

THE LIBERALIZATION PROCESS OF THE RAILWAY SECTOR IN ROMANIA AND SOME INFRINGEMENT CASE STUDIES

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ABSTRACT

Transport represents an important sector of the economy. Although the railway sector has historically been an important component of the transport industry in the EU, it was noted in the past three decades, its market share constantly declining in comparison with other modes of transport both for freight and passenger transport. Moreover, the railway sector has transformed from a monopolistic sector to oligopoly and competitive markets. This research paper makes an overview of the Romanian railway sector, analyzing the impact of the liberalization process. The four case studies presented in the paper reveal infringements of the selected countries for non-complying with the EU railway directives.

KEYWORDS: *railway sector, liberalization process, infringement, directive, legislation.*

JEL CLASSIFICATION: *K42, K23, L51.*

1. INTRODUCTION

The legal framework of liberalization was provided by the EU directives, but there have been different realization schemes. The convergence of these directions can be defined as the following: firstly, the establishment of regulatory bodies, which occurred in the examined countries (Szekely, 2009). Secondly, the actual functioning of these bodies, such as can be observed in congestion charging, which has discrepancies everywhere. From that point onwards, there are continuous efficiency problems and operators had to contend with financial difficulties.

Policy makers should firstly ensure that infrastructure management companies are more independent, in order to further ensure real competition and discourage the dominance of incumbent operators (Cioaca & Nedelcu, 2015). These remnants of former communist policy are also the main feature of the market in freight transport (Beria et. al., 2012). The railway freight market was opened earlier, and thus there have already been more new participants and the competition is sharp - edged; however, the volume of goods transport has been decreasing.

The implementation of EU legislation framework is also important from a legal viewpoint. Compliance with the legislation enacted by the European Parliament and the Council is a critical element of membership to the European Union. Failure to comply could lead to action before the European Court of Justice (ECJ) and, ultimately, to fines and periodic penalty payments. Under certain circumstances, the ECJ has also allowed individuals the possibility of redress where Directives have been transposed inadequately or too late. ECJ considers that a Directive has direct effect towards the Member State when the deadline for transposition has elapsed (i.e. a railway undertaking may rely on it in court even if not transposed into national law).

The European Union directives shall be transposed into the national legal order of all Member States before a specified deadline. Although is not the obligation of the European Union countries

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to notify their transposition measures, sometimes they fail to comply with these deadlines (König & Luetgert, 2009). Angelova et. al. (2012) presented a synthesis of quantitative and qualitative research on compliance with EU directives. The authors identify and code 12 theoretical arguments tested in 37 published compliance studies and evaluate the robustness and representativeness of their findings. An overview of non-compliance with the EU transportation directives were done by (Börzel & Knoll, 2012). In their paper, the authors questioned whether infringement proceedings are a reliable indicator for non-compliance in the EU and then they presented a descriptive statistics on various characteristics of the infringement cases.

2. OVERVIEW OF THE EU LEGISLATIVE FRAMEWORK

The EU legislator has considerably developed the EU railway sector by encouraging competitiveness and market opening.

Greater competition should make a more efficient and customer-responsive industry. In parallel, measures should improve the interoperability and safety of national networks and promote the development of well-integrated rail systems leading to 'European', rather than 'national', rail systems.

In order to achieve these objectives, first, starting from 1990, some limited degree of market opening impelled the railways to improve efficiency by establishing management independence of railway undertakings from the state and separation of accounts between infrastructure management and transport operations. The second step towards European railways liberalization was the adoption of packages of legislative measures in the years 2000.

