Chapter Six

SINGLE MARKET RAILWAYS

INTRODUCTION

Rail transport in Western Europe has, by and large, been in steady decline over the past few decades. Significant recent successes, such as the development of efficient high-speed passenger rail systems, have only camouflaged the relative deterioration of the sector as a whole. The growing pre-eminence of road transport has undermined the railways in terms of both freight and passenger trade, a trend reinforced by social and industrial change.

The decline of rail transport in figures

Figures published by the European Commission give a useful picture of the status of rail in the Community. In 1970, the railways held a 10% share of the passenger market in the 15 present-day Member States, but, by 1997, that share had declined to 5.8%. Passenger rail traffic did increase 30% in the period, but this was dwarfed by the overall doubling of the market, and the 130% growth in passenger car use. The picture is even more dramatic for freight. In 1970, rail transport accounted for 32.7% of the inland freight market but only 14.5% in 1997. Despite a very substantial expansion in the freight market overall, the volume of goods traffic actually carried by rail went down, from 283bn tkm in 1970 to 237bn tkm in 1997, with the bulk of the traffic growth absorbed by road.

This serious decline in the use of rail for both freight and passenger transport has led to a range of negative impacts for the Community: an increase in air pollution, more congestion and accidents on the roads, and an escalation in the movements of hazardous materials in road vehicles (where previously they were more commonly moved by rail, i.e. away from people). Consequently, the Commission has consistently tried to promote rail as an important component in its strategy to develop sustainable mobility within the EU, and as a means of reducing road traffic.

The rail industry's structural problems

The problems afflicting the rail sector and causing its decline are diverse, according to the Commission. The rise of cheap and flexible road transport, combined with the reduction in importance of the heavy industries which have traditionally carried products by rail (e.g. coal and steel), are only partly responsible. Equally significant is the constant interference from the state, the sector's insulation from market forces, and its nationally-oriented structure. International freight services have, for example, been carried out on the basis of collaborative agreements between national state-owned operators, and, consequently, been held back by national priorities. According to the Commission, these structural problems have led to a situation where railway operators have frequently been unable to respond to market demands for a given service, where the services that are provided are often poor, and where there is a lack of clarity about responsibility or liability for cargo.

Early Community actions affecting the rail sector included the adoption, in 1969-70, of the general Regulations covering state aid and public service obligations in inland transport (Chapter Two). A further Regulation, adopted in 1969, set out specific rules on the "normalisation" of the accounts of rail firms and defined the conditions for state subsidies. A first attempt to rationalise railway financing was taken in the mid-1970s when the Council adopted both a Decision requiring Member States to give state-owned companies a degree of financial independence, and a Regulation setting out common accounting principles for those companies. A further Decision, dating from July 1982, extended the commercial independence of rail firms by enabling them to cooperate with one another to establish tariffs for international goods services, taking account of commercial criteria. A year later, a similar Decision was adopted relating to international passenger and luggage traffic.

Efforts to promote an agenda aimed at progressively bringing market forces to bear within the sector did not take off, however, until the 1990s. In 1991, the Council adopted a groundbreaking Directive which obliged Member States to open access to their rail networks for a very limited range of services, and which contained measures aimed at further reducing Member States' political interference in the running of national rail companies as well as at addressing the companies' historical debts. Two further rather basic Directives, adopted in 1995, sought to provide a legal framework for the opening up of network access, by establishing principles for infrastructure charging and capacity allocation, as well as for licensing rail operators.

With these basic rules in place, the Commission embarked on a more ambitious strategy. A proposal was put forward in 1995 which called for the full liberalisation of international rail transport in both the passenger and freight sectors, and this was followed in 1996 by a comprehensive white paper (referred to repeatedly in this chapter) entitled "A strategy for

revitalising the Community's railways". The Council was not prepared, however, to move as swiftly as the Commission proposed, and, as an interim measure, diverted discussions towards the idea of rail freight freeways. In 1998, the proposal became mixed up with new initiatives on licensing, infrastructure charges, and unbundling of train operations.

This chapter looks in detail at the measures which have already been put in place to encourage a regeneration of the railways, and at the Commission's struggle throughout the 1990s to push the process of liberalisation forward. It also looks at complementary measures, some of which have been almost as contentious as those on market access. Much of the chapter is devoted to recording the Commission's efforts to bring Community competition rules to bear on this heavily protected market. State aid remains endemic in the sector, with large subsidies not even requiring notification. In general, where aid is notified, the Commission is clear that it does not require authorisation if the infrastructure is to be openly available; while other notified aid has tended to be allowed for various reasons such as promotion of the trans-European networks. The Commission has had some limited success in controlling anticompetitive cooperation agreements in the freight sector, but has failed to prove similar action is necessary in the passenger sector.

FRUSTRATED ATTEMPTS TO PRISE OPEN THE RAIL MARKETS

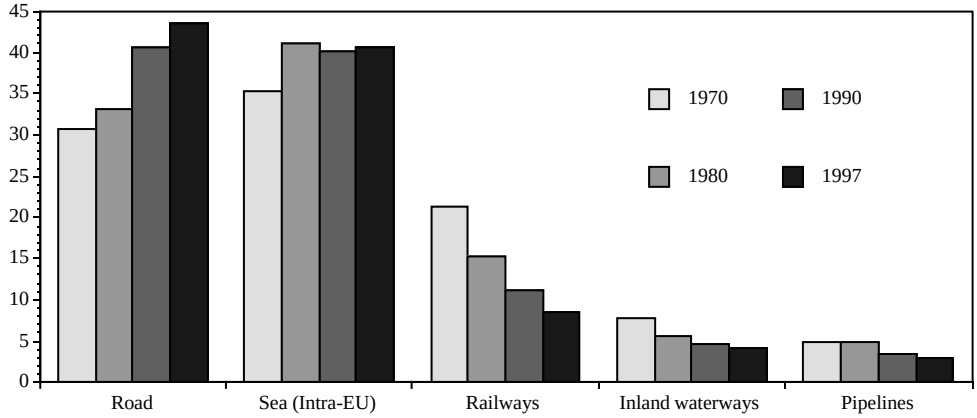
The Council laid the foundations for future reform of the rail market in 1991 with the adoption of the Rail Development Directive (91/440/EEC). The Directive contains four main components aimed at transforming state monoliths into viable businesses managed along commercial lines, independently of political interference, and at launching the difficult process of opening access to national rail networks, thus exposing incumbent operators to competition from outside.

The 1991 Rail Development Directive

Firstly, the Directive demands that Member States take all necessary measures to ensure that "as regards management, administration and control over administrative, economic and accounting matters railway undertakings have independent status in accordance with which they will hold, in particular, assets, budgets and accounts which are separate from those of the state". It stipulates that "railway undertakings shall be managed according to the principles which apply to commercial companies". Furthermore, rail companies are obliged to draw up business plans with a view to achieving financial stability, and, within the context of general policy guidelines laid down by the state, should have the right to take decisions on issues such as internal organisation and market strategies.

Secondly, in order to improve transparency and enable railway finances to be monitored more easily, the Directive requires Member States to ensure railways keep separate accounts for "business relating to the provision of transport services" and "business relating to the management of railway infrastructure". It insists that transfers of state aid between the two fields of activity should be banned.

Thirdly, the Directive says that, in conjunction with the existing publicly-controlled railway undertakings, "Member States shall set up appropriate mechanisms to help reduce the indebtedness of such undertakings to a level which does not impede sound financial management and to improve their financial situation". It suggests that a "debt amortisation unit" should be set up within each rail firm's accounting department to assist in the process, and that aid to cancel debts should be granted under the terms of the Treaty.



