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Arnd Busche\*

## How Does the Community Wish to Revitalise its Railways?

*In recent years the European Community (EC) has increased its rail transport activities. Current European policy is aimed at revitalising the railway sector, the intermodal market shares of which have strongly declined within the last decades, especially in the area of freight services. What measures has the Community taken to achieve its goal? How can its policy be characterised? Are EC actions really suited to improving the performance of European railways? Finally, by engaging in rail transport, do supranational actors take general regulatory reform principles into consideration?*

The Single Market programme which was adopted in 1985 led to an incremental opening of network industries that used to be heavily regulated by individual member states. Consequently, the Single Market policy also affected the European railway sector. In 1991, a Directive was adopted that envisaged the independence of railway companies from the state, separate accounting at least for infrastructure and transport services, the reduction of the indebtedness of public railways and finally, to some extent, the abolishment of monopoly rights.<sup>1</sup> However, this legislation and two supplementing directives containing harmonised conditions for permission to offer transnational services<sup>2</sup> and requirements concerning railway safety and the allocation of infrastructure capacity<sup>3</sup> did not have the expected effects. The modal split is still showing decreasing railway market shares in the EU.<sup>4</sup> While in 1970 these amounted to 20.1% and 10.2% in goods and passenger transport respectively, in 2001 these figures had decreased to 7.8% and 6.4%. The fact that the intensity of competition in European rail transport markets clearly lags behind the expectations associated with the first liberalisation measures has surely contributed to this decline. Although in the meantime the incumbent companies in some member states (e.g. Germany, Sweden) are challenged by some rival companies, they succeed to a large extent in maintaining their former legally protected monopolies.<sup>5</sup> Furthermore,

the Commission stresses that the single railway market has still not been realised and therefore the extent of transnational services remains rather small.

In order to revitalise European railways the Commission adopted a new initiative in 1996.<sup>6</sup> This article begins by outlining the Community railway legislation that followed this new strategy. The infrastructure package adopted by the Council and the European Parliament in 2001, the "second package" adopted in 2004, proposals for a "third railway package" adopted by the Commission in 2004 and, as far as railways are concerned, the activities of Trans-European Networks (TEN) are described. This is followed by a characterisation of EC policy. It is discussed whether current legislation and Commission proposals are intended to strengthen market forces by

<sup>1</sup> Directive 91/440 EEC of 29 July 1991 on the development of the Community's railways, OJ L 237, 24.8.1991, pp. 25–28.

<sup>2</sup> Directive 95/18/EC of 19 June 1995 on the licensing of railway undertakings, OJ L 143, 27.6.1995, pp. 70–74.

<sup>3</sup> Directive 95/19/EC of 19 June 1995 on the allocation of railway infrastructure capacity and the charging of infrastructure fees, OJ L 143, 27.6.1995, pp. 75–78.

<sup>4</sup> See European Commission: EU energy and transport in figures: Statistical pocketbook 2003, Luxembourg 2003, pp. 136 and 165.

<sup>5</sup> For a survey of the current degree of market opening in each member state see a study carried out by IBM and the Humboldt University, Berlin: IBM: Rail Liberalisation Index 2002 – comparison of the status of market opening in the rail markets in the 15 member states of the EU, Switzerland and Norway, Berlin 2003 ([http://www.europa.eu.int/comm/transport/rail/market/doc/rmms-final\\_en.pdf](http://www.europa.eu.int/comm/transport/rail/market/doc/rmms-final_en.pdf)).

<sup>6</sup> See European Commission: Whitebook – a strategy for revitalising the Community's railways, COM(96) 421, July, 1996 (<http://www.europa.eu.int/en/record/white/rail967/wp9607en.pdf>).

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dismantling barriers to trade and competition, or whether supranational decision-makers consider supplementary actions necessary in order to revitalise European railways. Subsequently, Community rail transport policy will be extensively assessed from an economic point of view.

### Current Community Railway Policy

Looking at current rail transport activities it is apparent that the industry is affected by European policy in various respects. For example, Directive 2001/12/EC refers to the legal opening of markets by liberalising the access to an exactly defined Trans European Rail Freight Network, on which approximately 75% of the entire EU rail freight takes place today. The complete opening of freight markets should be terminated by 15 March 2008,<sup>7</sup> whereby the Commission is even pushing for an acceleration of this process including the liberalisation of cabotage services. After negotiations in Parliament and the Council, however, the liberalisation is now intended to be completed on 1 January 2006 (cross-border services) and 1 January 2007 (domestic freight services) respectively.<sup>8</sup> Facing increasing intermodal competition from low-cost airlines, the Commission is proposing the opening up of the market for international passenger services in 2010 excluding services between two locations under a public service contract.<sup>9</sup> At present, a clearly defined temporal target for the complete liberalisation of European rail passenger transport (including cabotage) does not yet exist.

