



## Railways: EU policy

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This note gives an overview of the development of a common European railways policy towards the long-aspired to goal of a single European Railway Area.

The European Union has been intimately involved in railway development within since 1985 when the White Paper of that year, on completing the internal market, set out the guidelines for the common European transport policy. The aim of the four waves of legislation that followed (an initial Communication and three railway 'packages') has been to promote the efficiency and competitiveness of European railways through gradual liberalisation:

- the First Railway Package aimed to open up the trans-European rail freight network to international goods services by 2008; it was recast in 2011 to allow operators to run services across the whole of the Union on compatible track, using interoperable equipment
- the Second Railway Package was designed to provide for a legally and technically integrated EU railway area; and
- the Third Railway Package aimed to revitalise the international rail passenger market by extending competition and establishing a harmonised system of minimum passenger rights, to improve the interoperability of the EU rail system and to enhance the performance and size of the EU rail freight market.

In January 2012 new regulations on interoperability came into force on both the conventional and the high speed rail network. The Commission published its proposals for a Fourth Railway Package in January 2013; this would primarily further liberalise the rail market (though not to the extent previously anticipated) and increase the powers of the European Railway Agency.

Information on other rail-related matters can be found on the [Railways Topical Page](#) of the Parliament website.

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# 1 Communication on a Community Railway Policy, 1990-96

## 1.1 Generally

In January 1990 the European Commission (EC) prepared the White Paper *Communication on a Community Railway Policy* for the Council of Ministers. This was the starting point of an active involvement of the Community in rail policy. The aim of this and subsequent publications has been to promote the efficiency and competitiveness of the railways through gradual liberalisation.

[Directive 91/440/EEC](#) of 29 July 1991 on the development of the Community railways requires that Member States grant rail companies independence from government and introduce commercial management techniques; and separate the management of infrastructure from transport management. The Directive was originally implemented in the UK by the *Railways Regulations 1992* ([SI 1992/3060](#)), later replaced by the *Railways Regulations 1998* ([SI 1998/1340](#)) and now in force via the *Railways Infrastructure (Access and Management) Regulations 2005* ([SI 2005/3049](#)).

The 1991 Directive followed up many of the ideas contained in the White Paper with the aim of adapting the railways to the needs of the single market and increasing their efficiency. The Commission thought the relationships between the state and the railways needed to be clarified and that the railways needed to be able to behave as commercial enterprises. The Communication and the Directive both stressed several times the importance of management autonomy and the necessity of using uniform accounting methods. It sought to introduce greater financial discipline and more operational competition both nationally and across borders. National railways were pressed to separate track infrastructure from train operations or, at the very least, to produce transparent accounts revealing the respective costs and revenues attributable to infrastructure and to services.

The Directive did not require that the two activities be conducted in different institutions, nor even in distinct divisions within the same institution, but it did stress that this was possible. It was left up to each Member State to decide how they wished to organise their railways but it had to be possible to attribute costs. In the UK the then Conservative Government decided to separate track and trains via privatisation, putting both into the private sector; no other EU country took this route.<sup>1</sup>

The interest of the Directive was less to do with the structure of the railways than the desire to enable railway operators to run their trains more easily on other rail networks and to ensure that they could compete as completely as possible on a common European infrastructure. It established the principle entitling the rail company of one Member State to have access to the infrastructure of other Member States. Underlying the Directive was the belief that whichever way infrastructure was to be managed, the question of who would be granted access to the infrastructure and on what terms was of fundamental importance.

The 1991 Directive created certain access rights. By separating railway infrastructure management from the operation of the trains, it established the possibility of multiple users of an individual railway infrastructure. These rights would have little effect unless there was a legislative framework governing access conditions. The Directive was therefore followed by

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<sup>1</sup> for a summary of the infrastructure management of and private sector involvement with other EU rail systems, see annexes 5 and 12 of: EC, [Commission staff working document accompanying document to the Report from the Commission to the Council and the European Parliament on monitoring development of the rail market](#), 18 December 2009

proposals on the licensing of railway undertakings and the allocation of railway infrastructure capacity and the charging of infrastructure fees, intended to supplement and facilitate the application of the Directive:

- [Directive 95/18/EC](#) of 19 June 1995 covered licensing of railway undertakings: if an applicant meets stated licence criteria covering financial standing, professional qualifications and insurance and has a safety certificate, then he must be granted a licence. This Directive was amended by [Directive 2001/13/EC](#) of 26 February 2001, which extended the system of licensing to all railway undertakings with some exceptions (e.g. some undertakings with local and regional activity) and again, more recently, by [Directive 2004/49/EC](#) of 29 April 2004.
- [Directive 95/19/EC](#) of 19 June 1995 covered the allocation of railway capacity and the charging of infrastructure fees for services operated under article 10 of the 1991 Directive. The Community's proposals on infrastructure charging lay down a set of common principles, while leaving the level of charges to be determined by the infrastructure manager. Fees should not be set lower than the marginal costs of a line. It guarantees fair and non-discriminatory access to infrastructure and requires companies to set up a user fee scheme, based on actual costs. The fees are levied by an independent body, which may be the network manager if this is separate from the rail companies. The Directive was replaced by [Directive 2001/14/EC](#) of 26 February 2001; this was consequently amended by [Directive 2004/49/EC](#) of 29 April 2004.

