



**COMPETITION AND CO-OPERATION  
IN INTERNATIONAL  
RAIL FREIGHT SERVICES**

■  
April 2002

**ECMT**

EUROPEAN CONFERENCE  
OF MINISTERS OF TRANSPORT

## COVER NOTE AND ACKNOWLEDGEMENTS

This document was reviewed by the ECMT Committee of Deputies at their meeting in April 2002 [document CEMT/CS(2002)11/REV1]. Its purpose is to provide factual information to inform debate on railway reform and the report does not represent any formal position of ECMT Ministers.

The ECMT Secretariat would like to thank Banverket for enabling Åsa Tysklind to examine competition issues at ECMT as a visiting fellow and lay the basis for this report. It would also like to thank Jeremy Drew of Drew Management Consultants for his assistance in drafting the paper and the members of the ECMT Railway Group for their work in preparing the report.

## TABLE OF CONTENTS

1. INTRODUCTION .....	5
2. EVOLUTION OF EU TRANSPORT POLICY AND LEGISLATION.....	5
2.1 Treaty of Rome.....	5
2.2 Development of EU Rail Policy .....	5
2.3 Implementation of Directive 91/440/EEC.....	6
2.4 Freightways .....	7
2.5 Competition or Co-operation.....	8
2.6 Alliances in the Rail Freight Market .....	9
2.7 Ownership of Freight Operators.....	11
2.8 Passenger Services .....	11
3. THE EU RAILWAY PACKAGES .....	13
3.1 Introduction .....	13
3.2 Access Rights .....	14
3.3 Priority Criteria for Capacity Allocation.....	14
3.4 Integrated Railways .....	14
3.5 Safety Certification.....	16
3.6 Regulatory Bodies and their Powers .....	16
3.7 The Second Railway Package and Further Legislation.....	16
4. CO-OPERATIVE ARRANGEMENTS BETWEEN RAILWAYS.....	17
4.1 International organisations and agreements .....	17
OTIF/COTIF .....	17
International Railway Transport Committee (CIT).....	18
International Union of Railways (UIC).....	18
Regulations for Reciprocal Use of Rolling Stock (RIV/RIC) .....	19
Association of European Infrastructure Managers (EIM) .....	20
4.2 Interoperability .....	20
4.3 Customs .....	21
4.4 Insurance .....	22
5. EU COMPETITION RULES .....	23
5.1 Treaty of Amsterdam.....	23
5.2 Relevant Market .....	23
5.3 Application of Competition Rules to Transport .....	24
5.4 Competition Rules and Freightways .....	25
5.5 Modernisation of Competition Rules .....	26
5.6 Mergers and Concentrations.....	27

6. CONCLUSIONS .....	28
Scope of Access Rights .....	28
Reciprocity.....	28
National Regulators .....	29
Capacity Allocation .....	29
Safety Certification.....	29
Ownership of Freight Operators .....	29
Customs .....	29
Insurance.....	30
Abuse of Dominant Position.....	30
Mergers.....	30
Continuing Need for Review .....	30

# COMPETITION AND CO-OPERATION IN INTERNATIONAL RAIL FREIGHT SERVICES

## 1. INTRODUCTION

The purpose of this report is to examine the international legislative framework affecting competition and co-operation between railways, particularly in the European Union where the framework is most developed<sup>1</sup>, and its overall impact on international rail freight. Chapter 2 traces the evolution of EU policy and legislation as it affects co-operation and competition between railways and Chapter 3 discusses the recently approved EU directives known as the Rail Infrastructure Package. Chapter 4 describes co-operation between railways, including various international organisations and agreements, and how these affect competition. Chapter 5 reviews EU competition rules and their impact on international rail freight. Finally, Chapter 6 reviews issues that require resolution in order to develop rail freight in ECMT Member countries in a coherent manner.

## 2. EVOLUTION OF EU TRANSPORT POLICY AND LEGISLATION

### 2.1 Treaty of Rome

In the EU Treaty of Rome of 1957, the principles regarding transport policy were described only in general terms and there was uncertainty as to whether transport was to be regarded as a service within the context of the common market. In 1980, the European Parliament took action to make the Council of Ministers develop a common transport policy, bringing the Council before the European Court of Justice for not fulfilling its duties in this respect. The Council was found guilty.<sup>2</sup> Action to establish a common transport policy first really started with the Commission White Paper in 1985 on completing the internal market<sup>3</sup>. It has taken quite some time for a common transport policy to emerge and there is still some way to go before railway transport will be an integral part of the internal market.

### 2.2 Development of EU Rail Policy

One of the main elements of EU railway policy has been to separate the management of rail infrastructure from the commercial activities of train operation. It also aims to ensure that railway undertakings be given management independence to act according to commercial principles, which should

- 
1. Both the EU sectoral legislation governing the railways and the competition rules of the Treaty apply across the EEA (EU Member States plus Norway, Liechtenstein and Iceland).
  2. European Parliament v EC Council, Case 279/80, (1981), ECR 3305; (1982) CMLR 719.
  3. COM (85) 310 final.

allow them to compete more effectively with other modes. Amongst other aims, separation of responsibilities for infrastructure and train operations is viewed as necessary to attract new entrants to the railway market and prevent cross subsidies from passenger to freight services being used to enable incumbent railways to protect markets from new entrants.

Directive 91/440/EEC, on the development of the Community's railways, represented the first concerted attempt to open up railway services to competition. The Directive introduced access rights for international groupings and for railway undertakings operating combined transport services on railway infrastructure in other Member States. Except for combined transport, the Directive required only limited opening of the market as it applied only to international groupings and only provided a right of transit, rather than generalised access. Cabotage (the loading or unloading of freight / coupling and uncoupling of wagons to trains in transit countries) was not covered. The Directive also imposed separate accounting for infrastructure and operations and this is where it had the greatest impact since it led to structural changes.

In 1995 the Commission published a Communication on the Development of the Community's Railways<sup>4</sup> that emphasised the importance attached to providing non-discriminatory access to rail infrastructure to allow new companies to enter railway markets and offer new and better services.

### **2.3 Implementation of Directive 91/440/EEC**

Different Member States have implemented Directive 91/440/EEC in different ways, both as regards organisational arrangements and access.

Some states have made a complete structural separation between infrastructure management and train operations, with each belonging to independent entities<sup>5</sup> (Sweden, Great Britain, Denmark, the Netherlands and Portugal). In Sweden the separation between infrastructure management and train operations took place as early as 1988, with the main aim of introducing a level playing field between rail and road transport in terms of the costs of using transport infrastructure. The aim was also to ensure infrastructure planning based on socio-economic, rather than financial, criteria.

In France and Finland, separate bodies have been established to own and finance infrastructure:

- In France this is RFF, which is required at the moment to contract all infrastructure maintenance and development to the national railway undertaking (SNCF) – both are public enterprises with a commercial remit;
- In Finland, the infrastructure manager RHK is an authority under the Ministry of Transport and Communications. It purchases track maintenance and construction work from outside enterprises. Many of these services are purchased from the national railway undertaking (VR Group), in particular the contractor VR-Track Ltd.

In Germany and Italy, infrastructure and operations are managed by separate companies under common holding companies.

---

4. Proposal for a Community directive 95/0205 amending Directive 91/440/EEC on the development of the Community's railways, Communication from the Commission on the Development of the Community's railways COM (95) 337 final 95/0205 (SYN).

5. These infrastructure entities are all state owned companies (either joint stock or public enterprises with a commercial remit) except in Sweden where Banverket is an Administration and in Britain where Railtrack was privatised (and is now in administration as a commercial company).

Other EU Member States (Austria, Belgium, Luxembourg, Spain) have maintained an integrated railway company with distinct business units for infrastructure and train operations.

Currently, rail freight operations in most Member States are run by publicly owned companies. The most far-reaching change in this respect is Great Britain where all services are operated by privately owned companies. At the other end of the spectrum, in Spain, France, Belgium, Greece and Ireland, state companies with a commercial status run all railway services. In Sweden and Germany, a mix of state owned and privately owned rail freight companies compete on the respective national networks, but the market share of private companies is still small (below 10 %).

The organisational arrangements in some countries are more likely to provide a clearer division of roles between public authorities and commercial transport companies and between infrastructure management and train operations than in others.

