



**Harmonizing Regulation, Limited Access And The Persistence Of The
East-West Divide: Liberalization And Cross-Border Passengers' Railway
Markets In Poland And France**

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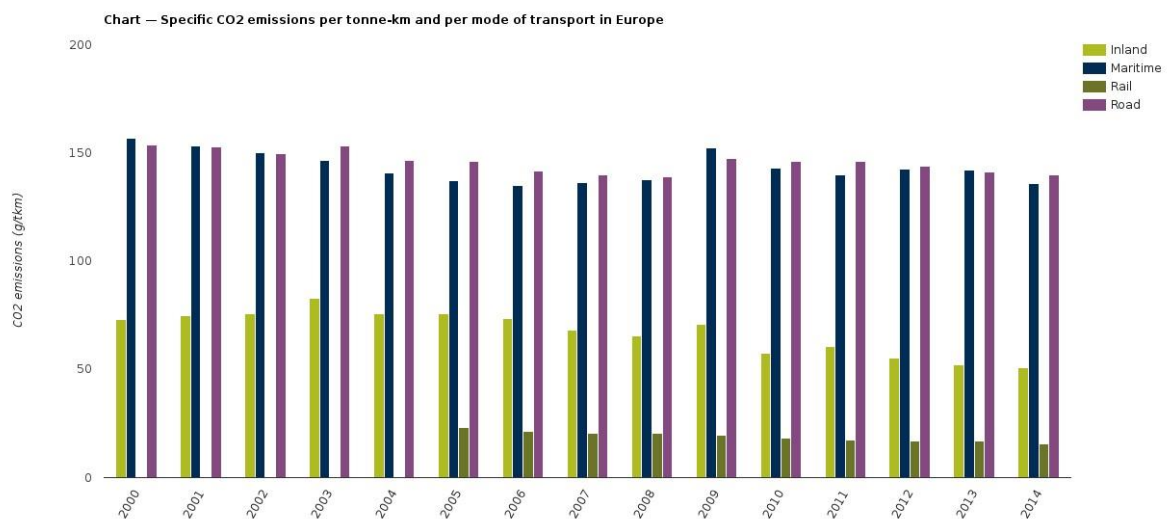
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Abstract

EU railway policy obliges Member States to fully liberalize the railways. Moreover, the Single European Railway Area stresses the importance of trans-European lines connecting all parts of the continent. This harmonized regime could nonetheless lead to a different understanding of the meaning of railways. One could expect the persistence of an East-West divide regarding the implementation of railway policy. Indeed, the beginning of the liberalization process started in the early 1990s and especially with the first railway package of 2001, i.e. before the accession of the New Member States. The latter had to implement the *acquis* before joining the EU and comply with the numerous administrative requirements foreseen in EU railway regulations, not least the separation of the infrastructure manager and the state-owned incumbent or the establishment of an administrative independent regulatory body. Besides, varieties of capitalism and different historical and political developments regarding railways between Western and post-Soviet states could also have proved to be an impediment to the harmonized implementation between these 2 groups. The study of the implementation and compliance of the 4 railway packages in France and Poland shows on the contrary a regulatory and practical convergence. Both states have regulators performing similar functions and obtaining similar results in terms of partial liberalization. They also share a similar perception of their role in governance: they are independent institutions with the best knowledge of their respective networks, leading them to oppose a further role of the Commission's DG MOVE in the liberalization of domestic markets. They share a similar voice within the Independent Regulators Group-Rail and face similar difficulties regarding their relationship with the infrastructure manager, that they see as an impediment in the liberalization process. The East-West divide persists however in terms of accessing the networks of other Member States. The opening of borders allows for incumbents to enter the network of other Member States. While French undertakings supported by the regulator face little hurdles in entering the networks of neighboring countries, the Polish regulator (interested in providing a rail access to Polish citizens working in Germany) still faces the refusal of German authorities to enter Germany's network, whereas Deutsche Bahn has been for long granted access to the Polish system and drop passengers as far as Warsaw.

Introduction: The absence of divide across Member States regarding the liberalization of passenger markets?

The Green Deal is the cornerstone project of the Von der Leyen Commission¹. It anchors all the policies and regulations enacted by the legislator. Its main aim is to promote a decarbonized economy without hindering citizen mobility in the European Union (EU). In that regard, the achievement of the Single European Railway Area established in 2012² is seemingly a core priority of the EU. Rail represents the most carbon-friendly transport mode in Europe today.



Data sources:

Railway transport - Goods transported, by type of transport provided by Statistical Office of the European Union (Eurostat)
PRIMES provided by National Technical University of Athens (NTUA)
European Consortium for Modelling of Air Pollution and Climate Strategies provided by European Commission
1990-2030 Environment Strategy Reporting System - The 2016 Report provided by International Union of Railways (UIC)

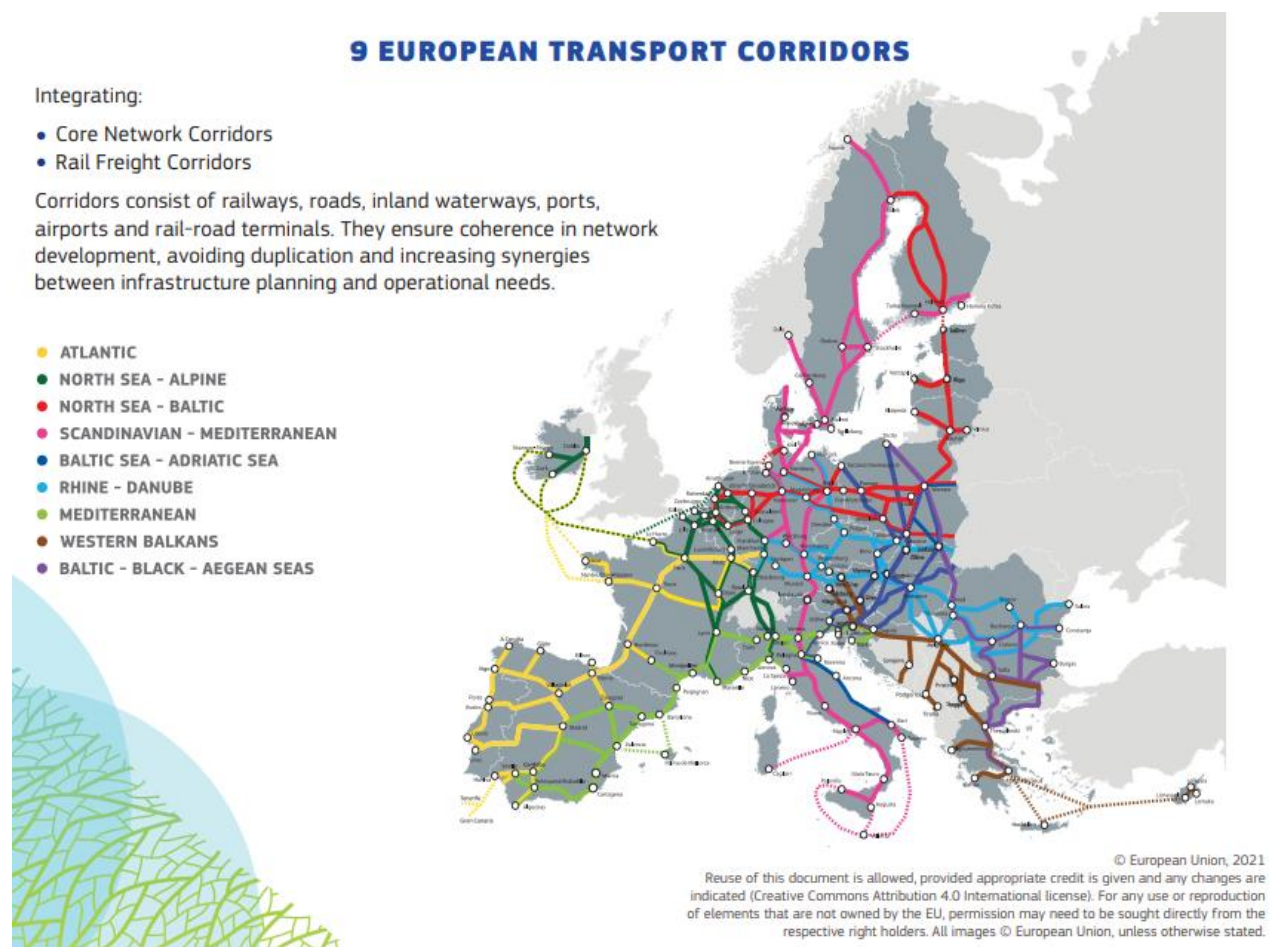


Source: European Environmental Agency, “Specific CO2 emissions per tonne-km and per mode of transport in Europe”, 04/01/2017: [Specific CO2 emissions per tonne-km and per mode of transport in Europe — European Environment Agency \(europa.eu\)](https://www.eea.europa.eu/en/press-releases/2017/04/specific-co2-emissions-per-tonne-km-and-per-mode-of-transport-in-europe)