Source: Transport DG

Fourthly, and most importantly, it states, in Article 10:
"*1) International groupings shall be granted access and transit rights in the Member States of establishment of their constituent railway undertakings, as well as transit rights in other Member States, for international services between the Member States where the undertakings constituting the said groupings are established.*

2) Railway undertakings . . . shall be granted access on equitable conditions to the infrastructure in other Member States for the purpose of operating international combined transport goods services.

Limited market access conditions

3) Railway undertakings engaged in international combined transport of goods and international groupings shall conclude the necessary administrative, technical and financial agreements with the managers of the railway infrastructure used with a view to regulating traffic control and safety issues concerning the international transport services referred to in paragraphs 1 and 2. The conditions governing such agreements shall be non-discriminatory."

Under the terms of this Article, therefore, the Directive provides for a limited opening up of access to national rail networks, albeit only for combined transport services and "international groupings", the latter defined as associations of at least two undertakings, established in separate Member States, set up in order to provide international services within the EU. In its annual report on Community law, the Commission drew attention to the fact that, at the end of 1998, it was still having problems with France and the UK over the transposal of this Article with regard to the Channel Tunnel.

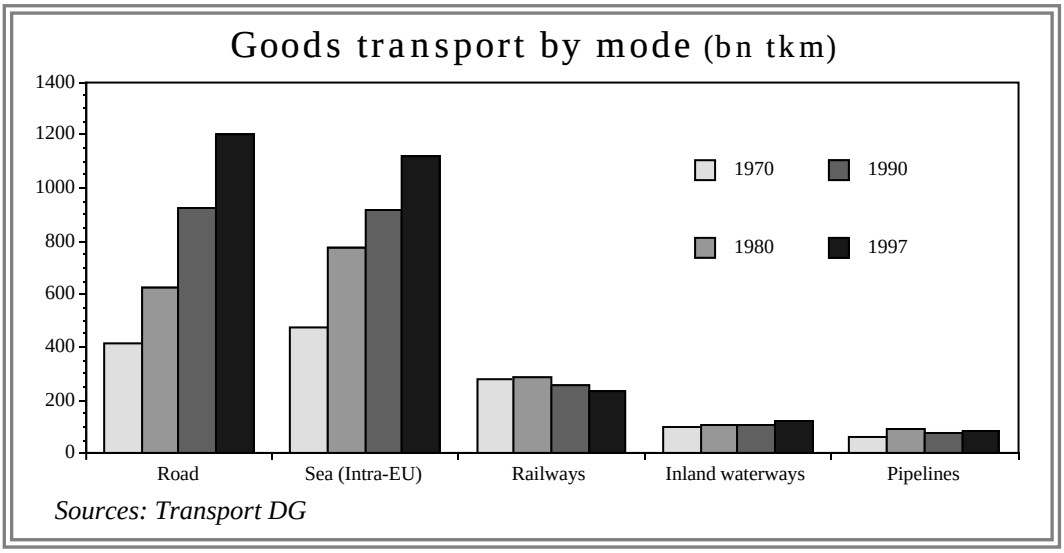
The Commission's 1995 proposals to extend access rights

The Commission sought to take the liberalisation process forward, in July 1995, by proposing an ambitious extension to rail companies' access rights, well beyond the limits set down in the 1991 Directive. It called for the opening up of national rail networks to all rail freight operations, including cabotage services, as well as to international passenger services. The European Parliament, which has since inherited codecision powers on the proposal, backed the Commission's approach in October 1996. However, in the Council, there was strident opposition from several Member States which objected to the sudden, rather than progressive, nature of the liberalisation proposal and were concerned about the lack of supporting measures.

In an important white paper on rail revitalisation, presented in July 1996, the Commission repeated its arguments for further liberalisation, as part of an overall strategy for rail reform, but the Transport Council, meeting in December 1996, failed to support the most progressive ideas. According to an internal Council report at the time, a number of Member States considered that "emphasis should be placed not only on competition but on other factors such as railway cooperation within the relevant international organisations; coordination with other modes of transport; harmonisation measures between national railway networks; and appropriate social measures". Moreover, France, clearly the staunchest opponent of rail deregulation, expressed a "fundamental reservation" over the Commission's approach. The Parliament, in a Resolution passed in January 1997, took the view that "liberalisation should be progressive, beginning with the liberalisation of international freight transport and followed by domestic freight transport and international passenger transport". It also criticised the Commission for failing to address adequately the social aspects of restructuring such as employment, working time, and training.

Council and EP reaction to market access ideas in white paper

Despite the difficulties within the Council, the Commission continued to push forward its liberalisation agenda. In a report on the implementation of the Rail Development Directive, in March



Sources: Transport DG

1998, it noted that the access rights provided under the Directive had been little used, partly because of a lack of supporting measures, but also because those rights were far too limited (being restricted to international rail groupings and combined transport operations). In an attempt to defuse some of the opposition in the Council, the Commission, in a climbdown from its earlier more dramatic proposal, suggested that one way forward would be to allow freight services to be liberalised gradually, with Member States being required to open up 5% of their freight markets to competition immediately, rising in stages to 15% after five years, and to 25% after ten years. The Commission claimed that "such an approach would stimulate a rapid improvement in performance, while avoiding disruption of the market and allowing experience to be gained". It implied, also, that the proposed liberalisation of passenger services should be put on the back burner for the meantime.

Amended plan for phased approach to opening of freight markets

The initial reaction in the Council to the new, more modest ideas was still divided, into the by-then familiar groups. Several Member States - the UK, the Netherlands, Germany and Sweden - supported the proposed strategy, but a significant contingent - notably France, Belgium and Luxembourg - remained strongly opposed. France argued that since rail was already in competition with other transport modes, it had sufficient incentive to improve its performance without the introduction of competition between rail operators. It suggested, moreover, that if liberalisation were to go ahead, commercial operators would concentrate their efforts and investments on the most profitable routes, to the detriment of less profitable ones, leading to fragmentation of the market. Instead, it said, efforts should focus on improving cooperation between operators.

The Member States sign up to guaranteed access

During 1999, the question of market access was again brought to the Council's table, this time as a result of the Commission's 1998 'infrastructure package' of proposals aimed at providing a more competitive legal framework (see below), and the fact that many States wanted the issues discussed together. Furthermore, the European Parliament, in its March 1999 first reading on the legal framework proposals, called for the entire rail freight market to be opened up to competition - a position that, following the ratification of the Amsterdam Treaty, falls under the codecision procedure.

The trans-European rail freight network

A breakthrough was managed by the Finnish Presidency in October 1999. Unanimous Council Conclusions stated that the Council would proceed to define a "trans-European rail freight network (TERFN)", which would include "at least all relevant freight lines as well as access to major terminals and ports". More importantly, they stated the following: "*As from the date of application of the railway infrastructure package, access will be extended to international freight services on the TERFN for all licensed Community railway undertakings. The access right is guaranteed to the licensed railway undertakings seeking access, which meet the safety conditions, whatever the mode of operation.*"

The success of the Finnish Presidency

Finland, in its first ever term as President of the Council, continued to work enthusiastically on the dossier and was rewarded with a political agreement (on this dossier and the infrastructure package of complementary measures - see below) at the subsequent Transport Council in December. The agreement should pave the way (assuming approval by the Parliament) for a set of maps to be attached to the Rail Development Directive setting out all relevant freight lines, major terminals and ports which are to be part of the TERFN. Railway undertakings are to be granted, on equitable conditions, access to the TERFN for the purpose of operating international freight services. A clause in the recitals of the draft text should provide an element of reciprocity, in that a Member State will be able to grant more extensive access rights, but limit them to railway undertakings licensed in Member States where similar rights exist. It was agreed that Belgium and Luxembourg should be allowed short transition periods for their so-called feeder lines (to which access must also be provided), as they constitute a large part of their small but dense networks.