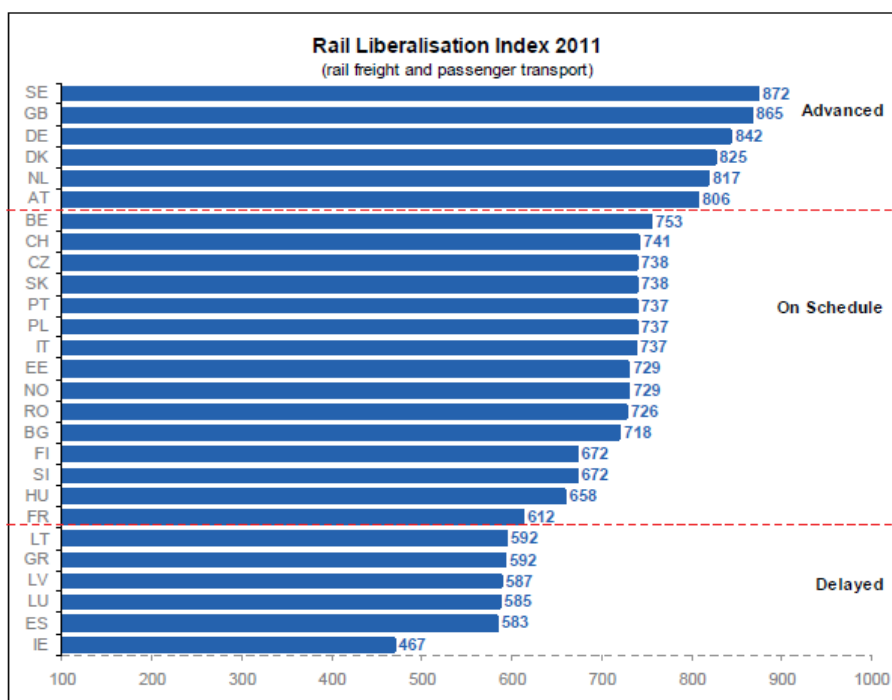


Figure 1. Rail liberalization index, as of 2011

Source: IBM Global Business Services - Feroviar liberalization index in 2011, retrieved from https://www.deutschebahn.com/file/2236522/data/study_rail_liberalisation_index_2011_comp_lete__version.pdf

The EU started the liberalization process by the adoption of Directive 91/440/EEC (1991) on the development of the Community's railways in 1991, which is the first milestone in the reform of the railways sector. Its main features were to:

- (i) Ensure the independence of the management of railway undertakings;
- (ii) Introduce accounting separation between infrastructure management and transport services;
- (iii) Improve the financial situation of railways undertakings, in particular through debt restructuring;
- (iv) Guarantee access to railway infrastructure.

In practice, these provisions did not change the monopoly status of the railway sector, (Holvad and Godward, 1991) but they did mark a first step towards market opening and liberalization (in particular for freight traffic) by allowing rail companies to form "international grouping" with each other for international transport of passengers and freight. Accordingly, railway companies must give access to their infrastructure for the operation of combined transport services. Thus, it introduces for the first time the "open access" principle, which allows competition into the railway market and reduces the financial burden on Member States by restructuring railway operators' financial debt. Directive 91/440 (1991) came into force on 1 January 1993.

The liberalization process in EU Countries was done through three packages: the first, second, third and are going to continue with the implementation of the fourth railway package.

The First Railway Package seeks to: open the international rail freight market, define policy for capacity allocation and infrastructure charging, create a general framework for the development of European railways and shed light on the relationship between the state and the infrastructure manager, railway undertakings and the infrastructure manager, the state and railway undertakings, and finally lay down the conditions that freight operators must meet in order to be granted a license to operate services on the European rail network.

The Second Railway Package's goal was to determine: a common approach to rail safety, the opening of national and international rail freight markets on the whole European network, the establishment of the European Railway Agency (ERA) and requirements for interoperability of the European high speed and conventional rail systems.

The Third Railway Package's objectives were regarded the opening of the market to competition for international passenger services, ensuring fundamental rights for rail passengers and laying down the conditions and procedures for the certification of train crews operating locomotives and trains.

On 21 November 2012, the European Parliament and the Council adopted Directive 2012/34/EU ("Recast Directive"), which replaces all Directives composing the First Railway Package.

The Recast Directive was designed to simplify and consolidate the rules by merging the three mentioned Directives and their amendments into a single text. The Recast also aims to shed light on existing provisions and tackle key issues which have been identified in the market. Specifically, the Recast Directive will reinforce the power of regulatory bodies, improve the framework for railway investment and ensure fairer access to rail infrastructure and rail related services.