The extent of existing rights of access to national railway networks for international traffic also differs between Member States:

- Some have gone beyond the demands of Directive 91/440/EEC and, for freight services, have opened their network to single carriers, in principle, on the whole network without restrictions (Great Britain, Denmark).
- Others have given access to their network on the basis of reciprocity (Austria, Germany, Italy) or on certain routes, namely freightway corridors (the Netherlands, Sweden and also Norway).
- The rest have opened their network only to the extent demanded in Directive 91/440/EEC.

Different kinds of regulatory safeguards may be required under different structural arrangements to ensure non-discrimination in the exercise of rights of access to infrastructure.

## **2.4 Freightways**

The EC White Paper of 1996<sup>6</sup> put forward the idea that each member state should, without legislative action taken by the EU, provide single railway undertakings, not just those in international groupings, with rights of access to the rail network for international freight transport. A ministerial declaration was made in June 1998 by Ministers of Transport for freight corridors to be created based on co-operation between infrastructure managers. These "freight freeways" would be open to licensed railway undertakings within the European Economic Area in accordance with EU and national legislation, creating for train operators a single point of contact with infrastructure managers, the so called One Stop Shop (OSS). Infrastructure managers would also co-operate to reduce border stops, improve speeds and ensure that greater priority is given to rail freight on the routes identified. A variation of this concept was also developed, initially in Belgium, France and Luxembourg, in which there would initially be no open access. There are presently two "freightways":

---

6. White Paper: A Strategy for Revitalising the Community's Railways, COM (96) 421 final.

- the North South Freight Freeway (Austria, Denmark, Germany, Finland, Italy, the Netherlands, Norway, Sweden and Switzerland), incorporating Scanways;
- the Belifret Freightway (Belgium, France, Luxembourg, Italy and Spain).

A third was designated, the East West Freight Freeway (Hungary, Austria, Germany, France and Great Britain), but is not in use as such.

Though successful in establishing one-stop-shops for potential clients to negotiate international transport and in securing some faster international train paths, none of these corridors has attracted liberalised traffic, at least not to any significant extent

The North South Freight Freeway was opened in 1998 with open access to any licensed railway undertaking. It incorporated Scanways, giving it coverage of nine countries: Italy, Switzerland, Austria, Germany, Netherlands, Denmark, Sweden, Norway and Finland. Average speeds of 55kph are achieved, including stops. Paths are made available for one year at a time, but offered only where train-paths are not already committed, making their impact marginal. There are reciprocal access arrangements between national railway undertakings who have been the only operators. So far, there has been no open access traffic but this will change when IKEA starts operation in March 2002.

The Belifret corridor, which also opened in 1998, has attracted more traffic. This was essentially a co-operative arrangement between national railway undertakings for mutual recognition of licences and safety certificates and this corridor is not open to new entrants. Faster journey speeds and reduced delays at border crossings have allowed journey times to be reduced by 20% on average, giving times between Milan and Antwerp of just 24 hours. Each day, 34 paths are available, of which six are used regularly. Growth was rapid initially from 38 trains a month on opening in 1998 to over 100 trains a month in early 2001. Traffic has now levelled off<sup>7</sup> and railway undertakings often prefer to continue to use old arrangements.

These corridors have been valuable in that they have brought the infrastructure managers together in a discussion on how best to respond to customer needs. New railway undertakings (and probably many existing operators) prefer to deal only with one infrastructure manager and to receive all information from this source. This single point for allocation was prescribed already in Directive 95/19/EC. Experience on the North South Freight Freeway has raised awareness of issues to be dealt with in order to make cross border traffic run more smoothly. For example, the issue of customs clearance and discrepancies in requirements on a railway company insurance cover in different Member States has become apparent (see Chapter 4 under Customs and Insurance).

## **2.5 Competition or Co-operation**

Although one of the aims of Directive 91/440/EEC was to introduce competition in international rail freight services, by focusing on international groupings of railways it may in practice have served to

---

7. Source: Telephone interview with Belifret manager, Marc Hari, and X-Rail.net.

promote co-operation between state owned railways rather than competition<sup>8</sup>. To date, examples of a single railway undertaking operating complete international traffic movements are rare and international groupings of state-owned rail companies still account for the great majority of international rail freight operations. Even in those Member States where access to the domestic market is completely open, the emergence of new players on the international market has been more gradual.

Examples of **new entrants serving international traffic** include:

- Rail4Chem (Germany), the country's largest "single carrier", was formed in 2001 from a merger between the rail divisions of BASF AG and Hoyer GmbH, VTG-Lehnkering AG and the Swiss company Bertschi AG. It began operating in February 2001. In Belgium it depends on the national carrier SNCB to operate services to Antwerp;
- Häfen und Güterverkehr Köln (HGK), an operator owned by the city of Cologne, which co-operates closely with DB but also operates a service to Rotterdam in association with Short Lines (Netherlands), with locomotives (but not drivers) crossing the border – Short Lines was the first open access freight operator in the Netherlands.

In addition, the following companies hold **licences to operate internationally**:

- In June 2001, IKEA Rail (Sweden) signed an agreement with the German, Swedish and Danish infrastructure managers to allow it to operate its own freight trains (one each night) with an EU licence. Operations are not expected to start until March 2002 due to difficulties in obtaining locomotives for border crossings
- In July 2001, LTE Logistik und Transport (Germany) was awarded a licence to operate in Austria
- Hupac (Switzerland), a combined transport operator, is now licensed to operate in Germany.

## 2.6 Alliances in the Rail Freight Market

National railway undertakings have created a number of joint ventures to facilitate cross-border freight traffic, usually amongst themselves but sometimes with new entrants. New entrants usually form joint ventures with national railway undertakings to operate internationally because they experience a range of difficulties acting on their own, including obtaining access to sidings and depots, and obtaining wagons. Examples of **joint ventures** include the following:

---

8. The limitations inherent in the concept of "international grouping" as a means of giving effect to the freedom for individual companies to act alone in providing services were acknowledged by the Commission in its 1996 White Paper *A Strategy for Revitalising the Community's Railways*. Equally, however, it is settled case law that the term "international grouping" is capable of wide interpretation. In *European Night Services* (joined cases T-374/94, T-375/94, T-384/94 and T-388/94), the Court found (paragraph 182 of the decision) that the definition of international grouping:

"does not lay down any specific mandatory form...The essential feature which is clear from that definition is merely that it must be a form of association under which the provision of international transport services is possible. The Court therefore considers that, failing a precise definition...use of the term...cannot be confined to "co-operative associations" among railway companies ("traditional joint operation agreements"), to the exclusion of any other form such as a co-operative, or even concentrative, joint venture."

- In 2001, DB Cargo and SNCF Fret established a joint company for managing wagons and improving quality of service for cross-border freight traffic;
- English Welsh and Scottish Railways (EWS) and SNCF Fret announced in February 2001 the formation of a strategic alliance, Channel Rail Freight, to develop freight transport through the Channel Tunnel through joint marketing;
- BLS Cargo AS (Switzerland), a private railway (mainly owned by Cantons) carrying significant international rail freight, and DB Cargo AG recently formed a joint venture;
- SBB Cargo (Switzerland), which is owned by the Federal Government, has formed a strategic alliance with a HGK AG for the traffic in Germany and to the Benelux ports referred to in section 2.5<sup>9</sup>.

There are also examples of joint ventures involving combined transport although these are not necessary to obtain access under Directive 91/440/EC.

Joint ventures embody a special form of co-operation between undertakings. When they concern joint marketing of services, they will normally lead to a limitation of the competitive behaviour of the parent companies. The number of joint ventures is increasing but, except to the extent that new entrants are part of these joint ventures, they may restrict rather than increase competition and lead to greater concentration of market power.

Railway undertakings appear to prefer joint ventures to mergers, probably because joint ventures are easier to manage, quicker, more reversible and cheaper to arrange than a merger. There are only three cases of major **mergers or proposed mergers** to date:

- The merger between German Rail Cargo (DB) and Netherlands Railways Cargo (NS) to become Railion, which was followed in 2001 by the incorporation of the Danish Railways Cargo (DSB) - Railion now accounts for one third of the freight traffic in Europe.
- The proposed fusion between SBB Cargo and FS Cargo, which is progressing more slowly than planned due to difficulties with integrating management and working practice cultures.
- The merger which created Rail4Chem, as described above, which was the only merger between private companies.

