

Magic bullet or missed opportunity?



More than five years in the making, the Fourth Railway Package is a broad raft of reforms that seeks to significantly improve the competitive position of rail transport across the European Union. **Keith Barrow** assesses the contents of this key legislation and looks at the challenges facing its implementation.

IMPROVING the quality and cost-effectiveness of rail transport is a core component of European Union transport policy. Between 2001 and 2016, four legislative packages were adopted with the aim of opening up rail transport services for competition, enhancing interoperability between national networks, and building a framework for the development of the Single European Railway Area (Sera).

The outcome of nearly five years of political discussion and debate, the Fourth Railway Package is perhaps the most ambitious of these legislative instruments, encompassing extensive structural and technical reforms which are intended to break down many of the remaining barriers that stand in the way of realising Sera.

According to the European Commission (EC), the Fourth Railway Package has four core aims:

- standards and approvals that work, cutting administrative costs for railway companies, simplifying market entry for new operators, and centralising responsibility for vehicle authorisations and safety certification with the EU Agency for Railways
- a structure that delivers, strengthening the role of infrastructure managers (IMs) by giving them complete operational and financial independence from train operators
- opening domestic passenger markets with mandatory competitive tendering for public service obligation (PSO) contracts and open-access on profitable routes, and
- maintaining a skilled rail workforce, recognising the need to attract new talent to the industry and improving protections for staff when PSO contracts transfer to new operators.

To achieve these diverse goals, the package is divided into the technical pillar and the governance or market pillar.

The technical pillar was approved by the European Parliament and the Council in April 2016 and came into

force on June 15 2016. It comprises one regulation and two proposals, which update existing pieces of legislation:

- Regulation (EU) 2016/796 on the European Union Agency for Railways and repealing Regulation (EC) 881/2004
- Directive (EU) 2016/797 on the interoperability of the rail system within the European Union (Recast of Directive 2008/57/EC), and
- Directive (EU) 2016/798 on railway safety (Recast of Directive 2004/49/EC).

Member states have until June 16 2019 to transpose the interoperability and safety directives into national law, with an option to request an extension of up to a year.

The technical pillar aims to increase harmonisation between Europe's national networks by drastically reducing the number of national rules (more than 11,000) which the Commission considers a hindrance to interoperability.

Regulation 2016/796 gives the EU Agency for Railways sole responsibility for issuing authorisations for railway vehicles, safety certificates for train operators, and authorisations for trackside control-command and signalling systems, with the aim of streamlining procedures and achieving a significant reduction in costs. It also makes the Agency responsible for monitoring national rules and the performance of National Safety Authorities (NSAs) and strengthens its role as the systems authority for the development of ERTMS.

The timeline for the implementation of the technical pillar gives the Agency just three years to plan and execute this transition, ensuring that by June 16 2019 it is in a position to issue vehicle authorisations and single safety certificates for operators. By this time, EU Member States should have transposed the technical pillar into national law, providing a legal basis for the transfer of responsibilities from NSAs to the agency.

This transfer is facilitated through the

so-called Implementing Acts, secondary legislative acts used where national legislation must be consistent across all Member States. Implementing Acts are subject to input from and voting by the Member States through specific committees. Most of the 25 secondary legislative acts in the Fourth Railway Package concern the technical pillar, emphasising the need for a uniform approach to the transition at the Member State level.

In June 2017, the European Commission's Railway Interoperability and Safety Committee (Risc) approved the Implementing Act for the Single European Safety Certificate in June 2017, and the committee subsequently adopted the Implementing Act for Vehicle Authorisation in November 2017. The Implementing Act for the fees and charges levied by the Agency was approved in January. These positive votes followed an extensive consultation between the agency, member states, and industry stakeholders across Europe on both the transition phase and future arrangements for authorisations.

