PANORAMIC

RAIL TRANSPORT 2024

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LEXOLOGY

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Panoramic guide (formerly Getting the Deal Through) enabling side-by-side comparison of local insights into industry structure and regulatory bodies: market entry; market exit; competition law; price regulation; network access; service standards; safety regulation; financial support; labour regulation; environmental regulation; and recent trends.

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Global overview

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Railways have been a global phenomenon since their invention nearly two centuries ago. When the Liverpool and Manchester Railway, the world's first intercity rail service, premiered in 1830, construction had already started across the Atlantic on the United States' first railway, the Baltimore and Ohio Railroad. As detailed by railway historian Christian Wolmar in *Blood, Iron and Gold*, within a decade of the Liverpool and Manchester Railway's successful debut, railways were spreading across Europe to nations such as France, Belgium and Italy. By the 1840s, the new technology was being introduced in Asia and South America and was well on its way to revolutionising transport around the globe.

This rapid expansion is not surprising. While for centuries (and indeed millennia), waterways provided the only avenues for low-cost, high-volume transport, the advent of the railway opened up new opportunities for transporting people and goods across virtually any terrain. But as this unique new technology was adopted around the world, the burgeoning rail industries in different nations often took divergent paths. Geography, political circumstances and economic needs have led to significantly different approaches in the structure of the industry and the laws that govern it. Many of these distinctions endure to the present day.

Nearly two centuries after railways were established internationally, they remain a key part of the global transport network. The chapters in this volume illustrate the significant jurisdictional differences in the laws regulating the rail transport industry. But all jurisdictions face some of the same issues related to technology and economics, which permits some observations about the legal frameworks governing the industry and what the future may hold.

The first observation that the reader will note is that the basic structure of the rail industry and the regulations governing it varies significantly from jurisdiction to jurisdiction. Systems dominated by privately run, vertically integrated railways (such as in the United States and Canada) have significantly different rules for licensing and economic regulation than systems where infrastructure management and rail operations are conducted by different entities (such as those in Europe). And both types of systems are themselves quite different from those where a single state entity has responsibility for conducting rail operations and managing infrastructure.

In general, rail legal systems fall into one of the following basic models: vertically integrated railways; separated infrastructure and operating railways; and centralised state operations. Each of these models has distinct approaches to licensing and to economic regulation, but there are significant commonalities in how most jurisdictions approach safety regulation.

Vertically integrated railways

The rail systems of Canada and the United States feature vertically integrated railways, in which the same entity owns the rail infrastructure and operates over that infrastructure. In

general, US and Canadian railways are privately owned and focus on freight operations. (Passenger rail receives public support in both Canada and the United States, through VIA Rail in Canada and Amtrak in the United States.) Canada and the United States do not currently provide substantial government financial support to freight railways; instead, railways are expected to recover the funds necessary to fully fund their operations through the rates they charge to rail customers. This is no small matter: railways have intensive infrastructure needs, flowing from the need to construct and maintain track over every mile of the transport route. This distinguishes rail transport from other modes, such as motor carriers (which can take advantage of publicly available roads), and air and water transport (which can traverse the seas and the skies between ports and terminals). The high infrastructure costs inherent in rail transport thus require a revenue stream that both covers the incremental operating costs of running individual trains and provides sufficient additional funds to support that infrastructure.

Railways' need for adequate revenue to support both operations and infrastructure has often been at odds with political pressure for railways to charge lower rates or to maintain unprofitable routes deemed to be in the public interest. Both the United States and Canada have undergone significant changes to their legal regimes in an effort to strike the right balance. In the United States, the most significant reforms were made in the late 1970s and early 1980s in response to serious financial difficulties in the railway industry, including multiple bankruptcies. In a series of pieces of legislation culminating in the Staggers Rail Act of 1980, railways were given general freedom to price their services without government approval, the ability to more easily abandon unprofitable lines and the option to transfer unprofitable passenger service to the government-supported passenger provider Amtrak. Shippers retained the ability to challenge the quality of a railway's services or the level of rates in certain circumstances, but it was generally recognised that railways had the right to set rates at a level sufficient to support their infrastructure costs. The result of these successful reforms was the financial recovery of the US freight rail system, which continues to flourish today. The US regulatory landscape continues to be contested territory, with some freight shipper interests arguing for more aggressive regulation of freight service and rates, and some passenger interests arguing that freight railroads should be more accommodating of Amtrak and commuter service. In 2023, rail safety regulation became a particular area of focus in the United States, in the wake of the February 2023 derailment of a freight train in East Palestine, Ohio that resulted in the release of certain hazardous materials. Multiple pieces of legislation and regulatory actions are being considered by the US Congress, federal regulatory agencies and state governments, some of which could have significant effects on US rail regulation if they were adopted.

