucial for the real achievement of the internal market.

In the field of transport, two other agencies, the European Maritime Safety Agency (EMSA) and the EASA were established in 2002. While the former merely assists the Commission in the initiative and implementation of EU maritime legislation and is involved in dissemination activities,¹⁶⁵ the latter has been endowed with more extensive powers, which resemble in some ways those foreseen for the ERA. EASA's primary text is the 'Basic Regulation' for civil aviation, No 216/2008,¹⁶⁶ which lays down the framework criteria and objectives for its responsibilities. In particular, the Basic Regulation confers on the EASA several sets of functions. It is entitled to formulate opinions, conduct inspections and investigations, assist the Commission in preparing technical measures for the implementation of the Regulation, and to carry out on behalf of Member States the functions ascribed to them by international

¹⁶¹ Draft Interinstitutional Agreement on the operating framework for the European regulatory agencies, COM(2005) 59 final, p. 2.

¹⁶² M. Chamon, 'EU agencies: does the Meroni doctrine make sense?', *Maastricht Journal of European and Comparative Law*. 2010, UGent 17(3). p. 281-305.

¹⁶³ Meroni & Co., Industrie Metallurgiche, SpA v High Authority of the European Coal and Steel Community, Case 9-56. European Court Reports, p. 133.

¹⁶⁴ Of course, reality is sometimes more nuanced. A higher degree of technicality may often strengthen the agencies' influence on the final decision of the Commission, even if those agencies possess only advice powers. While being the accountable body, the Commission may not always possess the required capacity and resources to operate an assessment on the technical findings of the Agencies. See: *The agency phenomenon in the European Union*, cit., p. 105-127.

¹⁶⁵ Regulation (EC) No 1406/2002 of the European Parliament and of the Council of 27 June 2002 establishing a European Maritime Safety Agency, OJ L 208, 5.8.2002, p. 1.

¹⁶⁶ Regulation (EC) No 216/2008 of 20/02/2008 on common rules in the field of civil aviation and establishing a European Aviation Safety Agency, and repealing Council Directive 91/670/EEC, Regulation (EC) No 1592/2002 and Directive 2004/36/E, OJ L 79, 19.3.2008, p. 1, as lastly amended by Regulation 6/2013/EU.

conventions. Most relevantly, the EASA issues certification specifications and acceptable means of compliance, and prepares drafts for the Commission. It also issues, in some circumstances, airworthiness and environmental certifications for products, parts and appliances, and releases certificates for pilot and air traffic controller third-country organizations. In addition, the EASA may take action with any problem affecting the safety of air operations by determining corrective action and disseminating related information; it has a number of powers related to air traffic management and air navigation services and the related certifications; it authorizes third-country operators and may request the Commission to impose fines when the provisions of the Basic Regulation and its implementing rules have been breached.¹⁶⁷

It is not clear whether the new powers that will be granted to the ERA will mirror those of the EASA and to what extent. It would in any case seem that the actual intention of the EU legislative bodies is to deflate the ambitions of the initial Commission proposal. The higher caution concerning the powers to be delegated to the Railways Agency compared to the EASA may be due, once again, to the structural differences between the systems, the first being still very diversified from country to country, while the second is more fitted to international transport and thus more harmonized. Although this looks very much like a vicious circle, one can expect that the powers of the ERA will be wider once the interoperability of the rail sector reaches the ideal level where a centralized management of the certifications and authorizations will be convenient for all.

¹⁶⁷ See in particular Art. 17-27 of Regulation 216/2008.

4. SUBSIDIES TO RAILWAY TRANSPORT SECTOR

4.1. The present regime

The peculiarities of the transport sector – namely its national monopolistic organization and the lack of standardization – were acknowledged even at the time of the EEC Treaty. In fact, the related Article 73 of the Rome Treaty is still unchanged and in force; it is now Article 93 of the TFEU, and it provides for a special legal basis for the assessment of state aid in the form of public service compensation in land transport. It is worded as follows: ‘Aids shall be compatible with the Treaties if they meet the needs of coordination of transport or if they represent reimbursement for the discharge of certain obligations inherent in the concept of a public service.’¹⁶⁸

As was stated in the judgment of the Court of Justice in Case 156/77, *Commission v Belgium*,¹⁶⁹ aid to the transport sector is not exempted from the general system of the Treaty concerning state aid, or from the controls and procedures laid down therein; therefore it can be inferred that Article 93 TFEU is *lex specialis* to Article 106(2) TFEU and not to Article 107 TFEU.¹⁷⁰ Consequently, Article 93 TFEU rules on the compatibility of the state aid with the general Treaty provisions on the subject, not on the mere existence of such aid. The Court therefore confirmed what had been anticipated by the Commission in Decision 65/271,¹⁷¹ namely that competition rules do apply to the transport sector. The Commission plays a very important role in this field, mainly due to its margin of appreciation in assessing whether the criteria set in Article 107 TFEU to consider state aid compatible with the internal market are met.