At the core of the new system is the so-called one-stop shop (OSS), an IT tool which will funnel all applications for safety certificates and vehicle authorisations through a unified online portal. A key milestone for the OSS was achieved in September 2017, when functional specification was approved by the agency's management board, which is composed of representatives of the EC and the 28 Member States. The agency has recently shown a mock-up of the OSS to stakeholders in Italy and Germany to gain initial feedback on the user interface. The OSS must be fully-functioning and online by February 2019 in readiness for the June switchover.

"There are three major challenges in the transition phase," explains the agency's executive director, Mr Josef Doppelbauer. "Preparing ourselves, preparing stakeholders, and, most importantly, preparing the entire ecosystem for a period of uncertainty. Member States have to announce by

December whether they will transpose the legislation by June 2019, and they have up to a year after that if they need some extra time. We have to be prepared for this."

Doppelbauer observes that there is huge variation in stakeholder preparedness for the extensive changes coming next year. "We need to continue investing in dissemination, and getting the message out there," he says. "There are big companies, big member states who have been in the workshops from the very beginning, and then there are smaller stakeholders who have only a vague notion of the consequences of the Fourth Railway Package. This is the most important change in railway legislation ever, so the industry needs to be ready and we are in continuous communication about what will change."

Doppelbauer says the agency is on course to begin the second phase of the transition - shadow running - in July. This involves testing the integrity of the OSS through the so-called learning cases, where agency staff will work alongside their counterparts from the NSAs on vehicle authorisations and operator safety certifications. In each learning case, the existing processes of the NSA will run in parallel with the agency's new methodology and the OSS. "This should allow us to learn how to deploy new processes and do any fine-tuning," Doppelbauer says. "It will also enable us to establish how we interface with the NSAs' IT systems, and linking our IT portals is a key task in the shadow running phase."

Around 40 agency staff are working on the learning cases and Doppelbauer says the industry response has been positive, with more than 20 applications for learning cases. "Shadow running means that there is some additional effort on the part of the applicant, because they have to submit a second set of documents and use the OSS," Doppelbauer explains. "We wanted to do this on a voluntary basis and the

Mr Libor Lochman, executive director of the community of European Railway and Infrastructure Companies (CER), says the industry accepts a degree of short-term upheaval in the safety certification regime as a price worth paying for the anticipated long-term efficiency gains. "The overall cost of certification will certainly be higher in the next three-four years, but we should start to see a reduction in authorisation



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applicants get pre-engagement free-of-charge. The selling point for suppliers is that they can try out the system for free. I'm optimistic that we have the strong interest we need from key stakeholders. In the short-term, the transition clearly requires investment from all actors, but in the long-term, everyone benefits from a process that is simpler, faster, and consistent throughout Europe."

Another benefit is the centralisation of knowledge, with the creation of a 200-strong pool of experts. "The pooling of expertise from across Europe makes us more flexible and means there will be fewer situations where expertise is not available," Doppelbauer says.

costs after 2022," he says. "If this hasn't been achieved within that timescale, it has failed. So the next few years are not going to be normal practice, but the industry is ready to invest in the transition to see the benefits at the end."

The interoperability directive extends the agency's remit to include the authorisation of ERTMS trackside equipment. While processes for vehicle authorisations and single safety certificates already exist, the authorisation of ERTMS trackside equipment is a completely new procedure. According to the Group of Representative Bodies (GRB), a grouping of European railway



A CAF New Generation Sprinter for NS undergoes dynamic testing at the Velim test circuit in the Czech Republic. The technical pillar aims to vastly simplify the authorisation of new rolling stock. Photo: Quintus Vosman

associations which supports the rail sector's input into the Agency's work programme, IMs will need to prepare for the administrative and cost implications of this change. Some IMs have agreed to participate in learning cases to help define this process and therefore find ways of minimising the cost impact. However, the GRB says these cases will not be completed in time for the intended legislative act on ERTMS trackside component approval, which is due to be adopted in May.