To finalize the EU harmonization and liberalization domestic railway services, the Commission has proposed a Fourth Railway Package that is still being discussed at the European Parliament.

2.1. An introspective look into the main Romanian railway legislation

The EU regulatory framework was reflected in the Romanian legislation in:

- (i) Government Emergency Ordinance no. 12/1998 on the Romanian railway transport and the reorganization of the Romanian National Railway Society, approved with the relevant amendments and completions by the Law no. 89/1999, with later amendments and completions;
- (ii) Government Ordinance no. 89 of 28 August 2003 on the allocation of railway infrastructure capacity and the levying of charges for the use of railway infrastructure;
- (iii) Law 55/2006 on railway safety.

Governance Ordinance no. 12/1998 organizes the institutional separation of the national operator between infrastructure and transport services, as well as between passenger and freight railway services. As a result, SNCFR was split into five independently-administered companies.

Besides this major change for the Romanian railway sector's landscape, Ordinance 12/1998 encompasses the following: a general organization of the railway transport, the establishment of a State Authority in the field of rail transport (Ministry of Transport) and its tasks, the organizational and operational framework of the railway infrastructure, the approval of foreign rail passenger operators to have access to the Romanian network, the approval of rail passenger operators to obtain access to passenger transport services under public service contracts through tender procedures, safety and protection provisions with regard to the railway infrastructure, provisions regarding traffic safety and the Performance contract's legal framework and content.

Government Ordinance no. 89/2003 guarantees the liberalization of the Romanian railways. It primarily consists of: setting forth the network statement content (e.g. access conditions, tariff structure), setting out the framework for charging fees for the use of railway infrastructure, as well as the charging principles and its exceptions, setting out the framework and timetable for the process of allocating infrastructure capacity, providing for network capacity analyses in order to identify bottlenecks in the network, as well as concrete plans to improve the quality and capacity of the network and establishing the RSC as a regulatory body and assigning its functions and powers (e.g. fines, monitor competition, treat applicants' complaints).

The Romanian law on railway safety implements Directive 2004/49 ("Railway Safety Directive"). Its purpose is to ensure the development of safety on the Romanian railway network and to improve market access for railway operators. It defines the various actors' responsibilities and transposes the EU common safety targets and safety methods into national rules. It also defines common principles for safety management, regulation and control.

2.2. Liberalization process in Romania

In 1998, Romania separated the national operator into different companies, following a "vertical separation" model, and introduced competition among freight operators through the provision of "open access" to the infrastructure.

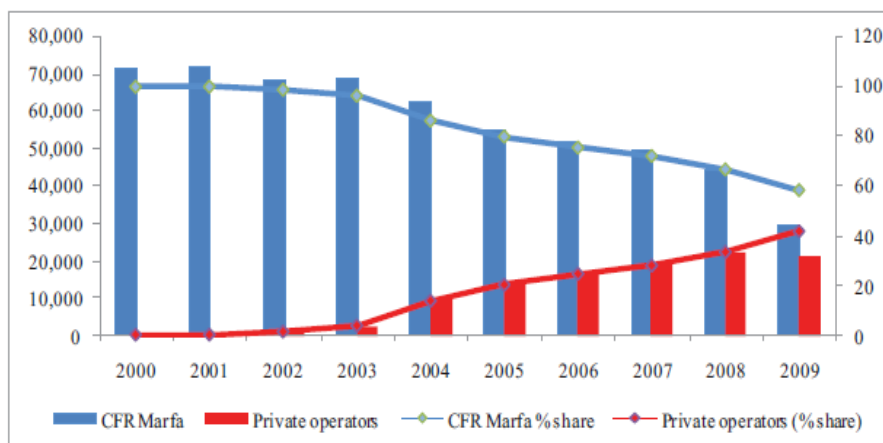
CFR separation. The Romanian railways reform dates back to 1998, when Romania decided to split the then-existing SNCFR, into five independently-administered companies. While strictly separated, those companies nevertheless remain owned by the Romanian State today. The five companies are the following:

- i. CFR Infrastructura (infrastructure manager);
- ii. CFR Calatori (rail passenger operator);
- iii. CFR Marfa (rail freight operator);
- iv. CFR Gevaro (services linked with restaurant cars);
- v. SAAF (company dealing with excess rolling stock to be sold, leased or scrapped).