Closely linked to the market opening are questions related to the allocation of infrastructure capacity and the calculation of charges for the use of rail tracks. Directive 2001/14/EC creates a common regulatory framework that is intended to ensure transparent and non-discriminatory access to rail infrastructure.<sup>10</sup> The following aspects of the Directive are of importance.

- Based on individual national framework regulations rail track charges are set by network companies themselves. However, in the case of obvious dependencies between infrastructure undertakings and railway companies member states have to install independent charging bodies. This legislation appears relevant in particular to countries like Germany in which the incumbent railways are vertically integrated.
- With regard to the calculation of infrastructure fees the Directive basically envisages a marginal cost approach. Surcharges are nevertheless possible if they are justified by rail track scarcity and negative externalities or if they contribute to the amortisation of fixed costs borne by the network manager. However, the levy of surcharges is attached to special conditions that will be discussed below.
- For the case of infrastructure companies showing any discriminatory behaviour while allocating rail tracks, member states are forced to establish independent regulatory bodies. Railways can appeal to these authorities if they claim that they have been unfairly treated by network managers.

While these measures are directed toward the establishment of competition in rail transport markets, the technical linkage of national railway systems constitutes a further emphasis of current EC railway policy. Cross-border services, particularly in rail freight transport, are obstructed by different signal and electrification systems as well as different rail tracks. According to the Commission this heterogeneity contributes to the low competitiveness of rail transport compared to road haulage. Due to positive experiences with an interoperability directive addressing the high-speed rail system, Council and Parliament adopted appropriate legislation for the conventional rail sector.<sup>11</sup> This directive provides for the establishment of a “joint representative body” bringing together infrastructure managers, railway undertakings and industry. On behalf of the Commission, this body is responsible for drawing up binding technical specifications for interoperability (TSI) referring to subsystems of the conventional trans-European railway system. Member states have to ensure that components used in their national railway systems correspond to the TSI. Therefore, “notified bodies” in each member state have to assess whether manufacturers of subsystems conform to the TSI. Meanwhile, Parliament and Council have

<sup>7</sup> Art. 10 Directive 2001/12/EC of the European Parliament and of the Council of 26 February 2001 amending Council Directive 91/440/EEC on the development of the Community's railways, OJ L 75, 15.3.2001, pp. 1-25.

<sup>8</sup> Directive 2004/51/EC of the European Parliament and of the Council of 29 April 2004 amending Council Directive 91/440/EEC on the development of the Community's railways, OJ L 164, 30.4.2004, pp. 164-172.

<sup>9</sup> See European Commission: Proposal for a Directive of the European Parliament and of the Council amending Council Directive 91/440/EEC on the development of the Community's railways. COM(2004) 139 final, 3.3.2004 ([http://europa.eu.int/eur-lex/en/com/pdf/2004/com2004\\_0139en01.pdf](http://europa.eu.int/eur-lex/en/com/pdf/2004/com2004_0139en01.pdf)).

<sup>10</sup> See Directive 2001/14/EC of the European Parliament and of the Council of 26 February 2001 on the allocation of railway infrastructure capacity and the levying of charges for the use of railway infrastructure and safety certification, OJ L 75, 15.3.2001, pp. 29-46.

<sup>11</sup> Directive 2001/16/EC of the European Parliament and of the Council of 19 March 2001 on the interoperability of the trans-European conventional rail system, OJ L 110, 20.4.2001, pp. 1-27.

adopted a new directive<sup>12</sup> for clarifying the relationship between binding TSI and voluntary European standards adopted according to the new approach to technical harmonisation.<sup>13</sup>

The need for an amendment of the directive also arises due to the fact that in 2004 the joint representative body is to be replaced by the European Railway Agency for Safety and Interoperability.<sup>14</sup> According to a corresponding Commission proposal this independent body is to contribute to the development of common targets, methods and indicators in the field of railway safety. Furthermore, harmonised requirements referring to main elements of safety management systems for infrastructure and railway undertakings are to be developed by the agency.<sup>15</sup>

The European rail transport sector is also affected by the common infrastructure policy Trans-European Networks (TEN), which promotes several infrastructure projects in the member states by EC transfers. While the budget item "TEN-transport" covers about €700 million p.a., between 2000 and 2006 €29.2 billion from the structural funds are intended for financing transport infrastructure. The high share of railway projects indicates the importance that supranational decision-makers attach to this means of transport.<sup>16</sup> Meanwhile, this outstanding position is also legally codified, with at least 55% of the financial TEN resources reserved for rail transport projects. Today, the Commission points to insufficient investment efforts by member states and private actors. This is one reason for projects lagging behind the original schedule and for bottlenecks emerging on frequently used transnational transportation routes. Hence, the Commission proposes amendments of the general

TEN transport guidelines and the appropriate financial regulations.<sup>17</sup> Among other things, it is suggested concentrating political resources on projects which are in a legally defined special European interest. These projects exhibit a volume of approx. €220 billion, whereby the majority of the projects mentioned belong to the railway sector. To raise the effectiveness of European transfers an increase of co-financial levels up to 30% of the entire investment volume is suggested.