## 1.2 Interoperability

A separate point, not covered by the 1991 Directive, was the unifying of the market for rail equipment so that an invitation to tender (ITT) was open on equal terms to all producers in the Community.

A working group was set up to develop the idea of a European high speed train network and it produced an interim report at the end of 1990. This outlined plans for a network and identified certain key links which needed further study. The Council passed a resolution on 17 December 1990, asking for more detailed work to be carried out on technical harmonisation. The subsequent proposal on the interoperability of the European high-speed train network concentrated on technical requirements but also included some operational and administrative requirements which would be necessary for the 'completion and exploitation' of an integrated, coherent and interoperable trans-European network on 'the most economically efficient terms'.

[Directive 96/48/EC](#) of 23 July 1996 on the interoperability of the European high-speed train network came into force on 16 May 2002. The aim of the Directive was to make it easier for train operators to use the systems in other Member States by ensuring infrastructures, equipment and rolling stock were all compatible and also to assist the EC railway manufacturing industry by the adoption of common standards. It was made clear that the proposal did not require interoperability from every point in the network to every other point in the network, but only where necessary for the operation of international services over the network. The requirements were not retrospective and would be applied gradually as existing lines are upgraded and new ones constructed.

This was of particular importance for the creation of the [Trans-European Transport Network \(TEN-T\)](#), as it created a regulatory framework of mandatory [Technical Specifications for](#)

[Interoperability \(TSI\)](#) and harmonised standards. Its main purpose was to harmonise national laws, which were based on differing ideas about safety, environmental protection, health and consumer protection and operational requirements. The Directive was subsequently amended by [Directive 2001/16/EC](#) of 19 March 2001 and [Directive 2004/50/EC](#) of 29 April 2004 (see section 4.3 for further information).

## 2 First Railway Package

### 2.1 1996 White Paper: Revitalising the Community's Railways

In July 1995 the Commission published a communication on the application of the 1991 Directive with proposals for developing the system through further liberalisation of access rights to cover international passenger rail services and all freight services, domestic and international.<sup>2</sup> It considered that this extension would help increase competitiveness of rail transport, particularly at Community level, by attracting new capital and enterprises to the sector. At the time there was little support for a proposal creating further rights of access as Member States felt the Commission was pushing ahead too fast and the benefits of open access had not yet been demonstrated.

The proposal was resurrected the following year in the then Transport Commissioner, Neil Kinnock's, White Paper *A strategy for revitalising the Community's railways*.<sup>3</sup> The White Paper set out the Commission's suggestions for a strategy to revitalise the Community's railways, together with a proposed timetable. In the terminology of the UK it was more a 'Green' Paper than a 'White' Paper as it did not contain formal proposals but instead set out a number of conclusions and suggestions. The Commissioner's aim was to promote a transfer of freight traffic from roads to railways. He explained that without any rebalancing of traffic flows, freight traffic by road would account for 84 per cent of the total being transported by the year 2002 (against 70 per cent in 1992). In presenting his paper, he called for open access to Europe's rail networks, restructuring of state rail companies and moves to boost rail freight, including a series of rail freight 'freeways'.

Overall the White Paper offered a vision of a new rail culture, a triumvirate where innovative private sector managers would compete to provide enhanced passenger and freight services; individual governments would oversee the sector to ensure an element of social responsibility in service provision; and the EU would bring Member States together to overcome border restrictions and enable faster and cheaper trans-European rail links. It proposed that the railway should be first and foremost a business, free to exploit opportunities, and organised so that it was exposed to market forces. The paper was discussed in both the Houses of Parliament<sup>4</sup> prior to the 1997 General Election.

These policies initially proved contentious at Council level and future action was confined, at least for a time, to the development of freight freeways. The concept of the Trans-European Rail Freight Freeways (TERFFs), first introduced in the White Paper, was to provide a framework for voluntary co-operation between Member States, freight train operators and infrastructure managers to make international freight services more attractive to customers.

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<sup>2</sup> COM(95) 337 final, 19 July 1995

<sup>3</sup> [COM\(96\) 421 final](#), 30 July 1996

<sup>4</sup> ESC (A) Deb 11 December 1996; and: House of Lords Select Committee on the European Communities, [Community Railway Strategy](#) (seventh report of 1996-97), HL paper 46, 18 February 1997

This suggestion was so popular that a high level group of national officials was set up by the Commission to take the initiative forward.<sup>5</sup>

The White Paper also covered interoperability of the trans-European **conventional** rail system, following on from Directive 96/48/EC. A Commission report on the implementation and effects of that Directive was considered by the European Parliament in October 1999. The Commission consequently presented a proposal on 25 November 1999 for a Directive on the interoperability of the trans-European conventional rail system, accompanied by an explanatory Communication, which became part of the rail package.<sup>6</sup>

In the White Paper the Commission had undertaken to report on the implementation and effect of the 1991 Directive. This was published in the form of a Communication in March 1998.<sup>7</sup> It highlighted several problem areas in the system and outlined legislative measures to address them.

## 2.2 Directives

On 22 July 1998 the Commission proposed a package of measures to ensure a more efficient use of Europe's railway infrastructure – the 'rail infrastructure package'.<sup>8</sup> The proposals focused on the allocation of infrastructure capacity and on the charging of infrastructure fees (amending Directive 95/19/EC); the separation of accounts of infrastructure management and of transport operations (amending Directive 91/440/EEC); and the licensing of railway undertakings (amending Directive 95/18/EC). A White Paper on infrastructure charging was presented the same day.