¹ Communication From The Commission To The European Parliament, The European Council, The Council, The European Economic And Social Committee And The Committee Of The Regions: The European Green Deal, COM/2019/640 final, 11/12/2019: [EUR-Lex - 52019DC0640 - EN - EUR-Lex \(europa.eu\)](https://eur-lex.europa.eu/eli/comm/communication/2019/640/1/en)

² Directive 2012/34/EU of the European Parliament and of the Council of 21 November 2012 establishing a single European railway area (recast): <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A32012L0034>

If railways had been a Commission priority for decades³ and led to the first dedicated directive in 1991 that enshrined the separation of maintenance and use of the infrastructure⁴, the regulation of railways has picked up steam in the 21st century. No less than 4 regulatory packages⁵ were adopted in 2001, 2004, 2007 and 2013 in order to promote a sustainable railway policy that would favor competition on tracks and become a favored transport mode for citizens. The main focus lies in establishing trans-European corridors connecting the major nodes or hubs of passengers, similar to the network established for the transport of freight with the Trans-European Transport Network (TEN-T).



Source: European Commission. (2017). Mobility and transport. infrastructure - TEN-T - Connecting Europe, 14/12/2021: https://transport.ec.europa.eu/system/files/2023-03/Creating_a_green_and_efficient_Trans-European_Transport_Network.pdf

³ Helene Dyrhaug (2013) *EU Railway Policy-Making. On Track?*, Springer

⁴ Council Directive 91/440/EEC of 29 July 1991 on the development of the Community's railways: [Directive - 91/440 - EN - EUR-Lex \(europa.eu\)](#)

⁵ Summaries of the packages and links for the precise instruments may be found here for the [First](#), [Second](#), [Third](#) and [Fourth](#) packages.

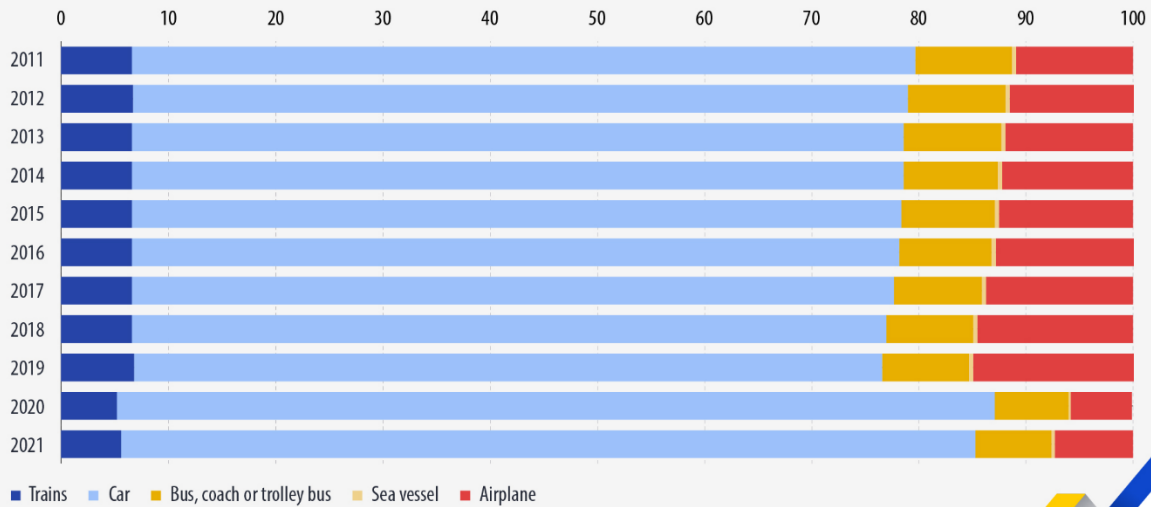
If the purpose of the Recast Directive of 2012 was focused on cross-border networks, the 4th Package of 2016 aims at duplicating the liberalization of trans-European lines to the domestic networks of Member States. The latter must ensure that competitive tendering *in* the market (here open competition on tracks) or *for* the market (attribution of the monopolistic use of a part of the network for a certain period of time, following a competitive attribution process) becomes the general rule of railway policy. If the package previewed a rather long transition period for adapting to these new rules, the expectation of Commission officials was that national administrations would slowly but surely implement the “market pillar”⁶ of railway policy. The purpose was that by the deadline of December 2023, no direct awards should be allowed (except for a few set of exceptions) and that opening should be complete.

A few weeks after the deadline, the 2 major objectives of EU regulations – increasing rail’s modal share and entrance of private undertakings – have not been fulfilled. Rail modal’s share has decreased between 2011 and 2023, only amounting to 5,1% of transport modes used by citizens. The liberalization of passenger markets started already in 2010 concerning international routes (with the introduction of “cabotage”, i.e. the possibility for a foreign undertaking to do several stops in a single Member State on a broader international route), aiming at replacing some airline connections (e.g. Berlin-Amsterdam), did not contribute to increasing rail’s share in passenger’s transportation.

⁶ As opposed to the “technical pillar” consisting in providing regulations related to security issues, such as driver’s licensing, interoperability at the border, etc. (see Ivana Katsarova and Damiano Scordamaglia, “The fourth railway package: Another step towards a Single European Railway Area”, EP In-depth analysis, March 2016: [https://www.europarl.europa.eu/RegData/etudes/IDAN/2016/579088/EPRS_IDA\(2016\)579088_EN.pdf](https://www.europarl.europa.eu/RegData/etudes/IDAN/2016/579088/EPRS_IDA(2016)579088_EN.pdf), pp. 16-17). The European Union Agency for Railways is a major player in the development of the technical pillar, but plays no role regarding the market pillar).

Means of transport in the EU, 2011-2021

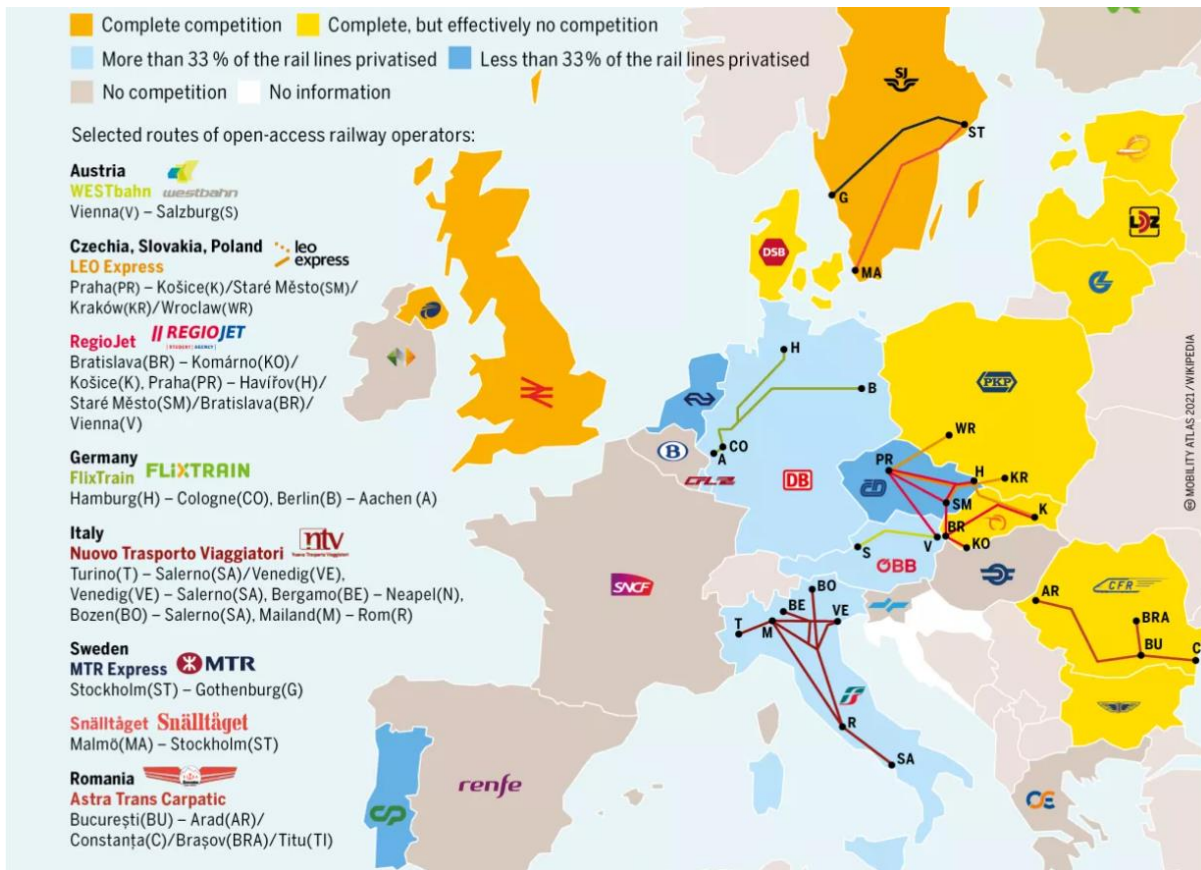
(Share of total transport performance)