This reform was triggered to a certain extent by the efforts deployed by Romania in fulfilling the criteria to join the European Union and its main objective was to allow the new companies to operate on a commercial basis and to ultimately also allow the possibility of privatizing the companies.

The Romanian State has made several attempts to privatize CFR Marfa, the last of which dates from October 2013. None has been successful so far. The main activity of CFR Marfa consists of rail freight transport within the local and international traffic with full wagons and intermodal transport units, which are all accessory rail freight services. The company's activity area is represented by the entire Romanian railway network. The company is organized in 4 branches: Muntenia-Dobrogea, Banat-Oltenia, Transylvania and Moldova, 89 management stations, 8 depots operating locomotives (907 locomotives) and 12 wagons revisions (22.000 locomotives). CFR Marfa also recorded a major staff restructuring in the last few years, as the company has reduced its number of employees by 70%.

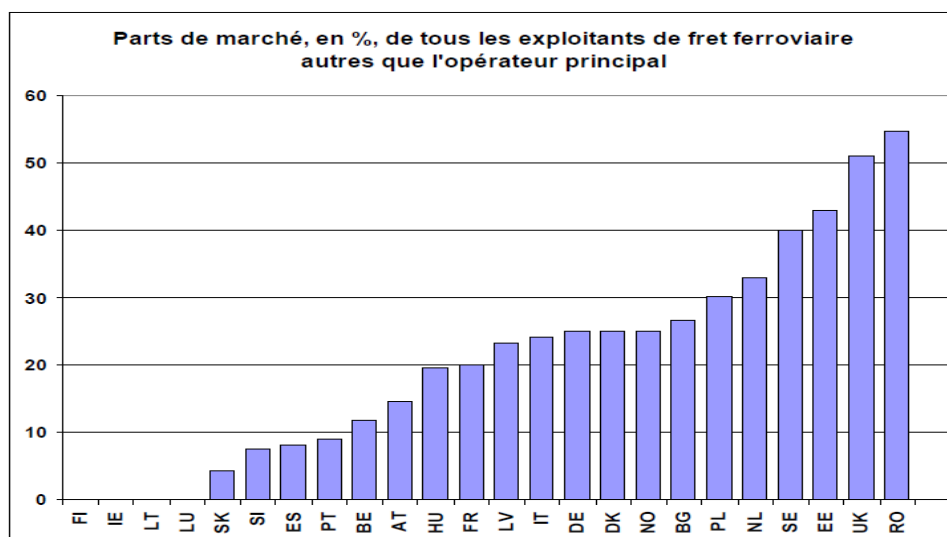
The activities of the operators in the Railway sector have posed some competition concerns in the past. The sector is dominated by state-owned companies: the National Railway (Infrastructure) Company (CFR SA), the National Railway (Passenger) Company (CFR Calatori) and the National Railway (Freight) Company (CFR Marfa), as well as some of their subsidiaries. However, new private rail freight operators entered the Romanian railways sector, and to date, the development of private freight operators has been strong (24 new private companies since 1998), eroding the market share of CFR Marfa. The main competitors of Marfa are: Grup Feroviar Roman (GFR), Servtrans Invest, Cargo Trans Vagon, Unifertrans, DB Schenker Rail Romania, Transferoviar Grup. By the end of 2011, the market share percentage of CFR Marfa was reduced to about 45%.



Source: CFR Marfa.

Figure 2. CFR Marfa Traffic and market share in comparison with Private operators ('000 tons)

Source: CFR Marfa



Source: RMMS questionnaire completed by Member States in May-June 2011

Figure 3. Total Market shares 'expressed as a percentage of traffic in tone-kilometers) of freight operators other than the main operator at the end of 2010

Source: RMMS

From the above graph we could see that Romania is the country in which the freight operator incumbent has the least market shares compared to the other EU Member States. That shows the fact that, the liberalization process of the freight sector in Romania is very dynamic.