Market pillar

Approved by the European Parliament and the Council in December 2016, the market pillar comprises:

- Regulation (EU) 2016/2338 amending Regulation (EU) 1370/2007 on the award of public service contracts for domestic passenger transport services by rail (the so-called PSO Regulation)
- Directive 2016/2370/EU amending Directive 2012/34/EU, which deals with the opening of the domestic passenger rail transport services market and the governance of the railway infrastructure (the 'Governance Directive'), and
- Regulation (EU) 2016/2337 repealing Regulation (EEC) 1192/69 on the normalisation of the accounts of railway undertakings.

The PSO Regulation is designed to allow Member States a degree of flexibility in how they proceed. Direct awards will still be allowed under certain circumstances, albeit with strict contractual requirements for service quality, frequency, and capacity. There will be a 10-year transition period for entry into force of the new rules on PSO contracts directly awarded before December 2022, which means some large-scale direct award contracts could continue until 2034. Open-access operators will be permitted to run services in competition with the incumbent operator on domestic routes from December 2020, subject to analysis of the economic impact on PSO services.

The EC says it expects competition to bring "substantial benefits for passengers, railway undertakings, and taxpayers alike: more quality of service, greater choice, innovation, cost-effectiveness, and customer-orientation."

In contrast with the technical pillar, which enjoyed a relatively frictionless passage through the legislative procedure, the market pillar was the subject of intense debate and political wrangling between the EC and the Member States, primarily over the

provisions of the Governance Directive.

One of the EC's core aims in the market pillar was to end the natural monopoly of the vertically-integrated railway through the compulsory unbundling of incumbent train operators and IMs. In 2010 the EC took 13 member states to court for failing to fully enact European legislation on railway reform. However, the court rejected the EC's case against Austria and Germany, ruling compulsory and complete separation of IM and train operator was not required under the First Railway Package or any other EU legislation. Crucially, this also confirmed that IMs existing within a holding company structure could be regarded as independent.



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Libor Lochman

In February 2014, MEPs introduced amendments at the first reading of the six legislative proposals of the Fourth Railway Package in the European Parliament which would give Member States greater flexibility in their choice of governance model. This vote quashed the mandatory unbundling proposal and forced a compromise in the Governance Directive that maintains indefinitely the integrated holding company structure in some of Europe's key rail markets.

Naturally, this has caused consternation among open-access operators. The European Rail Freight Association (Erfa) argues that the discussion around the market pillar has been "dominated by national and monopoly player egoisms," reinforcing the historic status of state-owned railways at the expense of customers.

"We've ended up with the second-best option on unbundling and this part of the legislation has been heavily watered down," says Erfa secretary general, Mrs Julia Lamb. "It's natural that if you have infrastructure and operations in the same company you will try to use that to your competitive advantage. This may be enough to deter prospective new entrants, who are concerned about discrimination and privileges favouring incumbents. We want the IM to be working towards the success of the whole railway system, not just one operator. Unless you

believe you can attract more customers to rail through monopoly services, an IM that works in the interests of one operator is clearly not working in the interests of healthy competition."

Mandatory unbundling was opposed by CER, which argues the Fourth Railway Package includes adequate provisions to protect the interests of new entrants in countries where the holding company structure persists. "There are sufficient safeguards in the legislation to ensure non-discriminatory access to infrastructure," Lochman says. "Without system integration a railway simply cannot function, and you can't separate the infrastructure manager off without ensuring you maintain proper system integration. The Fourth Railway

Package is an opportunity to ensure that this is implemented in the proper manner. We don't need the pressure for full vertical separation."

With unbundling no longer on the agenda, Lamb says the pressure is now on regulatory authorities to ensure that a level playing field is maintained in countries where incumbent operator and IM remain under the umbrella of the same holding company. Indeed, as regulation of the market matures, those responsible for policing it are beginning to show their teeth.