eurostat 

Source: Eurostat, “EU people on the move: changes in a decade”, 18 September 2023

Besides, the progressive generalization of competitive tendering has kept favoring the incumbents, i.e. former state monopolies such as PKP or SNCF. The use of subsidiaries by incumbents (e.g. DB Regio and Netinera for *Deutsche Bahn*) has satisfied EU requirements in terms of separate accounts, but has mostly prevented the entrance of private undertakings in most Member States. Complete competition in the EU has only occurred in Sweden, whereas most states retain systems that formally apply competition rules but without effective competition. Some even have not introduced competition on the tracks at the time of the deadline.



Source: Heinrich Böll Stiftung, “Rail: The Challenges of a Single European Railway Area”, 03/02/21: <https://eu.boell.org/en/rail-the-challenges-of-a-single-european-railway-area>

This slow and uneven liberalization process is puzzling in terms of governance because the regulation of railways is similar to the ones found in other networked economies⁷. These refer to activities characterized by a closed infrastructure that have traditionally been under state monopoly. Sectors such as aviation, electricity and gas or telecommunications have also been subject to EU-led liberalization⁸. This process consists in the adoption of substantive and procedural rules. The main substantive principle is “unbundling”, i.e. separation of the maintenance of the infrastructure from its use. The idea is that maintenance can remain under state monopoly but that the infrastructure (telecoms cables, electricity grids, gas corridors, etc.) should be open to private undertakings. The EU legislator provided procedural requirements to ensure the implementation of liberalization. It enacted the creation or the consolidation of the prerogatives of independent administrative authorities, often referred to in the utilities sectors

⁷ In this paper, I will use “utilities”, “sector” or “networked” economies interchangeably.

⁸ See Emmanuelle Mathieu (2016) *Regulatory Delegation in the EU: Networks, Committees and Agencies*, Palgrave; Emmanuelle Mathieu and Bernardo Rangoni (2019) “A Matter of Degree? Experimentalism in EU Electricity and Telecoms Regulation”, *Regulation & Governance*, 13 (9):577-592

as “regulators”. These independent bodies should ensure compliance without interference from other state organs. The latter are assumed to retain strong ties with (at least partially) state-owned companies, leading to a potential bias in the attribution of market shares. These independent authorities are independent at national level but are led to cooperate with their counterparts from other Member States in European Administrative Networks⁹ (EANs). These are not formal EU agencies and therefore leave some leeway to their members (such as in the European Competition Network¹⁰) to establish common practices contributing to harmonization across Member States. If the efficiency of such networks has been questioned in the past¹¹, recent studies showed that several EANs have consolidated themselves as solid platforms of cooperation, even leading the legislator to formalize some of them as EU agencies¹².

The absence of variation across different economies of capitalism: the exceptionalism of rail ?

The regulation of unbundling by regulators has been effective in the energy, telecoms and aviation sectors, but remains superficial for railways despite of a regulatory involvement lasting more than 3 decades. How can the slow liberalization process of railways be explained despite similarities across utilities regulation in the EU? The main argument in the literature highlights path dependency and strong national preference for incumbents in the sector of railways¹³. The original hype started with the adoption of the first railway package¹⁴ faded rapidly with the stalling of railway harmonization, meaning that the state of the art on the subject is both scarce and mostly outdated, except for the historical institutionalist perspective of Helene Dyrhaug. Contemporary academic contributions come from railway specialists closely associated with the *Florence School of Regulation* of the European University Institute and take more the form

⁹ Dorte Sindbjerg Martinsen, Ellen Mastenbroek & Reini Schrama (2022) “The power of ‘weak’ institutions: assessing the EU’s emerging institutional architecture for improving the implementation and enforcement of joint policies”, *Journal of European Public Policy*, 29(10): 1529-1545

¹⁰ Francesca Pia Vantaggiato, Hussein Kassim & Kathryn Wright (2021) “Internal network structures as opportunity structures: control and effectiveness in the European competition network”, *Journal of European Public Policy*, 28(4): 571-590

¹¹ R. Daniel Kelemen & Andrew D. Tarrant (2011) “The Political Foundations of the Eurocracy”, *West European Politics*, 34(5): 922-947

¹² Martino Maggetti & Thenia Vagionaki (2022) “How to tame the beast: the diverse development of European networks regulating finance and competition”, *Journal of European Public Policy*, 29(10): 1590-1609

¹³ Helene Dyrhaug (2013) *EU Railway Policy-Making. On Track?*, Springer; “Transforming a steam train: a historical institutionalist analysis of EU railway policy”, *Journal of European Integration*, 44(6): 855-870

¹⁴ Christoph Knill & Dirk Lehmkuhl (2000) “An alternative route of European integration: The community’s railways policy”, *West European Politics*, 23(1): 65-88; Adrienne Héritier and al. (2001) *Differential Europe: The European Union Impact on National Policymaking*, Rowman & Littlefield Publishers

of detailed policy briefs detailing the contemporary technical details of railway regulations rather than exploring theoretical questions in terms of integration and governance¹⁵. The literature is also scarce in legal scholarship and highlights the potential barriers surrounding railway liberalization¹⁶, focusing on regulatory problems.

The absence of variation across territories: no East-West divide?

Equally puzzling is the absence of a clear geographical trend that would explain the uneven liberalization of the railway markets. The most striking absence is the one theoretically separating the East from the West. Western European states (WES) have been in the EU since the 20th century and have started the liberalization process in the early 1990s. They adopted the 1991 unbundling directives and every package ever since. This means that their respective governments have had a say in the entire process, and that liberalization was their choice of policy. The same cannot be said for Central and Eastern European (CEE) countries. Most joined in 2004, i.e. after the adoption of the Framework Directive, the First Railway Package and having to comply with the upcoming Second Railway Package at the time of joining the EU. CEE countries had to adapt to the substantive and procedural obligations already in place in EU-15. Second, the different histories of both groups regarding transportation could have led to different implementation processes. Western European states have enjoyed facilities regarding the availability of different transportation modes since the 1960s. The rise of the automobile as the privileged mode of transport happened early in the second half of the 20th century in Western Europe, whereas CEE countries were having a strong public transportation network where rail played an important role. WES abandoned several secondary parts of their railway networks that were underused with the rise of other modes of transports, and some major cities even abandoned intercity trains and trams in order to secure more parking space for cars. The same phenomenon occurred in CEE states after the Fall of the Iron Curtain, and is still ongoing to a large extent. WES on the other hand were victims of the success of cars, and tried to re-establish public transportation as a favored mean of transporting workers and passengers travelling for leisure. In other words, CEE countries still have a strong and thick

¹⁵ See for example Matthias Finger and Pierre Messulam (eds) *Rail Economics, Policy and Regulation in Europe*, Edward Elgar; Matthias Finger and Juan Montero (eds) *Handbook on Railway Regulation*, Edward Elgar

¹⁶ Javier Guillen (2022). The liberalisation of the European Union passenger rail market: New challenges for future public service contracts. *Competition and Regulation in Network Industries*, 23(1): 60-76

railway network coming from the communist times, whereas WES have a depleted and partially abandoned railway network focused on the connections of major hubs.

