European Parliament

The fourth railway package

Another step towards a Single European Railway Area

IN-DEPTH ANALYSIS

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The aim of this publication is to present the content of the fourth railway package and its objectives, against the backdrop of existing EU rail policy framework. The publication presents the positions of the co-legislators during the ongoing legislative process as well as different stakeholder viewpoints and reactions.

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EXECUTIVE SUMMARY

Railways were the first modern means of transport and the rail network developed considerably across the EU over time. Despite its expansion, when comparing 1995 with 2013, rail's share has decreased for freight and has remained fairly constant at about 6% for passenger transport. This is due, among other factors, to the rise in car ownership and the growth of commercial aviation. Today, the rail sector faces many challenges: high development and operational costs, heavy reliance on public funding, administrative and technical barriers, a lack of homogeneity in governance structures and different approaches to liberalisation of rail markets. The European Commission has put forward a range of measures to reverse the decline in rail use since the late 1980s. Various objectives have been met: the separation of rail infrastructure managers and operators to ensure their mutual independence, the establishment of independent regulatory bodies, and the harmonisation of national safety and technical requirements with the creation of a European Railway Agency (ERA). Moreover, rail services have been fully liberalised, from 2007 for freight and from 2010 for international passenger transport.

Despite these improvements, the sector is still hampered by numerous shortcomings, including different national governance systems due to incomplete or heterogeneous transposition of EU law, sometimes leading to discrimination against new rail companies, the domination or monopoly of incumbent companies in many Member States, and cumbersome and costly dual management of technical and safety standards between ERA and national authorities. To remedy this situation and to enhance the competitiveness of EU rail services, the Commission put forward six legislative proposals in January 2013, collectively known as the fourth railway package. The proposals relating to safety and technical compatibility are part of the technical pillar, and aim to expand ERA's powers and improve its governance, to streamline and speed up administrative procedures for new operators. The new measures relating to market liberalisation and governance structure, known as the market pillar, are intended to strengthen the infrastructure management independence and to gradually grant access rights to all operators for domestic passenger services, either through competitive commercial services or participation in tendering procedures for public service contracts (PSCs). The fourth rail package also deals with the social impacts of rail liberalisation, with a view to avoiding a 'race to the bottom'.

The legislative process, begun in 2013, is still ongoing. While the technical pillar did not raise serious difficulties, finding an agreement on liberalisation of passenger services, a model of governance and allocation of PSCs proved to be more challenging. In the European Parliament, the original committee position was modified by plenary amendments. For instance, Member States would get the choice between tendering procedures and direct award of PSCs. Interinstitutional negotiations began in October 2014, Council having reached an agreement on the technical pillar in June 2014. Debates on the market pillar continued during subsequent presidencies; a general approach being reached by unanimity in October 2015. Although the spirit of the initial proposals of the Commission is still discernible, exceptions were introduced as a result of pressure from some Member States and stakeholders. The Dutch Presidency seeks to reach an agreement on this file to enable the Parliament to vote in the first half of 2016. Once adopted, the fourth railway package will make a decisive contribution towards a Single European Railway Area.

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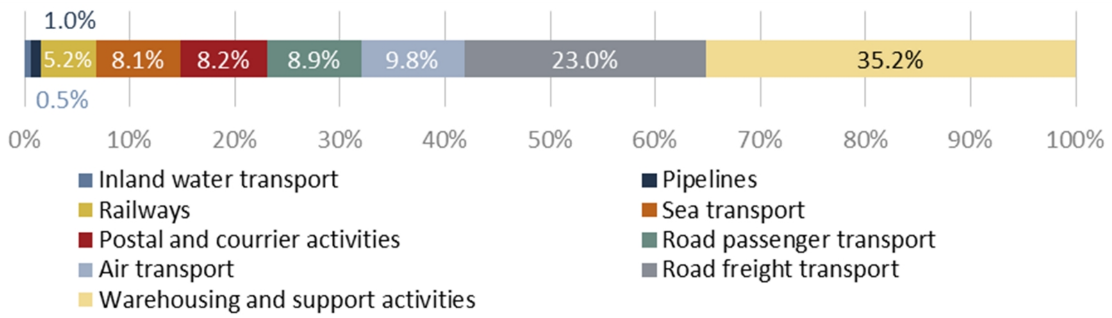
1. Introduction

1.1. European railways

Emblematic of the industrial revolution, Europe's railways were the first modern means of transport. They developed considerably in the 19th century and in the early decades of the 20th century. Today, 26 out of the 28 European Union (EU) Member States[1] have a well-developed railway sector, with total track length amounting to over 215 000 km in 2012.[2]

Out of a total 2012 turnover in EU transport activities amounting to €1 360 billion, and accounting for slightly less than 10% of EU GDP (€13 92 billion in 2014),[3] the railway sector contributed almost €71 million.

Figure 1 – 2012 Turnover by mode of transport* in million euros



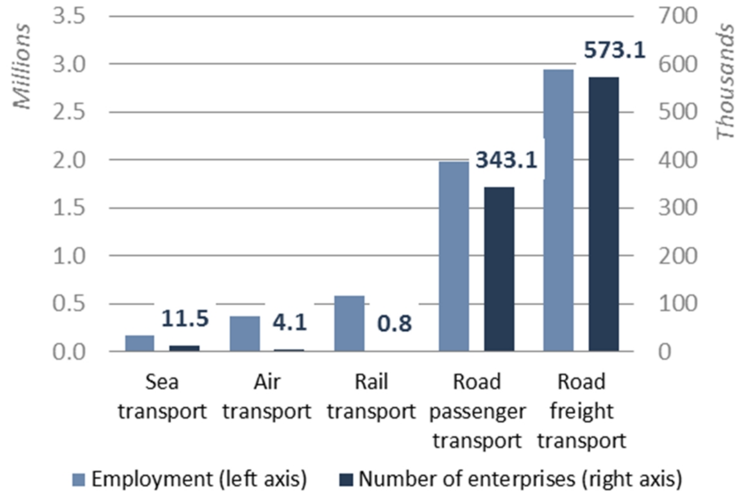
* Data refer to transportation and storage activities

Road passenger transport includes all urban and suburban land transport modes (bus, tramway, streetcar, trolley bus, underground and elevated railways).
Data source: European Commission – EU transport in figures, Statistical pocketbook 2015.

In 2012, 804 enterprises operated in the EU rail sector, employing approximately 577 000 persons.

Overall railway performance, expressed in passenger-kilometres (pkm),[4] has increased steadily over time; between 1995 and 2013 it increased by more than 20%, from 350 3 billion pkm to 424 2 billion pkm. In the high-speed rail sector, in view of the rapid development of the network's track length, this trend was even more spectacular: 15 23 billion pkm in 1990, 58 8 billion pkm in

Figure 2 – 2012 Employment and number of enterprises by mode of transport



Data source: European Commission – EU transport in figures, Statistical pocketbook 2015.

[1] Cyprus and Malta do not have rail networks.

[2] European Commission: EU transport in figures – Statistical pocketbook 2015, p. 78.

[3] Eurostat: gross domestic product at current market prices (2012-2014).

[4] Pkm: passenger-kilometre is a unit of measurement representing the transport of one passenger by a defined mode of transport over one kilometre.

2000, and up to 111 67 billion pkm in 2013. Nevertheless, these figures cannot hide the slow increase in railway's modal share,[5] due, among other things, to the rapid development and success of other transport modes, in particular, motor cars and commercial aviation. For instance, when comparing 1995 with 2013, EU rail modal share was constant and amounted respectively to 6.5% and 6.6% of all passenger transport. This compares with slightly more than 72% of modal share for passenger cars and 9% for air in 2013. When looking at freight transport for the same timeframe, the rail modal share declined from 13.6% to 11.7%, while road transport share rose from 45.3% to 49.4%.[6]

1.2. Challenges facing European railways

Railways in the EU are faced with numerous challenges. Firstly, railways entail high costs for planning, infrastructure development, manufacture and renewal of rolling stock, design and production of traffic management and signalling systems. Considering its capital needs, the rail sector depends heavily on public funding which, in the aftermath of the 2008 economic and financial crisis, is becoming scarce. Moreover, Member States, due to their history and economic development, have different starting points. As an example, rail rolling stock is expensive and in some Central and Eastern European countries in which the sector suffered from underinvestment, the average age of rolling stock is 30 years, compared to 15 years in the UK.[7] The EU rail sector is quite complex and expensive to manage. Its sunk costs, which by definition have already incurred and cannot be recovered, are considerable. Rail companies play an essential role in transport, most importantly at regional and local levels, where the 2013 global share was 49%.[8] However, local and suburban services require a high number of stations and more intensive rail operations and are therefore more costly.

With few exceptions, the rail sector is characterised by the dominant position of incumbent companies, which are sometimes backed by their governments. This is due to historically strong ties between the state, the rail infrastructure manager and the rail operating company. Moreover, rail incumbents possess important assets since they are often well endowed with human and financial capital. For this reason, they may be resistant to reform and to more open competition, due to possible opposition coming from the companies concerned or to pressures from trade unions or national political actors. Due to non-uniform development of rail governance structures and their liberalisation, rail services offer imperfect opportunities for competitors.

Other challenges exist: the EU rail industry is fragmented, cumbersome administrative and technical barriers, as well as regulatory loopholes, hamper its development. National rail markets differ considerably in size and demand. In some areas, rail still has a low level of appeal. According to a 2014 consumer scoreboard,[9] rail services are perceived as performing poorly, despite some improvements since 2011. They were ranked 25th out of 31 market services in 2013 and showed a relatively high incidence of problems. Nevertheless, a 2013 Eurobarometer report on Europeans' satisfaction with

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5 Modal share: share of each transport mode (trains, passenger cars, buses and coaches) in total passenger transport, expressed in passenger-kilometre.