Occasionally, EU legislation has been even stricter on the transport sector than on other sectors when it comes to the application of state aid provisions. Suffice it to mention that the Commission notice on *de minimis* aid,¹⁷² which sets a threshold figure of aid below which Article 107 can be said not to apply, does not concern transport. Similarly, Regulation 69/2001¹⁷³ on the application of Articles 87 and 88 of the EC Treaty to *de minimis* aid does not apply to that sector either, since, as is explained

¹⁶⁸ For an overview, see T. Maxian Rusch., S. Schmidt, ‘The post-Altmark Era Has Started: 15 Months of Application of Regulation (EC) No 1370/2007 to Public Transport Services’, *Eur. State Aid L. Q.*; 2011, Vol. 10 Issue 2, p. 249; R. Bieber F. Maiani, M. Delaloye, *Droit européen des transports*, Bruylant 2006, p. 227-238; C.H. Bovis, ‘Public Service Obligations in the Transport Sector: The Demarcation between State Aids and Services of General Interest under EU law’, *EBLR*, 2005, p. 1331.

¹⁶⁹ ECR (1978) 1881, Judgment of the Court of 12 October 1978, point 10: ‘l’application de l’article 77 du traité, qui admet la compatibilité avec le traité d’aides aux transports seulement dans des cas bien déterminés et ne portant pas préjudice aux intérêts généraux de la Communauté, ne peut avoir pour effet de soustraire les aides aux transports au régime général du traité concernant les aides accordées par les États et aux contrôles et procédures y prévus.’

¹⁷⁰ See T. Maxian Rusch.; S. Schmidt, ‘The post-Altmark Era Has Started’, cit., p. 249.

¹⁷¹ Council Decision of 13 May 1965 on the harmonization of certain provisions affecting competition in transport by rail, road and inland waterway, JO 1965, p. 1500.

¹⁷² Commission notice on the *de minimis* rule for State aid, C 068, 06/03/1996 P. 9-10.

¹⁷³ OJ L 10, 13.1.2001, p. 30-32.

in Recital 3, there is a risk that even minor aid could fulfil the criteria established in Article 107 of the TFEU.

The first action of the European legislator in the field of state aid to the transport sector was the adoption of Regulations 1191/69,¹⁷⁴ 1192/69¹⁷⁵ and 1107/70.¹⁷⁶ The former aimed to eliminate disparities liable to cause substantial distortion in the conditions inherent in the concept of a public service which are imposed on transport undertakings by Member States. The concept of PSO was clarified and classified as an obligation to operate, to carry, and related to tariffs. Regulation 1191/69 required the termination of all the PSOs, in so far as they did not comply with the definition of being essential, in order to ensure the provision of adequate transport services. In those cases, public service contracts could be concluded, in a way that is less costly for the community, and the economic disadvantages undertaken by undertakings carrying out public services should be compensated. State aid granted according to such a provision was exempted from the obligation of prior notification from the Commission. The Regulation did not apply to urban, local or regional undertakings.

Regulation 1192/69, on common rules for the normalization of the accounts of railway undertakings, aimed to eliminate disparities which arise when public authorities impose financial burdens on, or grant of benefits to railway undertakings, as opposed to other modes of transport – which are consequently liable to cause substantial distortion in the conditions of competition. In particular, the normalization of the accounts of railway undertakings, within the meaning of this Regulation, consisted of: determination of the financial burdens or benefits undertaken by specifically indicated railway undertakings by reason of any legal provision; comparison with their position if they operated under the same conditions as other transport undertakings; and, at a second stage, in the payment of compensation in respect of the burdens or benefits disclosed by such determination.

The following year, Regulation 1107/70 on the granting of state aids for transport by rail, road and inland waterway was adopted. The general intention of the Commission was to authorize coordination of transport only in those cases where such an intervention is deemed necessary to grant services which could not be granted under the market forces, either because the market does not exist or because competition is distorted. Particularly important is the provision under Article 3 of the Regulation, which required that, with the exception of what is provided by Regulations 1191 and 1192 of 1969, Member States will neither take co-ordination measures nor impose obligations inherent in the concept of a public service in transport and which involve the granting of aids pursuant to Article 93 TFEU, except in a number of cases specifically indicated. Some of those cases were only valid until the entry into force of

¹⁷⁴ OJ L 175, 23/07/1968 p. 1-12.

¹⁷⁵ OJ L 156, 28/06/1969 p.8-20.

¹⁷⁶ OJ L 130, 15/06/1970 p. 1-3.

common rules on the allocation of infrastructure costs, or of Community rules on access to the transport market. In 1991, Regulation 1191/69 was amended by Regulation 1893/91,¹⁷⁷ which introduced a detailed notion of public service contract.

Not much occurred in recent decades in terms of legal policy or enforcement concerning state aid in the transport sector, probably as a consequence of both the notification exemption and a lack of real competition in the European markets.

Some provisions of Directive 2012/34¹⁷⁸ should be mentioned. In particular, Article 8 regulates the state financing of infrastructure managers; this is a provision that is not intended to be amended by the Fourth Railway Package proposals. It provides that, having due regard to Articles 93, 107 and 108 TFEU, Member States may provide the infrastructure manager with financing which must be consistent with its functions, the size of the infrastructure and financial requirements, in order to cover new investments. Member States may decide to finance those investments through means other than direct state funding. In any case, Member States will ensure that, under normal business conditions and over a reasonable period which should not exceed five years, the profit and loss account of an infrastructure manager will at least balance income from infrastructure charges, surpluses from other commercial activities, non-refundable incomes from private sources and state funding, on the one hand, advance payments from the state, where appropriate, and infrastructure expenditure, on the other hand. The provision concludes with some fairly hopeful wording, stating that where rail transport is able to compete with other modes of transport, Member States may require the infrastructure manager to balance his accounts without state funding.