Canada's regulatory system has also undergone significant changes in recent decades, reflected in legislation such as the National Transportation Act of 1987 and the Canada Transportation Act of 1996, and in the 1995 privatisation of the Canadian National Railway. While Canadian and US practitioners can identify myriad differences in the details of the two regulatory systems, from a wider perspective there are many parallels: each system features large privately owned freight railways that each control their own infrastructure (supplemented by a number of short-line carriers); each country generally gives railways the freedom to price their services as they deem appropriate, but provides a mechanism for shippers to challenge rates that they believe to be unreasonable in certain circumstances (through final offer arbitration in Canada and Surface Transportation Board rate complaints in the United States); each system provides mechanisms for shippers to challenge the

quality of service they receive; and each country has separate state-supported national passenger railways. In both nations, freight railways are expected to operate largely without public support and are permitted to charge rates allowing them to recover the costs of infrastructure. Indeed, both major Canadian railways, Canadian National Railway and Canadian Pacific Kansas City, have extensive operations in the United States and operate successfully in both countries.

Following a March 2023 merger approval by the US Surface Transportation Board, Canadian Pacific Railway completed its merger with Kansas City Southern to create Canadian Pacific Kansas City (CPKC), the fourth-largest North American railway (measured by miles of road operated) and first north–south transcontinental railway linking Canada, the United States and Mexico. The impact of the CPKC merger on the North American rail network and potential future consolidation of the North American network remains to be seen.

Separated infrastructure and operating companies

A second type of rail regulatory regime (the 'separated model') is more common in Europe. In this model, an entity is charged with maintaining infrastructure and providing access to that infrastructure to rail operators. Operators are given licences to operate over the tracks maintained by the central infrastructure entity. In some jurisdictions, the infrastructure entity is entirely separate from operating entities. Examples of this arrangement include Network Rail in the United Kingdom and ProRail in the Netherlands. Other jurisdictions have hybrid models, where the infrastructure entity is part of a holding company that also controls operating entities. For example, in Germany, separate subsidiaries of Deutsche Bahn AG manage infrastructure and operations. Distinctions also arise among jurisdictions that have different mixes of operating entities. In some countries, the market continues to be dominated by a single operating entity (often the historic state-owned incumbent), while in others market shares are more evenly distributed among several operating competitors.

To some degree, these separated models have been implemented to comply with European Union (EU) rail laws. A series of EU railway packages have been enacted over the past two decades to support the ultimate goal of a single European railway area. In the interest of creating a level marketplace for operators to compete across borders, successive EU railway packages have required members to separate infrastructure and operating entities; to permit open access to rail operators; and to eliminate state aid that could distort rail competition. Some level of government support of the rail industry remains common, particularly support of the infrastructure entity.

As discussed above, in vertically integrated systems the focus of economic regulation is on the rates charged by integrated railways to rail customers. In separated regimes, by contrast, the primary focus has been on the terms of network access and the charges payable by passenger and freight operators to infrastructure managers for network access. There is relatively little direct regulation limiting the rates charged by rail operators to freight shippers, although some jurisdictions limit fare increases for passengers.

Nationalised control

The third model, which has been tried historically in many jurisdictions and persists in some today, is nationalised control of both the rail system and rail operations. The general trend has been towards privatisation of nationalised railways, although different countries are at different stages of that process. Japan, for example, has privatised all but three of its railway companies, and it has plans to privatise the remaining companies in the future. India, by contrast, continues to have a nationalised system through Indian Railways, but it is exploring opportunities for private sector participation. Mexico is a good example of a country that has made substantial progress towards privatising its system; however, the government continues to maintain control over rail infrastructure, and private rail entities conduct their operations pursuant to concessions that will eventually expire unless renewed by the government.