6 *Op. cit*., Statistical pocketbook 2015, p. 37.

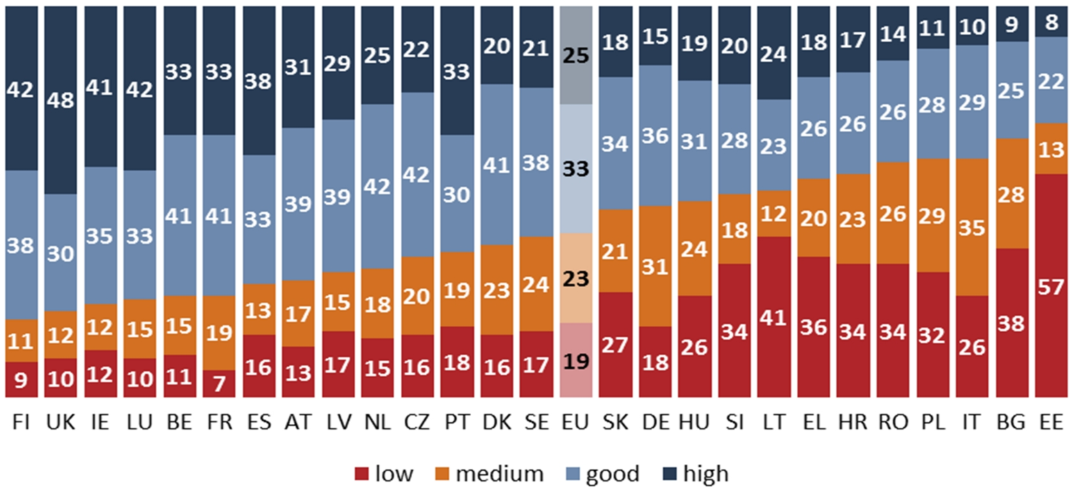
7 H. Dyrhauge, EU Railway Policy-Making on track?, Palgrave Macmillan, 2013, p. 103.

8 European Commission: Impact Assessment SWD (2013) 10 final, Part 1, p. 11.

9 European Commission: Consumer markets scoreboard, 2014, pp. 24-25.

rail services[10] shows a relatively high degree of consumer satisfaction. On the basis of an aggregated index of satisfaction, which takes various railway stations and travel services in their home country into account, 58% of European respondents had a positive opinion (high satisfaction 25%, and good satisfaction 33%).[11]

Figure 3 – Satisfaction index for railway stations and travel (%)



Data source: European Commission: Flash Eurobarometer 382a, Europeans' satisfaction with rail services, 2013.

In its 2011 White Paper on Transport[12] the European Commission put forward a wide range of objectives, some of which concern rail: to shift 30% of road freight over 300 km by 2030 and more than 50% by 2050 to greener modes of transport such as rail and waterways, to ensure that the majority of medium-distance passenger transport travels by rail by 2050 and to triple the length of the existing high-speed rail network by 2030.

The Commission seeks to translate these objectives into reality, along with its vision of a competitive transport system. The latter will face an important traffic increase, estimated at 80% for freight and at 51% for passenger transport by 2050,[13] a reduction in oil dependence, and also with decarbonisation concerns. For all these objectives, rail will have to contribute to the achievement of important efficiency gains. The forecast traffic growth will also have a direct impact on rail infrastructure and operating system requirements, as well as on technological developments. Finally, the funding of infrastructure and rolling stock will continue to be of crucial importance.

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[10] European Commission: Flash Eurobarometer 382a – Europeans' satisfaction with rail services, 2013, pp. 93-94.

[11] For Estonia the satisfaction index was affected by a large proportion of respondents who found it difficult to state their opinion.

[12] European Commission: White Paper – Roadmap to a Single European Transport Area – Towards a competitive and resource efficient transport system, COM(2011) 144 final, p. 9.

[13] European Commission: Press release: Transport 2050, the major challenges, the key measures, 28 March 2011, MEMO 11/197.

2. The EU rail policy framework

2.1. Initial establishment and main achievements

The decline of rail's share, particularly for freight transport (20% share in 1970 and 11.7% in 2013), prompted the European Commission to react and present new proposals. As some commentators underline, Commission support for this sector was dictated from the start by rail's potential in terms of growth, competitiveness and contribution to the protection of the environment.[14]

After the publication of the 1985 White Paper[15] setting guidelines for a common European transport policy, the Commission put forward a series of measures to gradually create an integrated railway area at European level. Its overall objective was to revitalise the sector and to offer better performing rail services. When examining the Commission's[16] 1996 position on rail development, we can observe that railways should be more customer oriented, safe, less expensive, require less subsidies and be managed as businesses. They should allow for a greater involvement of the private sector, whilst also preserving their role as a public service provider. To achieve this objective, an appropriate partnership between the (then) Community, the Member States and the railway operators was thought necessary.

If we consider a timeframe ranging from the late 1980s, when the Commission presented its first proposals to create an internal market in rail services,[17] to October 2012,[18] marking the end of the legislative cycle of the first three sets of measures (referred to as first, second and third railway packages) designed to improve the railways, there have been many noteworthy achievements.

The three previous rail packages in a nutshell

- The **first package**: proposed in 1998 and adopted in 2001, this package (known as the 'infrastructure package') mainly aimed to give operators access to rail infrastructure without discrimination, to open the international freight market to competition and to allow efficient use of the infrastructure. It established the open access principle for freight rail companies licensed in accordance with Community criteria, to the trans-European freight network at first, and to the entire network at a later stage.

- The **second package**: tabled in 2002 and adopted in 2004, mainly focused on opening the freight market to competition from 2007, on developing a common approach to safety and on establishing a European Railway Agency (ERA) as a steering body.

- The **third package**: put forward in 2004 and adopted in 2007, essentially sought to extend the liberalisation of international rail passenger services by 2010, to reinforce passenger rights and to introduce a European licence for train drivers. It harmonised train driver certificates within the EU and set the conditions for rail Public Service Obligations (PSO). It defined rail passenger rights and obligations,[19] established rules regarding information on rail company liability towards passengers in the event of an accident, and made special provisions for disabled or persons with reduced mobility.

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[14] A. Perier, Le quatrième paquet ferroviaire: l'impossible libéralisation?, Bruges Political Research Papers, 33/2014, p. 6.

[15] European Commission: White Paper – Completing the internal market, COM(85) 310 final.

[16] European Commission: White Paper – A strategy for revitalising the Community's railways, COM(96) 421 final.

[17] European Commission: Communication on a Community railway policy, COM(89) 564 final.

[18] Directive 2012/34/EU establishing a single European railway area.

[19] Regulation 1371/2007/EC on rail passengers' rights and obligations.

- The **recast of the first railway package**: intended to provide simplification and consolidation of existing legislation by means of a merger of the previous Directives and successive amendments to them, the recast[20] of the first package was adopted in 2012. On competition issues, it aimed to improve the transparency of rail market access conditions by providing more detailed information on available infrastructure for new rail companies. Regarding regulatory oversight, it sought to reinforce the powers of national rail regulators. On investment issues, the recast package encouraged investments by requiring long-term strategies, linking funding to performance, and stimulating private investment in greener technologies. This legislation establishes the Single European Railway Area.

These achievements represent the backbone of EU rail policy within the ongoing process of consolidating a single European rail market:

- **Separation between the infrastructure manager and the rail service provider.** Known as *vertical separation*, this is one of the main principles championed by the Commission in ending the conception of rail companies as a natural monopoly. This kind of monopoly exists in markets implying high fixed costs, necessary for instance to build large-scale infrastructure, and where a single supplier delivers the most cost-efficient outcome. Built upon the successful reform of other natural monopolies, such as the telephone and electricity utilities markets, the vertical separation principle aims to ensure the independence of infrastructure management from any rail company, to perform essential functions such as the allocation of rail capacity or charging for use of infrastructure. This principle was first enshrined in Council Directive 91/440,[21] which required a compulsory separation of accounts between infrastructure and transport entities, leaving institutional separation as an option. This implied that transport and infrastructure management services could be provided by a single legal entity but that at the same time, the accounts relating to these activities would have to be kept separate to avoid potential transfers of aid received from one area to the other. This principle was then reiterated in an amended version and introduced in the first railway package,[22] granting all licensed European rail companies fair and non-discriminatory access to rail infrastructure for international freight transport. It also requested separate accounting for freight and passenger operations.
- **Gradual opening of railway services to competition.** The process of opening the different rail transport segments to competition to offer better and cheaper services across the EU has been progressive. Initiated with the first rail package, which established an 'open access for international freight transport, full liberalisation of rail freight services from 1 January 2007 was provided for by Directive 2004/51/EC,[23] as part of the second rail package. Open access services are operated purely on a commercial basis, with many companies running the same routes and without a franchise or concession agreement. Further proposals to extend competition in the rail market were presented in the framework of the third package. This latter fully liberalised the rail market for international passenger services from 1 January 2010[24]

[20] See the European Parliament, Council and Commission interinstitutional agreement of 28 November 2001 on a more structured use of the recasting technique for legal acts.

[21] Directive 91/440/EEC on the development of the Community's railways.

[22] Directive 2001/12/EC amending Directive 91/440/EEC.

[23] Directive 2004/51/EC amending Directive 91/440/EEC. This Directive was repealed by Directive 2012/34/EU establishing a single European railway area.

[24] Directive 2007/58/EC amending 91/440/EEC and Directive 2001/14/EC.

and included a right, with some limitations, to pick up and set down passengers in stations situated in the same Member States, referred to as *cabotage*.