All forms of co-operation between national railway companies can be seen as a way to overcome cross border difficulties and improve marketing and quality of services. Co-operation between state railway companies was the only practicable means of achieving this in circumstances where domestic markets were closed to competition. But that is no longer the case and all forms of co-operation are in principle justifiable under the competition rules of the Treaty. Belonging to an international grouping does not provide anti-trust immunity. The merits of co-operative arrangements, from a competition law viewpoint, may be further called into question where one of the partners is integrated with an infrastructure manager since the latter has an obvious conflict of interest when handling requests for capacity from potential competitors.

---

9. X-Rail News week 15, 2001.

## 2.7 Ownership of Freight Operators

The ownership of freight train operators may present more fundamental obstacles to the development of competition in rail freight markets than their size or the way that mergers and alliances develop<sup>10</sup>. Where the state owns the main freight train operator, which is the case in all ECMT countries except the United Kingdom and Estonia, this operator enjoys an implicit state guarantee. In practice, the state will not allow a state owned operator to go bankrupt in any foreseeable circumstances. This is a deterrent to new entry as the state owned operator is potentially able to price its services below any competitor, even when its productivity is lower. Regulators and the courts can be used to challenge such predatory pricing, and there is currently a case before the German competition authority between Hoyer Railserv and DB Cargo<sup>11</sup>. In the European Union, regulatory oversight of the award of State aids to industry by the Commission is designed to limit the scope for discrimination. Privatisation of rail freight companies might contribute to making the implementation of the regulations more robust.

## 2.8 Passenger Services

International consortia have begun to play a significant role in rail passenger markets. A number of joint ventures for international rail passenger operations have been established, for example:

- Eurostar, a joint venture between SNCF, SNCB and Eurostar UK (a private company) operates high speed services from London to Paris and Brussels
- Westrail International, a joint venture between SNCF, SNCB, DB and NS, was formed to develop and manage high speed (Thalys) services between France, Belgium, Germany and the Netherlands
- LINX, a joint venture between the Norwegian State Railways (NSB) and SJ Sweden AB markets passenger services in the Nordic Triangle
- Cisalpino, a joint venture between FS, SBB and BLS, operates high speed services between Italy, Switzerland and Germany
- CityNightLine, a joint venture between DB and SBB, operates luxury night services between Switzerland, Austria and Germany

---

10. See for example the section on Public Railways in the paper by Mario Ponti in ECMT Round Table 120, What Role for the Railways in Eastern Europe?, ECMT 2002.

11. The Hoyer Group has asked the German Federal Cartel Office to investigate the rates of the German state freight operator DB Cargo. Hoyer is concerned for the route Hamburg – Dormagen and Dormagen - Brunsbüttel, where Hoyer Railserv (the Hoyer railway undertaking) started operating tank wagon transports for an important customer in March 2000. Hoyer Railserv is offering rates of 43 DEM/ton, whereas the previous price from DB Cargo, who operated the traffic until Hoyer Railserv took over, was some 57 DEM/ton. Negotiations for 2002 were underway in September 2001 when DB Cargo offered to operate the traffic at a price of 35 DEM/ton. In a letter to the Federal Minister of Transport, Building and Housing, Hoyer claims DB Cargo can not possibly have productivity reserves that could economically justify a price reduction from 57 to 35 DEM/ton. The traffic involved concerns more than 50% of Hoyer Railserv's turnover.

- Rail France Suisse, a joint venture between SBB and SNCF, was formed to develop high speed services between Switzerland and France
- RENFE and SNCF are to form a joint subsidiary to manage Talgo services from Spain to France, Switzerland and Italy

In domestic passenger markets, some countries have awarded concessions for companies other than the national railway to operate regional services (e.g. Germany, the Netherlands, Sweden and Switzerland) while in Britain all services are operated under public service contracts (franchises) that are tendered competitively on a periodic basis. Some domestic passenger services in these countries are operated by international consortia or foreign owned companies:

- Syntus, which operates local services in the east of the Netherlands, is a joint venture between:
  - NS Reizigers BV (NSR), which is controlled by the Dutch railways
  - ConneXXion (Netherlands), a bus transport company
  - Cariane (France), part of the Keolis Group which is part owned by SNCF
- Noordned which also operates local services in the north of the Netherlands, is a joint venture between Arriva (UK) and NSR
- Thameslink, which operates some London commuter services and is a joint venture between the British Go-Ahead Group and Keolis (formerly VIA GTI)
- Citypendeln AB, a joint venture between Keolis and the BK Tåg AB (Sweden), operates commuter services in Stockholm
- Connex (France), part of Vivendi, which operates a significant number of local rail services in Germany and some London commuter services.

Further cross-border operations are also planned:

- Arriva has been awarded two contracts to operate 15% of passenger services in Denmark from January 2003
- Ortenau S-Bahn GmbH (OSB), Germany, a subsidiary of Sudwestdeutsche Verkehrs AG (SWEG), has signed an agreement with SNCF to operate short distance services on the French network across the border to Strasbourg, with services due to commence in June 2002.

These joint ventures and other international operations were all formed in the past decade and reflect a growing trend towards the internationalisation of service provision, ownership and management and growing co-operation between railway undertakings.

### 3. THE EU RAILWAY PACKAGES

#### 3.1 Introduction

The new rules for the railways of the EU/EEA are contained in three EC Directives, known collectively as the first Railway Package, which were adopted by the European Council and European Parliament in January/February 2001. These directives are aimed at revitalising Europe's railways<sup>12</sup> by improving economic efficiency at European level, rather than financial returns or national social or regional development policies. The package provides a new framework for the conditions of use of rail infrastructure, widening access rights and providing regulatory guidelines for the implementation of these rights. The key elements intend to guarantee that all railway undertakings are treated in a fair and non-discriminatory manner and to ensure efficient and competitive use of railway infrastructure for international freight traffic.

The principle that the railways need independent management and sound finances is again emphasised in the Rail Infrastructure Package, with a division of responsibilities between the governments and national railways. Change is to be brought about in stages.

The directives amend and replace earlier legislation:

- Directive 2001/12/EC amends Directive 91/440/EEC, focusing particularly on the development of international rail freight, initially on the Trans European Rail Freight Network (TERFN);
- Directive 2001/13/EC amends Directive 95/18/EC on licensing of railway undertakings and sets the conditions under which licenses should be granted for use across the EU, initially on the TERFN;
- Directive 2001/14/EC on the allocation of infrastructure capacity and charges for infrastructure use and the related issue of safety certification, replaces Directive 95/19/EC across the entire network.

Directive 2001/12/EC, instead of just requiring the separation of accounts between infrastructure and traffic operations as in Directive 91/440/EC, also requires separate management of certain essential functions (such as determining rail infrastructure charges, allocation of train paths and issuing of railway licences) and separate balance sheets for infrastructure and traffic operations. In addition, it requires the separation of accounts for freight and passenger transport. The Directive extends rights of access for international freight services so that by March 2003 a licensed railway undertaking should be able to gain access to the Trans European Rail Freight Network (TERFN) in any EU Member State. The TERFN has a length of some 50 000km and carries 70-80% of rail freight. From March 2008, all licensed railway undertakings will have the right of access to the entire rail network in the European Union to operate international services. This is designed to increase the competitive pressure on state railway undertakings.

Directive 2001/14/EC requires each infrastructure manager to develop and publish a network statement containing the information on the technical specifications of the network, access conditions and rules for capacity allocation.

---

12. OJ L 75, 15 March 2002.

The infrastructure managers in different Member States have recently set up a co-operation project regarding the TERFN. The aim of the co-operation is to market and facilitate cross-border train services for customers. One lesson from the freightways experience is that collaboration is needed both for marketing and sales and for operation of the infrastructure itself. The infrastructure managers aim to find a common structure for the network statements required by Directive 2001/14/EC and other key issues in order to make it easier for a customer operating cross border traffic to find the information they need.