Finally, the Commission intends to extend its consumer and environmental policy to rail transport. For example, it aims at strengthening passengers' and customers' rights, including provisions for paying damages in the case of contract violations.<sup>18</sup> Further, noise and emission caused by rail transport are to be reduced at a supranational level.

### Characterisation of EC Railway Policy

The European rail transport legislation and current Commission proposals do not show a clear overall pattern: measures intended to strengthen market forces as well as legal acts restricting them are both components of current railway policy at the European level. In the following, this assumption will be proved by empirical evidence.

Both deregulatory and interventionist policies are not only covered abstractly by the European economic constitution that emerges from the treaties.<sup>19</sup> Rather, this heterogeneity also arises concretely in EC railway policy. For example, all Community actions that lead to the opening of railway markets which have been heavily regulated for a long time provide for deregulation: legally protected monopolies have been replaced by the concept of railway markets on which numerous suppliers compete with each other by offering domestic as well as cross-border services. Liberalisation is a first order condition

<sup>12</sup> Directive 2004/50/EC of the European Parliament and of the Council amending Council Directive 96/48/EC and Directive 2001/16/EC on the interoperability of the trans-European rail system, OJ L 164, 30.4.2004, pp. 114-163.

<sup>13</sup> For an introduction to the new approach to technical harmonisation see Jacques Pelkmans: The new approach to technical harmonization and standardization, in: *Journal of common market studies*, Vol. 25, 1987, pp. 249-269.

<sup>14</sup> Regulation 881/2004/EC of the European Parliament and of the Council of 29 April 2004 establishing a European Railway Agency, OJ L 164, 30.4.2004, pp. 1-43.

<sup>15</sup> Directive 2004/49/EC of the European Parliament and of the Council of 29 April 2004 on safety on the Community's railways and amending Council Directive 95/18/EC on the licensing of railway undertakings and Directive 2001/14/EC on the allocation of railway infrastructure capacity and the levying of charges for the use of railway infrastructure and safety certification, OJ L 164, 30.4.2004, pp. 44-113.

<sup>16</sup> According to Decision 1692/96/EC of the European Parliament and of the Council of 23 July 1996 on Community guidelines for the development of the trans-European transport network, OJ L 228, 9.9.1996, pp. 1-104, 10 out of 14 subsidised projects belong to the railway sector.

<sup>17</sup> See European Commission: Enlargement of the trans-European transport network: Commission proposes new projects and new funds to dynamise Europe, IP/03/1322, 1.10.2003 ([http://europa.eu.int/rapid/start/cgi/guesten.ksh?p\\_action.gettxt=gt&doc=IP/03/1322\[0\]RAPID&lg=EN&display=](http://europa.eu.int/rapid/start/cgi/guesten.ksh?p_action.gettxt=gt&doc=IP/03/1322[0]RAPID&lg=EN&display=)).

<sup>18</sup> See European Commission: Proposal for a Regulation of the European Parliament and of the Council on International Rail Passengers' Rights and Obligations, COM(2004) 143 final, 3.3.2004 ([http://europa.eu.int/eur-lex/en/com/pdf/2004/com2004\\_0143en01.pdf](http://europa.eu.int/eur-lex/en/com/pdf/2004/com2004_0143en01.pdf)); and European Commission: Proposal for a Regulation of the European Parliament and of the Council on compensation in cases of non-compliance with contractual quality requirements for rail freight services, COM(2004)144 final, 3.3.2004 (<http://www.europa.eu.int/comm/transport/rail/package2003/doc/com144-en.pdf>).

<sup>19</sup> The European Economic Constitution is discussed in depth in Werner Mussler: *Die Wirtschaftsverfassung der Europäischen Gemeinschaft im Wandel*, Baden-Baden 1998, Nomos, and Ph.D. thesis, University of Jena, 1997.

for competition in the railway sector. Therefore, all Community measures directed toward the transformation of former monopolies into markets with workable competition are basically intended to strengthen market forces. Apart from directives allowing free market access all actions that try to ensure competition in liberalised railway markets belong to deregulatory politics. Even if details of its legislation have to be criticised from an economic point of view (see below), it has to be conceded that the Commission has at least correctly identified the core economic problem of liberalised network industries. Its proposals assume that large parts of rail infrastructure constitute an incontestable natural monopoly that combines economies of scale with high sunk costs. Therefore, the infrastructure manager is threatened neither by active nor by potential competition. This incontestable natural monopoly is also called a "monopolistic bottleneck", access to which is a prerequisite for supplying services.<sup>20</sup> As a consequence of monopolistic bottlenecks, competition at the service level is endangered by two factors. First, non-regulated bottleneck operators have incentives to set sub-optimal Cournot prices. Compared to prices that equal marginal costs, the allocated quantities are too small for social welfare to be maximised. Secondly, network enterprises might possess discrimination opportunities when they allocate rail track capacity. Especially if infrastructure operators and suppliers of transportation services are legally linked to each other, the preferential treatment of their "own" company seems to be a realistic threat. Incumbent European undertakings can thus preserve their monopolistic positions. Under these conditions, it is difficult for new competitors to increase market shares even in liberalised railway markets. If EC actions include the regulation of these monopolistic bottlenecks, they basically try to carry out competition at the railway service level. Market forces are of course restricted by these public interventions, but the latter can be qualified as instruments leading to workable competition between service suppliers. They are not primarily aimed at organising the railway sector politically. Therefore, it seems unjustified to presume that the Commission takes an interventionist attitude with reference to its bottleneck regulation. Public action seems necessary to establish welfare-increasing competition, so that it finally intends to strengthen market forces. Without already assessing the appropriate Community activities, it should be noted as an intermediate result that its measures to safeguard the independence of infrastructure managers from service undertakings, to regulate rail track charges