4.2. The CJEU case law

The landmark judgment in the sector of PSOs is the one given by the Court on 24 July 2003 in the *Altmark* case, C-280/00, delivered in response to a reference for a preliminary ruling from the German federal administrative court. The case concerned local bus transport companies, for which Germany made use of the provided exception and did not apply regulation 1191/1969 to urban, suburban and regional transport. *Altmark* being a licensee of the public authority, the renewal of its licence was challenged by another operator who claimed that *Altmark* was not financially viable since it could not have survived without public subsidies, and that the licenses were therefore unlawful.

The Court was essentially asked whether the subsidies granted to *Altmark* were state aid prohibited by the EC Treaty, and whether the German authorities violated EU law

¹⁷⁷ OJ L 169, 29/06/1991 p. 1-3.

¹⁷⁸ OJ L 343, 14.12.2012, p. 32-77.

in not applying the 1969 regulation on PSOs to regional transport services operated commercially.

The Court stated that public subsidies intended to enable the operation of urban, suburban or regional scheduled transport services are not caught by Article 107 of TFEU when such subsidies are to be regarded as compensation for the services provided by the recipient undertakings in order to discharge PSOs. For the purpose of applying that criterion, the national courts have to ascertain that four conditions are satisfied:

- first, the recipient undertaking is actually required to discharge PSOs and those obligations have been clearly defined;
- second, the parameters on the basis of which the compensation is calculated have been established beforehand in an objective and transparent manner;
- third, the compensation does not exceed what is necessary to cover all or part of the costs incurred in discharging the PSOs, taking into account the relevant receipts and a reasonable profit for discharging those obligations;
- fourth, where the undertaking that has to discharge PSOs is not chosen through 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 has been determined on the basis of an analysis of the costs which a typical well run undertaking would have incurred in discharging those obligations, taking into account the relevant receipts and a reasonable profit for discharging the obligations.

The Court held that the German legislature may, in principle, make partial application of the exception provided for in the Regulation for urban, suburban or regional transport. However, this could only be accepted provided that the principle of legal certainty is duly complied with, so as to make it possible to determine the situations in which the exception applies and those in which the Community regulation is applicable.

It added that, even though a measure may be considered as state aid because it does not fulfil the above criteria, it can still be authorized by the Commission pursuant to the criteria provided at Article 3 of Regulation 1107/1970, which lists exhaustively the circumstances in which the authorities of the Member States may grant aids under Article 93 TFEU.

Also remarkable is the judgment of the Court of First Instance of 16 March 2004 in Case T-157/01, *Danske Busvognmænd/Commission*. In this case, the Court recalled that Regulation 1191/1969 introduces a clear distinction between the 'obligations inherent in the concept of a public service' which the competent authorities are to terminate, and 'transport services' which those authorities are authorized to ensure through 'public service contracts'. Only in this latter circumstance may the common

compensation procedures be applied. That scheme must then be limited to those aids which are directly and exclusively necessary for the performance of the public transport service per se, and do not include subsidies intended to cover deficits incurred by the undertaking which benefited from the aids as a result of circumstances other than its task of providing transport, such as the consequences of unsound financial management.¹⁷⁹

In addition, the Tribunal noted that, following the adoption of Regulation 1107/70 on the granting of aids for transport by rail, road and inland waterway, Member States may no longer rely directly on Article 93 of TFEU in situations not covered by secondary Community law, meaning Regulations 11961/1969 and 1107/1970.

The Commission, as a watchdog for the application of the Treaties, has been quite active in recent years in investigating possible state aid in rail transport, in particular concerning direct grants and asset transfers.

4.3. Regulation 1370/2007

Already in 2000, the Commission had submitted a proposal to modify the 1969 legislation, which initially encountered several difficulties in obtaining the approval of the Council and of the Parliament. Finally, after three modifications to the proposal, and perhaps spurred by the legal uncertainty created by the *Altmark* and *Danske Busvognmænd* judgments, an agreement was reached in 2007, and Regulation 1370/2007¹⁸⁰ on public passenger transport services by rail and by road was adopted, repealing Regulation 1191/69 and 1107/70. The impact of this instrument on competition in the rail sector has, however, remained limited, due to the fact that it still allows local authorities to provide public passenger transport services, and because direct awards for railway passenger transport contracts find a legal basis here.

As stated in its explanatory memorandum,¹⁸¹ the starting point of the proposal for this Regulation was the development of competition for the provision of public transport. In the 1990s, 11 of the 15 Member States had introduced some elements of competition into their legislation or administrative practices, relating to at least part of their public transport market. In most cases it was some kind of controlled competition based on the regular renewal of exclusive rights, rather than free access to the market. There was therefore a need to establish legal certainty and to harmonize key aspects of the procedures used in different Member States. The Commission had initially proposed the establishment of an explicit obligation for national authorities to provide adequate transport services, which was not retained.

¹⁷⁹ Points 77 and 86 in particular.

¹⁸⁰ OJ L 315, 3.12.2007, p. 1-13.

¹⁸¹ COM/2000/0007 final – COD 2000/0212, OJ C 365 E, 19/12/2000 p. 0169-0178.