Support for freight freeways but little practical development

Aware that the liberalisation process would take a number of years to complete, and in view of the continuing decline of rail, the Commission elaborated, in its 1996 rail revitalisation white paper, the idea of "freight freeways", a suggestion put forward earlier by an advisory group of industry experts. The aim was for Member States voluntarily to open access to particular routes for international freight services. The routes would be administered and managed by 'one-stop shops', which would allocate train paths, receive bookings and be the single point of contact between the national authorities and infrastructure managers involved. The white paper pointed out that freight freeway projects would address many of the inefficiencies of the existing system, and would allow train operators to gain access to national infrastructure beyond that provided for under the Rail Development Directive, without having to wait years for new legislation to be adopted.

With the assistance of the European rail operators' association, the Community of European Railways, the Commission developed the plans further, and, in May 1997, published a Communication to clarify the circumstances under which the cooperation between infrastructure managers required to establish the freeways could be permitted under EC competition law. Such cooperation would be examined on a case-by-case basis, it said, but in principle agreements would be permitted if they:

- improved the distribution of goods and sped up their transport;
- promoted economic progress by making rail freight more competitive with road haulage;
- offered benefits to consumers (i.e. train operators and their customers) by making rail faster, cheaper and better quality;
- were indispensable to the attainment of those objectives and were not capable of eliminating competition in the relevant market.

Competition conditions for freight freeways

The EU's transport ministers confirmed their support for the freeways idea in June 1997, stressing that "a rail freight freeway based on a trans-European rail freight freeway concept is wholly voluntary and is a matter for each infrastructure manager to decide upon for itself". Actual implementation of the freeway concept was left to the railway companies.

A first 'freightway', was launched in January 1998, linking terminals in Belgium, Luxembourg and France. Although it did conform to the freeway blueprint in other respects (for example, by using a one-stop-shop), and it did make the running of freight services smoother, it did not actually offer greater access than that provided for under the Rail Development Directive. A further pilot project was established shortly afterwards on the initiative of the German, Dutch, Austrian, Swiss and Italian rail operators. The so-called North-South Freeway initially provided open access only up to the Italian border, with the provisions of the Directive applying beyond it. However, although these routes were later expanded, it gradually became apparent that industry enthusiasm for the freeways concept was relatively limited, and that the success of the one-stop-shops was being undermined by the high infrastructure charges imposed on freeway users by national infrastructure managers.

Little industry enthusiasm for freeways

COMPLEMENTARY MEASURES DESIGNED TO REMOVE BARRIERS

The deregulation of rail must, as in other sectors, be accompanied by measures to ensure the functioning of the internal market, the European Commission stated in the 1996 white paper on revitalising the railways. It proposed a series of measures, in five broad areas, to accompany the deregulation process, notably: the introduction of market forces, the integration of national rail systems, railway finances, public services and social policy. Its activities since then have generally followed this strategy, although, to date, the greatest efforts have been focused on the first area, developing an efficient legal framework to make the introduction of market forces possible. In the area of public services, the policy work has been more general than just in the railway sector (Chapter Two), and, in the fifth area, the introduction of the Community's working time rules to cover rail workers has taken precedence (Chapter Eleven).

Creating a legal framework without barriers

The creation of a suitable legal framework was started in 1995 with the adoption of two Directives both of which entered into force in 1997. The first lays down broad principles for the granting of operators' licences, valid throughout the Community, in order to ensure operators using the access rights provided under the Rail Development Directive fulfil minimum criteria, in terms of good repute, financial fitness, professional competence and cover for civil liability. The second Directive sets down equally broad principles for allocating infrastructure capacity and charging infrastructure fees to users. Its key proviso is that Member States should nominate a capacity allocation body to ensure the distribution of capacity on a fair and non-discriminatory basis. It also requires infrastructure fees to be fixed "according to the nature of the service, the time of the service, the market situation and the type and degree of wear and tear of the infrastructure". A number of Member States failed to transpose these Directives on time, and the Commission's 1998 report on Community law noted that some infringement proceedings had progressed to the final stage and been referred to the Court of Justice.

The 1995 laws on licenses and charging

In the 1996 white paper, the Commission reiterated its belief that, in the context of the single market, "establishing rights of access is the first step; the second is to create the conditions that make them effective". There was widespread agreement, it went on to say, that the principles established by the two Directives were too broad (even before they had come into force), and did not offer market entrants sufficient guarantees of fair treatment. Potential competitors had been deterred from using the access rights provided under the Rail Development Directive, it said, because of fears that integrated rail companies would then discriminate against them. Moreover,

other companies had found that the plethora of different charging and cost recovery systems, existing quite legitimately, made the organisation of international services difficult and complex. Train path allocation systems were also unsatisfactory, it noted, not only because of potential discrimination against new market entrants, but because they were slow, inefficient, and did not give adequate consideration to international, cross-border services.

The 1998 infrastructure package proposals

In July 1998, the Commission presented three draft Directives, known as the 'infrastructure package': one on infrastructure charging and train path allocation; another on licensing of rail firms; and a third aimed at continuing the unbundling of infrastructure management and train operations begun in the Rail Development Directive.

The proposal to replace the 1995 charging Directive

The first, and most complicated, proposal aimed to replace the 1995 infrastructure Directive with a more rigorous framework for charging and capacity allocation. It proposed that charges for the use of rail infrastructure should be based, in principle, on marginal costs, i.e. the direct cost of each additional train in terms of wear and tear to the network. Such charges could include a component to cover congestion costs, and could be modulated to take account of external social and environmental costs. Safeguards to ensure that rail would not be disadvantaged compared to other transport modes, were also included in the proposal, as was the possibility for limited derogations to the marginal cost principle where necessary to ensure sufficient investment revenue.

The second proposal in the package was designed to address the limitations - exposed by the freight freeways developments and moves by some States to open access to their networks - of the 1995 Directive on licensing of railway undertakings. Those rules only applied to international rail groupings and combined transport operations (i.e. those covered in the Rail Development Directive). The Commission proposed that the existing compulsory licensing criteria be extended to cover all rail undertakings, with the exception of those operating passenger services on local stand-alone networks or urban/suburban services using trams or light rail, as well as those operating their own freight services on dedicated networks. Authorised applicants licensed in this way, the Commission said, would be free "to exploit possibilities to enter markets, on a uniform and non-discriminatory basis" and this "would prevent licensing requirements becoming a barrier to entry".

Plan to ensure further separation of rail company operations

The third proposal was to strengthen provisions in the Rail Development Directive for the separation (unbundling) of accounts between infrastructure management and train operations. These provisions were necessary, the Commission said, to make the running of the two separate activities more efficient, to improve transparency where the use of public money was concerned, to avoid cross-subsidisation, and to simplify the introduction of infrastructure charges. In addition, it proposed extending the unbundling process to ensure separate accounts be kept for freight and passenger activities. A further clause in the draft Directive proposed that the management independence conferred on rail undertakings should be extended to infrastructure managers.

Hesitations from the EP and Council over the infrastructure package

In March 1999, the Parliament agreed its Opinions on the three proposals. On the first, the EP's rapporteur, Johannes Swoboda, criticised the excessive amount of detail, and lack of flexibility in implementation. This view was reflected in the EP's amendments which called for many articles to be more general, especially on the following: the modulation of charges in relation to demand; fixed charges for the greatest users of infrastructure; discounts and reservation fees; scheduling; short notice requests; and coordination. Replying to the debate in plenary, the then Transport Commissioner Neil Kinnock said it was important to establish precise procedural rules which were properly coordinated and fair to all undertakings. Only two, relatively insignificant, amendments were adopted in relation to the second of the Commission's proposals, on licensing.

On the third proposal, amending the Rail Development Directive, the Parliament took the opportunity to suggest a rapid direct liberalisation (see above) of access to rail networks. More specifically on the Commission's actual intentions for the proposal, the Parliament asked the Member States to go beyond the unbundling of accounts to "create entities, separate from railway undertakings, for the management of their national railway infrastructure" within two years of the Directive's entry into force.