In 2001 four directives on infrastructure and interoperability were adopted, with the aim of increasing competition:

- [Directive 2001/12/EC](#) of 26 February 2001 amended the 1991 Directive on the development of the community's railways. It established the 'open access' principle for international freight; made compulsory a separate balance sheet and profit and loss accounts for the infrastructure managers and the service operators; and established an independent body to guarantee fair and non-discriminatory access to infrastructure.
- [Directive 2001/13/EC](#) of 26 February 2001 amended Directive 95/18/EC on the licensing of railway infrastructure.
- [Directive 2001/14/EC](#) of 26 February 2001 replaced Directive 95/19/EC on the allocation of railway infrastructure capacity, the levying of charges and safety certification. It provided a more precise definition of the rights of railway undertakings with regard to capacity allocation and established a procedure for resolving capacity shortages. It stipulated that the charging for the use of infrastructure would be based on the marginal costs and defined the rights of railway undertakings and of the infrastructure manager and a procedure for the preparation of timetables. The Directive also ensured that capacity would be allocated by an independent authority (i.e. that is not providing transport services itself), and instituted a right of appeal. The charging of infrastructure fees was based, in principle, on marginal cost, that is the

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<sup>5</sup> [COM \(1997\) 242 final](#), 29 May 1997

<sup>6</sup> [COM\(1999\) 617 final](#), 25 November 1999

<sup>7</sup> [COM\(1998\) 202 final](#), 31 March 1998

<sup>8</sup> [COM\(1998\) 480 final](#), 29 September 1998 (98/0265, 98/0266, 98/0267), all available via the [Official Journal](#)



cost that is directly incurred as the result of the operation of a train. But the Directive would allow charges to be modulated for various reasons: a higher rate of cost recovery than under marginal cost pricing (but not for freight); reduction of external costs; and tackling problems of scarcity. The Directive also required that the charging system reward good efforts and penalise bad performance. It was subsequently amended by [Directive 2004/49/EC](#).

- [Directive 2001/16/EC](#) of 19 March 2001 on the inter-operability of the trans-European conventional rail system.

The directives were scheduled to come into force by 15 March 2003.

### **2.3 Recast of the Package and a Single European Railway Area, 2009-**

In September 2010 the Commission presented a draft Directive to recast (consolidate and amend) the First Railway Package. The aim is to increase transparency of rail market access conditions and improve access to rail-related services, for example, station, freight and maintenance facilities. The draft Directive would merge the first three Directives of the package (see above) and the subsequent amendments to them; clarify some of the terminology and interpretations within them; and update the legislation to accommodate new market conditions.<sup>9</sup> This forms the key legislative part of the Commission's wider goal of establishing a Single European Railway Area.<sup>10</sup>

In June 2011 the European Scrutiny Committee published a report setting out the progress of the recast to date. The Committee concluded that there was "insufficient progress on the proposal to justify the Government supporting or agreeing a general approach". The Committee also noted 'with approval' the Government's intention to oppose or abstain from a general approach if it could not block "the unacceptable text relating to the status of dominant operators in the provision of services". However, it also stated that "the Government may find it expedient to agree to a general approach if that would avoid adoption of a yet more unacceptable measure".<sup>11</sup>

The Government's main concerns about the recast related to access to services and, in particular, depots. On rail freight, it expressed concerns about the proposal to legally separate facilities such as terminals, sidings and yards from the main freight operators that currently own them. This could lead to companies like the UK's Freightliner having to divest itself of its terminals and could deter investment in new facilities.<sup>12</sup> The House of Lords EU Committee had previously raised similar concerns in a June 2009 report.<sup>13</sup>

At the June 2011 Transport Council a compromise text was agreed. The then Secretary of State, Philip Hammond, told the House:

The Council reached a general approach on a directive which recasts the 2001 first rail package. The 2001 legislation set the initial framework for a single European rail market, setting out principles for charging and access to the network. The present draft

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<sup>9</sup> [2010/0253\(COD\)](#), September 2010

<sup>10</sup> set out in: [COM\(2010\) 474 final](#), 17 September 2010

<sup>11</sup> ESC, [Documents considered by the Committee on 8 June 2011](#) (thirty-third report of session 2010-12), HC 428-xxix, 20 June 2011, paras 5.16-5.17

<sup>12</sup> *ibid.*, para 5.14

<sup>13</sup> HL EU Committee, [Recast of the First Rail Freight Package](#) (tenth report of session 2008-09), HL paper 90, 2 June 2009; the report was debated in the House of Lords in October 2009, see: [HL Deb 23 October 2009, cc950+](#)

directive modifies the three 2001 directives. The presidency tabled a compromise text which was slightly amended at the Council. The presidency then concluded that there was a qualified majority for a general approach. The text of the general approach is acceptable to the UK.<sup>14</sup>

The Recast Package was finally agreed by Transport Minister on 29 October 2012; the EP had given its approval on 3 July. The main elements of the Package are:

**Competition issues:** the recast will improve transparency of the rail market access conditions for example by

- requiring more detailed network statements -documents published annually so potential newcomers can see clearly the characteristics of available infrastructure and conditions for its use;
- establishing improved (and in certain cases guaranteed) access to rail-related services (subject for instance to management independence requirements) for freight and passenger trains;
- establishing explicit rules on conflicts of interest and discriminatory practices in rail related services.

