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**REPORT FROM THE COMMISSION TO THE EUROPEAN PARLIAMENT, THE
COUNCIL, THE EUROPEAN ECONOMIC AND SOCIAL COMMITTEE AND THE
COMMITTEE OF THE REGIONS**

**on the implementation of the provisions of Directive 2007/58/EC on the opening of the
market of international rail passenger transport**

**accompanying the Communication to the Council and the European Parliament on the
fourth Railway Package**

(Text with EEA relevance)

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1. INTRODUCTION

On 23 October 2007, the European Parliament and the Council adopted Directive 2007/58/EC amending Council Directive 91/440/EEC on the development of the Community's railways and Directive 2001/14/EC on the allocation of railway infrastructure capacity and the levying of charges for the use of railway infrastructure¹ (hereinafter: the Directive). All railway undertakings having a valid licence and the required safety certificates were given the right to operate international rail passenger services, including the possibility of carrying passengers on national sub-routes (cabotage) as from 1 January 2010. A deadline of 1 January 2012 was set for Member States for which the share of international carriage of passengers by train constituted more than half of the passenger turnover of railway undertakings in their territory (the only Member State to meet that criterion was Luxembourg). The obligations for transposition and implementation of the Directive do not apply to Cyprus and Malta for as long as no railway system is established within their territory.

In order to protect the interests of railway undertakings carrying out national services covered by a public service contract (PSC), the Directive provides for the possibility of imposing certain limitations on opening up the market of international rail passenger transport. Member States may limit the rights to introduce new international services

- where the principal purpose of the new service is not international;
- where a new international service would compromise the economic equilibrium of services provided under PSC;
- as a result of time-limited exclusive rights granted before the Directive came into force;
- where the service transits the European Union.

Furthermore, the Directive allows for a charge to be levied on the operator of a new international passenger service to finance public service obligations. However, this levy has to be imposed in accordance with the principles of fairness, transparency, non-discrimination and proportionality, without endangering the economic viability of the service on which it is imposed.

The Directive does not concern services between a Member State and a third country². As a certain number of Member States (Germany, Italy, Sweden and the United Kingdom) had

¹ OJ L 315 of 3.12.2007.

² Recital (4) of Directive 2007/58/EC.

already taken steps to open their rail passenger markets prior to the adoption of any formal obligation at EU level, the Directive also made clear that Member States where market opening had already taken place were not obliged to grant before 1 January 2010 the right to operate new international passenger services to railway undertakings and their subsidiaries licensed in a Member State where access rights of a similar nature were not granted³.

According to Article 10 (9) of the Directive, the Commission shall submit to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions a report on the implementation of the provisions regarding the opening of the international rail passenger transport market. The Commission hereby submits its report to the institutions mentioned in order to fulfil this obligation.

The Directive also requires the report to assess the development of the market, including the state of the preparation of further liberalisation and to analyse the different models for organising this market and the impact of the Directive on public service contracts and their financing. The present report shows that the implementation of the Directive resulted in very few new services launched so far and makes an attempt to analyse the reasons for that. Given the fact that there are a minimal number of new services, their impact on PSO financing is negligible. The state of the preparation of a further market opening and the different models for organising this market are analysed in the impact assessment linked to the legislative proposal on amending Directive 91/440/EEC.

In the following sections, first we analyse the legal implementation of the provisions of the Directive that are relevant for the opening of the international rail passenger market by Member States. After that, we examine the practical impact the Directive had on the rail market and the reasons which may explain why several positive effects expected have failed to appear so far.

2. LEGAL IMPLEMENTATION OF THE PROVISIONS OF THE DIRECTIVE RELEVANT FOR THE OPENING OF THE INTERNATIONAL RAIL PASSENGER MARKET

The **deadline for transposing** the Directive was 4 June 2009. By that date, none of the Member States had notified transposition. While some of them did during the following two months, the Commission opened infringement procedures against 19 Member States on 31 July 2009 for failing to notify the measures taken to transpose the Directive. On 3 June 2010, the Commission submitted a reasoned opinion to 4 Member States for the same reason. All Member States have notified transposition since.

