

# The Fourth Railway Package: a fair balance?

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A fully open European rail market has been an aspiration of the European Commission for decades. Unfortunately, this aspiration has not been shared with quite the same degree of enthusiasm by all Member States – with the relevant legislation (known as the “**Railway Packages**”) being implemented to varying degrees throughout Europe. In December 2012, the existing Railway Packages were recast, with the aim of clarifying and simplifying the existing legislation.

The first three railway packages involved:

- opening up the European rail freight network, including the separation of infrastructure management from train operations (the First Railway Package);
- setting a framework for the legal, technical and operational integration of the European rail network (the Second Railway Package); and
- dealing with international passenger travel and passenger rights (the Third Railway Package).

Whilst it remains to be seen whether the recast will be fully implemented throughout Europe, the aim of opening the EU rail markets to further competition is one which the European Commission continues to pursue and a Fourth Railway Package has been proposed. A well-formed proposal (albeit diluted from original plans) is, at the time of writing, being debated at EU level and considered by national parliaments – many of whom are consulting with their national railway industry. Ultimately, it is hoped that the Fourth Railway Package will be implemented throughout Europe by December 2019 – although whether this is realistic will become clearer once feedback from Member States is received.

The Fourth Railway Package has been considered by the House of Commons Transport Committee (the “**Transport Committee**”) which submitted a series of recommendations to the Government – and which the Government has recently responded to.

## Fourth Railway Package – details

The overarching aim of the Fourth Railway Package is to provide “the economic conditions in which competition can thrive”. It builds on the recast Railway Packages and seeks to introduce measures to further liberalise the market. The proposals have been watered down from original plans (which required full institutional separation of infrastructure management and train operations) following the intervention of France and Germany.

Proposals include:

- Reducing barriers to entry into the market – including in relation to technical standards and vehicle approvals. It is proposed to give the European Railway Agency a more prominent role.
- Eliminating the risk of cross-subsidisation where an infrastructure manager and train operator are in the same group of companies by ensuring complete financial transparency and institutional separation. Although this would allow existing group structures to be retained, it is unlikely to give Member States the right to reintegrate currently separate entities.
- Requiring Member States to enter into contracts to provide public services (setting limits on the size of such contracts, so that multiple contracts are offered within a Member State) and ensuring that the

letting of such contracts is carried out by way of a fair competition. Initial proposals suggest that “direct award” contracts may not be so easy once the Fourth Railway Package has been implemented.

- Requiring those authorities letting passenger rail contracts to publish objectives and policies for passenger transport.

These proposals would be implemented by way of a European directive setting out amendments to existing legislation.

## Transport Committee Recommendations and Government Response

The Transport Committee made a number of recommendations which the Government has now responded to. In particular:

- **Alliances** – both support joint working between Network Rail and train operators – and the Fourth Railway Package should not restrict such partnership arrangements. A key recommendation of the McNulty review, alliances are seen as a way of encouraging cost efficiencies and varying degrees of alliance have already been implemented. In the UK, rigorous protections have been put in place to ensure that key decisions impacting on competition are made by Network Rail outside of an alliance – protecting access to the market.
- **Associations** – both support the proposal to form a pan-European network of infrastructure managers if it adds value (and no unnecessary cost) to existing informal arrangements (such as the association of European Rail Infrastructure Managers). There is need for cooperative working across Europe in relation to projects such as the European Rail Traffic Management System (ERTMS) but it is important to ensure that there is no duplication or administrative burden in any formal association.
- **Channel Tunnel** – the Transport Committee asked the Government to confirm whether it intends to bring the Channel Tunnel governance arrangements into line with EU legislation – with the Government considering that the two were already aligned. Recent enforcement action by the European Commission against the UK and French governments suggests that it agrees with the Transport Committee – it remains to be seen what the outcome of such action will be.
- **Competent authority** – the draft proposal draws a distinction between authorities letting passenger rail contracts in urban and rural areas – which is rejected as being unhelpful. This is particularly the case in the UK where local authorities cover both urban and rural areas.
- **Services agreements** – the Transport Committee suggests that the maximum size of a passenger services contract should be reduced from a third to a fifth of the total national network in a Member State – meaning that more contracts would be available to be competed. The government notes the potential impact on Member States with smaller railway networks, where it would not be practicable to divide passenger services amongst at least five

contracts. We hope that this requirement will not be a way for larger Member States – in a position to compete more than three contracts – to avoid doing so in the interests of favouring the (often state-owned) incumbent operator.