Future trends

As the twenty-first century unfolds, the railway industry will face new challenges and opportunities, and the legal frameworks governing the industry will have to adjust to meet these new realities. One critical issue in the coming years will be how best to structure regulation to allow for smoother cross-border operations. Eliminating technical and legal obstacles to operating trains across national borders is essential to maximise the efficiencies of rail transport. One of the key successes of the US system was the centralisation of rail regulation in the national government so that railways could comply with national standards for rail equipment and safety rules rather than facing different regimes from state to state. Agreeing on equipment and safety standards across national borders is certainly more challenging than it was for the United States to do so internally, but efforts to streamline international rail transport are critical to enhancing its usefulness and sustainability. In particular, the EU's progress in developing unified interoperability standards is a key trend to watch.

Another trend to watch is the extent to which rail systems on both sides of the Atlantic may be seeking lessons from the other. In the United States, many are pushing for the freight-centred United States rail network to become more of a passenger-based network, citing the European passenger rail network as an inspiration. Amtrak has announced plans for a significant expansion of its passenger routes through the Amtrak Connects US programme, and the US government has made available significant new infrastructure funding to support passenger rail. Privately funded passenger rail projects in the United States are also progressing, such as the Brightline service, which is expected to begin operating between Orlando and Miami, Florida in the fall of 2023. Conversely, in Europe, the EU and several European nations have announced a focus on increasing freight rail's modal share of transportation and diverting truck traffic to rail, which would serve the twin goals of reducing CO2 emissions and mitigating traffic congestion.

Despite significant jurisdictional differences, international understanding and cooperation are key for the rail transport industry: from the physical movement of freight or passengers across country lines, to the marketing of rail technology equipment and the capital funding for cross-border investments. It is our hope that this guide will both assist legal practitioners in the industry and provide a starting point for businesses thinking about ways of getting the deal through in the field of rail transport.

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UPDATE AND TRENDS

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GENERAL

Industry structure

1 How is the rail transport industry generally structured in your country?

As a European Union member state, Belgium has implemented the EU legislative package liberalising the rail market sector, establishing a single European rail area through Directive 2012/34/EU and the other EU directives and regulations. In this regard, one of the key legislative acts transposing EU legislation is the Law of 30 August 2013 on the Railway Code (the Railway Code). In accordance with the EU rules, the rail transport market has been fully liberalised for domestic and international freight transport by rail, as well as for the international transport of passengers by rail. Although the market for the domestic transport of passengers has been liberalised in Belgium, it continues to operate pursuant to a single operating model in which the public service is provided exclusively by the National Railway Company of Belgium (SNCB). The market for freight has seen new market entrants over the years and currently has 12 operators in this segment.

Three rail undertakings operate in the international passenger transport segment. Nevertheless, the market continues to be dominated by the SNCB, which provides 86 per cent of all train kilometres circulated on the entire Belgian rail infrastructure (including passenger and freight).

The role of infrastructure manager is provided by Infrabel, which is a separate legal entity from the SNCB. Both Infrabel and the SNCB are established as public autonomous companies; however, they remain controlled by the Belgian state. In addition, despite being separate entities, some aspects of vertical integration are stipulated by law. For instance, both companies must conclude a transport convention with each other, establishing the conditions and means of operational collaboration for the discharge of their public service obligations on, among others, the punctuality and circulation of trains, the reception and information of passengers, the management of incidents (including emergency interventions) and the coordination of the implementation of investments by Infrabel and the SNCB.

Ownership and control

2 Does the government of your country have an ownership interest in any rail transport companies or another direct role in providing rail transport services?

The state directly owns several important rail stakeholders, including the SNCB, which continues to be the main market actor in the Belgian rail sector, enjoying a legal monopoly to provide domestic transport at least until 2032. In addition, the state also owns Infrabel. Finally, the state controls HR Rail, which handles recruitment of Infrabel's and SNCB's employees.

3 Are freight and passenger operations typically controlled by separate companies?

Freight and passenger operations are typically controlled by separate companies. There are currently three international passenger rail undertakings and 12 freight operators, with no overlap between the two types of operators.