**Regulatory oversight:** The recast strengthens the power of national rail regulators including:

- extending the competence of national regulators (to rail-related services);
- requiring the independence of national rail regulators (from any other public authority);
- strengthening the powers of the national rail regulators (with sanctions, audit and ex-officio investigating powers) and establishing the obligation imposed on these bodies to cooperate with their counterparts on cross-border issues.

**Investment:** the recast aims to strengthen the "financial architecture" to encourage investment including by

- requiring national long-term strategies and multi-annual contractual agreements between the state and infrastructure managers linking funding to performance, and business plans. These instruments of medium to long term planning should allow an orderly development of the infrastructure and give market players better predictability of business opportunities and thereby facilitate their own investments;
- requiring more precise and smarter infrastructure charging rules. Better implementation of the charging principles contained in the existing legislation should lead to lower track access charges for rail transport operators in many Member States. The new charging rules (with common rules for the introduction of noise-related modulation as the rail equivalent to external cost charging for road transport, mandatory modulation of charges based on the equipment of trains with European signalling systems) should also stimulate private investments in greener and interoperable technologies.<sup>15</sup>

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<sup>14</sup> [HC Deb 23 June 2011, cc29-31WS](#)

<sup>15</sup> EC, [Frequently asked questions on the recast of the first railway package](#), MEMO/12/520, 3 July 2012



Member States have 30 months from the publication of the Directive to transpose the Recast Package into national law (likely mid-2015).<sup>16</sup> Reports indicate that “the planned Fourth Railway Package will substantially revise the recast of the First Railway Package” (see section 5, below).<sup>17</sup>

### 3 Second Railway Package

#### 3.1 2001 White Paper: European Transport Policy for 2010

In 2001 the European Commission published the White Paper *European Transport Policy for 2010: Time to Decide*.<sup>18</sup> Its objective was to refocus Europe's transport policy on the demands and needs of its citizens and to place users' needs at the heart of its strategy. It proposed 60 or so measures to meet this challenge. The first of these measures was designed to shift the balance between modes of transport by 2010 by revitalising the railways, promoting maritime and inland waterway transport and linking up the different modes of transport.

The Commission proposed to revitalise the Community's railways by:

- opening up national freight markets to cabotage;
- establishing a high safety level;
- developing interoperability;
- opening up trans-frontier passenger services;
- promoting measures concerning quality of services and customer rights; and
- creating a common agency for safety.<sup>19</sup>

#### 3.2 Directives

The second package of rail directives was tabled by the Commission in January 2002 to include: widening access rights to domestic freight and international passenger services; developing a common approach to safety; establishing the European Railway Agency as a steering body; enhancing interoperability; and enabling Community access to the Convention concerning International Carriage by Rail (COTIF).

The emphasis of this package was on standardisation: to make it easier for railways to compete with each other and in particular to complete the liberalisation of the rail freight market. The proposal on international passenger services was not agreed – except indirectly as a comment about the third package – but the rest was agreed in April 2003.

The package is composed of the following measures:

- [Regulation 881/2004/EC](#) of 29 April 2004 to set up a European Railway Agency to take charge of finding joint safety and interoperability solutions.

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<sup>16</sup> Article 64 of the [Adopted Text](#), 3 July 2012

<sup>17</sup> “[European transport ministers approve First Railway Package recast](#)”, *International Railway Journal*, 29 October 2012

<sup>18</sup> [COM\(2001\) 370 final](#), 12 September 2001

<sup>19</sup> the Labour Government consulted on both the 2001 White Paper and the second railway package in 2001-02, see: DTLR, [European common transport policy: White paper](#), November 2001; and: DfT, [Consultation on EC Second Railway Package](#), May 2002

- [Directive 2004/49/EC](#) of 29 April 2004 (the 'Railway Safety Directive') on defining common safety objectives for the entire EU railway. It creates a clear procedure for issuing safety certificates all rail companies have to acquire before being able to operate on the European network. The text does not preclude stricter rules but establishes a notification procedure that should prevent the misuse of higher standards to surreptitiously discriminate between rail companies. It amends Directive 95/18/EC and Directive 2001/14/EC.
- [Directive 2004/51/EC](#) of 29 April 2004 to provide for the full liberalisation of freight from 1 January 2007 and propose the opening up of cabotage operations. It amends the 1991 Directive.
- [Directive 2004/50/EC](#) of 29 April 2004 applies to geographical and technical issues, the procedure for using European specifications, the application of technical applications in the event of upgrading or maintenance work and so on. It amends Directive 96/48/EC (interoperability of the high-speed railway) and Directive 2001/16 (interoperability on the standard system).

### 3.3 Convention concerning International Carriage by Rail (COTIF)

The recommendation for Community accession to COTIF could also be considered part of this package.<sup>20</sup>

COTIF is a long-standing inter-governmental agreement between forty countries, which provides a system of international law for the carriage of goods, passengers and luggage by rail on international journeys. It avoids the need for large numbers of bilateral agreements between rail service operators in Europe, the Middle East and North Africa. Uniform systems of law have been in operation for many years: the first international convention concerning the carriage of goods was signed in 1893.