- **Public transport plans** – contrary to the proposals, the Government believes that national and local government (rather than the authorities letting services contracts – which may be local) should set transport plans, to keep the regulatory burden to a minimum.
- **Rolling stock approvals** – both believe that safety should remain paramount and any changes to approval processes should not increase the regulatory burden. Recent experience in Europe indicates that there is a need to streamline processes for vehicle acceptance – which can often impose a high barrier to entry to the market. Member States will no doubt want to maintain control over safety-related matters.
- **Border control** – understandably, border control remains a key issue for the UK and the extension of services to new destinations raises the question of border control arrangements. Operators will no doubt be keen to ensure that the agreed arrangement does not detract from the benefits of high speed rail – avoiding lengthy stops for border checks or airport-style check-in arrangements. This remains a barrier to entry into the market and one which the Transport Committee highlights as being a concern.

### European perspective

The formal response of other Member States is not yet clear. Certain institutions have provided views – although it remains to be seen whether these are more generally accepted.

The proposals are not quite as revolutionary as originally intended – as a result of French and German government intervention, which in itself has generated a lot of commentary. From what we have seen so far, opinion tends to be divided between those who vehemently disagree with the proposals and those who think they should go further – the Fourth Railway Package may therefore be a middle ground between the two opposed views – although ones which many Members of the European Parliament seem to support.

The Association of German Transport Companies makes clear that it prefers the existing structure. It argues that the Fourth Railway Package should only apply to those railways of European-wide strategic importance (which would exempt many railways from its scope) and that the transfer of staff between infrastructure manager and train operator should be permitted – although this would compromise functional separation. It wishes to retain the right to use native languages in any streamlined vehicle acceptance process. It also argues that the infrastructure manager should be required to perform its functions, rather than being able to contract them out.

In contrast, Mofair (a German group representing private rail companies) has argued that the original, more radical, plans are the best way forward. The full separation of infrastructure management and train operations has also been supported by the European Rail Freight Association, which similarly believes that this will lead to “necessary” European rail liberalisation. This was a view echoed by Latvian MEP Roberts Zile and, in the UK, Lord Berkeley has been vocal in encouraging the EU to “stand firm” on its proposals for full separation.

In France, the recently-announced restructuring of the railway into an integrated group, with functional and legal separation between infrastructure management and train operations, may be seen to be against the aims of the Fourth Railway Package. However, France appears to be bringing its structure in line with that used in Germany – and France is likely to require amendments to the Fourth Railway Package to protect its proposed structure.

### Conclusion

The Fourth Railway Package is likely to be evolutionary rather than revolutionary. Gradual steps are being taken to increase competition in the European rail markets and to reduce the barriers to entry for new operators. Whether these proposals are likely to be welcomed by all Member States remains to be seen, with the protection of existing (state-owned) operators likely to be of concern. However, the proposals are less radical than originally planned and this may make them more palatable to certain Member States.

The UK’s rail market remains one of the most liberalised in Europe and it seems evident that the Transport Committee and the Government remain committed to this. At the same time, amendments to the Fourth Railway Package are being sought to best protect the UK’s interests – as seems to be the case throughout Europe. The opportunities that will be available throughout a liberalised European rail market will be welcomed by the industry – and may remedy existing imbalances where European operators can access the UK rail market but the reverse does not apply. It will be interesting to see the appetite for further liberalisation within Europe – and whether it is implemented in practice.

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