

# Liberalisation of International Passengers Transport Services

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# 1. EUROPEAN REGULATORY FRAMEWORK: GENERAL OVERVIEW (I)

- Findings EC: **loss of market** share despite environmental, safety, technical, financial and other advantages (*compared to other modes, esp. Road Sector*)
  
- Analysis EC:
  - Presence of « historical », « traditional », « national » railway companies (the “incumbents”):
    - these railway companies have a (legal or factual) « **monopoly** »: no competition – barriers to entry – no innovation – no efficiencies
    - these railway companies are « **integrated** » companies: they are both « *railway undertaking* » (RU) and « *infrastructure manager* » (IM), sometimes even « *regulator* » (safety), which means (real) possibility of distortions
  
  - Regulatory framework is « national » or « inter-national » (« bi-lateral » or « multi-lateral » as opposed to « supra-national »): national markets are protected – no internal market
  
  - State intervention: very high level of state intervention is « *counterproductive* » - no incentives to “change” (e.g. *losses are subsidised*)

# 1. EUROPEAN REGULATORY FRAMEWORK: GENERAL OVERVIEW (II)

- Solution EC: need for « *approach on 4 different levels* »:
  - level 1 = liberalisation of the Railway Sector: obligatory opening markets (new rules for the realisation of an internal market for railway services)
  - level 2 = fostering competition in the Railway Sector: elimination of distortions caused by companies (advantages as a result from “*market power*”)
  - level 3 = reduction of state aid to the Railway Sector: elimination of distortions caused by authorities (financial advantages)
  - level 4 = harmonisation of the Railway Sector: elimination of distortions caused by authorities (regulatory advantages)
    - interoperability: « *common interfaces / technical standards* »
    - safety: « *common safety standards* » (regulation – certification – investigation)
    - law / contracts: « *common legal / contractual standards* »
  
- Instruments EC: basically the so-called “*Railway packages*”

# 1. EUROPEAN REGULATORY FRAMEWORK: GENERAL OVERVIEW (III)

## ■ Liberalisation process (1 January 1993 - 1 January 2010):

(= previsions / between brackets: n° of Railway Pac kage)

	International	National
Combined Goods transport services	RU (1 January 1993: <b>FULL LIBERALISATION</b> ) (0) <i>(OBS: 1 July 1993, if not limited to RUs, with Directive 92/106/EEG)</i>	<b>Not applicable</b>
Freight transport services	IGRU (1 January 1993: <b>partial liberalisation with a distinction between access and transit</b> ) (0)  RU (15 March 2003: <b>liberalisation limited to TEFN only</b> ) (1)  RU (15 March 2008 > 1 January 2006: <b>FULL LIBERALISATION</b> ) (1 + 2)	RU (1 January 2007: <b>FULL LIBERALISATION</b> ) (2)
Passengers transport services	IGRU (1 January 1993: <b>partial liberalisation with a distinction between access and transit</b> ) (0)  * RU (1 January 2010: <b>FULL LIBERALISATION, subject to conditions and exceptions</b> ) (3)  ' OTHER ' method of liberalisation with Regulation 1370/2007 (tender system)	* RU (1 January 2010): <b>only the beginning of liberalisation (cabotage)</b> (3)  ' OTHER ' method of liberalisation with Regulation 1370/2007 (tender system)

# 1. EUROPEAN REGULATORY FRAMEWORK: GENERAL OVERVIEW (IV)

- Full liberalisation on 1 January 2010 (after Third Railway package):

RUs have access for:

- **(international) combined goods transport services** to the entire network
- **international freight transport services** to the entire rail network
- **national freight transport services** to the entire rail network
- **international passengers transport services** to the entire network, subject to conditions and exceptions
- **national passengers transport services in the course of an international passenger service** to the entire network, subject to conditions and exceptions (cabotage)

## 2. EUROPEAN REGULATORY FRAMEWORK: DIRECTIVE 2007/58/EC (I)

- Directive **2007/58/EC** of 23 October 2007 amends Directive 91/440/EEC (Railway package « zero ») and Directive 2001/14/EC (First Railway package):

- Directive 91/440/EEC, as already amended i.a. by Directive 2001/12/EC and Directive 2004/51/EC: general framework (incl. opening of markets)
- Directive 2001/14/EC, as already amended i.a. by 2004/49/EC: particular framework (incl. conditions and procedures concerning allocation of railway infrastructure and levying of charges for the use of railway infrastructure)