Late and inadequate transposition of previous railway packages may have a negative impact on the practical implementation of the provisions of the Directive as well. At the moment, there are 12 infringement cases for inadequate transposition of the First Railway Package before the European Court of Justice and the Commission sent reasoned opinions in similar cases to 4 other Member States. Those infringement procedures concern, among others:

- insufficient safeguards to guarantee the independence of the infrastructure manager from the railway holding and its transport affiliates in the exercise of essential functions;
- insufficient incentives for the infrastructure manager to reduce costs and level of access charges;

³ Article 10 (3d).

- access charges set at higher levels than direct costs without justification that the market can bear this;
- insufficient independence of the regulatory body from the incumbent⁴ railway undertaking, the infrastructure manager or the ministry that controls the incumbent railway undertaking;
- insufficient powers of the regulatory body to take and enforce the necessary decisions.

Besides, in September 2011, the Commission initiated infringement proceedings against France and the United Kingdom for insufficient transposition of the First Railway Package in respect of Channel Tunnel traffic.

The reasons for which the Commission opened the infringement procedures mentioned are relevant for access to the international rail passenger market as well. One of the positive consequences of infringement procedures is, however, a significant strengthening of the powers of the regulatory bodies that is crucial for increasing competition (only three of the sixteen ongoing infringement procedures mentioned still concern regulatory body powers).

Article 10 (3a) allows any railway undertaking established in a Member State that has obtained a licence and the necessary safety certificates to access the infrastructure of all Member States in order to operate an international passenger service within the EU. The Directive authorises new market entrants to pick up and set down passengers at any station located on the international route, including stations located in the same Member State (cabotage). Cabotage rights should be "focused on stops that are ancillary to the international route"⁵ and the introduction should concern services whose **principal purpose** is to carry passengers between stations located in different Member States. Regulatory bodies shall determine whether the principal purpose of a service is to carry passengers travelling on an international journey. They should not act on their own initiative but following a request from the relevant competent authorities and/or interested railway undertakings.

Since the need for guidance from the Commission on how to implement this provision emerged from a survey on the implementation of the Directive by Commission services at the end of 2009 and subsequent discussions with representatives of Member States and rail sector associations, on 28 December 2010 the Commission published an interpretative communication on certain provisions of the Directive⁶. This communication confirms that while determining the principal purpose of a service, regulatory bodies must act independently. This implies that their decision cannot be preconditioned or predetermined by instructions received from any other public authorities under national law. The regulatory bodies should verify the principal purpose of the service case by case.

In the framework of the recast of the First Railway Package, EU co-legislators decided to charge the Commission with the adoption of implementing acts setting out the details of the procedure and criteria to assess the nature of a service (principal purpose test), within 18 months after transposition of the Directive establishing a Single European Railway Area (by 2015).⁷

⁴ An incumbent is a (former) state railway undertaking which had a dominant position on the market prior to liberalisation.

⁵ Recital (8) of Directive 2007/58/EC.

⁶ OJ C 353 of 28.12.2010, pp. 1-6.

⁷ Article 10 (4) of the Directive establishing a Single European Railway Area, adopted by the European Parliament on 3 July 2012 and by the Council on 29 October 2012.

Estonia and Sweden apply no restrictions on commercial rail services, thus, they did not introduce any provision in their national legislation on determining the principal purpose of a service. In all other Member States but one (Finland), there are provisions in national legislation to authorise the regulatory body to examine the principal purpose of new international services applied for. Some Member States intend to use an approach based on purely quantitative thresholds (for the length of the route to be outside of the Member State, for the number of passengers making an international journey, for a part of turnover to come from international passengers) while in several other Member States the decision-making process and the methodology to be used have not been published. Finally, some Member States seem to have given the right to request a principal purpose test to market players not listed in the Directive (typically, the infrastructure manager). The Commission is analysing these cases for compliance with the Directive.

Member States may exclude from the scope of this Directive any railway service carried out in **transit** through the Union which begins and ends outside the EU territory⁸. Four Member States (Bulgaria, Greece, Lithuania and Romania) have chosen to use this opportunity which seems to be irrelevant for the others for geographical reasons.