The 1980 COTIF had several sets of rules, known as 'uniform rules' which made provision for:

- contracts for the international carriage of passengers (known as the CIV uniform rules); and
- contracts for the international carriage of goods (freight) (known as the CIM uniform rules) with annexes dealing with, amongst other things, the carriage of dangerous goods (known as the RID Regulation).

[COTIF 1980](#) was being modified primarily to reflect major changes in railway management and operations particularly following the 1991 Directive. In particular, the changes reflect the developments in EU Member States concerning the increasing separation of infrastructure management from train operations and the introduction of open access rights, opening up the possibility of more than one operator on any one network. The [1999 Vilnius Protocol](#) (referred to from this point on as COTIF 1999) provided new CIV uniform rules, new CIM uniform rules and made RID a free standing appendix. It introduced new uniform rules for contracts of use of vehicles in international rail traffic (CUV); contracts of use of infrastructure in international rail traffic (CUI); the validation of technical standards and prescriptions

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<sup>20</sup> [COM\(2003\) 696 final](#), 17 November 2003; the Labour Government consulted on this in 2004, see: DfT, [Revision of the Convention concerning International Carriage by Rail \(COTIF\)](#), January 2004

applicable to railway material intended to be used in international traffic (APTU); and the technical admission of railway material used in international traffic (ATMF).

COTIF 1999 brought within its scope certain matters that are within the competence of the European Community. In particular, the new APTU and ATMF appendices address the same matters as the EU directives on the interoperability of the European rail network (Directive 96/48/EC and Directive 2001/16/EC). These two appendices were drafted with the objective of achieving compatibility with the developing EU legislation on these matters. In any event, COTIF 1999 recognised that EU law would be paramount for Member States.

The Protocol and the resulting COTIF 1999 were presented to Parliament in October 2000.<sup>21</sup> The government obtained new primary powers – in section 103 of the *Railways and Transport Safety Act 2003* – to give effect to the 1999 Protocol by regulations, rather than relying on the *International Transport Conventions Act 1983*, which was not sufficiently flexible to deal with the new agreement. The 2003 Act makes provision for a reference in such regulations to the 1999 Convention to be treated, following modification, as a reference to the Convention as so modified. The *Railways (Convention on International Carriage by Rail) Regulations 2005 (SI 2005/2092)* were made in July 2005 and amended in 2010.

In August 2009 the Commission brought forward a revised proposal for a Decision authorising the Community to conclude an Agreement defining the terms of its accession to COTIF 1999. This was in relation to the incompatible legal regimes highlighted in Article 3(2) of COTIF 1999.<sup>22</sup> The EU [acceded](#) to COTIF in June 2011.

## 4 Third Railway Package

### 4.1 Original proposals

On 3 March 2004 the European Commission published four further proposals in the field of railways, the so-called ‘third railway package’. The emphasis was on increasing competition in the passenger rail market, an area that the Commission had previously avoided because of its complexity. It would mean competitors could challenge Thalys or Eurostar. The initial package consisted of a Communication, four legislative measures and a working document on an extended impact assessment for the gradual opening up of the market for international passenger services.

The initial package was made up of four legislative proposals: a draft Directive concerned with liberalisation of international passenger services; a draft Regulation on international passengers’ rights and obligations; a draft Directive on train driver licensing; and a draft Regulation on contractual quality requirements for rail freight services. The following documents were originally presented in 2004:

- [COM\(2004\)140 final](#), of 3 March 2004 on the further integration of the European rail system.
- [COM\(2004\)139 final](#) of 3 March 2004 on the development of the Community's railways. During discussion on the second package, it was agreed that the aim would be to liberalise international passenger transport from 2010 (this was a compromise – the Commission had wanted 2008; the Council did not want to specify a date). It did

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<sup>21</sup> FCO, *Protocol for the modification of the convention concerning carriage of rail (COTIF) of 9 May 1980 (protocol 1999)*, Cm 4873, 2000

<sup>22</sup> [COM\(2009\) 441 final](#), 31 August 2009

not include national passenger transport but was open to the inclusion of cabotage. This would amend the 1991 Directive.

- [SEC\(2004\) 236](#) of 3 March 2004 on a proposal to gradually open up the market for international passenger services by rail: this would allow competition on all routes not just on international routes. This would amend the 1991 Directive.
- [COM\(2004\)142 final](#) of 3 March 2004 on a proposals for the certification of train crews operating locomotives and trains on the Community's rail network.
- [COM\(2004\)143 final](#) of 3 March 2004 on a proposal for a regulation on International Rail Passengers' Rights and Obligations.
- [COM\(2004\)144 final](#) of 3 March 2004 on a proposal for a regulation on compensation in cases of non-compliance with contractual quality requirements for rail freight services. This aimed to introduce minimum quality clauses in contracts between railway undertakings and the customers, which is already considered good practice in the industry. The content would be left to the contracting parties but the proposed text aimed to guarantee that quality factors were systematically discussed and taken into account.