and to establish regulatory bodies basically intend the transformation of formerly legally protected monopolies into markets with workable competition. Therefore, they should not be qualified as strictly speaking interventionist.

Regardless of the above-mentioned liberalisation efforts, there is convincing evidence for the fact that an active political organisation of European rail transport is intended by supranational decision-makers, too. How does this fit with legislation that aims at decreasing national political influence in the railway sector and thus strengthening competition between suppliers of transport services? The common policy is primarily targeted toward the revitalisation of European railways, which show decreasing market shares especially compared to road transport. This goal is stressed by the Commission in almost all its transport policy publications. Community action is intended to contribute to raising the relevance of railways. The Commission regards all measures that help to introduce and/or guarantee competition in the railway sector as important instruments for achieving this goal. The positive functions of competition (cost and price reductions, quality increases) could raise the attractiveness of rail transport. Thus, supranational decision-makers expect positive impulses for rail transport from their liberalisation policy without any further activities. However, the Commission considers supplementary actions necessary. Consequently, its railway policy extends beyond market opening and the regulation of monopolistic bottlenecks.

For example, Community measures referring to railway safety and the interoperability of national rail transport systems as well as activities to increase passengers' rights are on the one hand justified by Single Market requirements and intended to intensify the supply of cross-border services. The Commission stipulates that divergent national standards constitute an important barrier for transnational service supply. A closer analysis of appropriate Community measures indicates, however, that a removal of trade barriers is only one goal the Commission is trying to achieve with its proposals. Following the general provisions for harmonising national laws within the Single Market,<sup>21</sup> the Commission strives

<sup>20</sup> For an introduction to the concept of monopolistic bottlenecks see Günter Knieps: Limits to the (de-)regulation of transport services, Diskussionsbeiträge des Instituts für Verkehrswissenschaft und Regionalpolitik, Universität Freiburg i. Breisgau, No. 99, 2004.

<sup>21</sup> Referring to the approximation of laws, Art. 95 para 3 TEC stipulates that „the Commission, in its proposals (...) concerning health, safety, environmental protection and consumer protection, will take as a base a high level of protection, taking account in particular of any new developments based on scientific facts.”

for high regulation levels in rail transport, too. Apart from its liberalisation efforts in the Single Market, the Community pursues further political objectives like environmental and consumer protection. This not only affects its economic policy in general, but is also reflected in its railway activities.

Evidence for the fact that supranational decision-makers intend increasingly to influence the rail transport sector can also be found in TEN politics. Although member states are still responsible for the organisation of their transport infrastructure in the first instance, Community efforts to run its own policy have increased in recent years. The fact that a majority of EC transport projects belong to the railway sector indicates that especially this means of transport is to be promoted politically. Hence, EC transfers are supposed to raise the attractiveness of the railway sector in order to increase its market shares.

Overall, it has to be noted that in order to revitalise European railways, Community action is not confined to market opening, the transformation of monopolistic structures and the safeguarding of workable competition. In fact, the strengthening of market forces contributes to an increase of the sector's efficiency. However, it is not considered to be sufficient, so that supplementary actions appear to be necessary.

### **Economic Assessment of Common Railway Policy**

While above we have described supranational railway policy, Community activities will now be assessed from an economic point of view. Competition in the railway sector can only be established if non-discriminatory market access is ensured. The threat of infrastructure managers treating similar service suppliers unequally when allocating rail tracks arises particularly in the case of vertically integrated rail transport undertakings. As long as network operators and suppliers of transport services are closely interlinked, the former have incentives to favour their "own" company. This issue is accurately expressed by Ewers: "It would be a great miracle, if a vertically integrated railway undertaking did not discriminate against third companies when granting access to railway markets".<sup>22</sup> Hence, current EC policy might contribute to reducing discrimination incentives and opportunities because Directive 91/440/EC providing for separate accounts for infrastructure and service undertakings is tightened by Directive 2001/12/EC