Since introducing new services with cabotage rights on a route covered by PSC may have implications for the organisation and financing of public service obligations, in accordance with Article 10 (3b), Member States may limit the right of access on services between a place of departure and a destination which are covered by one or more PSC conforming to EU legislation⁹ if the new international services could compromise their **economic equilibrium**. The interpretative communication of the Commission underlines that this limitation is optional. Regulatory bodies cannot act on their own initiative but only following a request by the entities listed in the Directive.

The Directive does not specify the forms such limitations can take but for instance, restrictions on the number or frequency of stops, exclusion of certain stops, reduction of train service frequency are possible options beyond the full exclusion of cabotage.

Assessments and decisions of regulatory bodies should be coordinated. Beyond exchanging information and, where relevant, coordination of principles and practice of assessment in individual cases, recital (17) invites the regulatory bodies to develop guidelines based on their experience.

The interpretative communication makes clear that the economic equilibrium test is independent from the principal purpose test: they can be run together but one cannot be considered a prerequisite for the other. It also underlines that the assessment should be limited to the points mentioned in the request received.

For transparency and non-discrimination, the methodology used to determine whether the economic equilibrium of a PSC is compromised by a new international service should be published.

In response to a questionnaire sent out in 2012 by Commission services, 11 Member States declared that they do not limit cabotage rights. Several Member States having chosen to make use of this option have not published the decision-making process and the methodology to be used. In some other Member States, rather strict criteria seem to be included in national legislation. In at least one Member State, the economic equilibrium test has to be preceded by

⁸ Article 2 (4) of Directive 91/440/EEC as amended by Directive 2007/58/EC.

⁹ Regulation (EC) No 1370/2007 of the European Parliament and of the Council of 23 October 2007 on public passenger transport services by rail and by road and repealing Council Regulations (EEC) Nos 1191/69 and 1107/70.

a principal purpose test, even in the case where there has been no request for that. The Commission is analysing these cases for compliance with the Directive.

However, while Member States seem to have difficulties with the transposition of the provisions of Article 10 (3a) and (3b), in fact there is only one practical example of using them to limit cabotage rights. In Italy (one of the few Member States where the decision-making process and the methodology to be used have been published on the website of the regulatory body), in the case of an application submitted by the Italian private operator LeNord S.p.A. in cooperation with the German incumbent DB and the Austrian incumbent ÖBB for the operation of several routes linking the three Member States, the regulatory body decided to apply a partial limitation of cabotage rights on the basis that they would compromise the economic equilibrium of several regional PSC. The decision was suspended by the regulatory body itself in order to assure the transport of passengers who had already bought their tickets. On the basis of a reconfiguration of international passenger services requested, the regulatory body lifted all cabotage limitations and the railway undertakings are currently operating daily services from Munich through the Brenner to three destinations in Italy (Venice, Bologna and Verona).

In the framework of the recast of the First Railway Package, EU co-legislators decided to charge the Commission with the adoption of implementing acts setting out the details of the procedure and criteria to assess the impact of a new service on PSC, within 18 months after transposition of the Directive establishing a Single European Railway Area (by 2015).¹⁰

In accordance with Article 10 (3c), Member States may also limit cabotage rights where an exclusive right to transport passengers between the relevant stations has been granted under a **concession contract** awarded before the entry into force of the Directive (4 December 2007) on the basis of a fair competitive tendering procedure and in accordance with the relevant principles of EU law. This limitation may continue for the original duration of the contract, or 15 years, whichever is the shorter.

The only Member State where such a limitation is in use is the Netherlands, on the line Amsterdam-Roosendaal for a period of 15 years. This concerns cabotage on the new high-speed line HSL Zuid which has connected Schiphol Airport with Antwerp in Belgium since 2009 where domestic transport is reserved for the operator High Speed Alliance (a joint venture between the incumbent NS and the national airline KLM).

Article 10 (3e) stipulates that the decisions regarding limitations on the basis of a concession contract or the economic equilibrium of PSC being compromised have to be subject to **judicial review**.

According to the information available to the Commission, this is provided for in the national legislation of all Member States that make use of those possibilities. In most cases, that does not require specific legislation but is in line with general provisions concerning judicial review of decisions of authorities. However, given the fact that there have been almost no decisions to be questioned, there has been no practical test of those provisions applied for the opening of the international rail passenger market.

According to Article 10 (3f), Member States may authorise the authority responsible for rail passenger transport to impose a **levy** on railway undertakings providing cabotage services in a fair, transparent and non-discriminatory way.