The Labour Government consulted on the package in July 2004<sup>23</sup> and it was subsequently debated in European Standing Committee A on 9 March 2005.<sup>24</sup> The European Parliament Transport Committee voted on the package on 19 December 2006 in favour of opening up access to the international passenger market, passenger rights and train crew licensing. In January 2007 the then Railways Minister, Tom Harris, highlighted the areas of disagreement between Member States, in particular the widening of the main proposals since the original drafts back in 2004. This meant that market opening would apply to domestic services as well as international (but over a longer time frame); similarly passenger rights would apply to both international and domestic services and train crew licensing was been extended to include non-driving crew who perform safety-related tasks.<sup>25</sup>

## 4.2 Agreement

Agreement was finally reached in October 2007. The three measures finally agreed were:

- [Directive 2007/58/EC](#) of 23 October 2007 on market opening for international rail passenger services (this introduces open access rights for international rail passenger services including cabotage by 2010).
- [Regulation 1371/2007/EC](#) of 23 October 2007 on rail passenger rights and obligations (this sets out minimum quality standards that have to be guaranteed to all passengers on all lines).<sup>26</sup>
- [Directive 2007/59/EC](#) of 23 October 2007 on the certification of train drivers (this EC introduces a European driver licence which will make it easier for train drivers to circulate on the entire European network).

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<sup>23</sup> DfT, [Consultation on the EC Third Railway Package](#), July 2004

<sup>24</sup> [ESC \(A\) Deb 9 March 2005, cc3-4](#)

<sup>25</sup> Letter from Tom Harris MP to Michael Connarty MP, 17 January 2007

<sup>26</sup> detailed information on the progress and implementation of this regulation can be found in section 1.1 of HC Library note [SN3163](#)

Directive 2007/58/EC on international passenger services was brought into force in the UK on 1 January 2010 by the *Railways Infrastructure (Access and Management) (Amendment) Regulations 2009* (SI 2009/1122). Directive 2007/59/EC on the certification of train drivers was subject to a consultation in mid-2009;<sup>27</sup> the Train Driving Licences and Certificates Regulations 2010 (SI 2010/724) came into force in March 2010.

### 4.3 New interoperability directive, 2008

Directive 2008/57/EC on railway interoperability was agreed on 17 June 2008. It set out to establish the conditions to be met to achieve interoperability within the Community rail system. These conditions concern the design, construction, placing in service, upgrading, renewal, operation and maintenance of the parts of this system as well as the professional qualifications and health and safety conditions of the staff who contribute to its operation and maintenance. The new Directive repealed with effect from 19 July 2010 Directive 96/48/EC on the interoperability of the European high-speed rail system as well as Directive 2001/16/EC on the interoperability of the European conventional rail system. Annex VII of the 2008 Directive was subsequently amended by Directive 2009/131/EC of 16 October 2009.

The Labour Government consulted on the new Directive in March 2009. It summarised the proposals as follows:

Directive 2008/57/EC was produced to contribute to the further development of the interoperability of the European Community rail system and the progressive creation of the internal market in equipment and services for the construction, renewal, upgrading and operation of the rail system within the Community.

The new Directive merges the existing Directives under which the Community railway interoperability regime was introduced and provides for the use of harmonised technical standards and a common European assessment and authorisation process for placing new rail developments or major upgrades and renewals of the existing railway into service.

It also establishes the procedures for the placing in service of interoperability constituents and subsystems, the conditions for vehicles to enter the market and the requirement for vehicle and infrastructure registers.<sup>28</sup>

A second consultation on draft regulations was published in March 2010.<sup>29</sup> The *Railways (Interoperability) Regulations 2011* (SI 2011/3066) came into force on 12 January 2012.

## 5 Fourth Railway Package

### 5.1 Publication and content of proposals

On 30 January 2013 the European Commission published details of the Fourth Railway Package. The package includes an overarching Communication and six legislative proposals. It is intended to open the domestic rail passenger market to competition and improve the operation of the EU railway system and its institutional framework. A press notice from the European Transport Commissioner, Siim Kallas, described the main features as follows:

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<sup>27</sup> DfT, [Consultation on the train driving licences and certificates regulations 2009](#), 25 June 2009

<sup>28</sup> DfT, [Consultation on the transposition of Directive 2008/57/EC on the interoperability of the rail system](#), 9 March 2009, paras 9-11

<sup>29</sup> DfT, [Consultation on the transposition of Directive 2008/57/EC on the interoperability of the rail system](#), 29 March 2010

The proposals focus on four key areas:

### **Standards and approvals that work**

The Commission wants to cut the administrative costs of rail companies and facilitate the entrance of new operators into the market.

Under the new proposals, the European Rail Agency will become a "one stop shop." issuing EU wide vehicle authorisations for placing on the market as well as EU wide safety certificates for operators. Currently rail authorisations and safety certificates are issued by each Member State.

The proposed measures would allow a 20% reduction in the time to market for new railway undertakings and a 20% reduction in the cost and duration of the authorisation of rolling stock. Overall, this should lead to a saving for companies of €500 million by 2025.

### **Better quality and more choice through allowing new players to run rail services**

To encourage innovation, efficiency and better value for money, the Commission is proposing that domestic passenger railways should be opened up to new entrants and services from December 2019.

Companies will be able to offer domestic rail passenger services across the EU: either by offering competing commercial services or through bidding for public service rail contracts, which account for a majority (over 90%) of EU rail journeys and will become subject to mandatory tendering.

The proposals would bring clear benefits to passengers in terms of improved services, increasing choice. Combined with structural reforms, it could produce more than €40 billion of financial benefits for citizens and companies involved by 2035 and would allow provision of up to about 16 billion additional passenger-km according to Commission estimates.