### **3.2 Access Rights**

Access to most of the rail network will, by 2003, no longer be restricted to international groupings and combined transport operators but will also be open to single operators of freight services. However, access rights will still be limited to international freight services with no provision for cabotage. This may limit the impact of the directives because, in wagonload freight, trains are typically formed and reformed at several points *en route*. Access rights will be extended from the TERFN to the whole network by 2008, but as long as cabotage is not included in the rights of access required by EU rules, national differences in the nature of rights of access to rail infrastructure will persist.

### **3.3. Priority Criteria for Capacity Allocation**

According to Article 22 of Directive 2001/14/EC, priority criteria are to be applied in granting access when capacity is scarce<sup>13</sup>. It states that “priority criteria shall take account of the importance of the service to the society” and that “the importance of freight services and in particular international freight services shall be given adequate consideration in determining priority criteria”. These statements are vague and the priority criteria have largely been left for the Member States to decide upon. It may therefore be possible for a Member State to give priority to passenger traffic on the TERFN. Given the scarcity of train paths, this could lead to a situation where it will be difficult to find paths on the TERFN for freight traffic, which would reduce the impact of the directive.

### **3.4 Integrated Railways**

Several EU Member States have retained an integrated railway. Whilst vertical integration may have important advantages<sup>14</sup> it may have the disadvantage that through the management of infrastructure, an integrated railway determines the conditions under which competitors enter the market and conduct their business. In respect of other operators competing in the same end markets, infrastructure should be managed in a non-discriminatory way, but it is difficult for an integrated company not to put its own interests before those of its competitors.

Under Directive 2001/12/EC, the following functions are relevant to provision of equitable and non-discriminatory access to infrastructure and have to be entrusted to bodies or firms that do not themselves provide any train operation services (Article 6 (3) and Annex II):

- preparation and decision making related to the licensing of railway undertakings including granting of individual licences;
- decision making related to train path allocation including both the definition and the assessment of availability and the allocation of individual train paths;

---

13. Note, priority criteria for the allocation of capacity are only allowed under directive 2001/14/EC when the infrastructure manager declares infrastructure is congested and designs a capacity enhancement plan.

14. Low transaction costs in the planning of investment and the co-ordination of and maintenance and train operations, exposure of infrastructure management to the commercial pressures of train operation, corporate responsibility for safety.

- decision making related to infrastructure charging;
- monitoring observance of public service obligations required in the provision of certain services.

Also under this directive, the tasks of laying down safety standards and rules, certification of rolling stock and railway undertakings and investigation of accidents shall be accomplished by bodies that do not provide rail transport services themselves and are independent of bodies and undertakings that do (Article 7(2)).

According to Article 10(3) of Directive 2001/12/EC, railway undertakings shall be granted, on equitable conditions, access sought on the Trans-European Rail Freight Network (TERFN). In other words, a newcomer should not be limited to gain access only to certain pre-planned train paths using only left over capacity. This is a departure from current practice on freightways where it is only the uncommitted paths that are made available.

According to Article 14(2) of Directive 2001/14/EC, “where the infrastructure manager, in its legal form, organisation or decision making is not independent of any railway undertaking, the functions (of allocation of infrastructure capacity) shall be performed by a body that is independent”. Although this formulation may leave some leeway for interpretation, the Directive clearly stipulates that regardless of the organisation structures implemented the objective of functional independence must be shown to have been achieved.

Thus whether the separate business units within the integrated Belgian rail company SNCB, or the holding company structures for DB in Germany and former FS in Italy, or the RFF-SNCF relationship in France, constitute sufficient independence, remains to be seen.

Exactly what parts of the capacity allocation process have to be separated from companies that include train operations is not yet clear. Is it sufficient simply to ensure formal legal responsibility for the outcome of the process resides outside of integrated companies? The functions of allocation include the whole timetabling process, including the timetabling of maintenance activities. The body that draws up the timetable can influence its shape. It is also this body that will need to respond to requests for additional train paths. Similarly, if a company has legal responsibility for timetable decisions, but has to rely on another body for the construction of the detailed timetable, it is highly dependent on the constructor of the timetable.

The capacity allocation and timetabling process is a part of a railway undertaking's production process, both for incumbents and newcomers. The company in charge of this process holds a powerful tool for controlling access to the market. If the allocation of train paths is carried out by one of the companies within a holding company that includes train operators, this may entail a conflict of interest.

The timetabling process is especially crucial for a newcomer. Even an inquiry as to whether it is possible to run a train between two places at certain intervals will, on occasion, be enough to reveal the precise nature of the transport business concerned. If the allocation body is not sufficiently independent from the railway undertaking, this could enable its operating arm to put in a lower bid for the traffic targeted by its competitor. For a potential newcomer to have to go to its competitor with a transport request is a potentially serious barrier to entry.

### **3.5 Safety Certification**

The two directives on interoperability list safety as an essential requirement in the operation of the trans-European rail system<sup>15</sup>. Regarding the award of safety certificates, Directive 2001/14/EC requires that the railway undertaking provides proof that its operational staff have the necessary training to comply with the traffic rules and to meet safety requirements. Today the only provider of this training is the national railway undertaking, except in Great Britain where there is no such undertaking. The situation elsewhere provides a potential barrier to entry. A lack of harmonisation regarding safety certificates also presents a potential barrier to entry. These issues are addressed by a proposed Directive on Safety that the Commission presented in January 2002 as part of the second railway package.

### **3.6 Regulatory Bodies and their Powers**

The new directives require a regulatory body to be established in each member state. The demand for a regulatory body serves several purposes, including that of monitoring competition and exercising control over infrastructure monopolies. The regulatory body will deal with appeals from railway undertakings that regard themselves as unfairly treated, discriminated against or in any other way aggrieved, in particular regarding decisions on the capacity allocation process, charging for the use of infrastructure and award of safety certificates (Directive 2001/14/EC, Article 30). The regulatory body is also to supervise negotiations regarding access charges and other aspects of competition in the sector.

The regulatory body is to act on appeal. However, it shall also “monitor competition in the rail services market, including the rail freight transport market” and can “where appropriate, on its own initiative, decide on appropriate measures to correct undesirable developments in these markets” (Art 10 (7) of Directive 2001/12/EC). A regulatory body that can act on its own initiative to assure conformity with regulations is much more powerful than one that can act only on a complaint.

### **3.7 The Second Railway Package and Further Legislation**

The proposed second Railway Package, presented to Council and Parliament on 23 January 2002<sup>16</sup>, principally concerns establishment of a community structure for rail safety and interoperability, which will co-ordinate technical issues. Issues of equity for new entrants related to safety certification are addressed but, unlike the earlier idea of a European rail agency contained in the 1996 White Paper on Railways, this structure will not control capacity allocation, which will remain under the competence of individual Member States, although the new community structure acts as an observer on access issues.

Under the 2001 Rail Infrastructure Package, access rights are provided only for international freight operations and a single carrier will need to co-operate with national railway undertakings to carry out cabotage business. The second railway package proposes to widen access rights by including domestic rail freight services and cabotage. This is likely to be key to obtaining the full benefits of earlier reforms.

The rail infrastructure packages are significant steps in the direction of creating transparency in conditions for access to rail infrastructure but clarification will be required in some areas and further legislation required in others. Clarification is needed on what constitutes independence and on what parts of the allocation process have to be separated from companies that include train operations. Clarification is

---

15. Directive 96/48 of 23 July 1996 on the interoperability of the trans-European high-speed rail system, and Directive 2001/16 of 20 April 2001 on the interoperability of the trans-European conventional rail system.

16. COM(2002)18, COM(2002)21, COM(2002)22, COM(2002)23, COM(2002)24, COM(2002)25.

also needed on priority criteria for capacity allocation. New entrants should not be limited to using only spare capacity, consisting of the paths that state railways do not currently use.

## 4. CO-OPERATIVE ARRANGEMENTS BETWEEN RAILWAYS

### 4.1 International organisations and agreements

#### *OTIF/COTIF*

The Intergovernmental Organisation for International Carriage by Rail (OTIF) was set up in 1985 principally to develop uniform legal systems applicable to international through traffic by rail<sup>17</sup>. Today, this organisation has 41 member countries, including all of Western and Central Europe. The Convention concerning International Carriage by Rail (COTIF) and its appendices define a set of rules for the railway sector on matters that are not regulated by the EU (or which overlap with EU regulations). The Appendices include uniform rules on the contract of international carriage of passengers (CIV) or goods (CIM) by rail and these are mandatory under COTIF in respect of any contract of carriage where the origin and destination are located in two different Member States.