In January, the EC's Directorate General for Competition (DG Competition) announced it is launching an investigation into the use of restructuring aid for Polish state-owned train operator Regional Railways (PR). Last year the European Court of Justice (ECJ) ruled that the German government had failed to ensure proper transparency in the separation of accounts between infrastructure and operating units of German Rail (DB), while the Dutch Authority for Consumers and Markets (ACM) fined Netherlands Railways (NS) for abusing its dominant position in the passenger market. Lithuanian Railways (LG) was fined €27.87m for breaching EU competition law by removing a section of track on a cross-border link with Latvia to force a customer to continue using a more circuitous route, while French rail regulator Arafer issued a negative



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Passenger Rights Regulation recast



IN September 2017 the EC adopted a proposal for a revision of the Rail Passenger Rights Regulation (EC 1371/2007) with the aim of improving consumer protections for passengers while taking into account the burden on train operators.

The EC argues that passengers are currently unable to fully exercise their rights when using rail services due to the extensive exemptions Member States have granted for certain domestic services, outdated provisions for passengers with reduced mobility, and issues with through-ticketing.

The recast will also include a force majeure clause, meaning train operators will no longer need to compensate passengers for delays or cancellations caused by natural disasters or extreme weather.

AllRail sees an opportunity in the recast to address some of the perceived shortcomings in the Fourth Railway Package. "The Fourth Railway Package does not give new entrants fair access to distribution systems," Brooks says. "There has to be through ticketing by 2022, but in reality this means the EC will give the incumbent operators until 2022 before it starts looking into what's going on, with another two-three years to investigate and legislate. So in reality it's going to be at least another seven years before open-access operators are part of through ticketing. How many open-access operators will go bankrupt before then?"

"Incumbent operators have a huge advantage in their inherited brand equity, but DB won't sell the tickets of operators not aligned to the DB Group and in Sweden, Saga Rail can't get access to SJ's booking system, which has a dominant position. We need through ticketing as soon as possible -

it's already technically possible, and independent ticket providers such as Trainline and Loco2 are doing it, but these companies don't have the brand equity of the big incumbents. The Fourth Railway Package is pretty weak when it comes to addressing this issue. This kind of dominance in the operator field is exported downstream to the rail retail market, unless you have a fair system of through ticketing."

Brooks also hopes the recast will challenge the incumbents' dominance of other sales channels, such as ticket offices. "People think the ticket office is neutral, especially when it has the same brand as the taxpayer-funded infrastructure manager, and it's a trusted, familiar brand," he says. "This problem was not addressed in the Fourth Railway Package. We are trying to get it addressed in the passenger rights recast, but this is likely to be our last chance for a while."

CER is calling on the EC to provide the "legislative stability" needed to deliver improvements in ticketing. "Existing provisions on through-ticketing should not be changed as they underpin the ongoing business-driven progresses of railways and ticket vendors," CER says. "Customer-friendly information on through-ticketing is essential, but EU requirements should be realistic. Railway undertakings which have not committed to, and are not aware of the intended connection of a passenger between two or more trains shall not be required to fulfil the obligations under this Regulation."

CER also argues new delay compensation requirements for passes and season tickets are "disproportionate and unrealistic to implement."

Consultation on the proposals concluded in November 2017.

opinion on the government's new investment and performance contract with IM SNCF Network.

"DG Competition is taking a renewed interest in rail and is playing a proactive role, particularly around illegal state aid and abuse of competition," Lamb says. "This is symbolic because it shows a willingness by competition authorities for a crackdown on monopolistic behaviour."

"There is an acknowledgement here that Member States have not achieved what they should have done in the rail sector. We saw how difficult the [Fourth Railway Package] discussions were at EU level, and how challenging it is to diminish the power of incumbents. Legislation alone will not be enough - we need to see external pressure from competition authorities and we need the rail sector itself to become more aware that it risks losing market share if it doesn't embrace reform."