National domestic passenger markets remain largely closed. Only Sweden and the UK have fully opened their markets, with Germany, Austria, Italy, Czech Republic and the Netherlands having opened theirs to a limited extent.

Experience in these open markets, has shown improvements in quality and availability of services with passenger satisfaction rises year on year and passenger growth in some cases of over 50% over 10 years. In other liberalised markets, tendering of public service contracts has shown savings of 20-30% for a given level of service which can be re-invested to improve services.

### **A structure that delivers**

To ensure fair access for all to the railway, independent track ("infrastructure") managers must run networks in an efficient and non-discriminatory manner and coordinate at EU-level to underpin the development of a truly European network.

To ensure that the network is developed in the interests of all players, and to maximise operational efficiencies, the Commission is proposing to strengthen infrastructure managers so that they control all the functions at the heart of the rail network – including infrastructure investment planning, day-to-day operations and maintenance, as well as timetabling.

Faced with numerous complaints from users, the Commission considers that the infrastructure managers must have operational and financial independence from any



transport operator running the trains. This is essential to remove potential conflicts of interest and give all companies access to tracks in a non-discriminatory way.

As a general rule, the proposal confirms institutional separation as the simplest and most transparent way to achieve this. Rail undertakings independent of infrastructure managers will have immediate access to the internal passenger market in 2019.

However, the Commission can accept that a vertically integrated or "holding structure" may also deliver the necessary independence, with strict "Chinese walls" to ensure the necessary, legal, financial and operational separation ...

Compliance Verification Clause: To safeguard this independence, in view of full passenger market opening in 2019, rail undertakings forming part of a vertically integrated structure could be prevented from operating in other Member States if they have not first satisfied the Commission that all safeguards are in place to ensure a level playing field in practice, and a fair competition is possible in their home market.

### **A skilled workforce**

A vibrant rail sector depends on a skilled and motivated workforce. Over the next 10 years, rail will face the combined challenges of attracting new staff to replace the third of its workforce which will retire, while responding to a new and more competitive environment.

Experience in Member States which have opened their markets shows this should lead to new and better jobs. Under the EU regulatory framework, Member States will have the possibility to protect workers by requiring new contractors to take them on when public service contracts are transferred, going beyond the general EU requirements on transfers of undertakings.<sup>30</sup>

The Government expects that there will be a policy debate on the Fourth Railway Package at the 11 March Transport Council.

## **5.2 Responses**

### ***A retreat from a fully liberalised rail market?***

As indicated above, the Single Railway Area, revised in 2012 under the recast First Package, will be further revised by the Fourth Package. There was some expectation that the Commission would force a permanent and legislative separation of infrastructure from services and mandate competition for services. Indeed, the Commission has had legal difficulties with those countries which, to its mind, have not sufficiently separate infrastructure and services provision, as required under the First Directive. European courts have struck down this view, most recently in regards to Germany, but also in Austria, Spain, Hungary and Portugal.<sup>31</sup> Both Deutsche Bahn and SNCF have queried whether further market liberalisation would actually harm rail services in France and Germany. They have argued that research into rail markets outside the EU concludes that "common management of railway infrastructure and exploitation (an integrated model) helps improve rail performance".<sup>32</sup> Similarly, rail unions have expressed concern.<sup>33</sup>

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<sup>30</sup> EC press notice, "[European Railways At A Junction: The Commission Adopts Proposals For A Fourth Railway Package](#)", 30 January 2013 (all relevant documentation is listed at the end of the notice); see also: [MEMO/13/45](#), 30 January 2013

<sup>31</sup> "[Advocate-general says German model legal](#)", *Europolitcs*, September 2012, [No. 241]

<sup>32</sup> "[Deutsche Bahn and SNCF fear a hasty decision](#)", *Europolitcs*, October 2012, [No. 242]

It is notable, then, the Commission's acknowledgement that it "can accept that a vertically integrated or "holding structure" may also deliver the necessary independence, with strict "Chinese walls" to ensure the necessary, legal, financial and operational separation", stepping back from the position it took in bringing the cases above to court. Consequently, it is not clear that the Package will require any significant restructuring of state-owned rail companies (with holding company structures) across the Continent. Indeed, Lord Berkeley, Chairman of the UK Rail Freight Group, commented that the Commission rowed back on the policy after intensive lobbying from the German Government:

Thanks to the intervention of the German Chancellor Angela Merkel, the Fourth Railway Package ... is a very different document from the original and excellent draft setting up a fully-liberalised and competitive railway structure compliant with the principles of the Internal Market.

In the space of less than a month, Merkel responding to massive lobbying by German Rail (DB) forced the Commission to turn the package into a German Railway Package for Europe.

This new package now allows Germany's railway holding company model to be maintained, which in turn permits the hidden transfer of funds from the infrastructure manager via the holding company to the commercial activities of train operators, placing them in a competitive advantage over their competitors who do not benefit from such aid. It allows for subsidised DB companies to acquire operators in other member states, unfairly competing with other companies. By failing to provide full separation between infrastructure managers and railway undertakings, it will allow confidential information as well as funding to flow undetected between these companies, again to the detriment of fair competition.

The new text gives member states, where a separated model exists, the right to refuse operators from a holding company onto their network. However, it fails to explain how such a complex procedure would work in practice.