This gives rise to a set of conflicting hypotheses. On the one hand, WES could have achieved a higher level of liberalization than CEE countries since they had developed capitalist economies with a strong focus on competition since World War II (the economic argument). They orchestrated themselves the regulation of the railway sector by using the EU as a vehicle for liberalization. On the other hand, CEE countries had a strong railway network along with a societal consciousness transport public transportation that lasted long in the 20th century, meaning little need to update the infrastructure and allowing for the immediate entry of several undertakings, whereas WES had partially abandoned parts of their network and focused on major lines already busy if not saturated by the activity of the state-owned incumbent (the infrastructure argument). The economic argument is conducive of a “most-likely”¹⁷ theoretical design for WES regarding liberalization of railway passenger markets, whereas the infrastructure argument is conducive of a most-likely design for CEE countries. The purpose of this paper will be to explain the extents to which economic models and the states of the respective rail infrastructures play a role in the development of, or in this case the impediment of, liberalization in the railway sector.

The plan of the paper: tracing the common challenges of Polish and French administrative authorities regulating railways

This paper will attempt to grasp the actors’ perspectives in charge of implementing the liberalization process, with a focus on regulatory bodies. The successive railway packages have empowered 2 types of administrative authorities impacting potential competition on the tracks: regulatory bodies (RB) and infrastructure managers (IM). The former is assessing and authorizing the tendering process and allows or not new undertakings to enter the markets. IM determine capacity allocation (time slots) and levy charges for the use of the infrastructure. This administrative setup as a result of unbundling has led to the empowerment of authorities with competing objectives. Besides, their relationship vis-à-vis EU rules and institutions differ greatly, and in such a way that liberalization is slow. First, I will briefly detail the liberalization rules of the railway market (I). I will then expose the theoretical and methodological approach

¹⁷ Gerring J. (2012) *Social Science Methodology. A Unified Framework*, Cambridge University Press, 2nd edition

used of this paper, which relies on *Science and Technology Studies* (STS) and mostly on actor-network theory (ANT) (II). I will then present the findings regarding RB and IM and expose their relationship with their respective governments and EU institutions (III). Section III will display how the regulatory challenges faced by Polish and French regulators are alike. The differences in terms of network access by one state incumbent to another state's network are however conducive of unevenness between Poland and France. The former does not get access to the West (Germany in this case) whereas it can enter the network of other CEE countries. France on the other hand has no issue entering the network of its neighboring countries (IV).

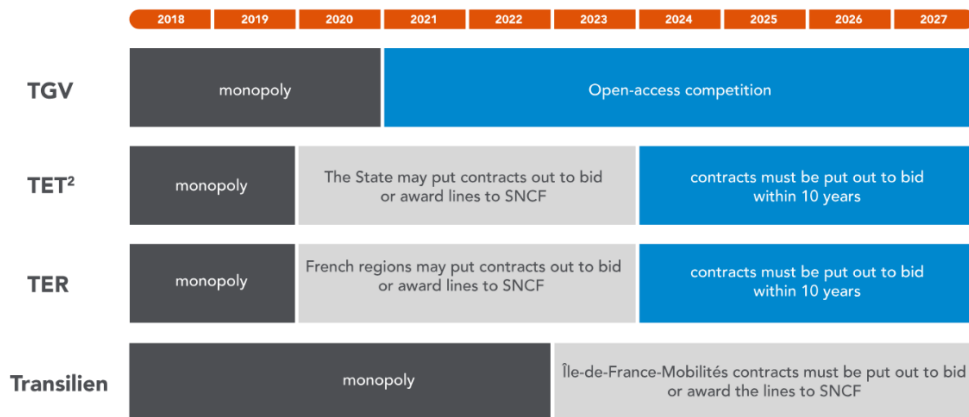
I) The liberalization of railway passenger markets: a slow and unachieved process

The unbundling of the railway sector in 1991 was meant to favor liberalization early. By demanding the separation of the service on tracks (run by the state-owned company) and maintenance of the infrastructure, the objective already was to favor the entrance of private undertakings in the market. This position was supported by the UK at the time, which was already in the process of privatizing its entire network¹⁸. But for other states not already pursuing such an objective, this process of 'automatic liberalization' did not occur. First, most Member States did not choose to adopt a strict separation between state-owned incumbent and IM. For some, e.g. Deutsche Bahn, a simple separation of accounts with a shift of debt to the IM was implemented. This absence of "vertical separation" has led to the criticism of having erected thin "Chinese Walls" between IM and incumbent, allowing the latter to possess privileged and uncompetitive information compared to other undertakings. Besides, the number of private undertakings interested in investing the railway sector was incredibly low, due to the high investment needed for the start of their activities and the difficulties to access specific rolling stock (see below).

The first railway package took a major step when it established RBs as independent authorities in charge of assessing the fairness of competition in or for the market. But the real first step of liberalization process occurred with the 3rd Railway package that introduced mandatory competition for international passengers' routes by 2010. While this step was mostly about creating a new market via the establishment of new lines across the EU, genuine competition started with the introduction of "cabotage", allowing an undertaking to make several stops in a

¹⁸ Christoph Knill & Dirk Lehmkuhl (2000) "An alternative route of European integration ... "

single Member State (just like historically done by the likes of SNCB, PKP or DB) as long as the whole journey was cross-border. The 4th railway package sought to replicate these rules on international travel to domestic markets. Adopted in 2016, the package previews several transition periods ended in 2023 in terms of liberalization domestic networks. High-speed national lines were to be open to competition by 2020, while regional services had to be subject to competitive tendering by December 2023.



Source: SNCF, “Rail Market Liberalization”, 21/03/24: [Liberalization of the rail market | SNCF](#)

Nonetheless, the principle of competitive tendering is subject to several exceptions. These are related to “public service obligations”, which are derogations allocated to Member States for lines that would not run a commercial profit and therefore necessitate state intervention¹⁹. Yet, as of 2020, major lines were subject to competition either in the market (allowing the common service of both incumbents and other undertakings, be these incumbents from other Member States or private undertakings), with entry granted by RBs and access authorized by IMs. As detailed above, such a competition is almost not happening, mostly for the internal competition between IMs and RBs and their different relationships with EU institutions and their counterparts. The following section will unveil how the findings were theorized and researched.

¹⁹ In accordance with art. 106(2) TFEU

II) Theory and methodology: bringing the infrastructure back in the mix

Theories of European governance mostly focus on actors interactions in their quest for power. The study of utilities, and railways in particular, seems to warrant the inclusion of material elements in the equation. STS provide theoretical tools for the inclusion of the agency of non-human actors, or “actants” in ANT terminology²⁰. Nature and human artefacts (such as the pre-existing state of the railway network) play a role in shaping the social and explaining the development of policy. Such an approach could prove particularly fruitful for studying European integration, considering that the EU is a polity in charge of regulating market “objects”²¹. The outputs of EU regulations are black boxes that have been sealed after the result of controversies. It therefore changes the point of departure of the enquiry by shifting the researcher’s focus on the object (here railways) rather than on the actors (such as EU institutions, governments, etc.). It advocates a rather inductive approach since it requires to follow controversies surrounding the appropriation of objects by other actants. Rather than assuming that the major political authorities in European integration necessarily dictate the course of policy action, focusing on controversies around the appropriation of objects means having a naïve but rather keen eye on the application or dismantling of an object, here market and railway liberalization. Following controversies such as the clash between the Czech RB and IM about the levying of charges²², or the united rebellion of RBs in 2011 against the original proposition of the European Commission to include in the 4th Railway Package the creation of a single European regulator²³ shows that EU policy implementation can escape the control its original creators and be given life by other actants. The daily life of EU railway policy is administrated by the national bodies in charge of its implementation. RBs and IMs are giving EU law its materiality and policy its concrete substance²⁴ and following their activities is as (if not more) indicative as following the Commission’s monitoring and reporting on the issue.