Basic scheme: RUs to which **access rights** are granted, are entitled to operate services on the railway infrastructure if:

- (they have obtained a licence)
- they have obtained **infrastructure capacity**
- they pay the **levies for the use of said infrastructure capacity**
- (they respect applicable safety and other rules)

- Aim of the Directive: further opening of railway services markets (extension access rights), without compromising (national) public service obligations = amendments to general and particular framework
- Scope: remains largely unchanged, but international passenger services only transiting Community may be excluded

## 2. EUROPEAN REGULATORY FRAMEWORK: DIRECTIVE 2007/58/EC (II)

### ■ New definitions:

- “**international passenger service**” = “a passenger service where the train crosses at least one border of a MS and where the principal purpose of the service is to carry passengers between stations located in different MS; the train may be joined and/or split, and the different sections may have different origins and destinations, provided that all carriages cross at least one border”
  - as opposed to “international freight service”
  - condition which is not required for “international freight service”: **principal purpose of the service**
  - whether said condition is satisfied shall be determined by **regulatory body**
  
- “**transit**” = “the crossing of the Community territory which is carried out without loading or unloading of goods, and/or without picking up of passengers nor setting them down in the Community territory”
  - as opposed to “access” (not defined)
  - “**transit**” of **Community** not of MS

## 2. EUROPEAN REGULATORY FRAMEWORK: DIRECTIVE 2007/58/EC (III)

### ■ Basic rights:

- **RUs** have a **right of access** to the **entire infrastructure** of **all MS** for the **international passengers services** as from **1 January 2010**
  - idea: introduce full liberalisation as a **principle** (though subject to conditions and exceptions)
  - no more necessity to **constitute IGRU** for “*international passengers services*” (IGRUs still possible though definition of IGRU and all other references to IGRUs are withdrawn)
  - no limitation of infrastructure this time (as opposed to “*international freight service*”: access limited to TEFN during transitional period)
- **RUs** have the **right to “pick up passengers”** at any station located on the international route **and “set them down”** at another, including stations located in the same MS, as from 1 January 2010
  - idea: make international passengers services viable
  - “*pick up passengers and set them down*” (compared to “*access*”)
  - “*including stations located in the same MS*” (link with national passenger service: **cabotage**)



## 2. EUROPEAN REGULATORY FRAMEWORK: DIRECTIVE 2007/58/EC (IV)

### ■ Limitations to said basic rights:

1. MS may grant the right of access only by 1 January 2012, **if the share of international carriage of passengers by train constitutes more than half of the passenger turnover of RUs in that MS**

- idea: mitigate effects of liberalisation process on MS that depend mostly on international passengers services
- not applicable to Belgium

2. MS may limit the right of access **on services between a place of departure and a destination which are covered by one or more public service contract conforming to the Community legislation in force**

- idea: reduce potentially negative impact international passenger services could have on the organisation of **public service obligations (PSO)** imposed on RUs
- only PSOs covered by **public service contract (PSC)** (as opposed to regulatory, applicable to all operators)
- PSC “*conforming to Community legislation*” (Regulation 1370/2007/EC, but also Altmark-jurisprudence for what is not covered by the Regulation)
- impact on PSC will be assessed by **regulatory body**

## 2. EUROPEAN REGULATORY FRAMEWORK: DIRECTIVE 2007/58/EC (V)

### ■ Limitations to said basic rights (ctd.):

3. Before 1 January 2010 MS may limit the right of access to **RUs and their directly or indirectly controlled subsidiaries licensed in another MS where access rights of a similar nature are granted,**
  - idea: avoid free-riding in case of early transposition
  
4. MS may limit the right to pick up and set down passengers **at stations within the same MS on the route of an international passengers service where an exclusive right to convey passengers between those stations has been granted under a concession contract awarded before 4 December 2007 on the basis of a tendering procedure and in accordance with the relevant principles of Community law**
  - idea: enable RUs concerned to recover investments
  - award of concession contract through tendering procedure **guarantee of competition** (same effect – other method)
  - duration is limited to **original duration with a maximum of 15 years**

## 2. EUROPEAN REGULATORY FRAMEWORK: DIRECTIVE 2007/58/EC (VI)

- Realisation of said rights:
  - Basic rights:
    - Regulatory
  - Limitations to said basic rights:
    - 1, 3 and 4: regulatory
    - 2: regulatory + **decisions of regulatory body**
      - Difficulty 1: assessment of “**international passengers services**” by “**national**” regulatory body
        - Necessity of objective economic analysis based on predetermined criteria
        - Necessity of large information and consultation procedures
        - Necessity of motivation
        - Necessity of judicial review
      - Difficulty 2: assessment of impact on PSCs, **which are defined by MS** (article 16 EC), by “**national**” regulatory body
        - Necessity of functional independence of regulatory body from any competent authority involved in the award of a PSC