Negotiations in the Council on the package were slow, partly due to the complexity of the charging proposal, and partly due to an insistence by some Member States that it be linked to the question of market access. A number of Member States, for example, had serious reservations

over widening the definition of "authorised applicants", who would be allowed to bid for infrastructure capacity, beyond that of licensed rail undertakings. Divisions over this point followed the familiar pattern of the liberalisation question, with the UK, Sweden and the Netherlands in favour of the Commission's proposal, and France, Belgium and Luxembourg expressing concern over possible adverse effects on their national rail companies.

Council Conclusions on charging principles

In October 1999, the Council adopted Conclusions which not only made the crucial point about access rights being "guaranteed" (see above) but tackled the thorny question of infrastructure charging. The Conclusions stated: "*With a view to work towards a harmonised charging system that fully meets the efficiency and cost recovery objectives, basic charges will be set at costs that are directly incurred as a result of operating the rail services with the possibility of mark-ups on the basis of efficient, transparent and non-discriminatory options, while guaranteeing optimum competitiveness in particular of international rail freight.*"

The Council's December 1999 accord on infrastructure charging

The political agreement, reached by transport ministers in December 1999, on extending the market access elements of the Rail Development Directive, also covered the texts (draft Common Positions) for the three elements of the infrastructure package: i.e. a new Directive on charging, an amending Directive on licensing, and (together with the market access changes) amending provisions for the Rail Development Directive on separation of accounts.

New provisions for capacity allocation

With regard to allocation of capacity, the new charging Directive (assuming it is accepted under the codecision procedure by the Parliament in 2000) will provide:
- a more exact definition of the rights of railway undertakings and of the infrastructure manager;
- a procedure to resolve conflicts between demands for capacity and to overcome problems caused by scarcity of capacity;
- that the body responsible for allocating capacity may not itself be a provider of transport services;
- a right of appeal.

As regards the levying of charges for the use of infrastructure, the Council's text foresees that charges should be calculated on the basis of the marginal costs. In addition, charges may be increased or modulated to attain other objectives (e.g. better cost coverage, the inclusion of external costs, and to solve problems caused by scarcity of capacity). It will also lay down a performance scheme together with incentives and penalties to bring about greater efficiency and the publication in advance of charging systems and of information on the method of calculating charges, so as to guarantee equitable treatment.

Variation to marginal cost principle

On the basis of a strong appeal from Germany, an exemption from the general rule of charging based on marginal costs was inserted into the text of the draft Directive, such that the infrastructure managers will be able to levy increased charges (to be added to the marginal cost pricing), if the market can bear this, on the basis of efficient, transparent and non-discriminatory principles, while guaranteeing optimum competitiveness, in particular of international rail freight. The charging system shall, though, respect productivity increases of the railway undertakings. Only certain options for levying higher charges will be allowed: mark-ups for individual market segments, individually negotiated contracts, and a system of fixed and variable charges. However, the wording of the Council's text seeks to ensure that, in some market segments (where there is high demand for access, for example), any increased charges should not end up with an exclusion of those undertakings that can only pay the relevant costs (i.e. those directly incurred as a result of the train operating costs plus a rate of return which the market can bear).

The Directive will apply to the use of railway infrastructure for domestic and international rail services. Licensed railway undertakings and international groupings of railway undertakings are to be considered as "applicants" (for rail path allocation). The Member States will be required to consider other bodies with public service or commercial interests in procuring infrastructure capacity (e.g. public authorities, shippers, freight forwarders, combined transport operators) as applicants, but only in their own territories.

Agreements on licensing and on separation of accounts

The second of the draft laws agreed upon at the December 1999 Transport Council will extend the scope of the 1995 licensing Directive, as proposed by the Commission, to cover all railway undertakings established in the Community (excluding some companies operating limited services, e.g. local or regional services), thereby removing the risk that licences might become an obstacle to entry to the market. All railway undertakings should thus be able to avail themselves of the opportunities for access to new markets on a uniform and non-discriminatory basis.

New provisions on separation of accounts

Finally, as per the third part of the Commission's infrastructure package, the Council's agreed amendments to the Rail Development Directive will provide for more extensive compulsory separation of accounts, and for the separation of essential functions in respect of powers regarded as determinant for guaranteeing equitable and non-discriminatory access of the infrastructure, namely allocation of capacity, decisions on charging for infrastructure and the licensing of railway undertakings. These powers will need to be exercised by a body independent of the railway firms. Certain transitional arrangements will be allowed, according to the Council's text; moreover, a special concession for Austria was agreed, one which the Commission will review within four years.

All three of these agreements (plus the amendments concerning market access) will need to be approved by the European Parliament under the codecision procedure during 2000.

Different national systems and progress towards interoperability

Because Europe's railways have evolved over long periods of time predominantly to meet national needs, the European network is fragmentary rather than coherent. One result of this is the lack, at European level, of international infrastructure links, and this is being dealt with through the development of the trans-European networks (Chapter Twelve). Another consequence of the nationally-oriented development is that the different technical and safety standards operating across the Community have given rise to problems of interoperability. The situation has been exacerbated by the fragmentation of the rail equipment supply industries which have also matured along national lines, so that manufacturers supply national operators with designs tailored to the peculiarities of each system.

Nevertheless, there has been substantial progress towards improving interoperability between networks. Agreements on technical standardisation between national railway companies have enabled passengers and freight to move increasingly freely through Europe, without a change of wagons at borders, as was more common in the past. However, railway operators continue to change locomotives and crews at frontiers. This is because of differences between electrical systems, signalling, operational rules and the qualifications of train crews. There are also, in some cases, differences in loading gauge which can hinder combined transport.

In its 1996 white paper, the Commission cautioned that any attempt to increase technical harmonisation would involve heavy costs, and that therefore "careful assessment" would be needed to decide where such harmonisation could be justified, a major question being the value of time saved. Nevertheless, it argued, common specifications were essential in some areas, particularly in command control and traffic management; and, in this context, the planned European Rail Traffic Management System, currently the subject of considerable effort within the RTD framework programmes (Chapter Fourteen), would provide the basis for compatible systems in future.

Directive on HST network interoperability

In particular, the paper pointed to the successful development (by contrast to other rail business) of the dedicated high-speed train (HST) infrastructure in the EU since the late 1980s. With numerous international HST links already in place, and with many more planned within the context of the TENs, the Community was anxious to ensure technical cohesion. A Council Directive, adopted in mid-1996, on the interoperability of the European HST network, created a mechanism for setting mandatory technical specifications for interoperability (TSIs), for eight 'sub-systems', including rolling stock, signalling systems, infrastructure and power supply. It provided for these specifications to be used as references for public procurement, established a system of independent assessment to ensure Member States' compliance, and required the setting up a regulatory committee of Member States' representatives. Subsequently, the committee nominated the European Association for Railway Interoperability (AEIF) to take responsibility for drafting TSIs.

Review of the Directive's implementation

In September 1999, the Commission published a report on the implementation of the Directive. It recorded that mandates had been approved for the AEIF to draft TSIs for five of the sub-systems: infrastructure, rolling stock, energy, control command, and signalling and maintenance. The drafts were expected to be complete by 2000. A mandate had also been agreed, it said, with the European standardisation bodies (such as CEN and Cenelec) to develop European standards where necessary in areas covered by the TSIs.

The need to extend interoperability to conventional rail systems

The Commission noted, in the report, that the idea of combining high-speed and conventional networks in a new railway network concept is under examination. In such an integrated network, it explained, "each specific section would be dedicated to one or more type of traffic (high-speed passenger trains, mixed, urban etc.) by the infrastructure manager, and this in turn would determine the required level of interoperability". It concluded: "*The application of procedures . . .*

for achieving interoperability and division of the railway system into eight sub-systems as defined in the Directive, seem to be appropriate for resolving problems of coherence on conventional tracks used by trains built for high speed. This would make it possible to further integrate conventional networks."