3. INFRINGEMENT PROCEEDINGS CONDUCTED BY THE EUROPEAN COMMISSION IN THE FIELD OF RAILWAYS TRANSPORT. CASE STUDIES

In the past few years, there were several infringements at the EU level for the lack of implementing the Railway packages. Further we will present three of the most important infringements cases.

3.1. Case study 1

1) EU States: Austria, Czech Republic, Germany, Greece, France, Hungary, Ireland, Italy, Luxembourg, Poland, Portugal, Slovenia and Spain

2) Proceedings: The European Commission decided to refer 13 Member States to the Court of Justice for failing to correctly implement various parts of the First Railway Package.

After detailed enquiries about implementation in every Member State, the Commission initially opened infringement proceedings in June 2008 against 24 (Member States. Following modifications introduced in their domestic legislation by several Member States in order to comply with EU legislation on a number of issues, the Commission sent reasoned opinions to 21 Member States in October 2009 on the remaining infringements. After analyzing the replies of the Member States to the reasoned opinions, the Commission decided to refer 13 Member States, which still do not implement EU rules properly, to the Court.

The Member States referred to the Court infringe the relevant EU legislation in several ways, in particular by not sufficiently ensuring the independence of the rail infrastructure manager, through inadequate implementation of the provisions concerning rail access charging and/or due to a failure to set up an independent regulatory body.

Incorrect implementation of the First Railway Package directives results in obstacles to market access and a lack of transparency of access conditions. This prevents the establishment of a fully functioning single market for rail services in Europe. Unfair conditions of competition in access to infrastructure can arise from a situation where the infrastructure manager, responsible for setting access charges and allocating network capacity, is not sufficiently independent from entities running railway services themselves. The EU rules on track access charges have the purpose of encouraging optimal use of the rail infrastructure. Incorrect implementation may lead to access charges which are too high and therefore exclude potential operators who would have been able to bear charges set at the direct costs resulting from the operation of a particular service (the minimum charge required under EU legislation). It may also lead to unjustified discrimination between railways operating in different market segments.

Strong and independent railway regulators, which have the power to take effective decisions on market access and charging issues, are also essential to the establishment of fair and non-discriminatory market conditions.

3.2. Case study 2

1) EU States: Austria, France and Portugal

2) Proceedings: The European Commission had welcomed the improvements made by Austria, France and Portugal to their national rail legislation, and therefore reduced the scope of the infringement cases against them. Nevertheless, other substantive issues remained unresolved in all three of these states, such that the Commission will continue to pursue the cases before the Court.

In accordance with the "First Railway Package", France has notified the Commission that it will introduce an independent rail regulator from 1 December 2010. In addition, France has relinquished state intervention in the determination of rail infrastructure charges, which will henceforth be set by the infrastructure manager.

The establishment of an independent rail regulator is a crucial step in opening the rail services market to competition. In particular, the regulator must prevent discrimination of rail operators when accessing railway infrastructure. The transfer of the power to set infrastructure charges from the state to the infrastructure manager will strengthen management independence of the infrastructure manager and ensure it can act according to economic and business criteria.

Portugal and Austria have established a performance regime to minimize disturbances on the network. These performance regimes set incentives for infrastructure managers and railway operators to avoid disturbances and thereby optimize the use of the railway infrastructure.

Incorrect implementation of the First Railway Package Directives results in obstacles to market access and a lack of transparency of access conditions. This prevents the establishment of a functioning single market and level playing field for rail services in Europe. Strong and independent railway regulators which have the power to take effective decisions on market access and charging issues are also essential for the establishment of fair and non-discriminatory market conditions.

3.3. Case study 3

1) EU States: Bulgaria

2) Proceedings: The European Commission decided to refer Bulgaria to the European Court of Justice for having failed to correctly implement different parts of the legislation known as the First Railway Package. This concerned the implementation of the provisions on charges which railway undertakings must pay for access to the infrastructure.

The main objective of the First Railway Package is to create a basis for market opening and competition in rail services. The provisions of its Directives aim in particular at ensuring the independence of the infrastructure manager from railway undertakings, the basic principles guaranteeing non-discriminatory track access charging, and the setting up of a regulator to address obstacles to competition in access to rail infrastructure.