## 2. EUROPEAN REGULATORY FRAMEWORK: DIRECTIVE 2007/58/EC (VII)

- Infrastructure capacity (“path”) allocation:
  - No fundamental changes in allocation system
  - **If application for infrastructure capacity for international passenger service, special procedures apply**
    - idea: enable **assessment** of potentially negative impact international passenger services could have on the organisation of PSOs imposed on RUs by means of PSC
    - RU concerned has to **inform**:
      - IM
      - **regulatory body**
    - **regulatory body** has to **inform**:
      - every competent authority that has awarded a rail passenger service defined in a PSC
      - every other interested competent authority with a right to limit access
      - every RU performing a PSC on the route concerned
  - **New provisions with regard to framework agreements, i.e. 5 years (general rule) – 15 years (special rule applicable to specialised infrastructure)**

## 2. EUROPEAN REGULATORY FRAMEWORK: DIRECTIVE 2007/58/EC (VIII)

### ■ Payment of rights of use:

- No fundamental changes in charges system
- **Levy on RUs providing passenger services for the operation of routes which fall within the jurisdiction of that authority and which are operated between two stations in that MS**
  - idea: provide with adequate **compensations for impact on PSOs** laid down in PSCs awarded in conformity with Community law
  - imposed by **authority responsible for rail passenger transport** (which authority ?)
  - **same** levy for national and international passenger services (how to calculate (passengers, all passengers, kilometers,... ? )
  - revenues out of levy may **not exceed what is necessary** to cover all or part of the cost incurred in the relevant PSOs taking into account the relevant receipts and a reasonable profit for discharging the PSOs
  - levy must **respect Community law and principles of fairness, transparency, non-discrimination and proportionality**
  - levy may **not endanger the economic viability of rail passenger services on which they are imposed** (meaning “international passengers services” ?)

## 2. EUROPEAN REGULATORY FRAMEWORK: DIRECTIVE 2007/58/EC (IX)

### ■ Control by the regulatory body:

– No fundamental changes in control system

– **“New” role with regard to international passengers services**

- idea: any decision about the right to pick up passengers and set them down in the course of an international passengers services
  - ≠ decision to open or not to open market for national passengers services (which should be realised by regulatory intervention)
  - = **ancillary** to decisions about fair, equal and non-discriminatory access (which is the very reason why the regulatory body was created)

#### ■ **informs**

- **assesses** potentially negative impact international passenger services could have on the organisation of PSOs imposed on RUs by means of PSC on the basis of objective economic analysis based on predetermined criteria

- **takes**, within 2 months of receipt of all relevant information, a **reasoned decision**, which is subject to judicial review

- nature of the decision: pick up/set down is OK if economic equilibrium is not compromised between international passengers services on the one hand and passengers services provided as PSOs

– **Functional independence of regulatory body**

### 3. BELGIAN REGULATORY FRAMEWORK (I)

- Most important legislation in force since Second Railway package:
  - **Act of 4 December 2006 on the use of the railway infrastructure** (« new » transposition of Directives, except for the « *Railway Safety Directive* ») (hereafter « *Railway Infrastructure Act* »)
  - **Act of 19 December 2006** (on the safety of railway exploitation) (transposition of « *Railway Safety Directive* ») (hereafter « *Railway Safety Act* »)
  - **RDs of 16 January 2007**
    - I: safety requirements and procedures
    - II: licence fees
    - III: licence
    - IV: safety authorisation, safety certificate, rolling stock and safety report
    - V: rules on accidents and incidents investigations
    - VI: creation Investigation Body
    - VII: creation Safety Authority
  - **RD of 28 December 2006** (interoperability)
- Third Railway package:
  - no transposition yet

### 3. BELGIAN REGULATORY FRAMEWORK (II)

In order to comply with Directive 2007/58/EC,  
« Railway Infrastructure Act » has to be modified !!!