²⁰ Michel Callon (1984) “Some Elements of a Sociology of Translation: Domestication of the Scallops and the Fishermen of St Brieuc Bay”, *The Sociological Review*, 32(1): 196-233; Bruno Latour (2005) *Reassembling the Social – An Introduction to Actor-Network-Theory*, Oxford University Press

²¹ Brice Laurent (2022) *European Objects: The Troubled Dreams of Harmonization*, MIT Press

²² Court of Justice of the EU, C-453/20 – CityRail, 03/05/2022: [CURIA - Documents \(europa.eu\)](https://eur-lex.europa.eu/eli/jb/2022/0001/oj)

²³ See the founding document of IRG-Rail called “BACKGROUND PAPER on the Cooperation of European Rail Regulatory Bodies”, 31 May 2011: <https://irg-rail.eu/download/5/8/BackgroundPaperIRG-Rail.pdf>

²⁴ Faulkner, A., Lange, B. and Lawless, C. (2012) “Introduction: Material Worlds: Intersections of Law, Science, Technology, and Society”, *Journal of Law and Society*, 39(1): 1-19

In a pure ANT fashion, theoretical assumptions should be reduced to a strict minimum. They are nonetheless a few canons about the social (or “assemblages”) to be applied. The principles of “generalized symmetry”, “free association” and “agnosticism”²⁵ mean following the actants without prior assumptions about the balance of power and their possibility to “enroll” others. Here, the fact that the EU empowered RBs and IMS and asks them to cooperate among themselves and the Commission does not preclude that opposite directions may be followed. Regulations forge new associations that may be undone over time or never firmly established. The attempt of the Commission of establishing itself as *primus inter pares* by establishing EANs in order to enhance compliance with EU law does not necessarily lead to successful cooperation.

An empirical assessment of the appropriation of the passengers’ market by actants is needed to understand which associations hold or collapse. “Following the actants” by describing their activities through ethnography was the classic way of doing ANT. This methodology is unfortunately unsuited for studying the activities of various regulatory bodies at once. That is partially why “post-ANT” or “thinking near ANT” approaches have distanced themselves from the classic methodology²⁶. There are several ways of following actants. The one proposed here is to dissect the reports and position papers of RBs via their independent group of regulators (IRG-Rail) as well as through the archives provided by the French and Polish regulators. The choice for RBs resides in the controversy raised about the Single European Railway Area Directive. A majority of RBs (soon to be joined by the others of all Member States’ RBs and from some third-countries²⁷) united together in opposition to the Commission’s proposal of establishing a Single European regulator. This unity in adversity led to the creation of a new assemblage – IRG-Rail – that became since an ‘obligatory passage point’ for the discussion of railway politics at EU level. Besides, the minutes of the meetings between the Commission and RBs in the *European Network of Regulatory Rail Bodies* (ENRBB) will also be analyzed²⁸. The choice for France and Poland is based on a willingness to compare countries with different trajectories when it comes to European integration. The former entered the EU before the establishment of an EU railways policy, whereas the latter had to integrate the *acquis* of the

²⁵ Michel Callon (1984) “Some Elements of a Sociology of Translation ...”

²⁶ Blok, A., Farias, I., & Roberts, C. (Eds.). (2019). *The Routledge Companion to Actor-Network Theory* (1st ed.). Routledge

²⁷ The list of current members is available at: [Members of the IRG-Rail - Members - IRG Rail](#)

²⁸ The minutes of all meetings that occurred since 2013 are available here: [European Network of Rail Regulatory Bodies \(ENRBB\) - European Commission \(europa.eu\)](#)

1991 unbundling directive and of the first railway package. In addition, both regulators publish extensively in English and allow for a comparison of the language used in IRG-Rail and individually. This archival work was accompanied by a set of interviews carried out in Warsaw and Paris with civil servants working on railways liberalization.

III) Understanding the impeded liberalization of passengers' markets through the actions of Rail Regulatory Bodies

RBs from Poland and France establish different kinds of relationships with the other players involved in railway policy. These are of varying nature, and include the infrastructure framing the possibilities and limits of competition on the tracks. The material element of railways has its own agency in the sense that it shapes subsequent behavior. All these assemblages also alter the perception regulators have of themselves. Overall, the perceptions and actions of these administrative countries are similar despite the theoretical differences hypothesized in the introduction.

How RBs view themselves: "the State, and us"

RBs have a self-perception of independence that is singular. Established under the 1st regulatory package, RBs had to be legally created as 'independent' bodies cooperating with one another, with the "support" of the Commission²⁹. These must assess applications for entrance in the railway network without interference from any other state organ. The degree of independence between RBs and other organs differs however across sectors. For example, in the field of competition policy, competition authorities are consulted by the other branches of government when a new legislation substantiating the regime derived from the *acquis* in competition law is discussed. Competition authorities exercise full independence when performing their reviewing tasks. In rail however, the independence seems to mean complete isolation. That is the perception of RB officials that clearly distinguish themselves from the "State", even though RBs are legally state organs. Their officials thus refer to the nature of their functions. When I asked the follow-up question "but don't you consider yourselves as the state?", the answers ranged from indecision to a clear "No". RB officials clearly follow their own course of action, which seems to be a strict following of established rules. They all want

²⁹ Art. 30 and 31 of 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

to promote competition as the principle that drove their creation, and deplore the exceptions provided to governments in the 4th regulatory package in terms of direct awards³⁰.

More interestingly, their perception of independence leads to them to believe that the creation of further bodies, especially at EU level, would undermine their own role. Administrative networks should remain loose forms of cooperation rather than a forum where common rules are forged. If such a forum were to be erected, it should then be composed of the RBs themselves that possess the terrain knowledge and the experience to promote further technical standards. This stands in clear contrast with the technical pillar of EU railway policy, where the authority of the EU Agency for Railways is accepted³¹. The proposal of the Commission to create a Single European regulator prompted the creation of IRG-Rail, whose first task was to lobby extensively the Council in order to see the proposal dropped in the 4th package (and they eventually succeeded). IRG-Rail symbolizes this loose form of cooperation promoted by RBs. RBs agree on a mutual set of principles and summarize them in position papers sent to the Commission and legislator. In that regard, they act like a pure Brussels-based civil society group³², although from a distance. This platform does not generate further commitment (unlike the European Competition Network), including among RBs (see below).

Finally, their perception of “independence” is linked to the perceived “unique” blend of each national railway system. RB officials stress the varying histories of their country in a comparative manner, and insist that only common denominators should engender agreements. If safety standards do not generate dissensus and that interoperability is mostly welcome (although the establishment of the European Rail Traffic Management System [ERTMS] generates bilateral difficulties), the intricacies passengers markets would seemingly be nationally specific. This specificity remains a matter of perception as there is no further evidence to back it up in policy and regulation terms. It seems to be more correlated to the state of the existing infrastructure, which exercises its own agency.

³⁰ IRG-Rail, “Position paper on the conclusions of the trilogue negotiations on the Fourth Railway Package”, 05/05/2016: <https://irg-rail.eu/download/5/14/IRG-Rail163-PositionPaperontheconclusionsofthetrlougenegotiationsontheFourthRai.pdf>

³¹ RBs refer directly to the safety standards drafted by the agency without stressing the need for fine-tuning at national level.

³² IRG-Rail can be found in the transparency register, showing their lobbying intent: [Transparency Register \(europa.eu\)](https://ec.europa.eu/transparency/regexp1/index.html). See Sylvain Laurens (2017) *Lobbyists and Bureaucrats in Brussels. Capitalism’s Brokers*, Routledge

Rail infrastructure: the remoteness of the Single European Railway Area

Material or non-biological objects do not seem to display their own form of agency. These are human-made “monsters”³³, and their creators remain theoretically able to adapt the infrastructure to their needs. Yet, the existence of a material network established over decades, involving large sums of money and requiring the intrusion of the state in societies dominated by private property gives materiality a prominent weight in establishing or dismantling assemblages. The establishment of a Single European Railway Area led to the rise of new cross-border lines, whereas the 4th package aims at applying the same rules to pre-existing domestic markets. But rules of liberalization and track connections may not be perfectly compatible.