Regulation 1370/2007 aims to clarify the requirements for national authorities so that they can comply with Community law in providing, purchasing and financing public passenger transport.¹⁸² In particular, national authorities that decide to grant the relevant operator compensation or an exclusive right in return for its discharge of a PSO should do so via a public service contract.¹⁸³ As a derogation to this rule, PSOs which aim to establish maximum tariffs for all or for certain categories of passengers may also be the subject of 'general rules'.¹⁸⁴ These are defined by the same Regulation as measures which apply without discrimination to all public passenger transport services of the same type in a given geographical area for which a competent authority is responsible.¹⁸⁵ The regulation sets down the mandatory content of public service contracts and general rules and sets a maximum duration for the contracts, which is 15 years for transport.¹⁸⁶

The Regulation in principle imposes an obligation to resort to public tendering for public service contracts for passenger transport.¹⁸⁷ However, this comes as a subsidiary rule, as substantial exceptions are provided. In particular, going far beyond the initial Commission proposal, Article 5(6) provides that public service contracts can be awarded directly when they concern transport by rail – unless they are prohibited by national law – and for a maximum period of ten years. For the other modes of transport, including metro and tramways, direct award is possible for contracts of moderate volume, subject to specific thresholds. Direct award is also allowed in case of immediate risk of disruption of passenger services.¹⁸⁸ In addition, competent local authorities are still free to provide passenger transport themselves, but then the same entities providing such services will not participate in competitive tenders in other domestic territories or in other Member States.¹⁸⁹

Transparency rules have been introduced, for instance, public services contracts that are to be tendered must be published.¹⁹⁰ Decisions to award contracts must be subject to review in case a third interest party so requests.¹⁹¹ If the public service contract is awarded through public tendering, the Regulation requires the application of criteria similar to those introduced by the *Altmark* judgment.¹⁹² In case of general rules or direct awards, additional requirements are set in the Annex to the Regulation, including the obligation to separate accounts.¹⁹³

¹⁸² For an explanation of the provisions, see O. Grith Skovgaard, 'Regulation 1370/2007 on public passenger transport services', *Public Procurement Law Review*, 2008, 3, NA84-89.

¹⁸³ Art.3 (1).

¹⁸⁴ Art. 3(2).

¹⁸⁵ Art. 2 (l).

¹⁸⁶ Art. 4.

¹⁸⁷ Art. 5(3).

¹⁸⁸ Art. 5(5).

¹⁸⁹ Art. 5(1) and (2).

¹⁹⁰ Art. 7(2).

¹⁹¹ Art. 5(7).

¹⁹² Art. 6 and Art. 4(1).

¹⁹³ Art. 6.

The Regulation clarifies the relation between its provisions and state aid rules.¹⁹⁴ In particular, compensation paid in accordance with the Regulation does not constitute state aid. Article 93 of TFEU still applies for other forms of compensation or financing. As earlier noted, Member States are only required to gradually come into line with the Regulation, the end of the transition period being fixed at 3 December 2019.

The Commission confirmed in its Community guidelines on state aid for railway undertakings of 2008,¹⁹⁵ that, after the entry into force of Regulation 1370/2007, Article 93 of TFEU will again be directly applicable as a legal basis for establishing the compatibility of state aid which does not come within the remit of the Regulation.

The first case regarding the application of this regulation is Andersen/Commission, T-92/11, based on the same issue as Danske Busvognmænd. It is currently under appeal before the Court of Justice as Case 303/13 P. In Case T-92/11 the General Court annulled the Commission's decision approving the state aid paid to the Danish incumbent railway company under public service contracts based on the fact that the applicability of Regulation 1370/2007 should be excluded for aid which has been paid without being notified, as the law in force at time of payment was Regulation 1191/69.

4.4. The new proposed amendments

The Fourth Railway Package provides for a proposal to repeal Regulation 1192/69 and for a proposal to amend Regulation 1370/2007, which are meant to enhance competition and improve the operational efficiency and quality of passenger transport service, and thus contribute to the main objective of establishing an internal market for transport.

Regulation 1192/69 allows Member States to compensate 36 specific railway undertakings for the payment of certain obligations, such as family allowances and pensions, which undertakings operating other transport modes do not normally have to support; the correct application of such rules exempts Member States from their state aid notification obligations. Since this is now considered inconsistent and incompatible with legislative measures currently in force, the Commission has issued a proposal¹⁹⁶ to repeal the Regulation. Such inconsistency and incompatibility are due to a series of reasons. First of all, since railway undertakings must be managed according to principles applicable to commercial companies, no state compensation for insurance, pensions or other expenditures can be permissible. Then, the list of undertakings eligible for compensation presupposes an integrated structure which is incompatible with the principle of separation of essential functions and accounts and implies discrimination among undertakings.¹⁹⁷

¹⁹⁴ Art. 9.

¹⁹⁵ OJ C 184 22/7/2008. See also the new interpretative guidelines of 2014 (OJ C 92/1/2014).

¹⁹⁶ COM(2013) 26 final.

¹⁹⁷ *Ibidem*.

The proposal¹⁹⁸ to amend Regulation 1370/2007 aims to boost competition for passenger transport by rail. It has to be recalled that the great majority of domestic passenger services are provided under public service contracts and not under a commercial basis.¹⁹⁹

The proposal has to be read in connection with the proposed amendments²⁰⁰ to Directive 2012/34, which introduces open access rights for railway undertakings and strengthens the provisions on non-discriminatory access to the rail infrastructure.