The SNCB used to provide freight services through its sister company SNCB Logistics, though it has disinvested the business following a large-scale restructuring effort. In 2015, SNCB's freight division was sold to a private company and in 2017 it was rebranded as Lineas, with the SNCB only operating in the passenger transport market.

Regulatory bodies

4 | Which bodies regulate rail transport in your country, and under what basic laws?

Rail transport is mainly regulated by:

- the European Commission;
- the Council of the EU;
- the European Parliament;
- the European Union Agency for Railways (ERA);
- the Belgian parliament; and
- the Federal Public Service Mobility and Transport (FPSMT) Directorate General Sustainable Mobility and Rail Policy.

The European Union has adopted a series of legislative packages that have gradually liberalised the internal rail market with the aim of creating a single European railway area. This process was completed with the fourth EU railway package of 2016.

Following the entry into force of Regulation (EU) 2016/796 on the European Union Agency for Railways (part of the technical pillar of the fourth EU railway package) on 15 June 2016, the ERA replaced and succeeded the European Railway Agency. The ERA is mandated to issue single safety certificates and vehicle (type) authorisations valid in multiple European countries and to ensure an interoperable European Rail Traffic Management System (ERTMS), in the development and implementation of the Single European Railway Area. Its tasks are to:

- promote a harmonised approach to railway safety;
- devise the technical and legal framework in order to enable removing technical barriers, and acting as the system authority for ERTMS and telematics applications;
- improve accessibility and use of railway system information; and
- act as the European Authority under the fourth Railway Package issuing the aforementioned authorisations and certificates, while improving the competitive position of the railway sector.

The Belgian parliament has adopted numerous laws governing the rail sector, notably the Law of 30 August 2013 on the Railway Code, as implemented by royal and ministerial decrees.

The FPSMT is a public administrative body whose main objective is preparing and implementing Belgium's transport policy. The sector regulator is the Regulatory Service for Railway Transport and for Brussels Airport Operations (the Regulator), which has the following objectives: undertake sector investigations; monitor compliance of Infrabel's network statement with the legislation; levy user charges and competition on the market for railway transport services; and determine the genuinely international character of international passenger transport. The National Safety Agency is the Department for Railway Safety and Interoperability.

MARKET ENTRY

Regulatory approval

5 Is regulatory approval necessary to enter the market as a rail transport provider? What is the procedure for obtaining approval?

Yes. For a rail undertaking to provide transport services in the already liberalised market segments, it must hold several types of authorisations:

- Rail operator licence: a Belgian licence may be used or any licence issued by an EU member state's competent authority. Any company established in Belgium may request a licence from the Federal Public Service Mobility and Transport. The procedure for issuance of the licence is laid down by Chapter II, Title 3 of the Law of 30 August 2013 (the Railway Code) and articles 3 and 4 of the Royal Decree dated 16 January 2007 on the railway undertaking licence.
- Safety certificate: to have access to the infrastructure, the railway undertaking must be in possession of a safety certificate. From 1 November 2020, the single safety certificate regime as set out in Directive 2016/798 and transposed into Belgian law, and in Commission Implementing Regulation (EU) 2018/763, applies. Access to the EU railway infrastructure is granted only to companies holding a single safety certificate issued either by the European Union Agency for Railways (ERA) or by the Department for Railway Safety and Interoperability. The purpose of the certificate is to provide evidence that the company concerned has established its safety management system and that it is able to operate safely in its intended area of operation.
- Cover of liabilities: applicants for a railway undertaking licence are required to have civil liability cover (article 13 of the Railway Code). Royal Decree of 8 December 2013 concerning the setting of the minimum amount for the cover of civil liability for travel on the railway infrastructure stipulates that the minimum amount is set at €50 million. An amount is also set at €70 million for the provision of rail transport services for passengers.

In relation to domestic passenger transport services, a rail undertaking's right of access to railway infrastructure and to pick up and set down passengers may be limited if an exclusive public contract has been awarded, when the regulatory body must carry out in certain cases an analysis of the impact on the economic equilibrium in accordance with the following four-step procedure:

- notification of the intention to start a new rail service for passengers;
- request for an economic equilibrium test;
- assessment of the economic equilibrium; and
- decision.