In June 1999, the Vilnius Protocol amended COTIF 1980 to correspond better to:

- the changes brought about or planned in the structure and legal status of railways, such as the independence of railway undertakings from the state, their establishment as companies of private or public law and the separation of infrastructure from operations
- the need to adopt more efficacious measures to eliminate obstacles to the crossing of frontiers.

One change in the revised COTIF is that the obligation to carry will be abolished. The purpose of the obligation to carry was to prevent the abuse of the monopoly position initially enjoyed by the railways. But the obligation to carry also stems from the fact that the railways were regarded as government agencies and not primarily as transport companies. Under the revised COTIF, contracts for carriage of freight by rail will be by consent.

The new version of the COTIF will apply to the whole network of each member country, rather than only to specified lines, and so will also be better suited to the changes in the market. At present, individual lines are registered on a list held by OTIF. This list is currently updated periodically, and the COTIF regulations are valid only on lines included in the list. Under the new convention, all railway lines in each member country will be covered by the COTIF.

---

17. [www.otif.ch](http://www.otif.ch)

Another change is the introduction of appendices with regulations for the validation of technical standards (APTU) and procedures concerning the technical admission of railway equipment (ATMF). These concern interoperability and are discussed further in that section of the report.

The CIV and CIM rules already cover liability issues but the new version of the COTIF will contain a new appendix entitled Contract of Use of the Infrastructure in International Rail Traffic (CUI) which deals with the liability of the infrastructure manager and carrier in respect of each other.

A conflict of laws is avoided by a regulation in the revised COTIF stating that for EU Member States or states party to the EEA agreement, the obligations arising from those agreements prevail. The revised convention will come into force when it has been ratified, accepted or approved by more than two-thirds of OTIF's members, possibly in 2003 or 2004.

Community competence in the railway sector has evolved considerably since the signature of the Vilnius Protocol, with adoption of the "railway infrastructure" package (Directives 2001/12/13/14/EC) and Directive 2001/16 on the interoperability of the conventional rail system. Consequently, the Commission proposes that Community accede to COTIF in order to exercise within OTIF its powers in relation to railway interoperability and technical specifications<sup>18</sup>.

### ***International Railway Transport Committee (CIT)***

The International Railway Transport Committee (CIT) is an association of railways. It is independent of OTIF, which is an organisation of states<sup>19</sup>. The objective of the association is the uniform implementation and application of international rail transport law in accordance with the COTIF. CIT's rules are therefore more detailed than the COTIF and they are applicable to all railways that are members. As with the COTIF, the statutes of the association will shortly be reviewed in the light of the changes in the railway market.

CIT remains an association of national railways. However, it is important that its rules are formulated in such a way that new entrants are not discriminated against. One way of ensuring this would be for decisions to be taken by government agencies or infrastructure managers rather than by railway undertakings.

### ***International Union of Railways (UIC)***

The International Union of Railways is an association of railway companies and rail transport organisations and was set up in 1922. The UIC has 159 members in 88 countries worldwide.

Within the 159 members there are 67 principal members (known as Active Members) - mainly the larger railway companies in Western, Central and Eastern Europe, the Middle East, and North Africa, together with Japan, China, India, and Pakistan. There are then 56 Associate Members comprising railway companies and organisations in the rest of the world (including the US Department of Transportation), and 36 Affiliate Members made up of companies and organisations that are not railways themselves but have key interests in rail transport. The North and South American railways are members through their respective regional associations. The members include railway undertakings, infrastructure managers, and "new entrants".

---

18. Commission proposal COM(2002)24 of 23.01.2002

19. Source: [www.cit.ch](http://www.cit.ch)

International rail movements in Europe, without the need to tranship goods or for passengers to change trains, have been in existence since the 1870's. The first international decisions on standards to permit international through running, including the decision to adopt 1 435 mm as the standard track gauge, were taken in 1882.

However the first World War caused great disruption in Europe and significantly changed the political geography of the continent. After the war the European States were very anxious to revive their economies and to re-establish international traffic and trade. One concern was the technical issues involved in getting international trains moving again over the European rail network with its newly drawn national frontiers. Two conferences at government level were held in 1921 and 1922, and as a result of these the railways were asked to convene a conference to discuss, amongst other issues, the setting up of a permanent organisation to produce standards and improve conditions relating to international rail traffic. The railway conference in October 1922 then founded the UIC, with technical standards as a principal function.

Even at this early stage railways outside Europe had expressed an interest in the new organisation and joined the ranks of the first members, giving the UIC from the outset a world dimension around a European core. The inclusion of members from outside Europe expanded the character of the UIC beyond that of a European railway standards organisation to a forum for an exchange of ideas and best practice. The commercial aspect of railways was always a major concern of the railway managers, and frameworks for addressing commercial matters were added later.

The UIC is an association of members where the work is done by the members, for the members, and for the benefit of rail transport as a whole. The decisions are taken by democratic agreement on the basis of procedures which are set out in the association's statutes. Depending on the subject the decisions can be designated as binding on the members. The standards produced are contained in the UIC standards leaflets. The new version of the COTIF mandates the UIC to produce new international railway standards which will then be validated by OTIF. However, as noted above, Community competence in the railway sector has evolved considerably since the OTIF Vilnius Protocol and progressively UIC standards will become of secondary importance in the EU with the entry into force of Technical Specifications for Interoperability under Directives 96/48/EC and 2001/16/EC.

### ***Regulations for Reciprocal Use of Rolling Stock (RIV/RIC)***

The arrangements covering the movement of wagons and coaches between one railway company and another and in particular the use of the vehicles by a company other than the owning company, were first agreed by two groups (Unions) of railway companies (one for wagons and one for coaches) in 1921 (i.e. before the setting up of the UIC). The arrangements are set out in two regulations:

- "Regulations governing the reciprocal use of wagons in international traffic" (RIV) for freight vehicles,
- "Regulations governing the reciprocal use of carriages in international traffic" (RIC) for passenger vehicles.

The two Unions of railway companies (and hence both sets of Regulations and decisions about them) are still formally separate from the UIC (though the members of the groups are also members of the UIC and at the end of the 1980's the UIC was asked to take over administration of the Regulations).

The Regulations themselves do not contain details of the technical standards necessary for international running. These are contained in the UIC standards leaflets. Rather the vehicles must comply with the UIC standards in order to be accepted for use under the RIV and RIC Regulations. The Regulations in fact cover matters such as the marking of the vehicles to indicate that they come under the Regulations and any special characteristics or restrictions, the conditions under which the wagons can be used, the charges that are levied during the period that a wagon belonging to one railway company is in use by another railway company, and the arrangements covering damage and repairs.

Privately owned wagons can be registered for international movement under the Regulations, but are not for use by another railway company (except by special agreement) and hence the charges for use do not apply. Arising from this the wagons are subject to different arrangements for repairs and for return when empty.

Vehicles can be used internationally outside the Regulations on a regular basis by arrangement between adjacent companies, or in special cases if they are checked at the border to ensure that they are within the loading gauge and otherwise meet the requirements to travel safely (e.g. braking systems and running gear).

The Regulations were revised in 2000 (RIV) and 2001 (RIC) to take account of EU Directives on railways and the division of some railways into infrastructure managers and railway undertakings.

#### ***Association of European Infrastructure Managers (EIM)***

A new trade association was launched in December 2001 to represent the interests of rail infrastructure managers in relation to EU legislative developments affecting the rail industry. The founding members are Banverket (BV - Sweden), Banestyrelsen (BS - Denmark), Jernbaneverket (JBV - Norway), Ratahallintokeskus (RHK - Finland), Railtrack (Great Britain), Rede Ferroviária Nacional (REFER - Portugal) and Réseau Ferré de France (RFF – France). One of the stated objectives of EIM is to seek to ensure that EU legislation sets out to meet the needs of both existing and new train operating customers.