- **Facilitating access to rail systems and services.** Enabling fair and non-discriminatory access to rail infrastructure and opening up rail services to competition would have had little effect without specific provisions governing effective access conditions. Legislation was therefore adopted to try level the EU playing field in the matter. Specific criteria to grant a licence to rail companies by an independent body were defined in 1995[25] and later by the first rail package.[26] The licence had to be valid throughout the Community territory. The conditions for allocating railway capacity and for charging for the use of infrastructure were introduced in 1995[27] and redefined in the first package.[28] All conditions to access the rail market were subsequently specified in the third railway package.
- **Establishment of independent regulatory bodies.** These bodies, set up in the Member States, are essential to monitoring the rail market and to settling possible disputes between the infrastructure manager and railway companies. This kind of situation could, for instance, occur when a new rail operator considers that it is not placed on an equal footing (in terms of charging for infrastructure or train schedules) with an incumbent operator. The bodies were set up by the first package[29] and their independence and powers in organisational, functional and decision-making terms were reinforced by the third rail package.
- **Establishment of the conditions for public service obligations.** Public service obligations (PSO), such as those provided for bus, coach or specific rail services (off-peak, low density lines) are determined by the competent political authority, to ensure public passenger transport, social mobility and cohesion. They are provided in the general interest, regardless of their commercial viability. The third railway package[30] set the conditions to contract or to impose PSO upon operators, to whom compensation for costs incurred and/or exclusive rights are granted, in return of the discharge of PSO. The legislative framework also defined the duration and the procedures for award of public service contracts (PSC). These measures are to be implemented gradually, the transition period ending in December 2019.
- **Harmonisation of national railway systems.** From the start, one of the main features of rail in Europe was its fragmentation into national self-regulated systems and infrastructures. This weakened rail competitiveness and added to the cost and complexity of running a train from one country to another. To counteract these disadvantages, the Commission progressively advanced a wide range of proposals concerning rail safety rules, technical features, training of staff and administrative procedures. To ensure the technical and operational compatibility of railways across the EU, defined as *interoperability*, two Directives were adopted in 1996 and in 2001. The former[31] facilitated the access of high-speed train operators to the

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25 Directive 95/18/EC on the licensing of railway undertakings.

26 Directive 2001/13/EC of 26 February 2001 amending Directive 95/18/EC.

27 Directive 95/19/EC on the allocation of railway infrastructure capacity and the charging of infrastructure fees.

28 Directive 2001/14/EC on the allocation of railway infrastructure capacity and the levying of charges for the use of railway infrastructure and safety certification.

29 Directive 2001/12/EC amending Directive 91/440/EEC.

30 Regulation 1370/2007 EC on public passenger transport services by rail and by road and repealing Council Regulations (EEC) 1191/69 and 1107/70.

31 Directive 96/48/EC on interoperability of the trans-European high-speed rail system.

networks of other Member States and the latter[32] completed the compatibility framework for the conventional rail system. These provisions were subsequently unified in 2004.[33] The second railway package defined common safety objectives[34] for the entire EU rail system, as well as clear procedures to issue safety certificates that each rail company should henceforth possess. The package also set up the ERA,[35] whose main tasks are to enhance and control the interoperability of the EU rail system, by drafting and revising the Technical Specifications for Interoperability (TSIs)[36] and developing a common approach to safety. To ensure a high level of safety and to facilitate the circulation of train drivers across the EU, the third package provided for the harmonisation of train driver certification.[37]

- **Guidelines on state aid for railway undertakings.** With competition in freight and passenger rail services absent until recently, rail companies did not have real incentives to reduce their operating costs or to maximise their profits. As a result, they could not always cover their costs and the essential investments required. State intervention was subsequently required, regardless of the financial viability of the rail company, for instance through the purchase of new rolling stock, financing of infrastructure, or provision of restructuring aid for companies in difficulty. This situation created, in certain cases, a strong relationship between the state and the historic rail company. According to some commentators, the situation did not undergo radical change: with the deterioration of the financial situation, rail companies' debt generally increased, as well as state subsidies for rail.[38] In a progressively opening EU rail market, new transparent rules were necessary to create a level playing field. To prevent state financed rail companies distorting competition within the Common Market, the Commission provided EU Guidelines in 2008[39] – a soft law tool – in an attempt to harmonise the rules and to ensure equal treatment for rail incumbents and newcomers. The guidelines list the possibilities of supporting companies by means of state funding (for instance, financing of infrastructure, new rolling stock, debt cancellation, restructuring aid) and set the conditions thereof. Financial support had to be compatible with Articles 73 and 87 of the Treaty establishing the European Community.[40]

32 Directive 2001/16/EC on the interoperability of the trans-European conventional rail system.

33 Directive 2004/50/EC amending Directive 96/48/EC and Directive 2001/16/EC.

34 Directive 2004/49/EC on Safety on the Community's railways amending Directive 95/18/EC and Directive 2001/14/EC.

35 Regulation 881/2004/EC establishing a European railway Agency.

36 Technical Specifications for Interoperability are the specifications by which each rail subsystem or part of subsystem is covered in order to meet the essential requirements and to ensure the interoperability of the EU rail system.

37 Directive 2007/59/EC on the certification of train drivers operating locomotives and trains on the railway system in the Community.

38 H. Dyrhauge, *op. cit.*, p. 101.

39 European Commission: Communication – Community guidelines on State aid for railway undertakings, (2008/C184/07).

40 Treaty establishing the European Community (consolidated version 2006).

3. Rail framework assessment: is a fourth railway package necessary?

Did the EU framework, which put the new principles governing rail policy into practice, manage to create a competitive, independent sector with non-discriminatory governance? Following the publication of its 2011 White Paper,[41] proposing 40 initiatives to set up a true European transport area, the Commission drew up a comprehensive picture of the EU rail sector[42] in 2013, to assess the impact and effectiveness of the regulatory changes introduced by previous legislation.

3.1. A governance structure in need of improvement

3.1.1. Three different governance systems

The separation between infrastructure managers and rail operators, intended to ensure equal treatment of all rail service providers, was heterogeneously transposed in the different Member States. This entailed different types of governance, which can be summarised in three broad groups.

The **first group** concerns vertically separated governance structures, where the infrastructure manager and the service provider are fully institutionally and organisationally independent. This is the case in Sweden, which was the first country to implement this type of structure through its 1987 rail reform; in the United Kingdom (UK), which adopted its Railways Act in 1993,[43] and introduced a new privatised organisational structure for British Rail the following year; and in eleven other EU countries.[44] The UK rail reform is particularly interesting in this regard, as it was not limited to separating passenger and freight operating companies and the infrastructure manager into autonomous entities, but also other rail activities such as passenger rail franchising through a dedicated office, rail regulation through another office and the provision of rolling stock through rolling stock companies (ROSCO).

In the **second group**, the governance structure makes provision for an independent (or sometimes integrated) infrastructure manager, but the latter delegates some of its management functions (such as traffic or maintenance) to one train operator, in particular to the state-owned incumbent. According to experts, this delegation of tasks to the incumbent could be a source of problems, as it might allow operators to influence decisions regarding rail network access due to information flow between the operator and the infrastructure manager.[45] France, as well as six other EU countries,[46] adopted this model with some variations. According to the Commission, in 2010 French state-owned incumbent *Société nationale des chemins de fer français* (SNCF) had a

[41] *Op. cit*., European Commission: White Paper – Roadmap to a Single European Transport Area – Towards a competitive and resource efficient transport system, COM(2011) 144 final.

[42] European Commission: Communication on the fourth railway package – Completing the single European railway area to foster European competitiveness and growth, COM(2013) 25 final.

[43] Railways Act of November 1993.

[44] Bulgaria, Czech Republic, Denmark, Finland, Greece, Lithuania, Portugal, Romania, Slovakia, Spain, The Netherlands – European Commission: SWD accompanying the 2012 report from the Commission on monitoring development of the rail market, Annex 2, SWD(2012) 246 final/2.

[45] H. Dyrhauge, *op. cit*., p. 48.

[46] Belgium, Estonia, Hungary, Latvia, Luxembourg, Slovenia *Op. cit*., European Commission, SWD accompanying the 2012 report, Annex 2.

quasi-monopoly both in passenger (99 %) and freight (80 %) transport.[47] Nevertheless, recent developments in the freight market led to 36% of rail freight being handled by new entrants in 2013. In this group, the Estonian model gives an interesting counter-example: in 2013, new entrants accounted for roughly 43% of passenger and for 35% of freight rail markets.[48]

The **third group** represents an integrated governance structure, where the infrastructure manager and the rail operator are legally separated, fulfilling accounting separation requirements, but nevertheless remain within the same structure, for instance in a holding company. This is the rail policy model chosen by Austria, Germany, Italy and Poland.[49] In Germany, the state-owned incumbent *Deutsche Bahn* (DB) is a holding company regrouping different businesses: passenger and freight transport, logistics and infrastructure management. In 2013, this company still enjoyed a very strong position in the passenger (slightly more than 73%) and freight markets (almost 67%).[50] Integrated governance is controversial, as the lack of organisational separation can enable a holding company to obstruct or prevent competitors from accessing the network.