The main innovations are the establishment of public tendering as the generally applicable rule for rail transport, the establishment of an annual volume of public services contracts for passengers by rail, the obligation for national authorities to establish public transport plans according to specified requirements, to which the PSOs should comply, and the clear definition of PSOs and of their geographical scope.

The proposal introduces competitive tendering as the general rule in the railway sector.²⁰¹ Competent authorities will have the possibility to choose between competitive tendering and direct award only when the contracts present certain limited annual values or a limited number of kilometres, values which are slightly increased for small- and medium-sized undertakings.

Competent authorities should set out public transport plans to which the establishment of PSOs and the award of public service contracts will be consistent.²⁰² Such plans should define the objectives of the public transport policy and the means to implement them, covering all relevant transport modes for the territory for which they are responsible. Specifications of PSOs for public passenger transport should be appropriate and proportionate, without exceeding what is necessary to achieve the objectives of the public transport plan. The assessment of appropriateness will take account of whether a public intervention in the provision of passenger transport is a suitable means of achieving the objectives, and take into account the cabotage services.²⁰³ The authorities will prepare the specifications of PSOs in a cost-effective manner, taking account of the compensation for the net financial effect of those obligations; they need to ensure long-term financial sustainability of public transport provided under public service contracts.²⁰⁴

The proposal establishes, albeit with a certain flexibility, a maximum annual volume of passenger transport by rail under each public service contract, in order to facilitate competition for such contracts.²⁰⁵ Further measures to enhance competition include

¹⁹⁸ COM(2013)28 final.

¹⁹⁹ *Ibidem*.

²⁰⁰ COM(2013) 29 final.

²⁰¹ Art. 1 (4), amending Art. 5 (4) of Regulation 1370/2007.

²⁰² Art. 1 (2), inserting Art. 2a of Regulation 1370/2007.

²⁰³ Art. 1(2), inserting paragraphs 2 and 3 of Art. 2a.

²⁰⁴ Art. 1(2), inserting paragraph 4 of Art. 2a.

²⁰⁵ Art. 1(2), inserting paragraph 6 of Art. 2a.

the possibility for competent authorities to limit the number of contracts to be awarded to the same railway undertaking following a competitive tendering procedure, therefore inciting other undertakings to cover parts of the same network.²⁰⁶

Concerning rail rolling stock, the proposal introduces an obligation on Member States to ensure effective and non-discriminatory access to suitable rail rolling stock for operators wishing to provide public passenger services by rail.²⁰⁷ Where there are no rolling stock leasing companies which provide such services in the relevant market, Member States will ensure that the residual value risk of the rolling stock is borne by the competent authorities in compliance with state aid rules. Competent authorities have broad scope to choose the most appropriate ways of achieving the objective; the details should be defined in implementing acts.

The transitional period to 2 December 2019, provided by the Regulation in its current wording, will only refer to the obligation to organize competitive tendering procedures and not to the other provisions provided in Article 5, which should be immediately applicable.²⁰⁸ In addition, the proposal introduces a further transitional period for public service rail contracts that are directly awarded between 1 January 2013 and 2 December 2019, establishing that they may remain in place until they expire and in any case no later than 31 December 2022.²⁰⁹

Other than in the fourth package, amendments to Regulation 1370/2007 are included in a proposal²¹⁰ to amend Regulation 994/98,²¹¹ which grants notification exemption for certain categories of horizontal state aid. The amendment provides that it will no longer be up to the Commission to grant notification exemptions for public service compensation or for complying with tariff obligations, but the matter should come within the scope of Regulation 994/98.

The proposal to amend Directive 2012/34²¹² aims to open the market for domestic passenger transport services and therefore to improve competition. Nevertheless, it leaves Member States the possibility of limiting access rights for the purpose of operating domestic or international services if the exercise of this right would compromise the economic equilibrium of a public service contract. It will be up to the regulatory bodies to determine if this is the case, according to common procedures and criteria.²¹³

²⁰⁶ Art. 1(4), amending Art. 5(6) of Regulation 1370/2007.

²⁰⁷ Art. 1(5), inserting Art. 5a of Regulation 1370/2007.

²⁰⁸ Art. 1(8), amending Art. 8 of Regulation 1370/2007.

²⁰⁹ *Ibidem*.

²¹⁰ COM(2012) 730 final, Art. 2, repealing Art. 9 of Regulation 1370/2007.

²¹¹ OJ L 142, 14.5.1998, p. 1-4.

²¹² COM(2013) 29 final.

²¹³ Art. 1(5), amending Art. 10 of Directive 2012/34.

CONCLUSION

The construction of a European rail market, though potentially one of the most important means for the achievement of the internal market and for the limitation of environmental damage, has taken a very long time to develop, mainly due to structural characteristics which basically consisted of network economies, national monopolies and a lack of interoperability between the national systems. This is why EU action in this sector has only gradually required Member States to open their undertakings to a commercial way of operating, to be subject to competition and state aid rules, and to open the internal market in general. In addition, the legislation has been characterised by a system of copious exceptions and temporary measures for the entry into force of the new provisions.

Notwithstanding the governments' lack of enthusiasm about giving up control of the national rail systems, big developments have been registered since the beginning of European integration in the rail transport sector. Action was taken in particular in three directions: improvement of competition, improvement of interoperability through the application of common standards, development of infrastructure. Liberalization has been promoted through the separation of the management of infrastructure from the operation of services, the consequent application of commercial-like business, the financial equilibrium of the business plan and the introduction of a clear set of provisions on the compatibility of Member States' financial measures with the state aid principles. Interoperability actions have been backed by safety standards, harmonization and improvement.