Equilibrium

The EC's Directorate-General for Mobility and Transport (DG Move) is preparing three implementing acts for the market pillar, which are intended to complete the legislative framework for market opening. These comprise:

- the implementing act on Service Facilities, which aims to give new entrants fair and non-discriminatory access to rail-related services and facilities (adopted on November 22 2017)
- delegated decision on the schedule for the allocation process, which sets deadlines for establishing working timetables, sets rules for integrating information on upcoming capacity restrictions into the scheduling process, and enhances coordination between IMs and their customers, and
- the implementing act on the Economic Equilibrium Test (EET), which will define the conditions under which Member States can restrict access to their domestic rail infrastructure where a new open-access service might compromise the economic equilibrium of a PSO contract.

The Alliance of New Rail Entrants (AllRail) says it is concerned that Member States could use the EET as a mechanism to block new open-access services, arguing that narrowing the scope of the test to focus solely on the profitability or net cost of the PSO contract increases the risk.

"This is a big worry, especially in instances where the Member State in question might want a high-frequency PSO offering in urban areas," explains

AllRail board director, Mr Nick Brooks. "This means the opportunities for open-access operators to get paths that are in any way commercially useful simply won't be there. There are countries where we are concerned about this, where there will be such a high level of PSO service that the network simply won't support open-access."

AllRail fears that the application of the EET to direct award PSO contracts,

the EET. "With this proposal, the EC is creating a presumption that directly awarded PSO contracts are unlawful," CER says. "PSO contracts should be subject to the same level of scrutiny without creating any discrimination between the two awarding procedures adopted by European legislators."

A deadline of December 16 has been set for the implementing act to define how regulators will be expected to run

every Member State. The governance package became a battleground pitching a few large Member States against those seeking a clear break between incumbent operators and IMs. Arguably, it marks a pause in a two-decade march towards unbundling, as the Commission's vision for Sera comes up against the resilience of established structures and the interests of Member States, but the debate may not be over.

The Fourth Railway Package puts the emphasis on competition to deliver the efficiency and innovation that will drive a modal shift to rail. The question now is whether compromising on the governance model will limit the capacity to meet these goals.

Like the market pillar, the significance of the technical pillar cannot be understated. Vehicle authorisation has been a costly, cumbersome process that has hindered progress in the rail sector for too long. The Europe-wide solution to this problem is ambitious, and the timescale for implementation is short. A successful transition will depend on a strong spirit of cooperation between the EU Agency for Railways, the NSAs, and the broader rail industry. **IRJ**



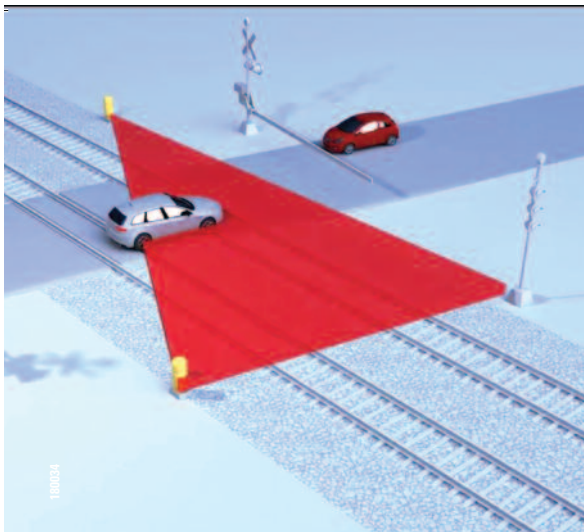
DG Competition is taking a renewed interest in rail and is playing a proactive role, particularly around illegal state aid and abuse of competition. Julia Lamb

which under the Fourth Railway Package can continue until 2034, could stifle the ambitions of new entrants.

CER argues that the EC will not be respecting the legal basis of the Recast Directive and the Fourth Railway Package if it differentiates between how directly-awarded and competitively-tendered PSO contracts are treated in

the EET procedure, and what the contents of the test will be.

The debate over these final legal acts in the Fourth Railway Package demonstrates how much is at stake for established players and newcomers, and the impact of the changes now being implemented, which will reach into every corner of the rail sector of



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