According to commentators, with the exception of the UK and Estonian rail markets, in all three types of governance structure the state-owned incumbents continue to hold a quasi-monopoly.[51]

3.1.2. Possible anti-competitive practices

In its 2013 assessment, the Commission noted that some infrastructure managers, in particular in the case of vertical integrated structures, had sometimes increased track and station access charges for passenger services for new entrants, compared to those for incumbents. The Commission also observed that the advantages retained by incumbent operators could represent bad practice. It reported, for instance, that in at least eight Member States, rolling stock continued to be predominantly owned by incumbent companies, which seemed unable or unwilling to make it available to new entrants on attractive terms. Information flows, particularly in a vertically integrated structure or in a governance system with delegated tasks, could represent a competitive advantage for incumbents. Additionally, a lack of financial transparency increased the risk of cross-subsidisation, allowing for compensation of some of the transport service provider's operating costs by the holding company.

Examples of discrimination against new entrants were given by the Commission. In 2012, the Italian Competition Authority imposed[52] a fine of €300 000 on the incumbent group *Ferrovie dello Stato* (FS) and its subsidiaries *Rete Ferroviaria Italiana* (RFI), the infrastructure manager, and *Trenitalia*, the main rail company, for abuse of a dominant market position. According to this decision, FS had implemented a strategy to obstruct access for *Arenaways*, a competitor in the passenger market, to the infrastructure and rail services on the profitable route between Turin and Milan from 2008 to 2011. In 2012, the French Competition Authority imposed[53] a fine of €60.9 million on SNCF for

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[47] *Op. cit*., European Commission: SWD accompanying the 2012 report, Annex 5.

[48] *Op. cit*., Statistical pocketbook 2015, pp. 72-73.

[49] *Op. cit*., European Commission: SWD accompanying the 2012 report, Annex 2.

[50] Deutsche Bahn AG Competition report 2014.

[51] H. Dyrhauge, *op. cit*., p. 51.

[52] Italian Competition Authority: Press release, July 2012.

[53] Autorité de la concurrence: Décision N° 12-D-25 of 18 December 2012.

anti-competitive behaviour in the rail freight market. According to this decision, SNCF had used confidential information on rail track requests from its competitors in the interests of its freight subsidiary, SNCF Fret. Moreover, SNCF had been found guilty of over-booking train tracks, as well as heavy goods carriages, which it did not return when not used.

3.1.3. Shortcomings in the implementation of rail legislation

The reports that the Commission drew up to monitor follow the implementation and impact of EU rail legislation were published from 2007 onwards. This information, published in the framework of the rail market monitoring scheme (RMMS), enabled the Commission to assess late, incomplete or incorrect transposition of the rail packages.[54] In 2008, to ensure correct implementation of the first railway package, the Commission opened infringement proceedings against 24 Member States, sending letters of formal notice.[55] They focused on three main issues: the lack of effective separation between the infrastructure manager and the incumbent rail operator, the inadequate implementation of the rules governing track access charges and lastly, the failure to set up a strong and independent regulator. Following modifications introduced by some Member States to comply with these rules, the Commission decided in 2009 to carry on the infringement procedure against only 21 Member States and sent them reasoned opinions. In these documents, the Commission explained how the Member States did not properly implement the first railway package. In 2010, as 13 Member States were still not fully compliant with EU rail legislation, the Commission opened litigation procedures against them, referring them to the European Court of Justice (ECJ).[56] Commentators underline that the Court rejected the Commission's infringement procedure against Germany and Austria, stating that neither Directive 91/440 nor existing EU law required a compulsory and complete vertical separation. The ECJ also confirmed the independence of infrastructure managers in these countries, which as seen above, are integrated in a holding structure. According to experts, this decision was a blow to the Commission's deep seated and long-term preference for complete separation.[57]

3.2. Insufficient liberalisation of rail markets

3.2.1. Incumbent operators still dominate

Freight services have been fully open to competition since January 2007, and international passenger services as of January 2010. But, as observed the Commission in its 2013 assessment, **domestic passenger services** by rail remained, with some exceptions (Germany, Italy, Sweden and the UK), largely closed. Yet, these markets represent more than 94% of all rail passenger-kilometres (pkm) in the EU and are still strongholds of national incumbents. Moreover, two-thirds of domestic rail services

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[54] European Commission: Communication on monitoring development of the rail market, COM(2007) 609 final.

[55] European Commission: Press release, Commission calls Member States to ensure correct implementation of the first rail package, 26 June 2008, IP/08/1031. The 24 MS are: Austria, Belgium, Bulgaria, the Czech Republic, Denmark, Estonia, Finland, France, Germany, Greece, Hungary, Ireland, Italy, Latvia, Lithuania, Luxembourg, Poland, Portugal, Romania, Slovenia, Slovakia, Spain, Sweden and the United Kingdom.

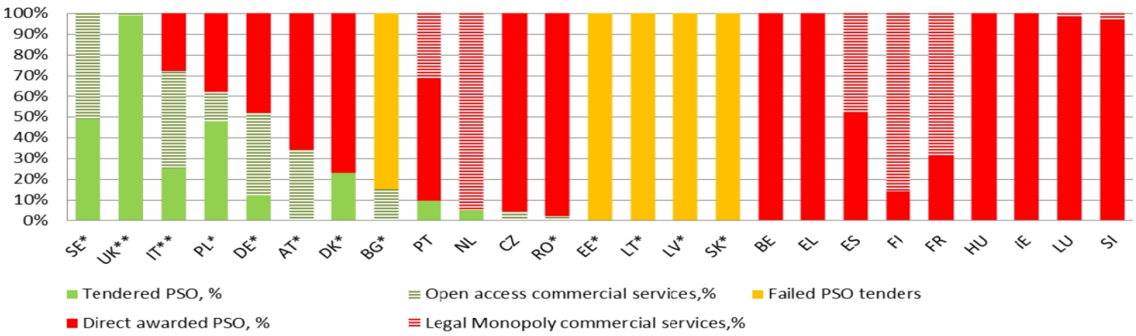
[56] European Commission: Press release, Commission legal action against 13 Member States for failing to fully implement first railway package, 24 June 2010, IP/10/807.

[57] H. Dyrhauge, *op. cit.*, p. 85.

across the EU are provided under PSCs or concessions,[58] granted as exclusive rights to an operator, representing the competition **for** the market. The rest is managed through competition **in** the market, with several operators providing services on a commercial basis on the same route. Current rules allow the competent authorities to directly award rail Public Service Contracts (PSCs), without any tendering procedure; directly awarded PSCs amount to 42% of all EU passenger-kilometres. As a result, in 2013, in 16 out of 25 Member States with a rail network, the incumbents held a market share of more than 90%.[59]

In addition to relationships with the infrastructure manager, which can be privileged, incumbent companies still enjoy protection through regulatory, technical or economic barriers. They can for instance implement 'predatory prices' – cutting prices on certain lines to drive out competition – or charge high prices where there is no transport alternative. Specifically concerning international passenger services, the Commission reported manifold obstacles to new entrants. To mention a few: administrative and information barriers to obtain certificates or authorisations; operational obstacles, like volatile access charges; or difficulties in accessing existing sales facilities.[60]

Figure 4 – Rail market structure 2012



Source: Fourth report on monitoring the development of the rail market COM(2014) 353 final, part 2/2.

In **freight transport**, liberalisation of the markets is also limited. According to a 2013 OECD report,[61] incumbents retain a market share varying between 70% and 90%. They adopt behaviours to limit or avoid competition in the market: introducing obstacles to securing rolling stock, controlling access to stations or other facilities, and modifying capacity allocations. According to other experts, many incumbents still have a freight market share above 50%.[62] Through its expansion in other foreign markets, carried out by means of acquisitions and mergers, the incumbent operator can further reinforce its market power and even gain a dominant position, which raises concerns not only at the Commission but also for rail industry sectors. A clear example is the case of German *Deutsche Bahn* (DB): this company purchased several freight divisions of European operators (for example, the Danish company *Danske Statsbaner* (DSB), Dutch *Nederlandse Spoorwegen* (NS) or *English Welsh & Scottish railways* (EWS)). According

58 With concessions a company is remunerated through being permitted to run and exploit the work or a service, the company being exposed to a potential loss on its investments. In a public contract, a company is paid a fixed amount to carry out the required work or to provide a service.

59 *Op. cit.*, COM(2013) 25 final, pp. 6-7.

60 European Commission: Report on the implementation of the provisions of Directive 2007/58/EC on the opening of the market of international rail passenger transport, COM(2013) 34 final, p. 8.

61 OECD: Recent developments in rail transportation services 2013 DAF/COMP (2013)/24, p. 6.

62 H. Dyrhauge, *op. cit.*, p. 73.

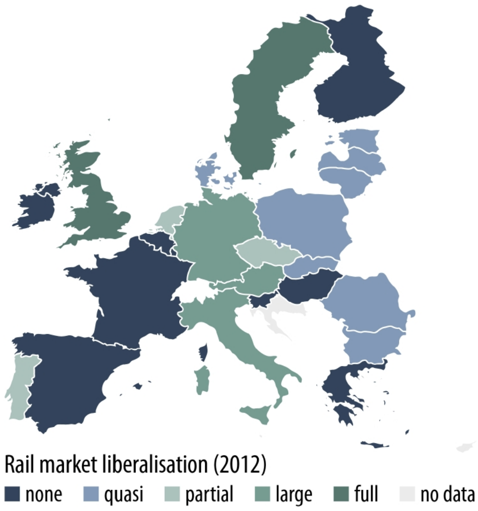
to the Commission report, in 2010, *DB Schenker* (the freight logistics subsidiary of DB Group) held a 75% share of the freight market in Germany and Denmark, in addition to 60% in the Netherlands and almost 50% in the UK.[63]

3.2.2. A patchy map of rail liberalisation

Different national approaches, timetables, delays in implementing rail legislation, and in fully liberalising the sector, generate some asymmetries in the EU rail market. Indeed, some Member States, such as the UK or Sweden decided to fully open their national markets to competition at an early stage. Others, like Germany or Italy, opened a substantial part of their network to newcomers, via open access or through tendered PSCs. Yet countries like France delayed the implementation of any rail liberalisation reform not strictly mandated by the European legislator. In its 2013 impact assessment,[64] the Commission grouped the Member States in five clusters, according to the level of liberalisation of their rail passenger markets.