In Germany, the EC's infraction proceedings have already demonstrated wide-ranging failures to comply even with existing law, particularly on the issue of hidden transfers of profits from the infrastructure manager to the holding company. The French government - Germany's partner in this monopolistic exercise - is hurrying towards the same integrated structure which is already seen by the EC as illegal in other member states, and this is in spite of French National Railways (SNCF) being fined more than €60m for anti-competitive behaviour.

So, two of the European Union's largest member states, which are already in breach of railway law, have succeeded in getting the law changed so that they can carry on as they please. Many smaller member states have expressed concern about the potential for their passenger and freight operations being taken over by DB.<sup>34</sup>

In contrast, the European Transport Workers' Federation (ETF) has interpreted the Package as delivering a too-liberal system which will undermine the public service ethos of rail services on the Continent:

[The ETF] denounces the introduction of compulsory competitive tendering for all rail public passenger transport services and the liberalisation of all other domestic rail

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<sup>33</sup> e.g. ITF press notice, "[European Transport Workers' Federation denounces railway plans](#)", 26 September 2012

<sup>34</sup> "[Germany rewrites the Fourth Railway Package](#)", *International Railway Journal*, 5 February 2013

passenger services, the so-called open access competition. The ETF decisively rejects as well the total separation of infrastructure management and operations.

The ETF is of the opinion that compulsory tendering disregards completely the right of the Member States to decide how to organise public transport services that is guaranteed by Protocol 26 of the Lisbon Treaty. Furthermore, open access competition only promotes cherry picking on the profitable lines to the detriment of a good and balanced network offer inspired by the principles of universality and accessibility of the railway services.<sup>35</sup>

### **UK Government view**

Successive UK Governments have supported liberalisation of the EU rail market; the UK rail market is one of the most open in Europe and it has long been the case that UK companies have wanted to be able to enter European markets with the ease that French or Dutch or German operators have found in the UK. Others argue that the then Conservative Government took the logic of the First Package too far in severing infrastructure from services and privatising the rail industry in the early to mid 1990s. They would like to see the UK move back towards the French or German system where the state runs the railways on a more integrated basis.

The Government's views on the Fourth Package are given in a series of explanatory memoranda, which will be available on the [Cabinet Office website](#).

On **rail market access**, the main concerns are about the new prescribed role of an 'independent' infrastructure manager (Network Rail manages the infrastructure in the UK), in particular how the role will be defined, how it will operate and whether the proposal might involve an unnecessary reorganisation of NR's operations. The Government shares the concerns of Lord Berkeley (see above) about the potential complexity or uncertainty surrounding "the potential effect on new international services of the proposed procedures which would give other Member States the right to decline access contracts to railway undertakings in vertically integrated organisations which do not meet the independence criteria set in the Directive". There is also a concern about new rules for determining access to the domestic rail network (currently undertaken by the UK Office of Rail Regulation).<sup>36</sup> The main concern on the connect issue of **public service contracts** is the new requirement for all transport authorities (including the UK Government) to have a public transport plan, this raises concerns about subsidiarity.<sup>37</sup>

On **train crews**, the Commission intends to ask European Railway Agency (ERA) to identify the common safety-critical tasks of other crew members not related to vehicle design/rolling stock, and then to develop a model of training in safety critical-tasks and a system of EU certification. The Commission intends this to be incorporated into the Railway Safety Directive and be part of an railway undertaker's Safety Management System. The Government is broadly in favour of these proposals and will "work with the Commission and other Member States to ensure that the actions taken are proportionate and are consistent with the subsidiarity principle".<sup>38</sup>

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<sup>35</sup> ETF press notice, "[ETF denounces ideological fourth railway package](#)", 30 January 2013

<sup>36</sup> DfT, *Explanatory Memorandum on EU Legislation: COM(2013) 28 and COM(2013) 34*, 14 February 2013, pp13-14

<sup>37</sup> *ibid.*, pp10, 12 & 15

<sup>38</sup> DfT, *Explanatory Memorandum on EU Legislation: COM(2013) 33*, 14 February 2013, p5

On **interoperability**, the Government is primarily concerned about the proposal to change the authorisation process for trackside signalling and vehicles, removing powers from national safety authorities (NSAs) to the ERA, in particular those relating to notified national safety and technical rules. The Government intends to consult with the rail industry before taking a definite view. There are also concerns about a change to the disapplication of the Technical Specifications for Interoperability (TSIs) by Member States, which “would have a significant impact on projects in the UK as the Commission would have to approve all of these”.<sup>39</sup>

On **safety**, the Government broadly welcomes the move from a two-certificate system to the issue of only one safety certificate, however it is concerned that again the responsibility for issuing these certificates will move from NSAs to the ERA.<sup>40</sup> More broadly, on **the ERA** itself, the Government remains to be convinced of the utility of giving the ERA formal powers of audit and inspection of NSAs as it “is a fundamental shift away from ERA’s current partnership role towards a “policing” function”. However, it does welcome proposals to standardise administrative measures across all European Union agencies and move to multi-annual planning.<sup>41</sup>

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<sup>39</sup> DfT, *Explanatory Memorandum on EU Legislation: COM(2013) 27, COM(2013) 30, COM(2013) 31 and COM(2013) 32*, 14 February 2013, p6

<sup>40</sup> *ibid.*, p6

<sup>41</sup> *ibid.*, p7