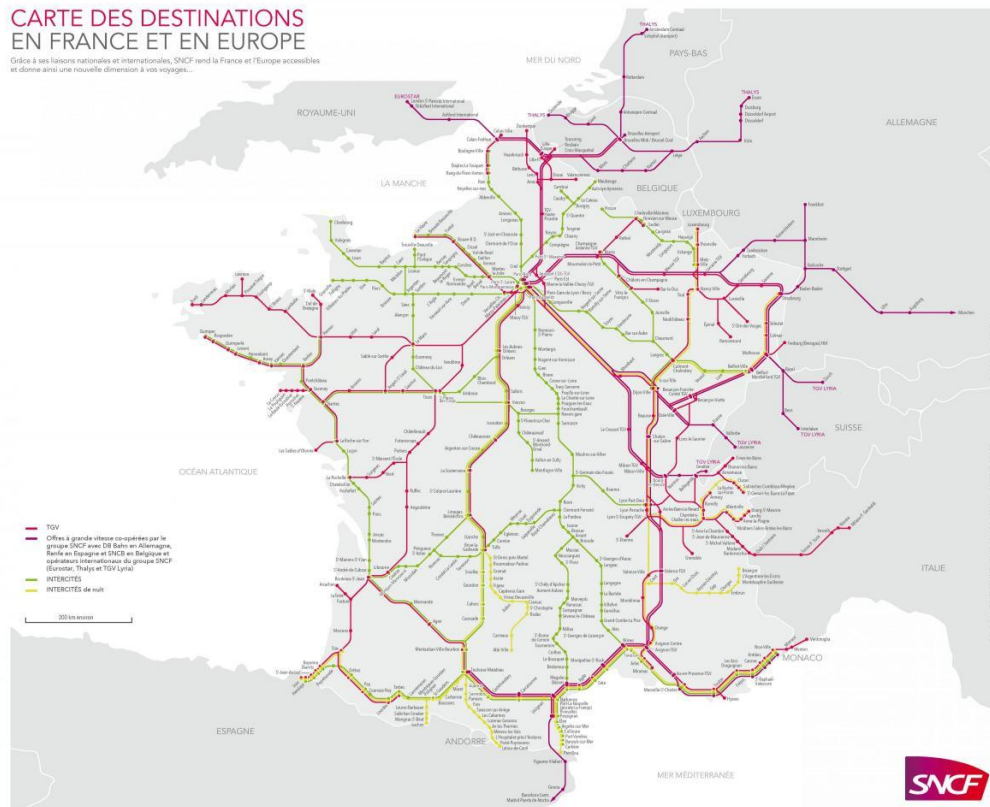


Source: European Commission, “Upgrading Poland’s railway communications for competitive, safer transport”:
https://ec.europa.eu/regional_policy/en/projects/Poland/upgrading-polands-railway-communications-for-competitive-safer-transport

The establishment of international connections using the pre-established network corresponds to the major lines of domestic networks (green lines in the Polish system, violet lines in the French system) and already use high-speed trains such as IC or TGV. These lines connect the major hubs in their respective countries, meaning the East-West line between Poznan and Warsaw in Poland, and the Lille-Strasbourg-Marseille through Paris configuration in France. These were established following salient political decisions at a time when rail became a vector

³³ John Law (ed) (1991) *A Sociology of Monsters. Essays on Power, Technology and Domination*, Routledge

of industrial modernization. In France, the system is referred to as the “Legrand star”, bearing the name of the engineer that designed a system where Paris would constitute the “center” of the modern world and therefore had to be the most prominent (if not exclusive) node in the network.



Source: FranceMap360°, “Carte des trains en France”: [Carte de France des trains : lignes ferroviaires et train à grande vitesse de France \(francemap360.com\)](http://francemap360.com)

These lines are already characterized by a high level of activity, almost leading at times to saturation. At peak hours, the traffic is really dense and does not allow for more capacity allocation, causing potential tensions between RBs and IMs on the issue (see below). This means that competition in the market can only be limited, and that only a few undertakings may co-exist on a single line³⁴. Some even suggest that international traffic is causing even

³⁴ The potential solution would be to reduce the incumbent’s share in favor of other undertakings. But this is not what is happening, for reasons related to the actions of both RBs and IMs (see below).

more congestion: international trains cause delays disrupting the full time efficiency of the network, leading IMs to contain the potential amount of allocations³⁵.

The rest of the network consists of secondary or tertiary lines. These do not connect the major hubs of Member states. Capacity allocation is not an issue there: most lines are subject to a medium or minimal service by the incumbent, and increasing the traffic would likely not generate any issue. But these lines are often not generating any benefit and are therefore subject to the “Public Service Obligation” (PSO) regime. These allow Member States to directly award a contract to any undertaking (incumbent or otherwise) and to provide a compensation for the loss generated by the activity, since the investment of the undertaking is superior to the return provided by the service. RBs, which are meant to be the promoters of railway liberalization, are excluded from this process. Governments (held to maintain close historical ties and political interests with the incumbent) choose the undertakings winning the competition for the market in that case, pursuant to the PSO regulation³⁶ which falls in line with the state aid exemption rule of art. 106(2). But this exception to the market is subject to a more burdensome attribution process, not only in terms of bureaucracy but also regarding the precise nature of the service to be provided, e.g. specific rolling stock and pre-determined (i.e. not by the undertaking) passenger quotas. These limit the potential number of applicants, which led to EU legislator to adopt a further transition period of 10 years (see the SNCF liberalization timeline in section I).

Infrastructure considerations are connected to rolling stock itself. Even if the technical pillar foresees the implementation of the European Rail Traffic Management System (ERTMS) that harmonizes safety standards allowing foreign rolling stock to enter domestic networks without hurdles at the border, some obstacles remain. In France, trains must possess a “KVB” box, that allows for the circulation of information about train speed. The ERTMS was supposed to substitute this national equipment, but only a minority of trains (40% of high-speed trains and 7% of classic trains in 2021) are equipped with ERTMS technology. Access to KVB boxes was provided by the French constructor Alstom, which possesses the patent to produce the technology. But Alstom has ceased to produce KVB boxes and will only relaunch the

³⁵ See for example <https://lequotidien.lu/a-la-une/retard-des-trains-un-reseau-sature-et-des-infrastructures-inadaptees/> denouncing the delays in congestion of the Luxembourgish traffic caused by SNCF trains

³⁶ Regulation (EC) No 1370/2007 of the European Parliament and of the Council of 23 October 2007 on public passenger transport services by rail and by road and repealing Council Regulations (EEC) Nos 1191/69 and 1107/70

production in 2024, thereby limiting the potential access to new undertakings³⁷. Besides, access to rolling stock overall remains complicated, as regularly denounced by IRG-Rail. It is not possible to rent rolling stock in France neither. The mandatory buying of wagons and locomotives, whose maintenance is usually provided by a single operator, is also an impeding factor to liberalization.

The rail infrastructure is thus determining the possibilities and impediments to liberalization because it is a *closed network*. Competition traditionally referred to the increase of available goods and services provided to the consumer, which is not an option in sector economies. The network is characterized by 2 extremes: the first refers to attractive but overcrowded segments of the market, whereas the second refers to available but unattractive segments. These features favor de facto the overwhelming role of the incumbent.

RBs and IMs: opposite purposes ?

RBs have to manage the specific state of the infrastructure with duty to liberalize, without disrupting the freight market either. RB officials will proceed with their own calculations about the efficiency of the network. But the decision of access to tracks belongs to IMs. The relationship between RBs and IMs is competitive at best, if not conflictual. IMs are in charge of capacity allocation and levying charges. These 2 factors come into play when fostering or impeding liberalization.

Capacity allocation is mostly dependent on the state of the infrastructure detailed above. What matters here is the agency exercised both administrative authorities. Each will assess it with different objectives in mind. RBs try to ensure that the network is used to its fullest extent for segments where competition in the market is possible, meaning that an increase of available services means an increase of undertakings on the tracks. IMs must ensure that the traffic is not congested and that the infrastructure remains fit for purpose. Their calculations will sometimes differ. This leads to the rejection of an RB-approved application by the IM.