¹⁰ Article 11 (4) of the Directive establishing a Single European Railway Area.

Seven Member States (Bulgaria, Greece, Hungary, Italy, Romania, Slovenia and Slovakia) have decided to include this possibility in their national legislation. However, such a levy has never been imposed on any railway undertaking.

3. NEW SERVICES OPERATED ON THE BASIS OF THE DIRECTIVE

Although the essential legal requirements of the Directive regarding the opening of the market for new international services with cabotage have been met, such services are rarely seen at the moment in Europe.

Since December 2010, Italian private operator LeNord together with German incumbent DB and Austrian incumbent ÖBB has been providing for services from Germany through Austria to Italy linking Munich – Brenner – Verona (1 pair of trains a day), Munich – Brenner – Venice and Munich – Brenner – Bologna (2 pairs of trains a day for both). Since December 2011, another railway undertaking based in Italy (Società Viaggiatori Italia S.r.l.) controlled by French incumbent SNCF has been operating new services linking Paris – Modane – Milan (3 pairs of trains a day), while Italian incumbent Trenitalia and the French-based private operator Veolia Transdev have been running a night train linking Venice to Paris via Switzerland under the brand name *thello*. This is the first service in the long-distance rail passenger market in France which is not operated by or in cooperation with SNCF.

In 2010, Swedish incumbent SJ started to offer services from Sweden to Denmark with cabotage between Copenhagen and Odense; however, the latter part of the service was stopped one year later.

An atypical international service on what seems to be a niche market is the Berlin Night Express, a night train service linking Malmö and Berlin three times a week from late March to early November, operated by Veolia and GVG Verkehrsorganisation GmbH.

It is worth mentioning that when DB withdraws from the cooperation for international high-speed transport with SNCF and Belgian incumbent SNCB as planned, Thalys will become a further competitor in the long-distance market, especially on the Aachen-Köln-Essen route. Thalys has extended its trains from Paris to Köln into the Ruhr area since 2011. DB has also announced its plans to introduce InterCityExpress services from Frankfurt to London through the Channel Tunnel.

The principal purpose of the services operated by the Austrian private operator WESTbahn (a company in which SNCF has a 26% stake) from Vienna to Salzburg and to Freilassing at the German side of the border seems to be domestic transport.

Cross-border regional services covered by PSC such as passenger transport from Enschede in the Netherlands to Münster and Dortmund in Germany are to be distinguished from open access international services provided under the Directive.

4. REASONS FOR THE MINOR IMPACT THE IMPLEMENTATION OF THE DIRECTIVE HAS HAD ON THE MARKET

Several barriers may be identified that prevent new entrants (including incumbent railway undertakings licensed in another Member State) from offering international services on the basis of the Directive. Late and, in some cases, restrictive implementation of the Directive and persistent discriminations in access to infrastructure and to rail-related services which resulted in the infringement procedures concerning the implementation of the First Railway Package do have a negative impact on the market.

There are few international destinations with traffic flows strong enough to enable operators to introduce economically viable new services. In particular, niche markets like night train services (that are being ousted by faster day services by rail or other modes of transport) offer few opportunities for a profitable service. It is also quite difficult to integrate the new international services in the domestic timetable to provide for appropriate connections.

The experience from opening the rail freight market also shows that new operators (even subsidiaries of incumbent railway undertakings in other Member States) prefer domestic services to international ones as traffic flows are larger and domestic traffic is easier to organise (only one infrastructure manager is involved, there are no linguistic issues, etc.).

Stakeholders interested in international services refer to the following access barriers:

- administrative barriers: difficulties in obtaining a safety certificate or vehicle authorisation (in several cases, extremely long times to produce a decision);
- information barriers: difficulties in getting information and poor quality of information relating to administrative issues mentioned above;
- operational barriers: need for staff speaking all official languages along the route, volatility of infrastructure charges, access to operational facilities and services, difficulties to align train paths in domestic timetables to get suitable international paths, lack of the inter-availability of tickets;
- access to sales channels: difficulties to use existing sales facilities on a fair and non-discriminatory basis or to rent space in stations to set up their own ticket sales offices or even getting their publicity displayed (according to a study, the Czech Republic, Portugal, Denmark and the United Kingdom were the only Member States in 2011 in which all sales facilities in rail passenger transport were available to external railway undertakings with no restrictions¹¹).