that forces national railway companies to publish separate balance sheets as well as profit and loss accounts. Although a further institutional separation is still not mandatory for member states, Art. 6 para. 3, Directive 2001/12/EC might have compensatory effects. It stipulates that "functions determining equitable and non-discriminatory access to infrastructure (...) are entrusted to bodies or firms that do not themselves provide any rail transport services". Among these functions is e.g. the issuing of operation licenses, that has also to be carried out by bodies independent of any railway actor.<sup>23</sup> In the case of vertically integrated companies, the *ex ante* calculation of rail track charges (see below) has to be accomplished by extra bodies in a non-discriminatory manner. Mandatory regulation authorities independent of infrastructure managers and rail transport companies constitute a further part of EC railway legislation. According to Art. 30 para. 1, Directive 2001/14/EC these bodies have to examine, at the request of individual railway undertakings, whether rail track allocation and the calculation of charges has been executed non-discriminatorily.<sup>24</sup> This indicates that the supranational regulatory framework not only contains actions for safeguarding fair access to rail transport markets *ex ante*, but forces member states to supervise infrastructure operators *ex post*. European policy is directed toward the intensification of competition in the railway sector and has therefore basically to be positively assessed. Further, it is remarkable that EC measures do not provide for a comprehensive centralisation of regulatory competencies. The fact that usually public or private member state bodies have to implement supranational legislation corresponds to the principle of subsidiarity, which might increase the quality of European railway policy.

### **Monopolistic Bottleneck**

Due to its monopolistic bottleneck characteristics, the *ex ante* regulation of rail track charges is justified by normative theory. This regulation has to be aimed at increasing allocative efficiency while simultaneously taking the deficit problem of natural monopolies caused by high fixed costs into account. Furthermore, the extension of network-specific market power to downstream levels through discrimina-

<sup>22</sup> Hans-Jürgen Ewers: Zur Zukunft des europäischen Schienenverkehrs, in: Nymphenburger Gespräche: Mobilität und Verkehrswirtschaft im 21. Jahrhundert, Munich 1999, pp. 4-15, our translation.

<sup>23</sup> Art. 3 Directive 2001/13/EC of the European Parliament and of the Council of 26 February 2001 amending Council Directive 95/18/EC on the licensing of railway undertakings, OJ L 75, 15.3.2001, pp. 26-28.

<sup>24</sup> Directive 2001/14/EC of the European Parliament and of the Council of 26 February 2001 on the allocation of railway infrastructure capacity and the levying of charges for the use of railway infrastructure and safety certification, OJ L 75, 15.3.2001, pp. 29-46.

tory behaviour by infrastructure operators must be prevented.

If Directive 2001/14/EC is examined against this background, the lack of fixed cost considerations in particular becomes evident. For example, the scientific advisers at the German Federal Ministry for transport, building and housing criticise the European regulatory framework. They point to the paradox effect that costly infrastructure extensions reduce scarcities so that, *ceteris paribus*, legally allowed surcharges decrease. Investments in rail tracks may thus cause declining revenues for infrastructure managers. This would lead to an increase in deficits, which have to be compensated by public transfers. Furthermore, this need for supplementary public transfers represents a hardly calculable residual which can cause problems for the *ex ante* planning of national budgets.<sup>25</sup> Art. 1 para. 3, Directive 2001/14/EC also grants opportunities for member states to exclude its application to those traffics regularly hit by scarcity problems and which can thus contribute particularly to alleviating the deficit problem. As large public transfers will therefore continue to be necessary in the future, the existing legal framework creates few incentives for infrastructure managers to reduce X-inefficiencies.

The interlinking of the economic regulation of rail track charges with specific transport and structural policy objectives is also controversial. The provisions of Directive 2001/14/EC try to promote railways at the expense of other means of transport. This assumption is proved by the following examples: regulations by member states need not necessarily oblige infrastructure managers to levy scarcity surcharges (Art. 7 para. 4); environmental surcharges are only possible if competing means of transport have to cover their negative externalities too (Art. 7 para. 5); finally, the intermodal competitiveness of cross-border rail freight services generally has to be considered when calculating rail track charges (Art. 8 para. 1). All these examples indicate that the common railway policy not only reacts to market failures but is trying to increase the sector's market shares. The European regulation of rail track charges does not primarily provide for efficient tariffs that consider scarcities and externalities. Instead, low price levels should be realised to raise the attractiveness of rail transport. An increase in passenger and goods volumes are, however, not to be caused by

political interference. Instead, "correct" intermodal market shares arise if different means of transport can compete with each other on a level playing-field. Against this background, Directive 2001/14/EC has to be assessed negatively. Supranational framework legislation can be ameliorated if it follows strictly the economic guidelines for regulating monopolistic bottlenecks.

### Interoperability

In current EC railway policy, a special focus is put on the interoperability of national railway systems. The fact that the more or less isolated development of national rail transport markets has led to technically divergent and weakly coordinated railway systems is not only stressed by the Commission, but is to a large extent undisputed in the literature, too.<sup>26</sup> Two economic problems arise. First, the insufficient linkage of systems prevents the exploitation of potentials resulting from the enlargement of networks. Secondly, the costs of cross-border transport increase in the case of a lack of interoperability, which could also reduce the extent of intramodal competition. Hence, the technical harmonisation of those systems which are responsible for the insufficient linkage of individual national railway systems can contribute to alleviating the problems outlined.

