

4th Railway Package: Cooperation agreements perpetuate unfair market barriers for third party railway undertakings

Input paper

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Bilateral agreements for cooperation between an Infrastructure Manager and a Railway Undertaking are not the answer to much-needed efficiency gains – they will only create more market barriers.

In response to the new ideas circulating around “cooperation agreements”, ERFA warns of the dangers in allowing IMs to gear e.g traffic management, infrastructure investment etc to the needs of one individual user. The IM can only become more efficient and more responsive to customer needs by working together with all users on the network.

Coordination Committees: the better solution

ERFA argues that desired efficiency gains on the rail network come from infrastructure managers who are able to have full oversight over their network, in close cooperation and consultation with all rail users on the network. That means, in line with the 4th Railway Package proposals, empowering infrastructure managers with the full responsibility over investments, planning, maintenance and operations so that they can get on with their job of providing quality and high performing infrastructure.

This also means ensuring that the infrastructure manager is focused on making strategic investments that are in the interest of the whole rail network, rather than serving the commercial needs of its own railway undertaking.

Railway undertakings and infrastructure managers have a natural interest in working closely together in order to communicate their needs and to ensure a return on investment for taxpayers' money. This can best be done via the proposed coordination committees, created by the Commission's 4th Railway Package.

There is a big difference between effective coordination to ensure the efficient use of taxpayers money, as allowed under coordination committees, and privileged partnerships with one or other railway undertaking, especially in the context of an infrastructure manager who already has an interest in securing maximum benefits for its own railway undertaking.

Bilateral agreements: a new tool for old discriminatory practices

ERFA has strong concerns over any such partnership agreements within vertically integrated structures. These structures have already proved to undermine the conditions for a fair playing field in the rail market. Why give them even more tools to discriminate against newcomers and their competitors?

The management of the natural monopoly that is the tracks should be done independently from the commercial interests of one or other privileged railway undertaking. Otherwise you simply run the risk of perpetuating monopolies.

It goes without saying that IMs and RUs have an interest in the performance of the other. You do not need privileged partnerships to create financial incentives. The financial incentives are already there. The RUs need efficient and well-managed infrastructure for the smooth running of their trains. The IM's fundamental job is to ensure the organisation and management of the tracks to allow this to happen, to serve the needs of its users.

To quote the Deutsche Bahn 2014 Competition report "competition and entrepreneurial activities establish the right framework for efficiently providing goods and services. There is no exception for rail transport."

These desired benefits from competition can only be achieved if you remove basic access barriers for newcomers. Concentrating even more control over the infrastructure in the hands of privileged rail operators sends a clear message to all other users of the network – the network is geared to run in the interests of a few privileged railway undertakings, who are your competitors, and who may use the advantage they have on the infrastructure against you at any time.

Creating another instrument that is open to misuse will simply lead to more discrimination.

A negative example: cooperation agreements in the UK

ERFA underlines the huge discrimination potential of such agreements, compared to the timid benefits demonstrated by the UK (the only Member State where such cooperation officially exists).

- **There are no identified customer benefits!**
The UK government argues that, within a vertically separated system, UK experience in 'partnership' or 'alliancing' working between infrastructure manager and a railway undertaking 'must remain possible in order to deliver benefits for customers of the railway.'
- There is one partnership/alliance/co-operation agreement in the UK – between RU South West Trains and IM Network Rail. There is a common management structure, but **there is no evidence of any financial benefit** to either party or to the Government; train performance has in fact got worse compared with other parts of the network. A freight operator has expressed concern about its effect on the performance of freight operations.
- **There is no evidence from the UK about cost savings from the first 'Alliance'**. Network Rail is forecasting several hundred million Euros savings during the next five years, but most of these appear to be the result of discussion between IM and RUs, where the RU suggests cheaper solutions to enhancements proposed by Network Rail. These discussions are of course necessary and if adopted, may save money, but could be achieved by proper communication between the parties without the complexity and perverse incentives which could occur with the bilateral nature of the current discussions on cooperation agreements.
- The UK experience does not support the statement that these agreements 'deliver benefits for customers'. **The same outcome could be achieved by requiring the RUs and IM to communicate regularly**, as they have done for several years in parts of the UK, and as is provided for under coordination committees in Art 7d of the Commission proposal.

NO to cooperation agreements in vertically integrated structures

It is difficult to believe that a co-operation agreement between an RU and IM in a vertically integrated structure will be fair on other passenger or freight operators. The purpose of the Commission requiring total separation was to ensure fair access to the infrastructure for all RUs. Chinese walls, even with strong regulatory supervision, are a poor substitute, but can work. However, a co-operation agreement, as under discussion, could enable the whole network of France or Germany to be included in an agreement between IM and RU which could effectively exclude any fair competition above the tracks. Even if it is for one route, the effect would be the same.

With a vertically integrated structure, the same company would effectively be in charge of signalling and operating trains. Naturally, the signaller would give priority to his own company trains. We cannot count on Regulatory Bodies (RBs) ensuring fair play. There are several problems here; most member states do not have the legislation which would allow the RBs to take such actions. Even if they had, can it be expected that the RB would take any significant action

against a national incumbent? The RB does not have the political power to take on an incumbent, nor the resources to police the tracks for contravention of rules. These kind of issues really cannot be solved by regulatory intervention. The legislation must prevent it being allowed to happen in the first place.

Regulation can't make up for inadequate legislation

Using Regulatory Bodies to sort out failures in legislation does not work, as retiring Competition Commissioner Joaquin Almunia said in his valedictory speech: 'European Union policymakers are relying too much on competition law to make up for their failures to adopt reforms and integrate the European economy'. Antitrust and competition enforcement puts a lot of power into the hands of the [European] Commission. But competition cannot solve all of the single market's problems.'

The only safe way of preserving the 4th Railway Package as a coherent whole is not to allow any form of cooperation agreement within vertically integrated structures.