Communication and draft Directive on conventional rail interoperability

In November 1999, the Commission presented a Communication, including a draft Directive, on interoperability in conventional rail, with the aim of bringing practical solutions to the problems - complex and expensive cross-border operations and hindrances to competition - caused by differing technical standards and national laws. The main objective of the Directive will be to set up Community procedures for the preparation, adoption and evaluation of technical specifications, similar to those used in the HST interoperability Directive. The Commission stressed, in the Communication, that, because of the huge costs involved, it was not suggesting the accelerated replacement of major infrastructure. Instead, it said, harmonisation in conventional rail should focus on those sub-systems where competitiveness could be improved.

The Commission proposed that the short-term priorities for harmonisation should include:
- preparation of specifications for signalling and command/control systems;
- exchange of data, information technology and telecommunications, in particular for the carriage of freight;
- noise levels, in particular for freight wagons;
- qualifications required for cross-border operations by train crews;
- preparation of specifications and procedures required for mutual recognition of maintenance and repairs.

Railway financing and the heavy indebtedness of several State companies

The 1969 Regulation on "the normalisation of the accounts of railway undertakings" allows Member States to compensate specified national railway undertakings for the financial burdens borne "by reason of any provision laid down by law, regulation or administrative action, by comparison with their position if they operated under the same conditions as other transport undertakings". In practice, this entitles Member States to provide aid, without notification, to cover a wide range of specified costs, such as those derived from social obligations, or from "payments which railway undertakings are obliged to make but which, for the rest of the economy including other modes of transport, are borne by the state"; or from "financial burdens devolving upon railway undertakings in consequence of their being required by the State to keep in operation works or other establishments in circumstances inconsistent with operation on a commercial basis".

In a bid to improve transparency and promote financial stability within the sector, the Council adopted a Decision in 1975 on "the improvement of the situation of railway undertakings and the harmonisation of rules governing financial relations between such undertakings and States". Its provisions, though, were taken over by the Rail Development Directive, which called for the Member States to set up mechanisms for reducing the rail companies' debts to a level not hindering sound financial management. A 1977 Regulation, which remains in force, lays down measures setting out how profit and loss and balance sheets should be drawn up with the aim of ensuring that rail companies' accounts are comparable.

The indebtedness of national rail companies

The progress of railway companies in reducing their historical debt and restructuring their finances was assessed by the Commission in its 1998 Communication on the implementation of the Rail Development Directive. It noted that, on average, the heavy indebtedness of the 1980s had improved during the early 1990s, but that in five States (Greece, Portugal, Spain, Sweden and France), debts had actually grown substantially from 1990 onwards, and were considered serious by 1995. Since then, the Commission said, Member States had taken action to remedy the situation. The Commission said it was confident that the situation was improving even though it was impossible to judge whether debts had yet been reduced to an acceptable level. The 1998 Communication concluded: "*At the policy level, the Community has not yet created a framework for railway finances that clearly defines the responsibilities of the state and of the railways. Many aspects remain obscure, including the real use to which public support is put. Once the Community has established a full set of rules for financial relations between the state and the railway, it should become clearer whether railway finances are on a sound footing.*"

By late 1999, work was well advanced within the Commission on proposals - called for in the 1996 rail white paper - to revise the framework for state aid for inland transport, and to amend the rules on compensation for public services to take account of market forces. According to its seventh survey on state aid, published in March 1999, the Commission's aim is "gradually to arrive at a system where the only public financing of railways will be in the form of financing for

infrastructure or compensation for public service obligations, or where it is part of an overall restructuring plan aimed at restoring the financial viability of railway companies".

STATE AID - NO SIGN OF ANY CUTBACKS IN NEAR FUTURE

Eur32bn/yr in state aid paid out to the EU's rail firms

The overall amount of state aid granted to the rail sector each year is vast, and, in recent years, has exceeded by a factor of 10 the level of subsidies provided to the airline sector, and by a factor of 100 aid to all other transport service sectors put together. According to the Commission, the level of subsidy granted in 1997 amounted to Eur29.86bn, with an average of Eur32bn/yr over the 1995-97 period. Most of this aid is paid out, without specific notification, under the terms of the 1969 Regulations on public service obligations (Chapter Two) and on the normalisation of accounts (see above).

Since the entry into force of the Rail Development Directive in 1993, the Commission has begun looking more closely at a number of types of aid or potential aid. In its 1993 competition report, it noted that "the whole question of the payment of infrastructure charges, particularly for freight, has come into sharper focus".

An early Decision in this respect was taken in September 1993, when the Commission approved the UK's plans to assist freight services through the introduction of a 'freight facilities grant' and a subsidised track charges scheme. It said the UK's plans would help promote rail freight. The same year, the Commission also approved a mechanism allowing the German national rail operator, Deutsche Bahn (DB), to provide assistance, including loans, materials and staff, to various firms in order to encourage them to maintain existing sidings or build new ones. The Commission considered that, because the costs of the scheme would be entirely recovered through freight charges paid to DB, it did not involve state aid components.

Aid for new rail investments and businesses

Many of the cases scrutinised by the Commission in recent years, however, have been concerned with the transfer of rail businesses to the private sector or with new investments. Decisions in the former category include the approval given, in January 1995, to a UK state guarantee provided to European Night Services, the Channel Tunnel sleeper venture, to cover the leasing of specialised rolling stock, prior to the privatisation of the company. In November 1995, it decided to raise no objection to UK government guarantees provided in the context of the sale of three rolling stock companies (Roscos) into the private sector. It concluded that the guarantees helped maximise the profit from the sale and therefore did not constitute state aid.

In November 1997, the Commission approved sweeteners worth Ecu338.5m provided by the UK to assist in the sale of British Rail's Channel Tunnel freight division, Railfreight Distribution, to the private firm English, Welsh and Scottish Railway. The aid was approved on the grounds that it helped restore Railfreight Distribution to long-term viability.

Investments for the Channel Tunnel high-speed rail link

Several decisions have been taken with regard to investments in infrastructure. In May 1995, for example, the Commission decided not to object to aid provided to Union Railways, then a state-owned company, charged with carrying out design and engineering work on the London-Folkestone Channel Tunnel high-speed rail link (CTRL), part of the PBKAL trans-European network priority project. In December 1996, the Commission authorised BFr125bn for measures to finance the Belgian section of the same priority project. Only BFr40bn of this was considered state aid under the Treaty rules, and was approved because

State aid to transport - mostly rail
Annual average 1995-97 (Eur m)

	Reg. 1191/69[1]	**All trans. excl. air**[2]
Austria	427.1	647.3
Belgium	339.1	1,545.0
Denmark		467.3
Finland	27.7	45.8
France	1,314.0	6,015.7
Germany	4,310.6	11,309.7
Greece		301.2
Ireland	77.7	133.5
Italy	640.2	5,270.8
Luxembourg	14.3	21.3
Netherlands	133.3	1,199.6
Portugal	57.0	75.6
Spain	303.6	1,777.3
Sweden		1,106.3
UK	2,110.9	2,163.4

[1] This is aid for inland transport public service obligations under the EU's Regulation 1191/69.

[2] This is the total aid paid out for transport minus that for air services (which is the only sector for which separate figures are given). Figures provided elsewhere in the report indicate that the state aid totals for transport minus air services are approximately 99% rail transport.

Source: COM/99/148

"aid to promote the execution of an important project of common interest" may be considered compatible with the common market.