IM levy charges paid by undertakings (with a repercussion on fare tariffs) to maintain the infrastructure. Charging practices have generated tensions between both authorities, because

³⁷ France Inter, “L’ouverture du rail à la concurrence : une réalité qui peine à se mettre en place”, 02/06/2023: [L’ouverture du rail à la concurrence : une réalité qui peine à se mettre en place \(radiofrance.fr\)](https://www.radiofrance.fr/)

RBs have accused IMs of favoring the incumbent. IMs must levy fees to maintain the infrastructure, and they do so by adapting to changes in the network. RBs contest this practice on the ground that undertakings need a clear and stable charging plan in order to propose a suitable business project. The *City Rail* case is a clear example³⁸. The Czech regulator contested a charging practice of the IM but was not accepted as a legitimate body possessing the prerogative to ask for a preliminary ruling before the CJEU³⁹.

The core tension however between RBs and IMs is the proximity of the latter with the incumbent. RBs deplore the absence of “vertical separation” between them in most Member State⁴⁰. IMs and incumbents are often subject to a separation of accounts but remain within a single overarching structure, and share the same premises. While the separation is legally supposed to be strict, RBs denounce the “Chinese walls” that would allegedly allow for the circulation of asymmetrical (and therefore anticompetitive) information between both branches of the organization, allowing the incumbents to possess privileged information before it is made public to other undertakings. In sum, IMs – also EU law creatures – would be a major if not the main obstacle of liberalization.

Private undertakings

Nonetheless, some private undertakings finally entered the French and Polish markets. *Trenitalia* connects Paris to Milan and makes a stop in Lyon, and the Czech undertaking *Regio Jet* is carrying passengers to several major cities in Poland, including Katowice and Krakow. Warsaw has a private company running local traffic in Warsaw (SKM), and the region Ile de France foresees an opening of regional trains in Ile-de-France as early as 2023, starting with the L line. But overall, the introduction of private companies remain scarce, which is particularly surprising for international traffic open to competition as soon as December 2020. And RBs play a role in including but also limiting the access of private undertakings in the market.

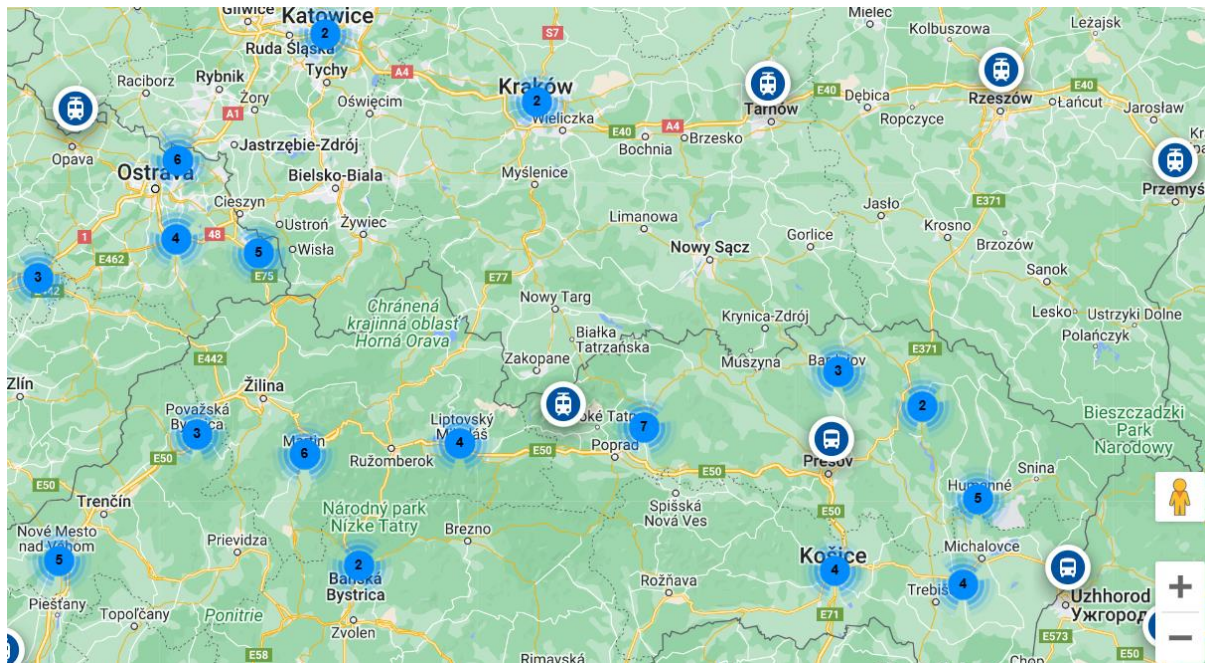
Private undertakings and foreign incumbents willing to enter domestic networks must establish a business plan assessed by RBs. The latter then perform a key evaluation called the “Economic

³⁸ C-453/20 – CityRail

³⁹ See Pietro Mattioli (2013) “Contested courts: from national administrative bodies to national regulatory bodies”, *Revue de la Faculté de droit de l’Université de Liège*, 2023/2: 295-310

⁴⁰ In France, ‘SNCF Réseau’ is the IM whereas ‘SNCF Mobilités’ is the incumbent. In Poland, PKP Polskie Linie Kolejowe S.A. is the IM whereas Polskie Koleje Państwowe (PKP) is the incumbent.

Equilibrium test⁴¹, i.e. a balance of economic interests regarding the public service to be provided. The applicant must submit a proposition reflecting the net financial gain foreseen by the activity, and the potential upside of replacing the operator already performing the service (which is de facto the incumbent). The operator already performing the service has a right of response. This test defines the procedural conditions that RBs must follow. Precise thresholds however remain at the discretion of RBs, deemed to know better the economic realities of their domestic markets.



Regio Jet rail connections in Poland and neighboring countries. Source: Regio Jet, “Timetables and stops”: [RegioJet | Train & bus tickets](https://www.regiojet.pl/en/train-and-bus-tickets)

RBs are granted leeway in their assessment, defining their thresholds and methodology as long as these remain transparent. They can therefore adopt strict thresholds in that regard. The reason lies in the lack of faith on the reliability of private undertakings by RBs. The latter must ensure that a service is carried out, and for example the Polish regulator has already faced a withdrawal of a private undertaking (having in Poland a notification period of 6 months). The

⁴¹ See the modalities expressed by the Commission in Commission Implementing Regulation (EU) 2018/1795 of 20 November 2018 laying down procedure and criteria for the application of the economic equilibrium test pursuant to Article 11 of Directive 2012/34/EU of the European Parliament and of the Council: [COMMISSION IMPLEMENTING REGULATION \(EU\) 2018/ 1795 - of 20 November 2018 - laying down procedure and criteria for the application of the economic equilibrium test pursuant to Article 11 of Directive 2012/ 34/ EU of the European Parliament and of the Council \(europa.eu\)](https://eur-lex.europa.eu/eli/reg/2018/1795/oj)

profitability (unilaterally established in Poland as being 1,5% higher than the current service⁴²) must be ascertained in order for the RB to allow access.

Private undertakings also face difficulties in accessing rolling stocks, which is particularly problematic for segments of the market under PSOs. In these cases, rolling stock must respect accurate technical properties specific to the needs of the line in question. Most undertakings face an insuperable hurdle in that regard.

“The European Commission does not leave room for cooperation”

Issues about interoperability (normally belonging to the technical pillar but having direct consequences on liberalization), access to rolling stock and establishment of common practices about the Economic Equilibrium Test could be harmonized or at least discussed in the EU. The Commission has attempted to provide such a forum when it established in 2013 the ENRRB. It is an administrative network similar to the ECN where the Commission host representatives of RBs and discuss issues regarding the implementation of the liberalization of passengers’ markets. The analysis of the minutes of these meetings over the last 10 years display that exchanges are brief, if not succinct. DG MOVE officials usually present the points of their agenda and expose their views on the matter, but these hardly trigger responses from RB representatives. These brief exchanges are in stark contrast with the pro-activity of IRG-Rail, where members have regular meetings and agree on common positions. When I asked about this discrepancy, the answer from Polish officials (and backed up by their French counterparts) was straightforward and is the title of this section. RB officials believe that the Commission exclusively focuses on transnational lines and is not heavily concerned with domestic networks. For RBs, transnational traffic only represents 7% of the activity of the network, i.e. a marginal portion of their activities. The part about cross-border cooperation where RB officials would hope for further Commission involvement is the possibility for a simple crossing of the border of 1 undertaking in order to connect all domestic networks, without changing the regulatory regime in place. But the Commission does not get involved in something it sees as bilateral. In a word, RB officials argue that the Commission and themselves pursue different objectives.