Member States were required to implement these Directives by 15 March 2003. In the case of Bulgaria, these had to be implemented by the accession date 1 January 2007. Member States were also required to inform the Commission of the laws, regulations and administrative provisions enacted at national level in order to comply with the European rules.

After detailed enquiries about the transposition in Bulgaria, an infringement proceeding started in June 2008 with the sending of a letter of formal notice for incorrect transposition of the railway Directives. Following modifications introduced in their domestic legislation in order to comply with European legislation on a number of issues, a reasoned opinion was sent in March 2010 on the remaining infringement in relation to its railway track access charges. After analyzing the replies of the Bulgarian authorities, the Commission decided to refer Bulgaria, which still does not implement EU rules properly, to the Court.

3.4. Case study 4

1) EU States: Austria, Estonia, Germany, Lithuania, Luxembourg, the Netherlands, Poland, Romania, Sweden and the United Kingdom

2) Proceedings: The European Commission sent a reasoned opinion to ten Member States, formally requesting to fully implement the last amendment to the Railway Safety Directive. These countries have so far failed to bring their national legislation into line with this Directive, although obliged to do so by 24 December 2010. The Commission had set a two-month deadline for these Member States to remedy the situation. Should the Member States fail to do so, the Commission may refer the cases to the European Court of Justice.

The aim of the Directive 2008/110/EC is to improve the level of safety of the European rail transport system. It provides a legal basis for a common framework for the maintenance of rolling stock: before a rail vehicle is allowed to be put into service, the "entity" responsible for its maintenance (known as the "entity in charge of maintenance" or ECM) must be identified. For freight wagons, the ECM must be certified according to a system developed by the European

Railway Agency and adopted by the Commission on 10 May 2011. Member States had until 24 December 2010 to transpose the Directive into their national legislation and to notify domestic implementation measures to the Commission.

An essential provision of the Directive is that the certificate granted to an ECM is valid throughout the European Union. This provision, which recognizes equivalence between the ECMs, is therefore intended to raise the level of railway safety throughout the EU and to ensure interoperability.

Directive 2008/110/EC has not yet been transposed, or has been transposed only partially, by ten Member States. Failure to implement the Directive would prevent achieving the expected level of safety. This will affect not only those countries that have not implemented Directive 2008/110/EC but the entire European single railway area as well.

4. CONCLUSIONS

In this paper, we emphasized the way in which the railway legal framework is reflected in the day-to-day practice of the major active players on the Romanian market.

Competition is a key factor at the basis of the liberalization process. In particular, increase of the competition degree is observed in the freight and passenger railway sectors. Open tender procedures in public procurement auctions facilitate competitiveness and transparency. Nevertheless, consumers' satisfaction represents probably the best barometer on a multitude of aspects, like possibility of choice from several alternatives for the end consumers, safety in traffic, the quality of services rendered by operators on the Romanian market, interconnection with major railway transport.

Timely implementation of EU legislation should help to boost competition, increase the powers of the regulator, complete the internal market for rail transport and improve railway sector competitiveness and growth. It is also critical to avoid judicial actions by the European Commission or private parties.

The national legislation, as developed in Government Ordinance 89/2003, establishes a series of rules which are sufficient to ensure that Romania complies with its main responsibilities under the current EU Railways legislation. More particularly, the issues identified in the World Bank inception report regarding the status, composition and powers of the Railway Supervisory Council ("RSC") were addressed in Law no. 188 of 30.10.2012 approving and amending Government Emergency Ordinance 21/2011 on certain measures regarding the organization and functioning of the Supervision Council ("Law 188/2012").

European Union railway directives are increasingly used to stimulate railway domestic framework compliance with European Union law (Versluis and Tarr, 2012). Through in-depth analysis of the European Railway Framework, we enhance our empirical understanding of the working and functioning of EU directives, and advances our thinking about compliance in international settings. It makes us conclude that, in order to be capable of stimulating domestic compliance, the directives should be flexible to resort to a mix of compliance strategies in order to be able to cope with the varying domestic compliance situations.

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