The Commission had previously approved, in October 1995, guarantees provided by the Italian government to cover an Ecu372m loan to the state rail company Ferrovie dello Stato. The loan was to be used to help pay for work on the Brenner-Verona high-speed link, part of the HST South, another TENs priority project. In Austria, the Commission took four Decisions during 1996, two in March and two in July. Three of them were to authorise aid for the construction and improvement of connecting lines to promote the use of rail transport goods. A fourth Decision stated that general measures to support the construction of public infrastructure in Tyrol did not constitute state aid within the meaning of the Treaty, since the infrastructure was freely accessible without any discrimination.

Rail infrastructure Decisions in Italy and Austria

Financing the UK rail links for the Channel Tunnel

Following a "full and lengthy analysis", the Commission approved a considerably more complex aid package to support the building of the UK's CTRL in April 1996. Under the UK's notified plan, the contract for building and operating the 108km link was to be carried out by a consortium known as London and Continental Railways (LCR). Construction was originally planned to take five years, and was expected to cost Ecu4.8bn. Under the plan, LCR was to take control of Union Railways and European Passenger Services (now Eurostar), the company which, together with the Belgian and French national rail operators, Societe Nacional des Chemins de Fer Belgique (SNCB) and Societe National des Chemins de Fer Francais (SNCF), was responsible for providing high-speed services through the Channel Tunnel. Because European Passenger Services was heavily indebted, the UK authorities agreed to absorb the debt. A further grant worth Ecu2.1m was provided to LCR.

In analysing the case, the Commission considered whether the price paid by LCR for the right to construct and operate the CTRL was set according to correct market mechanisms or not. It concluded that the UK had awarded the contract on the basis of a fair, open and transparent bidding process, in line with EC procurement rules, and that the costs of building maintaining and operating the link, together with the risk taken on by LCR, were in relation to the support package on offer and the revenues achievable from operating the line. As such, the arrangements for building the link would not involve state aid.

The CTRL project later encountered problems, as passenger service levels on the Eurostar high-speed services fell below predicted levels; and, as a result, LCR's revenues failed to meet anticipated targets. The company informed the UK authorities that it would be unable to complete the project without a further grant of £1.2bn. This the UK authorities refused to provide, instead asking LCR to come forward with revised proposals to guarantee the completion of the project without an increase in the direct grant. The result was a rescue package under which LCR planned to carry out the project in two stages, to be completed in 2003 and 2007, with the UK providing indirect support in the form of government guarantees, tax concessions, and a mechanism to support access charges. The Commission approved the new measures in December 1998, on the grounds that the project was "of European interest".

Commission approval for CTRL rescue package

Italy told to recover restructuring aid to rail sector firm

Finally, it is worth noting a rare Decision in the railway sector for the recovery of aid. Two Italian firms, Keller and Keller Meccanica, both of which originally belonged to the Keller Group, were declared insolvent at the same time, in 1994. They were placed into receivership, and an administrator was appointed to draft recovery programmes for them. The administrator also agreed to ensure the completion of existing orders while a buyer for the companies was found. If no sale were to prove possible, the companies were to be liquidated. An aid package provided by the Italian government at the time, and notified under the EC guidelines for restructuring aid (Chapter Two), consisted of a soft loan of L33.839bn for Keller, of which the aid element comprised L4.288bn and a further soft loan of L6.5bn for Keller Meccanica, with an aid component of L0.903bn. Italy also covered 50% of the loan in each case with state guarantees.

Italy ordered to recover aid from Keller

In March 1997, the Commission opened an investigation into the aid plan. In July 1998, it decided the soft loans could not be authorised as restructuring aid and demanded that Italy recover aid worth a total of Ecu2.67m granted to the two rolling stock companies. "Completion of existing orders is not tantamount to restructuring", it said, and affirmed that aid for such orders could not constitute part of a "feasible, coherent and far-reaching plan to restore a firm's long-term viability". Because they were provided simply to help the companies operate until a buyer could

be found, it stated, the loans were illegal under EC law, and Italy must recover its money. The Commission agreed to take no action over the state guarantees, following a commitment by Italy not to implement them.

ANTITRUST ACTIONS MAKE HEADWAY ONLY IN FREIGHT SECTOR

Despite the fact that liberalisation of the Community's railways has lagged behind the development of the single market in other sectors, the Commission has made efforts to impose a coherent competition policy. Since the entry into force of the Rail Development Directive, it has adopted a number of important Decisions, many of them concerning the relatively liberal downstream combined transport market. However, while its attempts have been modestly successful as regards the freight market, its efforts to police the passenger sector have been less productive.

Traditionally, international rail transport within the EU has been subject to a wide range of collaborative agreements drawn up by the national operators within the Union Internationale des Chemins de Fer (UIC). In recent years, the Commission has begun applying more pressure to ensure that such accords comply fully with EC law, and to persuade UIC members to notify both new and existing agreements. A landmark Decision, adopted in February 1993, focused on just such an agreement. In 1990, the twelve main EU rail operators, as members of UIC's "interunit subsidiary committee", decided to establish a common tariff structure for combined transport services. Under the agreement, they agreed to sell rail haulage services to specialised combined transport operators - either rail company subsidiaries or independent undertakings - using a single system for calculating prices according to factors such as the weight of loads.

UIC combined transport tariff accord approved for five years

Examining the agreement, the Commission concluded that, because rail companies would be prevented from adopting their own unilateral tariffs to attract traffic operating on competing combined transport routes, it would restrict competition in the market. However, the Commission also noted that the new tariff structure would make it easier to set prices for international services, and that operators buying haulage from the railways would still be able to compare the prices offered on different international routes and take advantage of competition between those routes. In addition, it observed that the introduction of a common tariff structure would give operators a degree of legal certainty, allowing them scope to make investments. The agreement was therefore exempted for five years, subject to a range of conditions intended to protect operators from abuses by the rail companies. Renewal of the agreement was under scrutiny in 1999.

Deutsche Bahn's battle with Brussels over a freight rates Decision

The combined transport market was also the subject of an important negative Decision regarding dominance by a national rail company monopoly. In 1991, the Commission received a complaint from HOV SVZ, an association of firms operating in the port of Rotterdam, over the behaviour of the German rail operator, Deutsche Bahn (DB) (then Deutsche Bundesbahn). HOV accused DB of distorting the market for sea container transport.

The Commission's investigation revolved around accusations that DB had used its dominance in the German rail market to ensure the prices for combined transport services through Germany to ports in Belgium and the Netherlands were higher than for those to German ports. The Commission also examined DB's involvement in a cooperation agreement, known as the Maritime Container Network (MCN), drawn up between itself, SNCF, SNCB, the Dutch operator Nederlandse Spoorwegen, Intercontainer, and its own subsidiary Transfracht. Under the agreement, Intercontainer provided sea container services to and from Germany via Dutch and Belgian ports, while Transfracht offered similar services using German ports, buying traction from the rail operators. The parties consulted one another over pricing arrangements, and based their charges on a common tariff grid.

DB fined for abusing its dominant position

In March 1994, the Commission decided that DB had been deliberately abusing its dominant position in the German rail market, so as to ensure that per-kilometre container transport prices for transport within Germany were up to 77% higher for operations to or from Dutch or Belgian ports, than they were to German ports, thus favouring facilities in Hamburg (and its own transport operations) over Rotterdam or Antwerp. For this infringement, the Commission imposed a fine on DB of Ecu11m. It also declared that DB, through MCN, had tried to control pricing decisions, had prevented competition between Intercontainer and Transfracht, and had made market access for other potential competitors more difficult. However, because the network had been disbanded in the meantime, the Commission did not impose any additional fines.