The "production" of interoperability might, however, also be possible through the interaction of supply and demand. Independent, privately owned network operators who try to maximise profits when selling the rights to rail track usage face incentives to increase the quality of their supply. If the degree of technical linkage constitutes an important parameter for rail track demand, it has to be assumed that infrastructure managers themselves will provide for the interoperability of heterogeneous railway systems.<sup>27</sup> To that extent, the removal of trade barriers and the intensification of competition could contribute to the alleviation of interoperability problems. Against this background, the adoption of harmonised European standards by supranational decision-makers might be superfluous. Furthermore, the central harmonisation of laws is faced by typical knowledge problems of public action and it might also reduce the welfare-increasing effects of institutional competition between member states. Even if the relevant EC legislation provides for

<sup>25</sup> See Wissenschaftlicher Beirat beim BMVBW: Faire Preise für die Infrastrukturnutzung: Ansätze für ein alternatives Konzept zum Weißbuch der Europäischen Kommission – Gutachten vom August 1999, in: Internationales Verkehrswesen, Vol. 51, 1999, pp. 436–446.

<sup>26</sup> See Wissenschaftlicher Beirat beim BMVBW: Verkehrspolitische Handlungserfordernisse für den EU-Beitritt von MOE-Staaten, in: Internationales Verkehrswesen, Vol. 72, 2002, pp. 1–24.

<sup>27</sup> See Henning Sichel Schmidt: Das Programm "Transeuropäische Netze" der EU – ein sinnvolles Konzept für den Verkehr von morgen?, in: Die Weltwirtschaft, Vol. 48, 1997, pp. 396–425.

the participation of market actors (see below), a closer examination of solutions relying on market forces might be advisable.

### Common Safety Policy

The common railway safety policy causes even greater doubts than the activities concerning the interoperability of railway systems. First, it is disputed whether public intervention in the market is at all necessary. Even if this is to be affirmed, it has to be asked, secondly, whether the appropriate competencies should be centralised at the Community level.<sup>28</sup>

From an economic point of view, public safety regulations are basically justified by externalities or information asymmetries. The theory of market failure shows, however, that public actions are not always necessary because market actors themselves take negative external effects into account or provide for a reduction of information inequalities. If it is assumed that safety is a decisive demand factor in rail transport, the sheer intensification of intramodal competition leads to an increase in railway safety. Profit-maximising network managers and railway companies therefore have incentives to invest in safety without any legal requirements as these investments raise the attractiveness of their service supply. Safety regulations adopted by public authorities are thus frequently redundant and restrict market forces to too large an extent so that market failure could be replaced by government failure. Following economic analysis, decision-makers should therefore carefully assess whether safety regulations are really suited to improve market outcomes.

Even if competition leads to sub-optimal safety levels and supplementing public action thus appears to be necessary, it is questionable whether legislative competencies should be delegated to supranational authorities. To justify its harmonisation activities the Commission often refers to Single Market requirements. Although divergent national safety regulations could in fact contribute to the fragmentation of railway markets, supranational actors should consider other instruments besides the harmonisation of national laws for dismantling trade barriers and guaranteeing the free movement of labour and capital. The principle of mutual recognition, according to which member states are obliged to accept imports of goods (and

to a lesser extent also services) legally produced and marketed in another EU country, could ensure the implementation of the Single Market by simultaneously preserving the variety of legal institutions. Even if Commission studies indicate that mutual recognition is sometimes faced with problems, its application to rail transport should nevertheless be considered by supranational decision-makers.<sup>29</sup> In contrast, a comprehensive legal harmonisation prevents institutional competition and could therefore reduce the static and dynamic efficiency of rules.<sup>30</sup> The centralisation of competencies is further criticised because it has to be assumed that European legislation provides for high safety levels, contradicting the preferences of citizens in many member states: in order to avoid competitive disadvantages resulting from low safety levels in other EU countries, market participants in member states with high standards have incentives to transfer their own regulatory system to their counterparts.<sup>31</sup> Therefore, they might act as allies of the Commission, which is obliged by the treaties to take as a base high levels of safety in its proposals. The fact that less regulated countries accept higher safety levels actually contradicting their own preferences could be explained e.g. by concessions in other policy fields. Particularly, the European structural and cohesion funds could be used for compensation. As these funds are finally financed by weakly organised taxpayers in highly regulated and rich member states, Community measures are well enforceable against their interest.

Overall, it becomes obvious that supranational decision-makers should restrain themselves from adopting legal acts referring to railway safety. European activities often do not convince with reference to the Single Market, because the latter might also be implemented by resorting to the principle of mutual recognition. Compared to the harmonisation of national law, this instrument restricts market forces far less strongly, promotes institutional competition and accounts for differences in national preferences.