The fourth package aims to give this a new impulse. Once the internal market has been fully established in this sector, a next step could be the introduction of structures that are created on a European level from the outset, or the gathering of European undertakings, mirroring what is in place in the air transport sector, with the various airline associations.

It is in any case desirable that, both on the freight and on the passenger segment, a modal shift to the use of rail transport will occur in the very near future, if only because of safety and, mostly, environmental reasons. Unfortunately, from this point of view, the EU railway policy remains far from complete, and somewhat unbalanced. The EU has demonstrated more abilities to adopt measures about railway transport itself than about its global environment. Firstly, externalities have not fully been reflected in the comparative prices of road, air and rail transport until now. Secondly, there is no global vision about infrastructure charges. Thirdly, the definition of performance itself in railways remains somewhat haphazard.

Finally, all this raises fundamental questions. What is the real added value of railways in a general transport system? Or, put otherwise, in the railway transport service,

what is the separate value of transport itself, comparative security, comfort, health and environmental benefits? And once this is defined, what are the optimal forms of public intervention in this imperfect competition sector? Though many measures have been adopted over the last 25 years, very important actions – which have enormous consequences for the relative competitiveness of railways – still remain to be carried out. Whatever happens at the end of this legislative procedure, the Fourth Railway Package will certainly be an important stop in this long regulatory journey, but not the last one.

APPENDIX: EU REGULATORY FRAMEWORK ON RAILWAY TRANSPORT

Railway packages

First Railway Package of 2001 (recast by Directive 2012/34/EU):

- Directive 2001/12/EC of the European Parliament and of the Council of 26 February 2001 amending Council Directive 91/440/EEC on the development of the Community's railways.²¹⁴
- Directive 2001/13/EC of the European Parliament and of the Council of 26 February 2001 amending Council Directive 95/18/EC on the licensing of railway undertakings.^{215 216}

Second Railway Package of 2004

- Directive 2004/49/EC of 29 April 2004 on safety on the Community's railways and amending Council Directive 95/18/CE on the licensing of railway undertakings and Directive 2001/14/CE on the allocation of railway infrastructure capacity and the levying of charges for the use of railway infrastructure and safety certification.²¹⁷
- Directive 2004/50/EC of the European Parliament and of the Council of 29 April 2004 amending Council Directive 96/48/EC on the interoperability of the trans-European high-speed rail system and Directive 2001/16/EC of the European Parliament and of the Council on the interoperability of the trans-European conventional rail system.²¹⁸
- Directive 2004/51/EC of the European Parliament and of the Council of 29 April 2004 amending Council Directive 91/440/EEC on the development of the Community's railways.²¹⁹ **Repealed by Directive 2012/34/EU.**
- Regulation (EC) No 881/2004 of the European Parliament and of the Council of 29 April 2004 establishing a European Railway Agency.²²⁰

Third Railway Package of 2007

- Directive 2007/58/EC of the European Parliament and of the Council of 23 October 2007 amending Council Directive 91/440/EEC on the development of

²¹⁴ OJ L 75, 15.3.2001, p. 1-25.

²¹⁵ OJ L 75, 15.3.2001, p. 26-28.

²¹⁶ OJ L 75, 15.3.2001, p. 29-46.

²¹⁷ OJ L 164, 30.4.2004, p. 44-113.

²¹⁸ OJ L 164, 30.4.2004, p. 114-163.

²¹⁹ OJ L 164, 30.4.2004, p. 164-172.

²²⁰ OJ L 164, 30.4.2004, p. 1-43.

the Community's railways and Directive 2001/14/EC on the allocation of railway infrastructure capacity and the levying of charges for the use of railway infrastructure.²²¹ **Partially repealed by Directive 2012/34/EU.**

- Directive 2007/59/EC of the European Parliament and of the Council of 23 October 2007 on the certification of train drivers operating locomotives and trains on the railway system in the Community.²²²
- Regulation (EC) No 1370/2007 of 23 October 2007 on public passenger transport services by rail and by road and repealing Council Regulations (EEC) Nos 1191/69 and 1107/70.²²³
- Regulation (EC) No 1371/2007 of 23 October 2007 on rail passengers' rights and obligations.²²⁴
- Regulation (EC) No 1372/2007 of 23 October 2007 amending Council Regulation (EC) No 577/98 on the organisation of a labour force sample survey in the Community.²²⁵

Recast of First Railway Package in 2012

- Directive 2012/34/EU of the European Parliament and of the Council of 21 November 2012 establishing a single European railway area (recast).²²⁶

Regulatory bodies (Repealed by Directive 2012/34/EU)

- Directive 2001/14/EC of 26 February 2001 on the allocation of railway infrastructure capacity and the levying of charges for the use of railway infrastructure and safety certification.²²⁷ **Repealed by Directive 2012/34/EU.**
- Directive 2001/12/EC of 26 February 2001 amending Council Directive 91/440/EEC on the development of the Community's railways.²²⁸ **Repealed by Directive 2012/34/EU.**
- Council Directive 91/440/EEC of 29 July 1991 on the development of the Community's railways.²²⁹ **Repealed by Directive 2012/34/EU.**

ERTMS – European Rail Traffic Management System

- 2012/696/EU: Commission Decision of 6 November 2012 amending Commission Decision 2012/88/EU on the technical specifications for interoperability relating

²²¹ OJ L 315, 3.12.2007, p. 44-50.