Deutsche Bahn subsequently appealed to the Court of First Instance for the Decision to be annulled, or at least for the fines to be overturned. It argued that numerous Community measures

explicitly allowed tariff consultations between rail enterprises involved in combined goods transport. Moreover, it claimed that, in assessing the company's dominance, the Commission had only taken into account the rail market, rather than the inland container market as a whole, in which it did not hold a dominant position. It denied any abuse of a dominant position, and insisted that it was not responsible for the prices charged on routes going beyond Germany. The Court, in a lengthy ruling passed down in October 1997, rejected the application, refused to reduce the fines and made DB liable for costs. The company subsequently appealed to the Court of Justice, but was no more successful when the higher court ruled in April 1999.

Restrictive agreements allowed but with conditions

In July 1994, the Commission approved the creation of Allied Continental Intermodal Services (ACI), a venture jointly owned by British Rail (BR), SNCF and Intercontainer. Its aim was to provide a rail service allowing road vehicles, containers, swap bodies and semi-trailers to be carried from the UK to terminals in mainland Europe. BR and SNCF intended to provide traction for the services, and special wagons suited to transport through the Channel Tunnel.

ACI venture approved with conditions

In its Decision, the Commission said that the venture, although it would restrict competition between the companies involved and could constitute a barrier to the entry of other operators into the market, would also have benefits. These would include providing shippers with new wagons for an efficient, regular transport service following the entry into use of the Channel Tunnel, and the achievement of economies of scale which could be vital to the future success of combined transport. Although it approved the venture, the Commission imposed a number of conditions, notably that BR and SNCF should sell equivalent rail services and facilities to other operators wishing to enter the market besides ACI, and should make any unused wagons available to them.

Rail transport particularly suitable for new motor vehicles

In September the same year, the Commission chose to exempt from the competition rules a framework agreement between 13 rail companies on the carriage of new motor vehicles between assembly plants and distribution centres. The companies agreed to cooperate in drawing up a common tariff structure, defining their market strategy, and establishing specific marketing objectives; tariffs were to be set for each international route by the companies most directly involved. The Commission considered, as in the ACI case, that the venture would restrict competition between railway companies, but decided that its benefits would outweigh its disadvantages, and that its objectives were in line with Community policy on promoting the development of rail transport. It noted that "rail transport is a particularly suitable form of transport for certain products, such as new motor vehicles leaving factories, and that its use should, therefore, be encouraged".

UIC told to adjust combined transport agreements after three years

Two UIC agreements, both concerning the combined transport sector and both involving 12 major railway operators, were approved by the Commission in July 1995. The first established arrangements for technical and commercial operations - enabling the companies to subcontract parts of their operations to one another - for supplying international services. It also provided for the joint operation of some services, although not all trains on a single route and not to the extent that actual or potential competition between different routes would be eliminated. The second agreement set out principles governing agreements between rail companies, as suppliers of rail traction, and the combined transport operators buying those services. It also established arrangements for risk sharing agreements between rail company and transport operators where the launch of potentially unprofitable services was concerned.

UIC agreements for developing combined transport

The Commission concluded that both agreements could restrict competition between railway companies, and pointed to the fact that the Rail Development Directive permitted individual rail companies to carry out international combined transport services on their own. However, in reaching its Decisions, the Commission concluded that the agreements could prove essential in ensuring the development of combined transport and promoting economic progress. It also observed that rail companies should be given time to adjust to the changes introduced by the Rail Development Directive. Consequently, it granted the agreements a three year exemption, but, at the same time, urged the companies concerned to examine new arrangements for the future.

Green lights for NDX and ERS agreements after negotiations

The Commission also had some difficulty with a joint venture notification by DB, NS Cargo and CSX Europe. The venture, known as NDX Intermodal, was formed to carry out door-to-door inland transport services for intermodal freight, sold directly to cargo owners and ocean carriers. The

partners argued that the agreement would improve the quality of transport services, increase productivity, and further technical and economic progress. However, the Commission felt a clause giving the DB and NS Cargo first refusal on some of NDX's traction services could potentially foreclose the market, and it, therefore, persuaded the partners to remove it. Subsequently, the Commission published a notice in the Official Journal calling for third party comments, and, in September 1998, was able to approve the venture with a so-called comfort letter.

Not all the decisions taken to date have involved the rail companies themselves. In 1994, a number of shipping lines (P&O Containers, Nedlloyd Lines, Sea-Land Services and NS Cargo), through a network of agreements, set up a new company, European Rail Shuttle (ERS), to operate rail shuttle services through various parts of Europe. ERS was to buy train services from rail companies in order to sell wagon space back to the parent firms. A subsidiary of Nedlloyd, VGL Cargo, was established as a managing agent for ERS under one specific agreement. By late 1997, the shuttle company was operating services on routes between Rotterdam and Milan, Gemmersheim, Neuss, and Padua.

Clearance for European Rail Shuttle service

In their notification of the agreements to the Commission, the parties argued they would have no appreciable effect on competition and trade between Member States, and that the venture should therefore fall outside the scope of the Community Regulation on competition in inland transport (Chapter Two). However, when the Commission disagreed, they argued for an exemption on the grounds that ERS had a tiny proportion of the market compared to its main rival, Intercontainer, and that rail made up only a small proportion of the container market. Moreover, they said, the agreements were indispensable, because the financial risk would be too great to allow any of them to operate such a service alone. Following a request for comments from third parties in autumn 1997, the Commission closed the case by comfort letter in January 1998.

The Commission's failure to impose freight successes in passenger sector

Although the Commission has developed a relatively coherent methodology for assessing competition cases in the rail freight sector, notably with regard to combined transport, this is not yet the case for passenger transport - indeed, when attempting to apply a similar policy to that used in the freight sector, it has suffered setbacks.

In January 1993, the Commission was notified of the creation of European Night Services (ENS), a joint venture between DB, SNCF, SNCB, Nederlandse Spoorwegen, and British Rail (later European Passenger Services/Eurostar). The aim of the venture was to provide night time sleeper services, through the Channel Tunnel, from London to Amsterdam and Frankfurt (via Dortmund), as well as from Glasgow to Paris (via Swansea) and Brussels (via Plymouth). ENS would own its own rolling stock, while the parent companies would provide it with essential services such as signalling, traction and train crews.

The European Night Services Decision

The Commission adopted a Decision authorising the venture in September 1994. It concluded that the agreement was likely to restrict competition between ENS's parent companies and between them and other operators, who would be faced with obstacles to market entry. However, it also stated: "*Both business and leisure travellers will clearly benefit from new high quality rail services and also from competition between these new services and air transport.*" In line with Decisions on the freight side, the Commission exempted ENS subject to conditions. As with the ACI partners, for example, the ENS companies were obliged to offer the same facilities on the same terms (that they they provided for ENS) to any other "transport operator" wishing to set up a rival service. Moreover, the exemption was limited initially to eight years.

The Commission's European Night Services Decision overturned

The parent companies of ENS, together with the UIC, launched a series of actions in the Court of First Instance, seeking annulment of the Decision. The exemption, they claimed, was too short, and the conditions provided too little protection from competition. They claimed the Commission's analysis of the relevant market affected by ENS was flawed. Crucially, from a policy point of view, they argued that ENS was merely an "international grouping" of railway companies, as allowed for under the Rail Development Directive, and that the Commission's application of the competition rules as a whole was based on a false interpretation of the Directive. The Commission responded that ENS was not an "international grouping" at all, but a separate "transport operator" trading in a market downstream from that of the parent companies and entering into a commercial relationship with them for buying traction and other services. It was, therefore, potentially in competition with other "transport operators", such as other subsidiaries of the parent companies, which could enter the same downstream market. In its arguments, the Commission referred to the ACI case in order to justify its belief in the identity of a separate downstream market.

The Commission's defence of its ENS Decision

The Court ruled, in September 1998, substantially in favour of the applicants and annulled the Commission's 1994 Decision. It said the Commission's assessment of ENS's share in the relevant market, and of the appropriateness of the length of the exemption, were vitiated by insufficient reasoning. It also agreed that the Commission's assessment of the legal status of ENS had been flawed. It ruled that the Commission was wrong to draw a distinction between markets in the passenger sector. The concept of "transport operator" was lifted, it said, from the relatively open combined transport market, and was unknown in the field of passenger services.