In addition, the rail operator will have to conclude a utilisation contract with Infrabel covering, among other things, the means of implementation of safety rules. Finally, the admission of rolling stock on the tracks is subject to a vehicle authorisation, confirming the conformity of said rolling stock with the applicable legislation, and is issued by the ERA or the Department for Railway Safety and Interoperability in accordance with the Royal Decree of 6 December 2020 adopting the requirements applicable to rolling stock for the use of train paths.

6 Is regulatory approval necessary to acquire control of an existing rail transport provider? What is the procedure for obtaining approval?

If the acquisition of an existing rail transport provider amounts to a concentration then prior merger clearance might be required from the Belgian Competition Authority or the European Commission if merger thresholds are met.

There are no additional sector-specific rules relating to acquisition of control of a rail transport provider. However, in effect a new rail operator licence is required as the licence is non-transferable.

7 Is special approval required for rail transport companies to be owned or controlled by foreign entities?

No special approval is required for acquiring control over a rail freight transport undertaking or over an undertaking providing international rail carriage of passengers. However, as national rail carriage of passengers is attributed exclusively to the National Railway Company of Belgium, a state-owned company, it is legally impossible to acquire control over it.

8 Is regulatory approval necessary to construct a new rail line? What is the procedure for obtaining approval?

Infrabel builds and develops the Belgian rail network. Private companies can also build private tracks and then ask for their connection to the rail network. In all cases, an urbanism permit is required before any works may commence. The issuance of an urbanism permit

is governed by legislation in the regions (Flemish, Walloon and Brussels-Capital) and the procedure usually involves a public investigation.

MARKET EXIT

Discontinuing a service

9 What laws govern a rail transport company's ability to voluntarily discontinue service or to remove rail infrastructure over a particular route?

Infrabel's yearly network statement reminds a rail operator that it must respect the traffic schedule that has been communicated by Infrabel. Should the rail undertaking use, on average, less than 80 per cent of the scheduled weekly planned trips during the preceding weekly timetable, this constitutes an automatic termination cause of the utilisation contract concluded by the rail undertaking with Infrabel.

A rail undertaking may nonetheless choose to relinquish the utilisation of part or all of its allocated capacities.

Finally, a rail undertaking cannot remove rail infrastructure since the utilisation contract states that a rail operator is prohibited from unilaterally modifying, damaging or using the rail infrastructure for purposes other than those for which it was conceived, prepared or provided.

10 On what grounds, and what is the procedure, for the government or a third party to force a rail transport provider to discontinue service over a particular route or to withdraw a rail transport provider's authorisation to operate? What measures are available for the authorisation holder to challenge the withdrawal of its authorisation to operate?

The standard utilisation contract concluded between Infrabel and the rail operator provides that Infrabel may discontinue service in the following circumstances:

- if the rolling stock has not obtained a vehicle authorisation, or where the rolling stock does not correspond to that described in the aforementioned authorisation. If the rail operator does not remove the rolling stock of its own accord, this may be done by Infrabel, or tasked to another rail operator by Infrabel. All costs associated with removal of rolling stock from the tracks lie solely with the infringing rail operator; and
- if it considers that the operator's safety personnel do not comply with the applicable safety norms and rules. If this is the case, the rail operator must remove such personnel, and, if necessary, remove the rolling stock as well. If this cannot be achieved, Infrabel may request the personnel of another rail operator to evacuate the tracks. All associated costs remain with the rail operator, including infrastructure fees, regardless of actual usage of the infrastructure.

Insolvency

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11 Are there sector-specific rules that govern the insolvency of rail transport providers, or do general insolvency rules apply? Must a rail transport provider continue providing service during insolvency?

There are no sector-specific insolvency rules. Instead, the general rules of Book XX on insolvency of undertakings of the Law of 28 February 2013 on the Code of Economic Law, which entered into force on 1 May 2018, apply. In the case of judicial reorganisation, in principle, the debtor may continue to operate its business during the moratorium period until the end of the insolvency process. Exceptionally, if the debtor's actions amount to a serious mismanagement and threaten the continuation of the business, then the court will appoint an administrator to continue business operations on behalf of the debtor. As such, all ongoing contracts will continue to be performed. However, within 14 days of the commencement of proceedings, the debtor may decide to cease to perform its contractual operations if necessary for the successful reorganisation of the business.