<sup>29</sup> Advantages and drawbacks of the principle of mutual recognition are discussed in depth in Jacques Pelkmans: Mutual recognition in goods and services: An economic perspective, European Network of Economic Policy Research Institutes, WP No. 16, Brussels 2003 (<http://www.enepri.org/Publications/WP016.pdf>).

<sup>30</sup> The impacts of and prerequisites for competition between rules are analysed by e.g. Horst Siebert, Michael J. Koop: Institutional competition versus centralization: *Quo vadis Europe?*, in: Oxford Review of Economic Policy, Vol. 9 (1993), pp. 15-30.

<sup>31</sup> This issue is also known as the "strategy of raising rivals' cost". For an application to the process of European centralisation see Roland Vaubel: Social regulation and market integration: A critique and public-choice analysis of the Social Chapter, in: *Aussenwirtschaft*, Vol. 50, 1995, pp. 111-132.

<sup>28</sup> The following remarks can also largely be applied to the current EU policy to protect railway customers. Particularly, the question arises whether special legal provisions to reach policy goals are at all necessary. Self-commitments by the industry can provide for satisfactory protection levels without at the same time restricting the freedom of market participants unnecessarily.



## TEN Policy

The EC transport infrastructure policy TEN could only be justified from an economic point of view if public subsidies refer either to EU-wide positive externalities or to cross-border externalities. While the former result primarily from frequently used transit connections (in many cases foreigners profit without financing the construction of these roads through taxes or charges), the latter are caused particularly in border regions due to the isolated planning of infrastructure. It should be stressed, however, that cross-border externalities could also be internalised by bilateral negotiations. This already illustrates that a European infrastructure policy should apply only subsidiarily; in accordance with the principle of equivalence, the financing of transport infrastructure should be carried out by its users. Even if preferable user charge models are not applied and transport infrastructure is financed out of tax revenues, a local, regional or national provision is usually required.

If those transport projects which are particularly eligible for European subsidies are examined, it becomes obvious that supranational decision-makers deviate at least partly from the guidelines outlined above. European legislation not only affects transit connections or closes gaps between national infrastructure systems. It also promotes projects of mainly national or regional relevance, e.g. Greek motorways. Thus, TEN policy is not only pursued to reach transport policy goals and to accelerate economic growth.<sup>32</sup> The redistribution of financial resources is intended, too. Evidence is shown by the fact that each member state has at least one transport infrastructure project which is promoted out of the EU budget. This kind of distribution may correspond to the reality of European decision-making; it is, however, no indicator of a common infrastructure policy guided by economic criteria. This redistributive element of TEN politics might create incentives for the acceding countries to demand European subsidies, too. Therefore, a further extension of TEN policy cannot be excluded in the future. As projects in these peripheral states are regularly not affected by those externalities outlined above, the problems of TEN policy might even be aggravated.

In addition to these fundamental problems of a common transport infrastructure policy, commenta-

tors complain about the inadequate effectiveness of transfers. Pure windfall gains could occur as the Community only partly finances projects in member states. European transfers might therefore not suffice to influence the behaviour of private and public actors in the member states. The intended raising of supranational co-financial levels from the present 20% to 30% of the entire investment volume could therefore contribute to the reduction of windfall gains, but does not eliminate the above-mentioned greater problems of EC transport infrastructure policy.

Overall, the increasing centralisation of transport infrastructure competencies is not convincing. Rather, these responsibilities should remain those of national, regional or even local authorities. If, however, member states argue today for a common growth policy at European level which is intended, among other things, to increase the efficiency of transport infrastructures and if one considers the TEN provisions in the European Convention's constitution proposal which remain unchanged compared to the current EC Treaty, an extensive reallocation of infrastructure competencies to member states could not be expected.

## Consideration of General Regulatory Reform Principles?

In view of the increasing relevance of regulatory politics at a national and supranational level, it does not surprise that both economists and political decision-makers themselves develop guidelines for regulatory reforms in order to improve policy outcomes.<sup>33</sup> Thus, the OECD and also the European Commission have designed appropriate frameworks. Following these frameworks, an efficiency-oriented reform of regulatory politics is, among other things, characterised by the following aspects.

- The taking of a wide range of interests into account by simultaneously avoiding the "capture" of regulators by those who are regulated.<sup>34</sup>
- Ensuring the influence of scientific expertise. Therefore, both the Commission and economists call for independent regulatory agencies.<sup>35</sup> These authorities should function as knots of networks consisting of a multiplicity of private and public actors.

<sup>33</sup> See OECD: The OECD report on regulatory reform, Volume II, Paris, 1997; and European Commission: European governance – A white paper, COM(2001) 428 final, OJ C 287, 12.10.2001 pp. 1-29.

<sup>34</sup> The capture theory was introduced by George Stigler: The theory of economic regulation, in: The Bell Journal of Economics and Management Science, Vol. 2, 1971, pp. 3-21.