- **Fully liberalised markets** exist only in Sweden and in the UK, where all pkm are in open access, or where all PSCs are competitively tendered;
- **largely liberalised markets** are found in Austria, Germany or Italy, where more than 33% of pkm are in open access or correspond to competitively tendered PSCs;
- **partially liberalised markets** are observed in the Czech Republic, the Netherlands and Portugal, where less than 33% of pkm are in open access or correspond to competitively tendered PSCs. In these countries new entrants have taken up an important share of the liberalised traffic;
- **quasi-liberalised markets** are present in Bulgaria, Denmark, Estonia, Latvia, Lithuania, Poland, Romania and Slovakia, countries in which the whole market is open via open access, but there is no effective competition in the market; the new entrants operate directly awarded PSCs; and
- **non-liberalised markets** such as Belgium, Finland, France, Greece, Hungary, Ireland, Luxembourg, Slovenia and Spain, where the incumbent operates all commercial services and Public Service Obligations (PSO).

Figure 5 – Scale of liberalisation of passenger rail, 2012



Data source: European Commission – Impact Assessment SWD (2013) 10, Part 1.

In 2014, The Commission reiterated this cluster exercise and came to approximately the same conclusions. Some developments were however observed: the Czech Republic was considering increasing its share of tendering for PSCs. In Estonia, Latvia, Lithuania and Slovakia all PSCs should henceforth be *de jure* competitively tendered. In reality, in these markets only the incumbent operators participated in the tenders.

63 *Op. cit*., European Commission: SWD accompanying the 2012 report, Annex 5.

64 *Op. Cit*., European Commission: Impact Assessment SWD (2013) 10, Part 1.

Finally, in Germany the amount of train-kilometres of PSO competitively tendered had progressed to 51%.[65]

According to commentators,[66] the greater the difference in national rail models, the more difficult it will be to harmonise them afterwards. Moreover, divergent models lead to somewhat paradoxical situations where incumbents with exclusive rights in their home country can expand their operations in Member States that have implemented liberalisation. This in turn can entail the introduction of formal or informal reciprocity requirements, which are contrary to the principle of a Single European Railway Area.

3.3. A multitude of technical rules

Despite some improvements in the harmonisation and simplification of procedures, technical systems and operating rules, in particular through the setting up of ERA, the management of technical systems and safety standards is still split between the European Agency and the competent national authorities. ERA recently estimated that over 11 000 national and EU rules coexist.

The European Railway Agency (ERA)

ERA was established in 2004 in Valenciennes (France) as a decentralised regulatory agency with the objective of creating and integrating the European railway area. Article 1 of its founding Regulation[67] defines its general objectives: to contribute to the implementation of Community legislation aimed at improving the competitive position of the railway sector by enhancing the level of interoperability of railway systems and at developing a common approach to safety. Since 2008,[68] ERA is also tasked with participating in the development of European rail traffic management systems (ERTMS),[69] as the system authority. In the area of rail safety, ERA develops and promotes a common EU methodology for safety management for all stakeholders. In this endeavour, the Agency cooperates with National Safety Authorities (NSA) and National Investigating Bodies (NIB). In the field of interoperability, ERA carries out the work to draft and update the Technical Specifications for Interoperability (TSI) for all components of the rail system. Moreover, the European Agency provides the rail community and users with access to databases and registers relating to infrastructure and vehicle data.

ERA is managed by an Executive Director and has an Administrative Board. This Board is composed of one representative per Member State, four representatives of the Commission and one non-voting representative for other categories (rail companies, industry, infrastructure managers, workers' unions, passenger and freight customers). The Administrative Board adopts ERA's general report and work programme and appoints the Executive Director – currently Josef Doppelbauer – for a five-year term; the latter is responsible for drawing up the work programme. Setting aside some third country contributions, ERA is mainly financed from the EU budget: the 2014-2020 financial framework makes provision for funds of €182.1 million.[70]

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[65] European Commission: Fourth report on monitoring the development of rail market, COM(2014) 353 final part 2/2, p. 59.

[66] Juan J. Montero: Rail transport: a balance sheet, Robert Schuman Centre for advanced studies, European University Institute Working Papers RSCAS 2014/115, p. 5.

[67] Regulation 881/2004 EC establishing a European railway Agency.

[68] Regulation 1335/2008 EC amending Regulation 881/2004 EC.

[69] ERTMS: is the European rail traffic management system for standardisation of rail signalling and communication.

[70] European Commission: Communication on programming financial and human resources for decentralised agencies 2014-2020, COM(2013) 519 final, Annex I.

This complexity entails high administrative burdens and costs, not only for new entrants, but also for train manufacturers. According to the Commission, the authorisation procedures are cumbersome, can last up to two years and cost up to €6 million. Stakeholders indicate[71] that they can account for up to 10% of the costs of a locomotive per country. Similar shortcomings concern the issuance of safety certificates. To obtain these, rail companies have to cope with sometimes excessive red tape, and long National Safety Authority procedures: in some cases the whole process can amount to €70 000 in administrative and advisory costs.[72]

Administrative and technical obstacles are specifically critical for potential new rail entrants, whose human and financial resources are more limited.

4. The fourth railway package

In January 2013, the European Commission presented its fourth railway package. It consists of six legislative proposals, namely three Regulations and three Directives, accompanied by an overarching Communication. It aims primarily to enhance the efficiency and competitiveness of rail services across the EU, by removing the remaining legal, institutional and technical obstacles.

4.1. Interoperability and safety: the technical pillar

The adoption of new provisions relating to rail interoperability and safety, commonly known as the technical pillar, is expected to reduce the administrative costs and accelerate procedures for rail undertakings to facilitate their access to the market and hence realise the potential of the Single Market. To achieve these goals, the Commission proposes to amend the ERA Regulation[73] and to recast both the Safety[74] and Interoperability[75] Directives.

Firstly, the package introduces a considerable expansion of ERA's powers. To further streamline administrative procedures, ERA would become a 'one-stop shop' to issue authorisations for bringing control-command and signalling sub-systems into service, EU-wide vehicle authorisations and single safety certificates. The latter would specify the nature and extent of rail operations covered. ERA would also have a more prominent role in ensuring a consistent development of the ERTMS, which is of great relevance to the development of a Single European Railway Area.

Due to more frequent recourse to outsourcing and the consequent scattering of responsibilities, the Commission proposals introduce risk control measures. These would have to be implemented by all rail contractors, infrastructure managers and entities in charge of maintenance. Additionally, ERA would have reinforced powers over national authorities as well as monitoring the decision-making and performance of NSA and notified conformity assessment bodies.[76] This would include allowing ERA to

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71 *Op. cit.*, COM(2013) 25 final, p. 8.

72 *Op. cit.*, COM(2013) 25 final, p. 8.

73 Proposal for a Regulation COM(2013) 27 final on the EU Agency for Railways and repealing Regulation (EC) 881/2004.

74 Proposal for a Directive COM(2013) 31 final on railway safety (recast).

75 Proposal for a Directive COM(2013) 30 final on the interoperability of the rail system within the European Union (recast).

76 Notified conformity assessment bodies are tasked with conformity assessment of rail subsystems.

carry out audits and inspections. To keep up with scientific development and to promote EU rail standards, the package also allows the European Agency to enter into administrative arrangements with supervisory authorities, international organisations and administrations of third countries.

The governance of ERA would also be improved. An Executive Board would be established, tasked with the preparation of the decisions to be adopted by the Management (previously Administrative) Board and with assistance to the Executive Director with their implementation. Independent Board(s) of appeal would also be set up allowing any natural or legal person to appeal against a decision taken by ERA in certification or authorisation matters. The new ERA regulation provides for new sources of funding, from the fees paid by applicants for certificates and authorisations.

According to the Commission,[77] the proposed measures would allow a 20% reduction in time for new operators to enter the market and a 20% reduction in cost and duration for the authorisation of rolling stock. Overall, this would lead to €500 million savings for companies by 2025.

4.2. The market pillar

The fourth railway package puts forward a number of proposals relating to the governance structure and to the opening of the passenger market, referred to as the market pillar.

4.2.1. The governance structure

The package aims to enhance the rail governance structure to ensure equal access to the infrastructure and to solve the remaining shortcomings. To do so, the Commission proposes to amend Directive 2012/34.[78]

The purpose of the amended Directive is to strengthen the infrastructure managers' role and independence, enabling them to control all the main functions pertaining to the rail network involving development (network, financial and investment planning), operation (track allocation, traffic management and charges) and maintenance. In its initial project, the Commission wanted to introduce a strict separation between the infrastructure manager and the service operator, also referred to as *unbundling*. Some commentators point out that the Commission was then subject to pressure from different stakeholders, in particular from the German DB and French SNCF operators, relayed by political actors.[79] As a result, the final version of the proposal made no provision for mandatory unbundling. Vertically integrated businesses are accepted (for instance in a holding company), provided that the infrastructure manager is fully independent and has effective decision-making rights.

Moreover, the proposal introduces a provision for compliance verification. Upon request by a Member State, the Commission verifies that the infrastructure manager in a vertically integrated structure fulfils all the requirements relating to its independence. It must meet four main criteria: distinct decision-making bodies; separate financial

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[77] European Commission: Press release, European railways at a junction: the Commission adopts proposals for a fourth railway package, 30 January 2013, IP/13/65.