The Court's ruling against the Commission

The Court concluded: "*On the market for combined transport of goods, railway undertakings do not sell transport services directly to consignors, except in very exceptional cases involving large consignments. Combined transport services are rather arranged and sold to consignors by combined transport operators, which may be subsidiaries of railway undertakings. Such operators are transport undertakings with their own specific equipment . . . and in order to perform those services operators must purchase rail traction and access to infrastructure from railway undertakings, the only parties able to supply them. While the rail segment of the market for combined transport of goods is to a certain extent an open market, in that rail undertakings are not the only operators on it, the same is not true of the market for rail passenger services, on which the only operators are railway undertakings, and to a certain extent international groupings of railway undertakings.*"

UIC's Leaflet 130 policy upheld by the Court of Justice

The Commission received a further setback in its attempts to apply competition law to the passenger sector in relation to the UIC's Leaflet 130. Originally drawn up in 1952, but modified several times since, the Leaflet laid down conditions under which travel agencies were allowed to sell rail tickets, both for domestic and international services, and the commission those agencies should receive. It also recommended the use of so-called model contract provisions in agreements between railways and agencies. Such provisions could include measures requiring the agency selling the tickets to use the official ticket prices and not to favour, through publicity or advice to the public, the use of competing transport modes over railways.

The Commission began to investigate UIC regarding Leaflet 130 in 1990, on the basis of Council Regulation 17 (which does not apply to the transport sector - Chapter Two). In November 1992, it took a Decision declaring the UIC terms illegal. UIC took the case to the Court of First Instance, claiming that the issue should have been considered under the provisions of the inland transport Regulation on competition (i.e. Regulation 1017/68), and not Regulation 17. Leaflet 130, UIC said, related in particular to "control of the supply of transport" and the "fixing of transport rates", both of which were covered by the transport Regulation.

UIC wins case over Leaflet 130

The Court, in June 1995, agreed that the Commission had based its actions on errors of law, and annulled the Decision. The Commission subsequently appealed to the Court of Justice, arguing that an important principle was at stake. The inland transport Regulation, it said, should be applied exclusively to the activity of transport as such, rather than related activities such as ticket sales. Moreover, it claimed the lower Court had erred in law by concluding that Leaflet 130 related both to the "supply of transport" and to "transport rates". However, in March 1997, the Court of Justice found the Commission's claims were invalid, and upheld the lower Court's verdict.

In parts of the EU, there has been a strong move towards denationalisation, and towards liberalisation beyond the requirements of Community law. The privatisation process has, though, created its own competition problems. In the UK, for example, the division of the former British Railways Board into 25 franchised operating companies led to the creation of a network of so-called inter-operator agreements between them, administered through the Association of Train Operating Companies. The aim of the agreements was to ensure that the benefits of restructuring within the industry should not be undermined by the loss of benefits derived from the unified operation of the railway, for example with regard to through ticketing, conditions of carriage, and passenger information services. The agreements were notified to the Commission by the UK Department of Transport on behalf of the operating companies, who argued that the arrangements were not designed to restrict competition, but rather to ensure that, after privatisation consumers would continue to benefit from network advantages. The Commission decided, in January 1998, not to oppose the agreements.

Privatisation cases referred to Brussels

The Channel Tunnel - a special case

The building and operation of the Channel Tunnel presented the Commission with a competition dilemma that was, at the time at least, unique. A vast undertaking, it was a major infrastructure investment, to be recouped over a very long period - made longer due to the problems encountered

during its building. A long-term agreement, with a duration of 65 years, between the tunnel concession holder, Eurotunnel, the French rail operator SNCF and the British Railways Board, was drawn up in 1987, prior to the opening of the Tunnel. It provided for the Tunnel capacity to be divided in two. One half would be made available for Eurotunnel's shuttle trains, while the other half would be used by BR and SNCF to run international passenger and freight trains linking the UK and continental Europe, on an exclusive basis unless they agreed to surrender part of their entitlement to other operators. The two rail companies would pay Eurotunnel user charges, and would pay a proportion of the costs of maintaining and renewing the infrastructure. They would endeavour to run as many trains as possible through the tunnel.

Conditions imposed on Channel Tunnel agreement

Initially, in 1989, the Commission agreed to authorise the agreement for a three year period from November 1988 onwards. Subsequently, it was asked to renew it and extend the exemption. In considering the case, the Commission decided that, although the agreements between SNCF, BR and Eurotunnel would restrict competition, the long-term nature of the agreement would make "a direct contribution to the project's financial equilibrium and ensure its success". It would also allow users to benefit directly from the introduction of new transport services with the opening of the tunnel. It therefore said, in a Decision adopted in December 1994, that "having regard to the exceptional nature of the Channel Tunnel", the agreement should be exempted for a 30 year period, beginning in November 1991. However, it imposed a number of conditions, notably that up until 31 December 2006, BR and SNCF should make 25% of the capacity nominated for international passenger and freight trains available to other railway undertakings if required. "The Commission's pragmatic approach here is aimed at facilitating the establishment of new European infrastructure that will contribute to a genuinely frontier-free area", the 1994 competition report said.

Channel Tunnel Decision annulled by the Court

The Commission's Decision, however, was later challenged in the Court of First Instance by SNCF and BR, who objected to the requirement to surrender a quarter of their rights to use the tunnel to third parties. They claimed that the Commission had made errors of fact in concluding that, without this requirement, third parties would be prevented from gaining access to the tunnel. The case revolved around the Commission's claim that the contract effectively reserved half of the tunnel's capacity for shuttle services and half for international freight and passenger services, and that, therefore, BR and SNCF were entitled to all the available capacity for freight and passenger services. The Court, in reaching its verdict in October 1996, agreed that the Commission had incorrectly interpreted the contract, and based the Decision on errors of fact. Therefore, it annulled the Decision. Subsequently, the Commission made a new analysis and went back to the parties suggesting they remove the offending clause altogether - which they did. The Commission was then able to close the procedure, in May 1999, with a comfort letter.

Limited application of merger rules to rail sector

In the immediate wake of privatisation in the UK, the Commission was called upon to vet several acquisitions under the merger Regulation. The French firm Compagnie Generale des Eaux took control, via its CGEA subsidiary, of two regional rail operators, Network South Central and South Eastern Trains, both of which operated passenger services in Southern England. Approving the ventures, in May and October 1996 respectively, the Commission concluded that, although CGEA already had transport interests in France, there was no risk of a dominant market position being created or reinforced in the market concerned.

It reached a similar Decision in April 1997, when considering the takeover of the Thameslink franchise by the UK firm Go-Ahead and Via Generale de Transport et d'Industrie (part owned by Compagnie Generale des Eaux). Although Go-Ahead already operated a separate UK rail franchise, Thames Trains, which had a network overlapping slightly with that of Thameslink, and also had bus interests in London and Brighton, the overlaps were not considered significant.

In December 1998, the Commission approved the creation of Inter-Capital and Regional Rail (ICRR) to take over the management of Eurostar UK, the UK partner in the Channel Tunnel high-speed passenger service. ICRR was planned as a joint venture between the French and Belgian national rail operators, SNCF and SNCB, the UK bus and rail firm National Express, and British Airways (BA). The venture was approved after the partners agreed to meet the Commission's concerns over anticompetitive effects on the London-Paris and Brussels routes, on which BA operated air services. At the time, the Commission noted that the venture, which saw BA take only a small shareholding in ICRR, was the first stage in a proposed two stage project, and that the second stage would intensify the airline's involvement. It would, therefore, need separate notification and approval, the Commission said.