<sup>35</sup> See e.g. Giandomenico Majone: Nonmajoritarian institutions and the limits of democratic governance, in: JITE, Vol. 157, 2001, pp. 57-78.

<sup>32</sup> With regard to the persistent weakness of European economies member states requested the Commission to adopt a European growth strategy. See European Commission: A European initiative for growth – Investing in networks and knowledge for growth and jobs. Final report to the European Council, Brussels 2003, COM(2003) 690 final/2, 21.11.2003 ([http://europa.eu.int/eur-lex/en/com/rpt/2003/com2003\\_0690en01.pdf](http://europa.eu.int/eur-lex/en/com/rpt/2003/com2003_0690en01.pdf)).

- Avoiding the adoption of policies that do not consider their impacts on related sectors. Instead, utmost attention has to be paid to the coherency of regulatory policies, which often affect a large number of sectors.
- Establishing an evaluation culture that reveals the impacts of planned measures *ex ante* and already implemented policies *ex post*. This comprises the ongoing examination of current legislation, too.
- Replacing traditional “command-and-control” measures through more innovative regulatory instruments. For example, the Commission suggests two new approaches: “co-regulation” and the “method of open coordination”. These approaches resort to the knowledge of private actors (co-regulation) or are based on the exchange of approved practices in member states (method of open coordination).

Notwithstanding objections<sup>36</sup> to the Commission’s “Governance” whitebook that illustrates how the Community wants to increase the quality of its policies, it has to be noted that the adherence to the guidelines outlined above could indeed improve regulatory policies at the European level. Thus, if these principles are applied to EC railway policies the latter has to be positively assessed.

The analysis of the current EC railway policy framework and the Commission proposals shows that the guidelines outlined above are at least partly considered.<sup>37</sup> The resort to scientific expertise is planned, as is a more comprehensive integration of interest groups, whereby the Commission explicitly stresses the need to take the interests of passengers into account. Thus, the Commission plays its role as an ally of diffuse interests in the common railway policy, too.<sup>38</sup> Moreover, it has to be noted that the Commission actively promotes voluntary self-commitments by the industry in order to reach environmental or consumer policy targets. In this respect, market forces are restricted to a lesser extent compared to “command-and-control” legislation. EC railway legislation also contains *ex ante* assessments of public actions and obligates supranational decision-makers to publish reports on the impacts

of the adopted legal framework *ex post*. These reports, combined with a comprehensive monitoring of European rail markets, provide the basis for the EC railway policy in the future.

Even if questions referring to the implementation of these general regulatory reform principles within the rail transport range cannot be answered today, their sheer identification leads to the assumption that EC decision-makers show at least their clear willingness to increase the quality of the common regulatory railway framework.

### Summary

This contribution has shown that supranational decision-makers have increased their activities in the railway sector in the recent past. Adopted legislation and Commission proposals aim at raising the intermodal market shares of European railways. This goal is to be achieved by resorting to two different instruments. Some actions are directed toward a strengthening of market forces in the Single Market. The opening of rail transport markets, the obligation to separate accounts for infrastructure and transport services as well as further regulations providing for a non-discriminating access to rail tracks could lead to (cross-border) competition between service undertakings that might increase the attractiveness of European railways. In order to revitalise the sector, however, supplementary public actions are considered necessary. The common TEN policy affecting the railway sector, the way rail track charges are regulated as well as the definition of common safety, interoperability and consumer protection standards should also contribute to reaching the goal of European railway policy, that is to say increasing the sector’s intermodal market shares. The analysis has shown, however, that EC activities directed at these problems are, at least partly, unjustified from an economic point of view. They might curtail those freedoms created by the dismantling of national barriers to trade and factor mobility. Hence, a stronger restraint by European decision-makers is often required. Compared to this, the analysis whether general regulatory reform principles are considered in EC railway policy yields better results. The intensification of policy evaluation as well as increasing resort to scientific expertise and knowledge of market actors are provided for in current legislation or Commission proposals. So even if EC interventions in the railway market partly exceed what is economically justified, it has to be conceded that supranational actors are at least trying to reach a high quality of railway policy by considering regulatory reform principles.

<sup>36</sup> See e.g. Christian Joerges, Yves Mény, Joseph H. H. Weiler (eds.): *Mountain or molehill? A critical appraisal of the Commission white paper on Governance*, Jean Monnet Working Paper No. 6/2001 (<http://www.jeanmonnetprogram.org/papers/01/010601.html>).

<sup>37</sup> See for details Arnd Busche: *Das Regulierungsverhalten der Europäischen Kommission – eine ordnungspolitische Analyse*, Aachen 2003, Shaker, pp. 304-308.

<sup>38</sup> Theoretical explanations and empirical evidence for the Commission promoting interests of large groups are given by Mark Pollack: *Representing diffuse interests in EC policy-making*, in: *Journal of European Public Policy*, Vol. 4, 1997, pp. 572-590.