[78] Proposal of a Directive amending Directive 2012/34/EU 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.

[79] *Mobilicités: Enterrement de première classe pour le IVème paquet ferroviaire*, 19 January 2013, and also Der Spiegel: *Druck auf Merkel: Bahn-Chef Grube soll mit Rücktritt gedroht haben*, January 2013.

circuits to avoid cross-subsidisation; protected access to its information systems and, with a view to preventing any conflict of loyalty; a three-year waiting period before senior staff is entitled to move to another position.

Additionally, the proposal seeks to strengthen the cooperation between infrastructure managers across borders through the creation of a European network. This will monitor the performance of the different infrastructure managers and will be responsible for the implementation of the ERTMS. Finally, a coordination committee should be established to enhance cooperation between infrastructure managers, network users and public authorities, to obtain advice on efficiency.

4.2.2. Full liberalisation of the passenger transport market

In its proposals, the Commission introduces a major innovation: to grant access rights to all EU rail operators on all domestic passenger markets. Rail companies would either offer competitive commercial services or participate in tendering procedures for PSCs, which would be compulsory (with some exceptions), from December 2019. To achieve this, amendments are proposed to Directive 2012/34 and to Regulation 1370/2007.[80]

For PSCs, liberalisation is subject to restrictions and would apply only above a fixed threshold, to avoid compromising the equilibrium of a public service. This means that public authorities may decide to directly award a PSC for a small-scale market. These public contracts are defined either by their average annual financial value or by the yearly amount of kilometres they provide for public passenger transport services. The proposals create a procedure to define Public Service Obligations (PSO), the geographical scope of Public Service Contracts (PSC), as well as the maximum volume of passengers transported by rail under each contract.

To ensure effective access to rail markets, Member States are obliged to guarantee non-discriminatory access to suitable rolling-stock. Moreover, to introduce a level playing field between incumbents and newcomers in tendering procedures for PSCs, the Commission proposes that the residual value of rolling stock at the end of a PSC be borne by the national competent authority. Indeed, it should otherwise be included in the price proposed by new tenderers, making their offer considerably less competitive. Public authorities could either: purchase the rolling stock and make it available to the operator; provide a guarantee for the financing of the rolling stock; or even take it over at the end of the PSC.

Finally, to facilitate the use of several means of transport run by one or more operators on one route, the package suggests the voluntary introduction of integrated ticketing[81] and information exchange schemes.

According to the Commission,[82] the proposed rail structural reform would improve service, increase the choice for passengers, and bring €40 billion of financial benefits to customers and companies by 2035. It would also provide for up to €16 billion in additional pkm. However, in its impact assessment of the fourth railway package, the Commission considers that the quantitative and qualitative analysis of market

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[80] *Op. Cit*., Proposal of a Directive amending Directive 2012/34/EU, COM(2013)29 final and Proposal for a Regulation amending Regulation 1370/2007(EC) concerning the opening of the market for domestic passenger transport services by rail COM(2013)28 final.

[81] For further information, European Parliament, DG for Internal Policies, Policy Department B: Study: Integrated ticketing on long-distance passenger transport services, 2012.

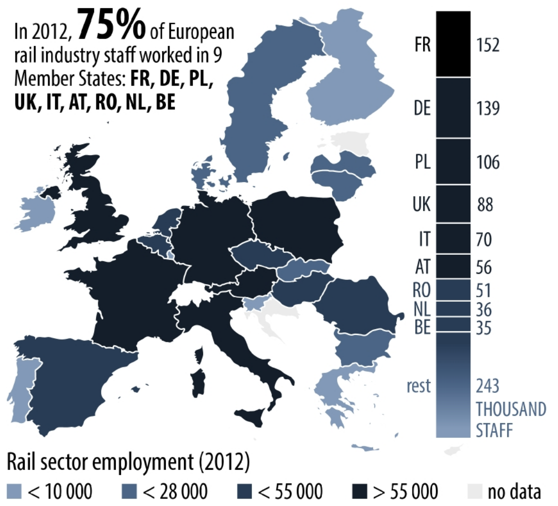
[82] *Op. cit*., European Commission: Press release, IP/13/65.

liberalisation are challenging. It further argues that there is a certain degree of uncertainty in the impact assessment of options and that the choice of a specific structural reform option therefore remains mainly political.[83]

4.3. The social impact

The full liberalisation of rail markets entails a series of social impacts which have been addressed by the Commission.[84] Firstly, these will arise from the need to restructure the incumbent rail companies to improve their productivity; indeed, they will have to be assessed against intramodal (with rail newcomers) and intermodal (with other transport modes) competition. Restructuring might also be accompanied by job losses. The rail sector will be faced with other concomitant challenges. Currently, over 570 000 persons are employed in rail transport. According to a 2010 survey[85] carried out in 19 EU countries, out of the total rail workforce, 54% of the employees were older than 45 years and 34% older than 50 years. The Commission considers that around 30% of rail workers will retire in the next ten years. In the mid- to long-term perspective, the issue of an ageing workforce will likely entail shortages of skilled workers.

Figure 6 – Number of workers in the rail sector (2012)



Data source: Fourth report on monitoring development in the rail market, SWD (2014) 186 final.

To answer these challenges, it could be useful to enhance worker productivity and employability. As the Commission argues, employment security in a broad sense is preferable to relying on a specific job. Training is key to achieving this objective. The European Social Fund is the main instrument providing training opportunities: supporting labour market programmes and life-long learning activities, including within companies. The Commission also advocates use of the European Globalisation Adjustment Fund, which finances actions for individual workers, such as career advice, tailor-made training and mentoring.

The existing social protection net should prevent 'a race to the bottom' after the rail market becomes fully open to competition. Rail transport is already covered by a horizontal set of EU social legislation. EU Directives on the organisation of working time[86] and on working conditions[87] for cross-border workers set a harmonised legal floor below which no operator can go. This provides key rights across the EU, such as

[83] European Commission: SWD Executive summary of the Impact Assessment, SWD(2013) 11 final, 30 January 2013, p. 12.

[84] European Commission: Staff Working Document, Impact Assessment, Annex 7, SWD(2013) 010 final.

[85] European Academy for Environmentally Friendly Transport: Practical guide, Employability in the face of demographic change – Prospects for the European rail sector.

[86] Directive 2003/88/EC concerning certain aspects of the organisation of working time.

[87] Directive 2005/47/EC on the agreement between CER and ETF on certain aspects of the working conditions of mobile workers engaged in interoperable cross-border services in the railway sector.

the maximum weekly working time, daily rest periods and paid annual leave. Based on an agreement between social partners this limits, for instance, driving time to a day shift (nine hours) or night shift (eight hours). The EU provides a framework for posting workers in other countries:[88] it grants workers posted in another Member State the social protection coverage of the host country. It already applies to staff working on international rail transport and will also apply to domestic rail services. Moreover, the EU legal framework ensures a certain level of job security; indeed, it provides for mandatory transfer of staff[89] when a PSC is awarded to a new company. The Regulation on public services obligations in passenger transport[90] allows competent authorities to require the transfer of staff from one PSC holder to another and/or to set standards or criteria when a PSC is awarded to a new business.

Finally, the Commission underlines the EU legislation on information and consultation of employees, which in some cases also applies at national level. It advocates the creation of a European Works Council,[91] through which employees can be consulted at transnational level on business developments. The Directive on collective redundancies,[92] introduces an obligation to hold consultations, to limit the number of workers affected and to implement mitigation measures. A general framework setting minimum principles and arrangements regarding information and consultation of employees at the enterprise level in each country was also introduced in 2002.[93]

The Commission notes that in some Member States, like Belgium, France and Luxembourg, employees of state-owned incumbents still enjoy a special status, which in some cases is similar to that of civil servants, granting them a high level of social protection.[94] In other countries, a significant number of employees also enjoy a special status, but this framework is changing; as in Austria, Denmark, Germany and Greece.

The Commission considers that full rail liberalisation should have a gradual impact and lead to an increase in the volume and quality of the services offered. This, in turn, would allow the maintenance, and even increase, of employment levels, and continued competitive salaries. A 2011 survey[95] on the impact of market liberalisation on North European passenger rail markets (Denmark, Estonia and Sweden) showed indeed some positive trends: rising salary levels, in particular for drivers, improvement of working conditions and greater career opportunities.

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88 Directive 96/71/EC concerning the posting of workers in the framework of the provision of services.

89 Directive 2001/23/EC on the approximation of the laws of the Member States relating to the safeguarding of employees' rights in the event of transfers of undertakings, businesses or parts of undertakings or businesses.

90 Regulation 1370/2007/EC on public passenger transport services by rail and by road and repealing Council Regulations (EEC) Nos 1191/69 and 1107/70.

91 Directive 2009/38/EC on the establishment of a European Works Council or a procedure in Community-scale undertakings and Community-scale groups of undertakings for the purposes of informing and consulting employees (Recast of Directive 94/95/EC).

92 Directive 98/59/EC on the approximation of laws of the Member States relating to collective redundancies.

93 Directive 2002/14/EC on establishing a general framework for informing and consulting employees in the European Community.

94 European Foundation for the improvement of living and working conditions: Study on Employment and industrial relations in the railways sector, 2012.

95 Finnish Transport Agency: research report, Progression of the deregulation on the North European railway passenger markets Research report of the Finnish transport Agency, 2011.

4.4. Initial positions and reactions

With a view to launching the legislative procedure, stakeholders put forward their opinion on the fourth railway package before its presentation by the Commission, or in the following months. Their reactions to the package's proposals were mixed.