⁴² Interview 1, Warsaw, 06/04/2023

The Commission noticed that its own network paled in comparison with IRG-Rail and advocated for closer relationships between both networks. This initial step however has not been followed by any further measure.

The growing and self-consolidating inner culture of IRG-Rail is shaping the distant relationship between RBs and the Commission. The latter wanted to empower a Single European Regulator, which is opposed by RBs. The latter state however that, if the legislator were to convene on the creation of such a body, RBs would then obviously follow suit. But as things stand, i.e. under the current regulatory regime of the 4th Railway package, RBs do not view the Commission or any other transnational institution as possessing the capacity of accounting for their own specificity. The fact that railway policy is mostly (if not exclusively) enacted at EU level does not mean that EU bodies take the lead in framing a common understanding of railway liberalization.

IV) The access to the networks of neighboring countries: East-West or David-Goliath divide?

Section III showed that regulatory authorities face similar challenges and display similar actions regarding the liberalization of passenger markets. The EU-regulated rail sector does not generate different regulatory challenges showcasing an apparent East-West divide. Liberalization may occur however when one state incumbent (SNCF and PKP here) enters the network of other Member States. Differences arise here. SNCF manages to transport passengers in all neighboring countries (see page 18). PKP however meets difficulties when trying to get access to neighboring countries, even if the IM and RB allowed for foreign undertakings to circulate on its own network, showing a lack of reciprocity.

The officials of UTK tried to obtain access to the German network, showing an interest in dropping passengers residing in Poland and working in Germany. The German safety authority, tasked (by the German implementing legislation of the 4th Railway Package) to assess applications from undertakings, has however consistently denied access to the German infrastructure, and so with very succinct explanations⁴³.

SNCF has managed to enter the network of the 6 countries sharing a border with France, including to the Iberic Peninsula despite the different gauge width (overriding the infrastructure

⁴³ Interview 2, Warsaw, 12 April 2023

issue). On the contrary, only the Italian (Trenitalia), Belgian (SNCB) and Spanish (Renfe) incumbents managed to secure a slot on the line connecting Paris to Milan, with all the technical hurdles faced for the acquisition of KVB boxes.

The comparison shows that technical considerations may be overcome. The economic model remains puzzling, since it is possible to assume that the costs of operation of railways are lower in CEE countries than in WES (salaries of staff among other considerations). These lower costs should lead to more competitive bids that would in theory be more competitive than those of Deutsche Bahn for example. Yet the opposite is happening, with DB accessing the network of several CEE countries whereas its network remains for the most part unscathed by competition.

Does this mean that the East-West divide persists in favor of WES? An overall look at the EU's international high-speed connections, along with the detailed comparisons of France and Poland, allow for a tentative but nuanced affirmative answer. West European incumbents manage to enter the network of CEE countries, especially DB and OBB (Austrian incumbent), whereas CEE incumbents do not. Poland's regulator asked for access to the German network and received a negative answer. SCNF is not travelling as far as Eastern Europe, but it is getting access in all neighboring markets.

But a looping comparison at the overall network may nuance the East-West argument in favor of something else: the asymmetrical power played by the 2 major Member States vis-à-vis their neighbors. The German and French incumbents penetrate the markets of their neighbors, irrespectively of the East-West divide. For example, Belgium and the Netherlands⁴⁴ allow for a dense circulation of SNCF and DB trains on their tracks. The opposite is not true however. Competitors of DB in Germany amount for just 4% of the overall high-speed traffic⁴⁵, and 10% in France⁴⁶. High tolls for the use of the infrastructure, added to the presence of strong workers unions protecting the status of their respective incumbents, impede the entry of private undertakings and other states' incumbents into their networks⁴⁷.

⁴⁴ E.g. Rijden de Treinen, "Trains between Germany and the Netherlands": [Trains between Germany and the Netherlands \(rijdendetreinen.nl\)](https://rijdendetreinen.nl)

⁴⁵ See Deutsche Bahn, "Competition figures 2022/23", p.12: [Competition-report-2021_22-data.pdf \(deutschebahn.com\)](https://www.deutschebahn.com/competition-report-2021-22-data.pdf)

⁴⁶ See Reporterre, "Ferroviaire : les miracles de la concurrence se font attendre", 26 September 2023: [Ferroviaire : les miracles de la concurrence se font attendre \(reporterre.net\)](https://reporterre.net/ferroviaire-les-miracles-de-la-concurrence-se-font-attendre)

⁴⁷ Ibid; and Interview 1, Warsaw, 12 April 2019

In sum, the introduction of liberalization rules via 4 railway packages has not led to a level-playing field in the railway market. Private undertakings and incumbents of several Member States remain structurally dominated by the economic status of major incumbents such as DB or SNCF. The latter are fostered by the regulatory choices of their national IMs in terms of charging for the use of the infrastructure, which deter the established of a balanced Single European Railway Area.

Conclusion: an Unbalanced Single Railway Area

The EU has established a renewed administrative setting at national level in order to ensure the continuation of the liberalization of railways, including in domestic markets. The main objective was to set national executives aside as much as possible. These were seen as having vested interests in protecting the incumbent. The EU legislator (partially made up of these national executives, which is not without incidence on the subsequent developments of the market) decided to empower RBs and IMs in order to achieve competition in the sector. The solution of empowering national administrative authorities had already proved fruitful in other areas of European governance, not least regarding other sector economies. There are correlations supporting the connection between regulatory empowerment of RBs and liberalization⁴⁸. Besides, the EU-led process of agencification has also given rise to further cooperation at transnational level and reinforced governance in various market areas, such as energy or competition.

Developments in railways show a very different pattern. RBs perform their liberalizing mandate following the needs of their respective markets. Moreover, incumbents retain not only a dominant economic position but also a privileged institutional status due to their proximity to IMs and executives. The infrastructure of railways is also very specific and prevents a full-scale competition on tracks, not least due to the congestion of hubs and the non-profitability of secondary and tertiary segments of the network. Numerous derogations to liberalization characterize regional transportation, which begs further developments in forthcoming years.

The development of railway policy through the production of changes in national administrative settings is showing that agencification is not necessarily conducive to increased compliance with EU rules and enhanced cooperation of technocrats at transnational level. The

⁴⁸ Fabrizio De Francesco & Graziella Castro (2018) "Beyond legal transposition: regulatory agencies and *de facto* convergence of EU rail liberalization", *Journal of European Public Policy*, 25(3): 369-388

formula leading to exporting a “government by committees”⁴⁹ at national level (bypassing democratic control in favor of an increased expertise and technocratic efficiency) means the empowerment of ‘independent’ bodies able to define by themselves the parameters of their connection with the other branches of government, national or otherwise. In the case of railways, the separation between state, IM and RB has generated numerous divisions. These organs pursue different economic and regulatory objectives that can be opposed to each other. EU institutions, not least the Commission, and national governments cannot anymore have the role of ‘principal’ as classically described in studies studying the empowerment of independent administrative authorities in the early 21st century⁵⁰. RB decisions are only amenable to judicial review, and only the board members are subject to appointment controls by other state organs. This institutional status grants them leeway in defining the life of EU public policy at national level. Regarding railways, liberalization is an accepted principle but is not overtaking the need for a public service to be provided in terms of transportation. Besides, the administrative setup adopted by the EU legislator may even impede the smooth development of competition on tracks, without much change possible under the current framework.

This paper has also shown that the regulatory challenges faced by WES and CEE countries are alike. The imbalance between the West and the East regarding railways is thus not the result of a persisting imbalance between former Soviet Republics and WES that would have started in the 20th century. The imbalance persists not only between the East and the West, but also between France and Germany on one side and the others on the other. The unilateral regulatory choices made by IMs and RBs allow for this imbalance to persist.

⁴⁹ Chris J. Bickerton (2012) *European Integration: From Nation-States to Member States*, Oxford University Press, 2012

⁵⁰ Mark Thatcher (2002) “Regulation after Delegation: Independent Regulatory Agencies in Europe”, *Journal of European Public Policy*, 9: 954-972; “The Third Force? Independent Regulatory Agencies and Elected Politicians in Europe”, *Governance*, 18(3): 347-373