Established forms of cooperation between incumbents (which, contrary to new entrants, enjoy network effects and a dominant position on their national markets) can also be an obstacle, not just for new entrants who have difficulties in finding a profitable market segment to start their own services but also for incumbents considering changing strategies and entering the market of another Member State on their own.

Inadequate financing of railway infrastructure in certain Member States leads to the inevitable deterioration of service quality and to the need to withdraw international services that have become non-competitive with other modes of transport.

High-speed rail has been the success story of railway transport and indeed high-speed services between major cities offer the greatest traffic flows and, therefore, a real potential to introduce new services (DB plans to run its own InterCityExpress trains from Frankfurt to London or the recently introduced new services between Frankfurt and Marseille in cooperation of SNCF and DB can confirm that). However, they need specialised rolling stock and, therefore, high investment, and may run against special safety barriers in certain markets like the Channel Tunnel where the special safety regulation based on vehicle standards different from the Europe-wide TSI has been an obstacle for DB to use its own ICE train sets.

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http://www.deutschebahn.com/site/shared/en/file_attachments/position_papers/study_rail_liberalisation_index_2011_complete_version.pdf, p. 70.

Framework conditions for different modes of transport do not provide for a level playing field either: in some Member States, international trains are subject to VAT and/or to fuel excise duty while aviation is not.

Finally, the negative overall economic climate since 2008 and the low reaction of the rail sector to regulatory changes (linked to high investment needs and the long duration of use of railway assets) have to be taken into account.

Some of the barriers listed in this report have been addressed by the European co-legislators during the recast of the First Railway Package that resulted in the adoption of the Directive establishing a Single European Railway Area (access to facilities and services, improved stability in infrastructure financing, shorter deadlines for administrative decisions). With harmonisation of safety certificates and vehicle authorisations, the Commission proposes to eliminate other administrative barriers in the framework of the Fourth Railway Package.

5. CONCLUSIONS

International rail passenger services including cabotage rights have been liberalised in the EU by Directive 2007/58/EC as from 1 January 2010 (except Luxembourg where this deadline was postponed to 1 January 2012). Although all Member States were delayed as regards transposition, by now all of them have taken national legislative measures to comply with the Directive.

As for practical implementation, the interpretation of the provisions concerning the principal purpose of a rail service and the economic equilibrium of services under PSC being compromised proved to be the most difficult for Member States. In this field, the Commission will adopt implementing acts on the basis of the Directive establishing a Single European Railway Area.

Several Member States decided not to use any of the options provided by the Directive to limit new international services or cabotage rights. Even where the possibility to limit cabotage is granted by national law, practical application of those provisions remains minimal. Concession-based limitation seems to be the most efficient of the safeguard clauses to protect the interests of operators providing services on a route that may be interesting for cabotage; however, it is used in one Member State only.

Despite the establishment of the relevant national legal framework in all Member States concerned, there are few examples of new international services operated on the basis of the Directive. When trying to enter the international rail passenger market, new operators are often facing barriers linked to inadequate implementation of previous railway packages or loopholes in previous EU legislation. Infringement procedures, the recast of the First Railway Package and the present proposals for the Fourth Railway Package are expected to contribute to the solution of these problems.

However, even in case of elimination of all those barriers we cannot expect a rapid growth of new international rail passenger services as most segments of the international rail passenger market are barely profitable and therefore unattractive for operators. It is much easier to organise domestic passenger transport and in Member States that have opened their domestic passenger market for competition, there are many more new entrants than in the international market. The liberalisation of rail freight services has produced a similar picture. It should also be noted that in passenger transport, competition seems to be the greatest for local and regional services under PSC in case of competitive tendering.

Thus, the analysis of the experience gained from the opening of the international rail passenger market since 2010 seems to confirm that new international services are likely to

spread from domestic market opening rather than the other way round. For instance, domestic market opening would enable international service operators to develop feeder services that would improve the viability of international services. The Commission's proposals to open up domestic rail passenger markets and to expand competitive tendering in the framework of the Fourth Railway Package should give a boost to the development of international services.