- Reminder: the « *Railway Infrastructure Act* » deals with:
  - opening of Belgian railway infrastructure: **access to the railway infrastructure**
  - 3 out of 4 « **essential functions** »
    - issuing of licence
    - allocation of railway infrastructure capacity
    - determining of prices to be paid for use of railway infrastructure
  
- Reminder: the « *Railway Infrastructure Act* » does **not** deal with:
  - guarantees to make sure RUs are separate from the State
  - the 4th « *essential function* »: monitoring of public service obligations since both issues are dealt with in NMBS / SNCB legislation (Act of 21 March 1991)
  
- Reminder: the « *Railway Infrastructure Act* » does **not** deal with:
  - interoperability (RD of 28 December 2008)
  - safety (Railway Safety Act)
  - other harmonisation measures



### 3. BELGIAN REGULATORY FRAMEWORK (III)

The « Railway Infrastructure Act » (summary + modifications)

■ Have « access rights » to the Belgian railway infrastructure:

- NMBS / SNCB for all transport services (freight + passengers)
- IGRUs (of which a RU established in Belgium) for international transport services (freight + passengers)
- RUs (established in EU) for international transport services (freight)
- RUs (established in EU) for all transport services (freight) (as from 1 January 2007)

■ Have « transit rights » on Belgian railway infrastructure:

- IGRUs (if no RU established in Belgium) for international transport services (freight + passengers) (between MS of establishment of their constituent RUs)

■ In order to be able to exercise these rights RUs must have:

- licence
- safety certificate
- infrastructure capacity

### 3. BELGIAN REGULATORY FRAMEWORK (IV)

#### The « Railway Infrastructure Act » (summary + modifications) (ctd.)

##### ■ Licence:

- is delivered by Minister
- conditions:
  - financial fitness
  - professional competence
  - good repute
  - cover for civil liability

##### ■ Safety certificate: see « Railway Safety Act »

##### ■ Infrastructure capacity:

- allocation by IM, in accordance with rules established by IM
- payment to IM, in accordance with rules established by IM
- said rules have to be in accordance with detailed rules in « Railway Infrastructure Act » itself
- said rules are published in Network Statement, which is established by IM
- conclusion of agreement between IM and user

### 3. BELGIAN REGULATORY FRAMEWORK (V)

The « Railway Infrastructure Act » (summary + modifications) (ctd.)

#### ■ Independent regulatory body:

- « Dienst Regulering van het Spoorvervoer en de exploitatie van de luchthaven Brussel-Nationaal » / « Service de régulation du transport ferroviaire et de l'exploitation de l'aéroport de Bruxelles-National »
- gives advice
- controls Railway Sector (licences, path allocation, prices)
- takes decisions (conformity of Network Statement with « Railway Infrastructure Act », the same for licences, path allocation and prices)
- may impose penalties
- decisions are open to judicial review

#### ■ Civil servants of Ministry:

- special investigation powers

## 4. FINAL COMMENTS

### « *CHALLENGES FOR THE FUTURE* » (I)

#### ■ Evaluation of current situation:

- The Railway Sector is (still) evolving, with a totally **new European regulatory framework** having been/being put in place:
  - liberalisation created / creates the *legal circumstances* to open the sector more than it ever was.
  - harmonisation made / makes this opening *effective*.
  - competition has been / is being introduced.
  - state intervention is being / will be controlled more effectively.
- Under the impetus of EC regulation, a totally **new Belgian regulatory framework** has been / is being put in place
- The **aim** of both new regulatory frameworks: **better railways...**

## 4. FINAL COMMENTS

### « *CHALLENGES FOR THE FUTURE* » (II)

- Challenges for the future:
  - **Quid further liberalisation ?**
    - Has the liberalisation process ended ?
      - difficult to say (political will ?)
      - however: Fourth Railway package does not contain new measures leading to more opening...
    - Should the liberalisation process end ?
      - the rules put in place for international passengers services are quite complex and far from easy to apply and/or monitor (risk of arbitrary/differences between MS)
      - national passengers services are not liberalised (yet): do said services need liberalisation ? Is Regulation 1370/2007 sufficient to guarantee competition ?
  - **Liberalisation remains a mere theoretical exercise if not accompanied by further harmonisation measures !**
  - **But new regulatory framework may not lead to new impediments !**
    - The regulatory body/bodies may have difficulties to play their role !
      - e.g. extension scope PSCs may compromise development of international passengers services by reducing decision power of regulatory body
    - The development of new national passengers services may be jeopardised by the (exclusive) focus on international passengers services !
      - e.g. full access (interoperability) on entire network may endanger new developments (Light Rail)

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QUESTIONS

FOR MORE INFORMATION  
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