Infrabel's standard contract on usage of the rail infrastructure, which must be concluded by any rail undertaking, states that a contract may be automatically terminated in the case of bankruptcy or judicial reorganisation of the rail undertaking. Moreover, should the reorganisation of the operator fail and the proceedings conclude with a court judgment declaring bankruptcy, this will result in the automatic revocation of the rail operator licence.

COMPETITION LAW

Competition rules

12 Do general and sector-specific competition rules apply to rail transport?

There are no sector-specific competition rules governing the rail sector. General Belgian competition law mirrors EU competition legislation and is contained in Book IV of insolvency of undertakings of the Code of Economic Law (CEL), introduced by the Competition Act of 2013 and amended in 2019, the Royal Decrees of 30 August 2013 on the procedures for the protection of competition, and on the notification of concentration of undertakings referred to in article IV.10 respectively. The CEL covers typical competition areas, such as mergers, cartels (article IV.1, section 1, the national equivalent to article 101 Treaty on the Functioning of the European Union (TFEU)), abuse of dominance (article IV.2, the national equivalent to article 102 TFEU) and abuse of economic dependence (article IV.2/1). The Belgian competition authority has now adopted a new simplified merger notification.

Regulator competition responsibilities

13 Does the sector-specific regulator have any responsibility for enforcing competition law?

The Regulator is entrusted with the supervision of competition on the market for provision of rail services, though this is limited to issuing non-binding opinions. The enforcement of competition rules remains with the Belgian Competition Authority (BCA).

Competition assessments

14 What are the main standards for assessing the competitive effect of a transaction involving rail transport companies?

The substantive test for transactions covered by the CEL is similar to the test used under the EU Merger Regulation. The BCA will clear a transaction provided it does not 'significantly impede effective competition in the Belgian market or in a substantial part of it' – the significant impediment to effective competition test. The BCA will assess the actual or potential overlap between the parties (horizontal effects), as well as vertical links and conglomerate effects of the concentration to assess the risk of market foreclosure. Various factors will be taken into account, such as the market shares of the parties and their competitors, the effectiveness of actual or potential competition, actual or potential barriers to entry or expansion, the bargaining power of customers and suppliers, market structure, the maturity of the market, the economic and technical level of the market, and alternative sources of supply. The BCA will clear concentrations if the parties' market share on the relevant market is less than 25 per cent.

PRICE REGULATION

Types of regulation

15 Are the prices charged by rail carriers for freight transport regulated? How?

The Law of 30 August 2013 (the Railway Code) establishes that prices charged by rail undertakings whether they are privately owned or state owned are undertaken in accordance with commercial practices. In particular, article 9 of the Railway Code provides that rail undertakings are free to control the provision and commercialisation of their services, including pricing.

The Railway Code makes no distinction between passenger transport and freight transport.

16 Are the prices charged by rail carriers for passenger transport regulated? How?

In terms of passenger transport, a distinction must be made between state- and privately-owned rail undertakings. For private companies, the provisions of article 9 of the Railway Code remain applicable, which means that they are free to set the prices for their services.

On the other hand, state-owned companies such as the National Railway Company of Belgium (SNCB) are subject to price control in accordance with the Law of 21 March 1991 reforming certain economic public companies. Thus, public autonomous companies, such as SNCB, will establish tariffs and tariff structures when discharging their public service obligations within the limits of the specific management contract concluded by the public company and the state. For pricing elements not provided for by the contract, such as the maximum tariff or the price calculation formula, these elements will require prior approval

by the ministry to which the public autonomous company is subordinated. However, for the provision of services other than public service obligations, the SNCB is free to determine such tariffs and tariff structures.

17 Is there a procedure for freight shippers or passengers to challenge price levels? Who adjudicates those challenges, and what rules apply?