Generally, the technical pillar was welcomed by stakeholders. In a position paper[96] jointly drawn up in 2011-2012, the Community of European railway and infrastructure companies (CER), the European rail industry (UNIFE), the European Rail Freight Association (ERFA), and the International Union of Wagon Keepers (UIP), advocated a reinforced role for ERA. These organisations share the view that ERA should become the only entity responsible for issuing safety certificates and authorisations and have more powers to monitor NSA, in an endeavour to streamline and harmonise interoperability and safety rules. In 2013, UNIFE[97] reiterated its support for a reinforced role for ERA, not only for authorisations but also for the promotion of ERTMS, of European rail standards abroad and in the field of research.

The market pillar proved to be more controversial. A 2012 study,[98] commissioned by CER and carried out by an international research consortium, on the economic effects of vertical separation in the railway sector, concluded that no particular rail business governance structure outperforms others. The study found that the effects of vertical separation depend on varying national structural characteristics. Moreover, the authors considered that imposing unbundling in all Member States would entail misalignment of incentives between actors and hence would increase rail costs (€5.8 billion/year) 'for no added benefits in any key measure of performance'.

In its 2012 position paper,[99] ERFA supported total unbundling and welcomed the upcoming railway package. To the contrary, the European Transport Workers' Federation (ETF) rejected[100] the liberalisation proposals. It strongly opposed separation between infrastructure managers and rail operators and called for freedom of choice for national competent authorities to organise domestic rail public services by direct award or tendering. ETF also highlighted the often neglected social consequences of market liberalisation. To avoid underbidding and social dumping, it called for the principle of a 'social clause' in cases of competitive tendering and transfer of staff to another operator.

Finally, the European institution which represents employers, workers and other interest groups, the European Economic and Social Committee (EESC), suggested that the Commission adopt a prudent approach to the liberalisation issue. In its Opinion on the subject,[101] it stated that: 'there is no automatic correlation between the separation, the opening up of the market and the improved railway results'.

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96 CER-ERFA-UIP-UNIFE: Position paper, Future role of ERA, 2011/2012.

97 UNIFE: News release, The European rail industry welcomes the Commission's proposals to make the rail sector more efficient, 31 February 2013.

98 CER: Press release – EVES-Rail Study: EU-wide imposition of vertical separation in rail would raise costs for society, 2012.

99 ERFA: Position paper on the fourth railway package, 12 October 2012.

100 ETF: Resolution on the fourth railway package, 3 May 2013.

101 EESC: Opinion on the fourth railway package, 11 July 2013.

5. The legislative process

5.1. The legislative procedure and political debates

5.1.1. European Parliament position

The European Parliament (EP) Committee on Transport and Tourism (TRAN) adopted the six reports on the fourth package in December 2013. In February 2014, the Plenary adopted its first reading position with several amendments. The vote took place in a tense political atmosphere: demonstrations against the rail package were organised in Strasbourg, bringing together more than 2 500 rail workers from 17 EU countries.[102] In an interview arranged to assess the results of the vote in Plenary, one of the rapporteurs, Saïd El Khadraoui (S&D, Belgium) stated[103] that national input had been very strong on governance issues, as was national railway company and CER lobbying.

The technical pillar files did not raise any serious problems and the legislative resolutions were adopted with large majorities. On the issuance of safety certificates, the proposed amendments underlined ERA's exclusive competence, both for rail companies and infrastructure managers, but in cases of isolated networks, left the right to choose between ERA and the national safety authority to rail companies.

Under the market pillar, the TRAN Committee's original approach was modified by amendments adopted in Plenary. The two most controversial resolutions were adopted by a relatively narrow majority: on governance structure and market liberalisation, by 412 votes to 146 with 106 abstentions;[104] on public service obligations, by 386 votes to 206 with 78 abstentions.[105] On the former, MEPs insisted that the infrastructure manager should have effective decision-making powers and should be independent from other entities within a vertically integrated company, with respect to essential tasks such as train track allocation and infrastructure charges. The Parliament also considered that the infrastructure manager could cooperate in a non-exclusive and non-discriminatory way with one or more applicants to carry out transport services on a specific line or a local or regional part of the network. At the same time, confidentiality of commercially sensitive information should be guaranteed. MEPs advocated the introduction, by December 2019, of an information and ticketing system common to all rail companies and stakeholders, to facilitate travel planning and purchase of tickets by customers.

For the award of PSCs, a Parliament resolution proposed giving Member States and/or competent authorities a choice between competitive tendering procedures or direct award. The latter would nevertheless be linked to specific requirements such as: evolution of passenger volumes; cost-efficiency of capital productivity; quality of rolling stock; frequency and punctuality of services; and customer satisfaction. Tendering procedures would become the rule from 3 December 2022, with the exceptions provided for by proposed Regulation 1370/2007. A ten-year transition period from the entry into force of the Regulation was also put forward for PSCs directly awarded prior to December 2022 which did not comply with the requirements. The Parliament also emphasised the social aspects of the package, and required that the selected public

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[102] ECG news: European rail workers protest liberalisation plan, 24-28 February 2014.

[103] Agence Europe: El Khadraoui says rail reform lobby was very strong, 28 February 2014.

[104] European Parliament, 2013/0029 (COD), 26 February 2014.

[105] European Parliament, 2013/0028 (COD), 26 February 2014.

service operators grant staff working conditions on the basis of binding national, regional or local social standards and implement the applicable collective agreement.

In October 2014, the Transport Committee voted on a decision to open interinstitutional negotiations on the fourth package and confirmed all its previous positions. It appointed two new rapporteurs:[106] David-Maria Sassoli (S&D, Italy) on railway governance and Wim Van de Camp (EPP, the Netherlands) on market liberalisation. The Committee chair noted[107] that the proposals would be treated as one package, without separating the political and technical parts.

5.1.2. Reactions to the European Parliament vote

The Community of European railway and infrastructure companies (CER) welcomed[108] the outcome of the EP vote and in particular the amendments giving Member States more flexibility in the choice of governance model. ERFA, however, stated[109] its disappointment and regretted the adoption of Parliament's amendments on the market pillar, since, according to the association, they neutralised the pillar and 'put back the clock of private investment in the rail sector for many years'. The Commission also reacted negatively to the Parliament's decisions. It regretted that MEPs did not support an effective independence for infrastructure managers and voted for the postponement and exceptions to competitive tendering for PSCs. Siim Kallas, then Commissioner for Transport, regretted[110] 'the tenacity of the vested national interests that proved more appealing ... than the balanced and well-reasoned compromises reached ... by the Transport and Tourism Committee.'

5.1.3. Council debates and position on technical pillar

After adopting general approaches on the three proposals forming the technical pillar, in June 2013 on interoperability, in October 2013 on safety and in March 2014 on ERA, the Council reached a political agreement on these files in June 2014, after nine trilogue meetings.[111] This agreement mainly aims to reduce the administrative burden and costs for rail operators and to facilitate their market entry. As regards authorisation procedures, the Council opted for a dual system: ERA would act as a 'one-stop shop' for issuing vehicle authorisations and safety certificates for train companies operating cross-border traffic. Nevertheless, NSAs would retain an important role in carrying out the necessary assessment linked to the issuance of these authorisations. For domestic operations, the undertakings would have the choice to submit their applications either to ERA or to NSAs.

In parallel with the expansion of powers and duties introduced by the amended ERA Regulation, recruitment of additional staff and seconded national experts for the Agency is planned. ERA's new responsibilities will be implemented over a transition

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[106] Saïd El Khadraoui (S&D, Belgium), rapporteur on railway governance, was not re-elected in the May 2014 elections to the European Parliament and Mathieu Grosch (EPP, Belgium), rapporteur on the opening of the market, did not run for another term.

[107] Agence Europe: Confirmation of mandates for negotiating rail reform, 13 October 2014.

[108] CER: Press Release, European Parliament paves the way for the future of a healthy European railway sector, 26 February 2014.

[109] ERFA: Input paper, Private investments into rail – What framework conditions?, 3 September 2014.

[110] European Commission: Press release, Transport: European Parliament adopts equivocal first reading position on fourth railway package, 26 February 2014, IP/14/192.

[111] Council: Press release, Council reaches political agreement on railway interoperability and safety and the European Railway Agency, 5 June 2014, 10401/14.

period of a maximum of four years. Michael Cramer (Greens/EFA, Germany), Rapporteur for the safety Directive, welcomed[112] this agreement, stating that it 'represent(ed) a fair balance between the interests of the Member States and the demands of the European Parliament' and that it 'could be the breakthrough for the European Railway Area'. On 30 June 2015, the permanent representatives of the Member States to the EU adopted an agreement on the technical pillar. Following the Member States' adoption, also in June 2015, of an informal agreement, the Council adopted an interinstitutional agreement on the legislative file on 10 December 2015.

5.1.4. Council debates and position on market pillar

Reaching an agreement on the market pillar proved more difficult, with liberalisation of passenger transport, the governance model, and allocation of PSCs remaining stumbling blocks. In the second half of 2014, the Italian Presidency, (and subsequent 2015 Latvian and Luxembourg Presidencies) encouraged progress on these files and promoted debate to find a common position.

Disagreement between Member States was obvious during the October 2014 Transport Council.[113] While rail liberalisation was seen as an opportunity by Germany, Spain, Sweden and the UK, other delegations expressed reservations, asked for impact assessments or for long transition periods. On PSCs, many countries shared the concern that 'cherry-picking' would lead to neglect of less profitable rail routes and stated that direct award should be possible. As regards governance, Austria, Germany, Luxembourg and Slovenia, among others, expressed a desire to keep the integrated holdings system. The majority of Member States believed that the governance model should be that most adapted to national realities and not necessarily the model decided by the EU.