## **4.2 Interoperability**

Technical integration between infrastructure and rolling stock is an essential feature of the railway system, more so than in other transport systems. In order to safeguard the interface between the different components, significant co-ordination is needed, especially when crossing borders. Almost half of current rail freight traffic is cross-border. Numerous technical differences between railways (different structure gauges and track gauges, differences in electrical power supply systems, signalling, braking and information technology systems) have to be managed in order to run international rail services. Basic interoperability standards were established in 1882 and have been constantly developed by the railways. Both within the EU and in OTIF, technical harmonisation of the railways is seen as important to achieving the long term aim of reducing costs, even if harmonisation can in some cases entail additional costs in the short term.

There are two EU directives on technical and operational harmonisation of railway systems with a view to creating a single market for railway equipment, one for high-speed railways and one for conventional railways<sup>20</sup>. The directives create a framework for common technical specifications for

---

20. Directive 96/48, on the interoperability of the Trans-European high speed rail system, and Directive 2001/16, on the interoperability of the Trans-European conventional rail system.

interoperability (TSIs) and the assessment of conformity with the specifications by notified bodies. The idea is that, through this system, the industry will contribute to the technical development of the railways in a more cost efficient way. These directives, however, only apply to the lines of the Trans European Transport Network (TEN)<sup>21</sup>.

As discussed earlier, there are two appendices to the proposed revised version of the COTIF that aim at ensuring interoperability and revising it a legal basis. These are:

- Uniform rules concerning the technical admission of railway material used in international traffic (ATMF)
- Uniform rules concerning the validation of technical standards and the adoption of uniform technical prescriptions applicable to railway material intended to be used in international traffic (APTU).

The ATMF rules will lay down the procedure under which wagons and railway material will be admitted for use in international traffic. Technical admission will be a task for the national authorities and will be carried out by delivering an admission to operate for an individual railway vehicle or for a type of vehicle by delivering an admission for a type of construction. Such technical admission has to be recognised without further examination and technical admission by the other states. The provisions of the technical annexes are not yet in place. To facilitate the monitoring of vehicles used in international traffic, a central register (data bank) will be administered under the authority of OTIF. It will contain all relevant data relating to vehicles admitted for international traffic.

As indicated above, the Commission has proposed to Council and the European Parliament in the second railway package, the setting up of an agency responsible for interoperability and safety issues and to administer a database on safety certificates, licenses, rolling stock and infrastructure for control purposes. In case of overlap between COTIF and EU rules for technical harmonisation and safety procedures the COTIF provides for EU regulations to prevail for those states that are part of the EU or the EEA<sup>22</sup>. When the EU and COTIF systems are fully in place technical standardisation will become a public authority responsibility.

### **4.3 Customs**

The national railway companies can, under certain conditions, run cross-border traffic applying simplified customs procedures. These simplifications consist of the elimination of formalities at frontiers for customs purposes, a waiver of guarantees and the suspension of other international procedures. It is a mutual trust benefit that began when the railways were state owned monopolies and thus one part of the state would trust the performance of the other. From early 2002, BLS (Switzerland) will be the first railway undertaking, other than national railways, to use simplified procedures.

There is also a principle of joint liability of the successive national railways to fall back on for the customs authorities. Joint liability stems from the COTIF, which established collective responsibility for the railways<sup>23</sup>. According to the agreements between the national railways, when damage occurs, the costs are divided between the participating railways along the route. This avoids the costly procedures of finding

---

21. Decision No 1692/96 of the European Parliament and of the Council of 23 July 1996 on Community guidelines for the development of the Trans-European network, OJ L 228, 9.9.1996, p 1.

22. Article 3.2 of the COTIF as modified by the Protocol of 3 June 1999.

23. Source: CIM Article 35.

the party at fault and taking recourse. In the revised COTIF, the principle of a community of carriers and of joint liability has been retained, if carriage governed by a single contract is performed by several successive carriers.

For the moment, it is not possible for a newcomer to the railway business, or even a national operator, to run international traffic under its sole responsibility and enjoy the right to use simplified customs procedures. Even where the newcomer only provides transport in one country and national companies operate in other countries, it is not possible for any railway company of that "chain" to apply the simplified procedure. Thus co-operation with newcomers in this context is made unattractive for national rail companies.

Private operators have put forward several complaints to the European Commission regarding this issue. The upcoming revision of the EU-EFTA Common Transit Procedure provides an opportunity to address the problem. It is important that the new procedure takes into account the need for non-discriminatory and open treatment for both traditional "co-operation" traffic and new "liberalised" traffic.

The EU and EFTA have established a working group to examine these issues and how to simplify the customs procedures that are used for new entrants and make them more transparent. Any differences between procedures should be based on objective criteria which would exclude ownership, history and possibly size. A balance must be struck between the concern of Customs in each state that security is not threatened, the transport needs of minimising the costs and delays of customs procedures and the needs for equality of treatment to ensure fair competition between rail operators.

#### **4.4 Insurance**

The amount of insurance that a railway undertaking is required to have in order to cover its liabilities differs between EU Member States. Liability also differs according to whether the transport service provided is national or international. National legislation on liability varies but, for international rail transport, it is partly regulated under the COTIF.

According to the Directive 95/18/EC on the licensing of railways, a railway undertaking shall be adequately insured or make equivalent arrangements, in accordance with national or international law, to cover its liabilities in the event of accidents, particularly in respect of passengers, luggage, freight, mail and third parties. In order to have a license, a railway undertaking must be able to demonstrate to the licensing authorities of the Member State in which it is established that it will at any time be able to cover its civil liabilities. The license issued in one Member State shall be recognised as valid throughout the Community.

Nearly half of the Member States in the EU have set an amount regarding the minimum required insurance cover (Denmark, Germany, Netherlands, Spain, Sweden and the United Kingdom). This cover ranges from around €10 million to close to €220 million, and in some cases is unlimited. Other Member States have not yet set an amount.

To obtain a licence, a railway undertaking must have sufficient insurance cover. A licence should be valid throughout the Community but a railway undertaking with a valid licence issued in one Member State could be prevented from running on the network of another because the latter deems the insurance cover to be too low. To some extent, these differences may be justified by the different risks in different countries. However, these differing requirements could be a significant barrier to entry. This issue is being examined by a working group of EU Member States set up to propose best practice for the technical implementation of Directive 2001/13/EC amending Directive 95/18/EC.

## 5. EU COMPETITION RULES

### 5.1 Treaty of Amsterdam

The basic rules regarding competition in the Treaty are:

- under Article 81, according to which “all agreements between undertakings, decisions by associations of undertakings and concerted practices which may affect trade between Member States and which have as their object or effect the prevention, restriction or distortion of competition within the common market”, shall be prohibited
- under Article 82, according to which “any abuse by one or more undertaking of a dominant position”, shall likewise be prohibited.

Exemptions can be given from the prohibition under Article 81 where agreements between undertakings, decisions by associations of undertakings and concerted practices contribute “to improving the production or distribution of goods or to promoting technical progress, while allowing fair shares of the resulting benefit” (Article 81 (3)). Regulations, Notices and case law allow exemption where the positive effects of the co-operation outweigh the negative effects of the restriction on competition. The Commission can attach conditions and obligations to the decision on non-applicability of the prohibition for specified periods.

### 5.2 Relevant Market

In order to fall under Article 81, agreements between undertakings and decisions by associations of undertakings and concerted practices must have a significant impact on intra community trade<sup>24</sup>. Agreements that do not significantly affect trade between Member States are not covered by Article 81 and such agreements are examined on the basis of national legislation alone.

In order to assess the effect of an agreement on competition and trade between the Member States the relevant market (geographic and product) must be defined. Market definition is a tool used to identify and define the boundaries of competition between companies in both its product and geographic dimensions. The main purpose of market definition is to identify the competitive constraints that the undertakings face and to identify the actual competitors to the undertakings involved that are capable of constraining their behaviour and preventing them from behaving independently of effective competitive pressure.

A relevant **product market** comprises all those products and/or services which are regarded as interchangeable or substitutable by the consumer, by reason of their characteristics, prices and intended use. A relevant **geographic market** comprises the area in which the undertakings concerned are involved in the supply and demand of products or services, in which the conditions of competition are sufficiently homogenous and which can be distinguished from neighbouring areas because the conditions of competition are appreciably different in those areas.