²²² OJ L 315, 3.12.2007, p. 51-78.

²²³ OJ L 315, 03.12.2007, p. 1-13.

²²⁴ OJ L 315, 03.12.2007, p. 14-41.

²²⁵ OJ L 315, 03.12.2007, p. 42-43.

²²⁶ OJ L 343, 14.12.2012, p. 32-77.

²²⁷ OJ L 75, 15.3.2001, p. 29-46.

²²⁸ OJ L 75, 15.3.2001, p. 1-25.

²²⁹ OJ L 237, 24.8.1991, p. 25-28.

- to the control-command and signalling subsystems of the trans-European rail system.²³⁰
- 2012/88/EU: Commission Decision of 25 January 2012 on the technical specification for interoperability relating to the control-command and signalling subsystems of the trans-European rail system (notified under document C(2012) 172).²³¹
 - 2011/229/EU: Commission Decision of 25 January 2012 on some technical specification for interoperability.²³²
 - 2009/761/EC: Commission Decision of 22 July 2009 amending Decision 2006/679/EC as regards the implementation of the technical specification for interoperability relating to the control-command and signalling subsystem of the trans-European conventional rail system [C(2009) 5607 final] (also referred to as ‘the European Deployment Plan’).²³³
 - 2008/386/EC: Decision of 23/04/2008 modifying Annex A to Decision 2006/679/EC of 28 March 2006 concerning the technical specification for interoperability relating to the control-command and signalling subsystem of the trans-European conventional rail system and Annex A to Decision 2006/860/EC of 7 November 2006 concerning the technical specification for interoperability relating to the control-command and signalling subsystem of the trans-European high speed rail system.²³⁴ **Repealed by Decision 2012/88.**
 - 2007/153/EC: Decision of 6 March 2007 modifying Annex A to Decision 2006/679/EC concerning the technical specification for interoperability relating to the control-command and signalling subsystem of the trans-European conventional rail system and Annex A to Decision 2006/860/EC concerning the technical specification for interoperability relating to the control-command and signalling subsystem of the trans-European high speed rail system.²³⁵ **Repealed by Decision 2012/88.**
 - 2006/860/EC: Decision of 07/11/2006 concerning a technical specification for interoperability relating to the control-command and signalling subsystem of the trans-European High Speed rail system and modifying Annex A to decision 2006/679/EC of 28 March 2006 concerning the technical specification for interoperability relating to the control-command and signalling subsystem of the trans-European conventional rail system.²³⁶ **Repealed by Decision 2012/88.**

²³⁰ JO L 311, 10.11.2012, p. 3-13.

²³¹ OJ L 51, 23.2.2012, p. 1-65.

²³² OJ L 99, 14.03.2011, p. 1-99.

²³³ OJ L 194, 25.7.2009, p. 60-74.

²³⁴ OJ L 136, 24.5.2008, p. 11-17.

²³⁵ OJ L 67, 7.3.2007, p. 13-17.

²³⁶ OJ L 342, 7.12.2006, p. 1-165.

- Communication on the deployment of the European rail signalling system ERTMS/ETCS [COM(2005)298].²³⁷
- Annex to the Communication [SEC(2005)903].²³⁸
- 2001/260/EC: Decision of 21 March 2001 on the basic parameters of the command-control and signalling subsystem of the trans-European high-speed rail system referred to as 'ERTMS characteristics' in Annex II(3) to Directive 96/48/EC.²³⁹

Interoperability Directive

- Directive 2008/57/EC of the European Parliament and of the Council of 17 June 2008 on the interoperability of the rail system within the Community (Recast).²⁴⁰

Cross acceptance of rolling stock

- Commission Directive 2009/131/EC of 16 October 2009 amending Annex VII to Directive 2008/57/EC of the European Parliament and of the Council on the interoperability of the rail system within the Community (Text with EEA relevance).²⁴¹

Telematic applications

- Commission Regulation (EU) No 328/2012 of 17 April 2012 amending Regulation (EC) No 62/2006 concerning the technical specification for interoperability relating to the telematic applications for freight subsystem of the trans-European conventional rail system Text with EEA relevance.²⁴²
- Commission Regulation (EU) No 454/2011 of 5 May 2011 on the technical specification for interoperability relating to the subsystem 'telematics applications for passenger services' of the trans-European rail system.²⁴³
- Commission Regulation 62/2006 concerning the technical specifications for interoperability relating to the telematic applications for freight subsystem of the trans-European conventional rail system was adopted on 23 December 2005 and published in the Official Journal of the European Union on 18 January 2006.²⁴⁴

Safety Legislation

- Commission Implementing Regulation (EU) No 402/2013 of 30 April 2013 on the common safety method for risk evaluation and assessment and repealing Regulation (EC) No 352/2009 Text with EEA relevance.²⁴⁵

²³⁷ Not published in the OJ.

²³⁸ Not published in the OJ.

²³⁹ OJ L 93, 3.4.2001, p. 53-56.

²⁴⁰ OJ L 191, 18.7.2008, p. 1-45.

²⁴¹ OJ L 273, 17.10.2009, p. 12-13.

²⁴² OJ L 106, 18.4.2012, p. 14-19.

²⁴³ OJ L 123, 12.5.2011, p. 11-67.