The Latvian Presidency presented compromise proposals[114] in May 2015, focusing on governance and market liberalisation. On governance, it suggested defining the infrastructure manager's independence requirements in relation to its functions rather than to its organisational structure. The proposals defined infrastructure charges and rail track allocation as essential functions, subject to the strictest independence requirements. On liberalisation, the proposals focused on competitive tendering of PSCs and introduced new exception proposals, in particular when a Member State's national passenger rail traffic is less than 1% of all EU rail passenger volume expressed in pkm.

Luxembourg made the fourth railway package the transport priority of its Presidency, guided by its philosophy of enhancing rail performance and competitiveness. At the October 2015 Transport Council, Ministers unanimously adopted a general approach to this file,[115] which, in their view, represented a fair compromise between the need to liberalise national rail markets and to take national specificities into account, in particular those of small countries.[116] In line with the original Commission proposal, EU rail operators would gain fair and non-discriminatory access to the network in all EU countries to run domestic passenger services. They could either set up commercial services or bid for PSCs.

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[112] Agence Europe: Council-Parliament agreement on rail package technical pillar, 18 June 2015.

[113] Agence Europe, Ministers divided over political aspect of railways reform, 9 October 2014.

[114] Council: Progress report 8959/15, 22 May 2015.

[115] Council: Report 12243/15, 1st October 2015.

[116] Agence Europe: Political pillar of rail package adopted, 8 October 2015.

For PSCs, within the spirit of the Commission proposal, competitive tendering would become the general rule, however the Council agreed on a longer list of exceptions. Direct award of PSCs would still be possible to prevent smaller markets being adversely affected and to ensure the continuity of public rail services. The general approach justifies direct award on the basis of a network's structure and geographic characteristics; national authorities would nevertheless have to assess the progress of directly awarded PSCs using performance criteria, as previously proposed by the Parliament.

Concerning governance issues, the general approach allows for vertically integrated businesses, but introduces safeguards against financial transfers between the infrastructure manager and rail operator within a holding company. The independence of infrastructure managers was strengthened. Nevertheless, the infrastructure manager may assign essential functions, such as rail track allocation, to an independent entity, thus exempting the former from complying with certain independence requirements from other entities in a holding structure.

Commenting on the agreement, François Bausch, President in office of the Council, expressed his satisfaction with '...the balanced and solid solutions we managed to agree upon'. Transport Commissioner Violeta Bulc shared this positive assessment and stated that the agreement '...paves the way for better efficiency, performance, value for money and quality of rail services in the EU'.[117] The Presidency began trilogue meetings involving the European Parliament and the Commission to reach a political compromise at the end of October 2015. These meetings are scheduled for conclusion under the Dutch Presidency by March 2016. A final Plenary vote on both technical and political pillars should take place in Parliament in the first half of 2016.

5.1.5. Some reactions to the Council vote on the market pillar

A few days before the Council vote, ERFA Association called for[118] effective separation of financial circuits within a vertically integrated rail structure to avoid cross-subsidisation, competitive distortions and to allow for regulatory control. ERFA asked the Member States to close the loopholes on financial transparency and minimise the privileges granted to incumbents.

The Community of European railway and infrastructure companies (CER) welcomed[119] the general approach adopted by the Council and declared that the amended proposal on governance had taken into account most of CER's concerns, above all the coexistence of different governance models within a single and more open rail market. Commenting on the outcome of the Council vote, the spokesman for the Rail Delivery Group, which represents British passenger and freight operators and Network Rail, said[120] 'we would have liked Member States to agree a greater degree of liberalisation, however we fully support this compromise as a useful step forward...'.

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[117] Presidency of the Council of the EU: Ministers for Transport adopt a general approach to railway infrastructure governance and market liberalisation as part of the fourth railway package, 8 October 2015.

[118] ERFA Press release: Fourth railway package: time to close the loopholes on financial transparency, 29 September 2015.

[119] CER: Press release, Transport Ministers adopt general approach on the market pillar of fourth railway package – may the technical pillar now enter into force as soon as possible!, 8 October 2015.

[120] RDG: Press release, RDG responds to EU agreement on fourth railway package, 8 October 2015.

The European Transport Workers' Federation (ETF) agreed[121] with the Council's choice to maintain direct award of PSCs, but criticised the ideological approach that competition would automatically improve the quality of passenger services. It considered that working conditions and job security were endangered by tendering procedures and insisted on compulsory social protection of workers, in line with Parliament's 2014 position. Finally, ETF strongly criticised Council support of 'open access' competition for rail passenger services.

6. Outlook

The description of the establishment of a European railway framework shows that this ongoing process has been long, gradual and had some pitfalls along the way. The Commission intended the framework to be an answer to the slow decline in rail share, witnessed since the 1970s, in particular for freight transport, and to increase the attractiveness and performance of rail for passengers. The development of this policy has been hampered by structural obstacles: the lack of interoperability between national rail systems, the presence of national monopolies in some Member States, the existence of different regulatory systems giving operators access to rail services (licences), and of heterogeneous rail governance structures. Moreover, different visions of rail policy and subsequent divergent implementation of EU rail packages have further delayed and complicated the creation of a Single European Railway Area. To mention some examples: Sweden adopted totally separated vertical rail governance in 1987; the United Kingdom dismantled and privatised its state rail monopoly in 1993-1994; while France adopted more limited changes and Germany retained a strong integrated structure. In some Member States trade unions and state railways have tried to protect established positions, which are challenged by the EU ambition to introduce market liberalisation and new governance.

Despite the opposition, or the lack of enthusiasm, of some governments for implementing the reforms, important steps have been achieved: increased competition, development of rail infrastructures, and improvement of interoperability. The market liberalisation advocated by the Commission is promoted by the vertical separation principle for governance; by the introduction of clearer provisions relating to the compatibility of state aid for rail companies; and by the introduction of new management techniques in rail companies, similar to those applied in any other private business. Intramodal competition has globally increased both in freight and passenger markets, with marked differences between the Member States. The Commission continues to push for greater intermodal competition, to make rail more competitive than short-haul air transport for passengers, or road haulage for freight. In this field, positive results were achieved in the high-speed rail segment.[122] Intramodal competition also feeds well into the EU transport infrastructure policy and its trans-European transport network (TEN-T), aiming to create and promote seamless transport for passengers and freight across the EU.[123]

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121 ETF: Press release, 8 October 2015.

122 According to experts, high-speed trains account for at least 70% of the rail and air markets considered together on journeys lasting less than three hours. For further information: High-speed rail in the EU, European Parliament, Briefing, September 2015, p. 4.

123 For further information: An overview of the Trans-European Transport Network, European Parliament, Briefing, September 2015.

Against this background, the fourth railway package takes stock of what has been achieved and gives new impetus to EU rail policy. The long, ongoing, legislative process is a clear indication of the different viewpoints and of the debates between the Commission, the co-legislators, and other stakeholders, on how far harmonisation of rail governance structures and rail liberalisation should go. The abandon of the flagship project of mandatory *unbundling* initially proposed by the Commission is a sufficiently telling example in this regard. The same could be said of the initial proposal to make the ERA a one-stop shop for all certificates and authorisations, also subsequently abandoned. The positions expressed during the trilogues which started in late October 2015 illustrate the persistence of different viewpoints between the stakeholders, for instance on transparency of financial flows in rail groups or on mandatory tendering of PSCs. In December 2015, when the Council adopted the interinstitutional agreement on the technical pillar (less controversial from the beginning), Poland abstained and the United Kingdom voted against the recast safety Directive. According to commentators, these positions were due to the issue of transfer of competencies to the ERA.

Transport as well as logistics and mobility are included in the new 18 month programme of the future Dutch, Slovak and Maltese Presidencies, as key elements for a strong EU economy, to create jobs and improve connectivity.[124] The fourth railway package is also a priority for the next six months, with the Dutch Presidency seeking to reach a final agreement with the trilogue to enable the European Parliament to vote on this legislative file in the first semester of 2016.[125] At the conference organised by ERA on 'Moving towards the Single European Rail Area', organised in November 2015, Transport Commissioner Violeta Bulc urged rail delegates to embrace the fourth railway package and 'to lower price, improve efficiency... deliver a new business model... and create an attractive system.' Violeta Bulc also stressed that the fourth rail package would be the last and that it would therefore be the last chance for many Member States to fully implement the previous rail packages.[126]

Some commentators,[127] nevertheless, raise the question of whether the fourth railway package will indeed be the last, or if another will be necessary to overcome its shortcomings. The answer to this question will depend on the consistency of choices and decisions which will be made during the trilogue and applied after the adoption of the package.

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[124] Council: Taking forward the strategic agenda – 18-month programme of the Council, pp. 7, 9, 15258/15, POLGEN 178, 11 December 2015.

[125] Agence Europe: Aviation and rail priorities of new Council presidency, 6 January 2016.

[126] International railway Journal: Bulc: embrace fourth railway package or lose funding, 24 November 2015.

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The fourth railway package comprises six legislative proposals to enhance the efficiency and competitiveness of rail across the European Union, put forward by the European Commission in 2013. It aims to remove the remaining institutional, legal and technical obstacles, and create a truly integrated European Railway Area. Although the legislative process on technical issues did not present many difficulties, negotiations on the liberalisation of rail markets and governance structures (known as the market pillar) continue and prove more complex. Trilogue discussions began after the adoption of a general approach by the Council in October 2015, and should conclude in 2016. Once adopted, the fourth railway package is expected to give a new impetus to rail services across the EU, and will contribute to meeting the objectives of the Commission's 2011 White Paper on Transport.

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