---

24. EU Commission Notice OJ C 372/04 of 9/12/1997, on agreements of minor importance which do not fall under Article 81 of the Treaty establishing the European Community.

The examination of the conditions of competition is based not only on existing competition between undertakings already present on the relevant market but also on potential competition, in order to ascertain whether there are genuine possibilities for the undertakings concerned to compete among themselves or for a new competitor to penetrate the relevant market and to compete with the undertakings already established. The definition of the relevant market in both its product and geographic dimensions allows identification of the suppliers and the customers which are active in that market. On that basis, a total market size and market share for each supplier can be calculated based on its sales of the relevant products in the relevant area<sup>25</sup>.

According to the view of the European Commission, an agreement between undertakings engaged in the production or distribution of goods or in the provision of services does not fall under the prohibition of Article 81 if the aggregate market shares held by all of the participating undertakings does not exceed a 5% threshold on any of the relevant markets when the agreement is horizontal (between undertakings operating at the same level of production or marketing)<sup>26</sup>. This is because the agreement is considered to be of minor importance and its impact on intra-Community trade or on competition is not appreciable.

The general definition of the product market given above is open to interpretation that could have significant implications in transport markets due to the potential for different modes to serve the final market. A narrow interpretation of the product market test could restrict consideration to intra-modal (rail on rail) competition. A wider interpretation could cover potential competition from other modes. Neither the Commission nor the courts have provided conclusive guidance in this area.<sup>27</sup> Probably no rail freight operations would exceed the 5% threshold if the relevant market is interpreted to include all modes. It is long standing Commission policy, however, to define the relevant market on a case by case basis and a number of formal complaints alleging abuse of dominant position are currently under consideration.

### **5.3 Application of Competition Rules to Transport**

Regulation 17/62 sets out the procedures regarding Articles 81 and 82 of the Treaty but, through Regulation 141/62, transport was excluded from the scope of Regulation 17/62. In 1968, Regulation 1017/68 was enacted in order to apply competition rules to rail, road and inland waterway transport.

---

25. EU Commission Notice OJ C 372/03 of 9/12/1997, on definition of relevant market for the purposes of Community competition law.

26. EU Commission Notice OJ C 372/04 of 9/12/1997, on agreements of minor importance.

27. In a 1998 court case, *European Night Services Ltd etc. (ENS) vs Commission*, the product market was defined as the market for transport in the context of a market served by all modes of transport. The Court of First Instance ruled that, when an agreement is assessed under Article 81 of the Treaty, account should be taken of the actual conditions in which it functions, in particular the economic and legal context in which the undertakings operate, the services covered by the agreement and the actual operational conditions and structure of the market concerned. The definition of the product market accepted in this court case therefore includes all modes. Given the generally low share of rail in the modal split for transport services, only in very rare cases are rail services likely to reach the thresholds for application of competition law, under this interpretation of the law. However, the court reached its decision on procedural grounds because the Commission had not provided an adequate statement of its reasons for considering the ENS agreement and similar agreements to be governed by Article 81 of the Treaty. Decisions on the complaints currently before the Commission may resolve the potential inconsistency between the definition of markets used to test abuse of dominant position and that used for determining rights of access to infrastructure under the railway packages, where the premise that competition from other modes is inadequate implies the relevant market is that for rail alone.

Regulation 1017/68 contains rules regarding the application of Article 81 on restrictive practices on competition in transport by rail, road and inland waterways and Article 82 on dominant position<sup>28</sup>. It includes rules favourable to preserving the status quo in the transport sector. The most important of these is perhaps the legal exception to the application of Article 81 to technical agreements found in Article 3, an exception based on the notion of distinctive features. Through Article 3, technical co-operation is permitted and consequently not regarded as distorting competition. The list of permitted co-operation includes:

- standardisation of equipment, transport supplies, vehicles or fixed installations;
- exchange or pooling of staff, vehicles or fixed installations;
- organisation and execution of successive, complementary, substitute or combined transport operations;
- co-ordination of timetables for connecting routes;
- the establishment of uniform rules as to the structure of tariffs and their conditions, provided that such rules do not lay down transport rates and conditions.

Notification to the Commission of an agreement between undertakings, decisions by associations of undertakings, or concerted practices is optional and it is for the undertakings themselves to judge whether they lead to restrictions of competition, if there are other economic benefits that will justify such restrictions, and to decide accordingly on their own responsibility as to the illegality or legality of these agreements<sup>29</sup>. A further provision allows undertakings to submit an application to the Commission for an agreement under which the Commission can grant exemptions from Articles 81 and 82 for specific agreements for three years, if no serious doubts are raised as to their compatibility with competition rules<sup>30</sup>. As noted above, participation in an international grouping as provided for under Directive 91/440/EEC does not of itself provide any anti-trust immunity.

#### **5.4 Competition Rules and Freightways**

The issue of whether freightways, a form of co-operation between railway infrastructure managers, falls within the scope of the competition rules of EU was addressed in a Commission Communication on the Trans European Rail Freight Freeways (COM (97) 242 final). This states that the freightway concept is essentially a collaborative venture between railway infrastructure companies and that, as long as it does not go beyond the infrastructure management functions, it should not fall under the competition rules. However, it concluded that co-operation which also covered train operation would be more likely to fall under Article 81 of the Treaty. Infrastructure managers entering into infrastructure co-operation agreements are free to decide whether these need to be notified to the Commission or not.

Agreements falling under Article 81 may be declared permissible by the Commission if they have pro-competitive effects that outweigh the anti-competitive effects on the restrictions contained in them. The Commission has stated that, even if Article 81 were applicable to the establishment and operation of a freightway, the Commission would in principle see no difficulty in declaring them exempt if it fully satisfied the following conditions:

---

28. Regulation 1017/68, Articles 2 and 8.

29. Regulation 1017/68 Preamble and Article 5.

30. Regulation 1017/68 Article 12.

- it improves the distribution of goods and speeds up their transport, in particular by the creation of a new product, that is an international train path offered by a One Stop Shop;
- it promotes economic progress by making rail freight transport more competitive with road haulage, in line with the Community's general transport policy and without distorting competition between train operators in the railway sector;
- consumers benefit because rail haulage is faster, possibly cheaper, and of better quality;
- it is indispensable to attain the above objectives;
- it is not capable of eliminating competition in any relevant market.

The Commission considers that, though assuring open access to licensed railway undertakings, such agreements are not capable of eliminating competition in the market for international rail freight services. However, in regard to Article 82, the Commission has stated that if all train operators are to enjoy access to and operate on the freeway on fair terms, care has to be taken to ensure that the allocation and charging process is non-discriminatory.

## **5.5 Modernisation of Competition Rules**

The competition rules are presently undergoing a review and there is a proposal for a Council Regulation replacing Regulation 17/62 on the implementation of Articles 81 and 82 and amending Regulation 1017/68<sup>31</sup>. The current system, in force since 1962, will be replaced by a system in which not only the Commission but also the national authorities and courts will be able to apply Article 81 in full. The current system with the notification of agreements to the Commission, which alone is empowered to authorise those that restrict competition, will be abolished. With the new system, both the prohibition rule set out in Article 81 (1) and the exemption rule contained in Article 81 (3) can be directly applied not only by the Commission but also by the national courts and competition authorities.

The proposal aims at strengthening the involvement of the Member States' competition authorities and courts in the application of Articles 81 and 82. A network between the national competition authorities and the Commission will be formed. The procedural rules in Regulation 1017/68 will be repealed but the substantive rules in the regulation will stay in force. This means that the "block exemption" regarding technical co-operation in the transport field will still be valid. The proposal does not concern merger control.

---

31. Proposal for a Council Regulation COM (2000) 582 final, 27.09.2000, 2000/0243 (CNS).

## 5.6 Mergers and Concentrations

The special competition rules applicable to mergers are found in Regulation 4064/89<sup>32</sup>. This requires that mergers or concentrations with a Community dimension shall be notified to the Commission and cannot be put into effect before being declared by the Commission to be compatible with the Common Market.

In order for a merger or concentration to have a Community dimension, the undertakings must have a combined world-wide turnover of more than € 5 000 million and a Community-wide turnover of at least € 250 million for at least two of the undertakings concerned. A further condition is that each of the undertakings achieves more than two thirds of its aggregate Community-wide turnover within one and the same Member State. Mergers with a certain turnover in at least three Member States are also regarded as having a community dimension.