²⁴⁴ OJ L 13, 18.1.2006, p. 1-72.

²⁴⁵ OJ L 121, 3.5.2013, p. 8-25.

- 2012/226/EU: Commission Decision of 23 April 2012 on the second set of common safety targets as regards the rail system (notified under document C(2012) 2084) Text with EEA relevance.²⁴⁶
- Commission Regulation (EU) No 445/2011 of 10 May 2011 on a system of certification of entities in charge of maintenance for freight wagons and amending Regulation (EC) No 653/2007.²⁴⁷
- Commission Regulation (EU) No 1169/2010 of 10 December 2010 on a common safety method for assessing conformity with the requirements for obtaining a railway safety authorisation.²⁴⁸
- Commission Regulation (EU) No 1158/2010 of 9 December 2010 on a common safety method for assessing conformity with the requirements for obtaining railway safety certificates.²⁴⁹
- Commission Decision 2010/409/EC of 19 July 2010 on Common Safety Targets as referred to in Article 7 of Directive 2004/49/EC of the European Parliament and of the Council.²⁵⁰ **Repealed by Decision 2012/226.**
- Commission Directive 2009/149/EC of 27 November 2009 amending Directive 2004/49/EC of the European Parliament and of the Council as regards Common Safety Indicators and common methods to calculate accident costs.²⁵¹
- Commission Decision 2009/460/EC of 5 June 2009 on the adoption of a common safety method for assessment of achievement of safety targets, as referred to in Article 6 of Directive 2004/49/EC of the European Parliament and of the Council.²⁵²
- Commission Regulation (EC) No 352/2009 of 24 April 2009 on the adoption of a common safety method on risk evaluation and assessment as referred to in Article 6(3)(a) of Directive 2004/49/EC of the European Parliament and of the Council.²⁵³ **Repealed by Implementing Regulation 402/2013.**
- Directive 2008/110/EC of the European Parliament and of the Council of 16 December 2008 amending Directive 2004/49/EC on safety on the Community's railways (Railway Safety Directive).²⁵⁴
- Commission Regulation (EC) No 653/2007 of 13 June 2007 on the use of a common European format for safety certificates and application documents in accordance with Article 10 of Directive 2004/49/EC of the European Parliament and of the Council and on the validity of safety certificates delivered under Directive 2001/14/EC.²⁵⁵

²⁴⁶ OJ L 115, 27.4.2012, p. 27-34.

²⁴⁷ OJ L 122, 11.5.2011, p. 22-46.

²⁴⁸ OJ L 327, 11.12.2010, p. 13-25.

²⁴⁹ OJ L 326, 10.12.2010, p. 11-24.

²⁵⁰ OJ L 189, 22.7.2010, p. 19-27.

²⁵¹ OJ L 313, 28.11.2009, p. 65-74.

²⁵² OJ L 150, 13.6.2009, p. 11-19.

²⁵³ OJ L 108, 29.4.2009, p. 4-19.

²⁵⁴ OJ L 345, 23.12.2008, p. 62-67.

²⁵⁵ OJ L 153, 14.6.2007, p. 9-24.

Environment

- Regulation (EU) No 1316/2013 of the European Parliament and of the Council of 11 December 2013 establishing the Connecting Europe Facility, amending Regulation (EU) No 913/2010 and repealing Regulations (EC) No 680/2007 and (EC) No 67/2010 Text with EEA relevance.²⁵⁶
- 2011/229/EU: Commission Decision of 4 April 2011 concerning the technical specifications of interoperability relating to the subsystem 'rolling stock – noise' of the trans-European conventional rail system (notified under document C(2011) 658) Text with EEA relevance.²⁵⁷
- Directive 2008/57/EC of the European Parliament and of the Council of 17 June 2008 on the interoperability of the rail system within the Community (Recast) (Text with EEA relevance).²⁵⁸
- 2006/66/EC: Commission Decision of 23 December 2005 concerning the technical specification for interoperability relating to the subsystem rolling stock — noise of the trans-European conventional rail system (notified under document number C(2005) 5666) (Text with EEA relevance²⁵⁹). **Repealed by Decision 2011/229.**
- 2002/735/EC: Commission Decision of 30 May 2002 concerning the technical specification for interoperability relating to the rolling stock subsystem of the trans-European high-speed rail system referred to in Article 6(1) of Directive 96/48/EC (Text with EEA relevance) (notified under document number C(2002) 1952).²⁶⁰

The European Rail Network for Competitive Freight

- Regulation (EU) No 913/2010 concerning a European rail network for competitive freight.²⁶¹

Workers' rights

- Council Directive 2005/47/EC of 18 July 2005 on the Agreement between the Community of European Railways (CER) and the European Transport Workers' Federation (ETF) on certain aspects of the working conditions of mobile workers engaged in interoperable cross-border services in the railway sector.²⁶²

²⁵⁶ OJ L 348, 20.12.2013, p. 129-171.

²⁵⁷ OJ L 99, 13.4.2011, p. 1-39.

²⁵⁸ OJ L 191, 18.7.2008, p. 1-45.

²⁵⁹ OJ L 37, 8.2.2006, p. 1-49.

²⁶⁰ OJ L 245, 12.9.2002, p. 402-506.

²⁶¹ OJ L 276, 20.10.2010, p. 22-32.

²⁶² OJ L 195, 27.7.2005, p. 15-17.