The Railion merger, between the German and Dutch state owned operators DB Cargo and NS Cargo, did not reach the threshold values<sup>33</sup> and was thus examined only by national competition authorities. It remains to be seen whether further market concentrations in the rail freight sector will fall under the scope of EU merger regulations.

The recent Green Paper (COM (2001) 645/6) on the Review of Regulation 4064/89 raises the issue of the potential increased efficiencies that may arise from mergers. These efficiencies are considered in US antitrust legislation but not so far in the EU. The paper seeks views on the role and scope of efficiency tests and this could affect future merger control in the railway sector, where mergers facilitate the provision of through services which may result in efficiencies.

---

32. Council Regulation 4064/89, 21/12/1989 on the control of concentrations between undertakings, OJ L 395, 30/12/1989 with amendments introduced by Regulation 1310/97 30/06/1997, OJ L 180 p 1 09/07/1997, Article 3. The regulation was amended in 1997 through Regulation 1310/97, which replaced the distinction between co-operative and concentrative joint ventures by one classifying them as either full function or non-full function. A joint venture is regarded as full function when two or more companies set up a joint venture that performs on a lasting basis all the functions of an autonomous economic entity. A full function joint venture with a community dimension is then assessed according to Regulation 4064/89. A non-full function joint venture does not fall within the ambit of the Regulation 4064/89 but is assessed under Article 81 and Regulation 1017/68 dealing with competition.

33. Partly as a result of the earlier division of the railway companies concerned into several different subsidiaries under a holding company structure: freight, passengers, infrastructure, etc..

## 6. CONCLUSIONS

Some state owned railway companies are divided into separate entities for traffic operation and infrastructure, while others are integrated. New entrants are mainly small and have until recently been limited to national traffic. However, there is a small but growing number of single railway undertakings operating international freight services. At the same time, mergers, alliances and joint ventures are increasing, mainly between national railway undertakings operating international freight and passenger services.

### *Scope of Access Rights*

The limited number of new entrants is not surprising since the legal framework so far only requires restricted rights of access to be provided to railway networks. In practice, Directive 91/440/EC promoted co-operation rather than competition since, in order to have access rights to another Member States' railway network, a railway undertaking needed to form an international grouping with railway undertakings in other Member States, except in the case of combined freight traffic. Further, the directive provided for rights for transit but not cabotage, and this remains the case under the 2001 Rail Infrastructure Package. This is significant for wagonload traffic where trains tend to be consolidated and split en route. Extending access rights to cover cabotage, as proposed in the 2<sup>nd</sup> railway package<sup>34</sup>, is thus a key issue for competition in rail freight transport. The European Commission believes that failure to provide rights for cabotage would be contrary to the requirements of the Amsterdam Treaty. The Commission therefore places cabotage at the centre of the provisions of the proposed Second Rail Infrastructure Package.

### *Reciprocity*

Between some Member States, access rights for international freight are currently based on the principle of reciprocity. This makes it possible for a railway undertaking of one Member State to run on the railway infrastructure of another Member State provided that the same right is granted in the other direction. With full implementation of the 2001 Directives in 2008, the value of applying reciprocity will diminish, since it will then be possible for a railway undertaking to gain access to any Member States' railway network for international freight transport. However, as long as cabotage is not included in the access rights required under EU law, reciprocity will continue. Under current law, Member States including accession countries following their entry into the Union, are free to choose whether to use the condition of reciprocity to:

- limit the impact of competition within their own country from other national railways and
- put pressure on other countries to provide opportunities for its own railways to gain access to infrastructure.

Self interest may lead to increased use of reciprocity despite the potential gains foregone in terms of competition in the home market. The impact overall may be positive because, although it provides for less competition than full open access, it puts pressure on other countries to grant reciprocal access rights and thereby provide some competition.

This will cease to be relevant when the 2<sup>nd</sup> railway package becomes law, if agreed in the form proposed to the European Council and Parliament.

---

34. COM(2002)25 of 23 January 2002.

### ***National Regulators***

To address the various conflicts of interest that are likely to arise, particularly where railway undertakings are integrated with an infrastructure manager, the 2001 directives require formation of a regulatory body in each member state. If they are to fulfil their tasks effectively, these bodies should not only act on complaint but also, when needed, use the rights conferred by the directives to act on their own initiative.

### ***Capacity Allocation***

The allocation of train paths is a crucial issue for new entrants. If a new entrant has to go to an infrastructure company linked to the incumbent competitor to operate proposed services, this could reveal business opportunities even before services start and could prevent the new entrant keeping the business proposed. Courts are handicapped in addressing this kind of conflict of interest as judgements can take several years to obtain and lost business cannot be remedied. The requirement of Directive 2001/14/EC stating that capacity allocation be carried out independently raises important issues of interpretation:

- What is the definition of “independent”? Does it apply where both infrastructure manager and railway undertakings are under the same holding company?
- What does “capacity allocation” include? Does it include the whole timetable planning process and the day to day management of the timetable?

### ***Safety Certification***

EU Member States have a large degree of latitude in determining the way safety certificates are issued. Given the potential for the procedures adopted to represent a barrier to entry, national governments should ensure that the rules satisfactorily meet the requirement of ensuring competitive neutrality in the implementation of agreed access rights. Actions to this effect are included in the Commissions proposal to Council and the European Parliament for a directive on rail safety<sup>35</sup>

### ***Ownership of Freight Operators***

State ownership of freight train operators presents potential obstacles to the development of competition. Where the state owns a freight train operator it enjoys an implicit state guarantee as the state is unlikely to allow a state owned operator to go bankrupt. This is a deterrent to new entrants, as the state owned railway is potentially able to price its services below any competitor, even if has lower productivity. Regulators and the courts can be used to challenge such predatory pricing and in the European Union, regulatory oversight of the award of State aids to industry by the Commission is designed to limit the scope for discrimination. Privatisation of rail freight companies might contribute to making the implementation of the regulations more robust.

### ***Customs***

Simplified customs procedures apply only to national railways undertakings at present and this discriminates against new entrants. A balance must be struck between the concern of Customs in each state that security is not threatened, the transport needs of minimising the costs and delays of customs procedures and the needs for equality of treatment to ensure fair competition between rail operators.

---

35. Commission proposal COM(2002)21 of 23 January 2002.

Transport and Finance Ministers need to find ways to extend co-operation to include new entrants in simplified procedures.

### ***Insurance***

Requirements for insurance cover for railway undertakings vary between Member states and, to the extent these variations do not reflect differences in risks, they prevent fair competition. There is therefore a need to harmonise the basis for establishing the amount of cover required, if not the amount itself. Within the EU, in implementing Directive 2001/13/EC discrimination must be avoided in defining the requirements that railway undertakings have to comply with in order to obtain a railway licence.

### ***Abuse of Dominant Position***

The use of competition law to prevent potential abuse of dominant position depends critically on the definition of relevant market adopted by regulatory authorities and the courts. Sufficient precedents to define this in relation to rail markets have yet to be established. Probably no rail freight operations would exceed existing thresholds if the relevant market is interpreted to include all modes. It is long standing Commission policy, however, to define the relevant market on a case by case basis and a number of formal complaints alleging abuse of dominant position are currently under consideration.

### ***Mergers***

Mergers fall under the competence of EU regulatory authorities only when they exceed certain financial thresholds. None of the mergers between rail freight operators to date, and notably the DB/NS merger, have reached the thresholds. National rather than EU authorities therefore have determined policy towards mergers in the rail freight sector. This may change but it is incumbent on ECMT Member governments to develop policy towards mergers of rail freight companies with international, as well as purely domestic, dimensions. International exchanges between competition authorities, both among EU Member States and in the wider international context, should be encouraged in the interests of developing coherent policy in this area across Europe.

### ***Continuing Need for Review***

There is a continuing need for comprehensive review and analysis of the approaches as they evolve in different countries for international rail freight, particularly focussed on which approaches have worked best at promoting the use of rail for international freight. The key issue is what has been learnt about the optimum balance between co-operation and on rail competition when making decisions relating to mergers, access, industry structure and ownership.