Before the adoption of new transport fares by SNCB, the Advisory Committee for Railway Travellers (the Committee) must issue an advisory opinion on the fares. The Committee was created by the Law of 21 March 1991 and is an independent advisory body whose main objective is to deliver opinions on the services granted to travellers by rail undertakings that are charged with public service obligations (such as the SNCB and Infrabel). In exercising its objective, the Committee is entitled, in accordance with article 35 of the SNCB's management contract, to request information from the latter to express its opinion on price increases. However, the Committee's ex-ante opinion is non-binding.

18 Must rail transport companies charge similar prices to all shippers and passengers who are requesting similar service?

Sector-specific rules do not address this topic, though generally charging different prices for similar services can be seen as a form of price discrimination, which conflicts with EU and national legislation on consumer protection, competition law and possibly constitutional law. The following national legislation governs equal treatment: the Law of 10 May 2007 promoting equal treatment between women and men, and the Anti-Discrimination Law of 10 May 2007, among others.

NETWORK ACCESS

Sharing access with other companies

19 Must entities controlling rail infrastructure grant network access to other rail transport companies? Are there exceptions or restrictions?

Infrabel must grant access to the Belgian rail network in a fair, transparent and non-discriminatory manner to any railway undertaking established in an EU member state for provision of transport of freight or international carriage of passengers, provided they fulfil the legal requirements to do so.

Access pricing

20 Are the prices for granting of network access regulated? How?

The prices for granting network access are regulated at EU level through the Commission Implementing Regulation (EU) 2015/909 of 12 June 2015 on the modalities for the

calculation of the cost that is directly incurred as a result of operating the train service. In addition, national legislation governs network access pricing such as: the Royal Decree of 19 July 2019 on the allocation of the capacity of the railway infrastructure and the railway infrastructure utilisation fee, the Ministry Decree of 9 December 2004 as amended adjusting the calculation rules, the value of the coefficients and the unit prices involved in the calculation of the railway infrastructure charge, the Royal Decree of 16 January 2007 on the rail undertaking licence, and the Royal Decree of 16 January 2007 on the annual fee for holding a railway undertaking licence as amended. These are reflected in Infrabel's network statement, which has a breakdown of how charges are calculated and for which services.

Competitor access

21 Is there a declared policy on allowing new market entrants network access or increasing competition in rail transport? What is it?

There is no declared policy in this respect.

SERVICE STANDARDS

Service delivery

22 Must rail transport providers serve all customers who request service? Are there exceptions or restrictions?

While rail transport undertakings must serve all customers who request service in a fair and non-discriminatory manner, certain exceptions exist. For instance, a rail undertaking may refuse service to, or escort off the train, passengers who are a danger to the safety of other passengers or to the rail undertaking's personnel. This can be as a result of various factors, such as the passenger's violent conduct, the existence of prohibited dangerous goods in his or her luggage, such as drugs or weapons, the consumption of drugs or other antisocial behaviour.

23 Are there legal or regulatory service standards that rail transport companies are required to meet?

Yes. A rail undertaking must use at least 80 per cent of the network capacity allocated to it during a given weekly time schedule. Otherwise, this can lead to termination of its utilisation contract with Infrabel and loss of network access.

Challenging service

24 Is there a procedure for freight shippers or passengers to challenge the quality of service they receive? Who adjudicates those challenges, and what rules apply?

Regulation (EU) 2021/782 of the European Parliament and of the Council of 29 April 2021 on rail passengers' rights and obligations stipulates certain rules in favour of rail passengers. This Regulation has applied in full in Belgium since 7 June 2023. To comply with its EU obligations, Belgium has also implemented national legislation on complaint handling, enforcement and sanctions through the Anti-Discrimination law of 10 May 2007 as amended, and the Law of 15 May 2014 on the rights and obligations of rail passengers. These set out the general framework relating to administrative sanctions, the rights of the defendants and the right to undertake inspections. Belgium designated the FPSMT as the National Enforcement Body (NEB). Passengers can submit a complaint to the NEB if they feel that their rights have not been respected.

SAFETY REGULATION

Types of regulation

25 | How is rail safety regulated?

The general safety rules are those set out by Directive (EU) 2016/798 on safety on the Community's railways, which was implemented in Belgium through the Law of 30 August 2013 (the Railway Code). The national safety regulatory framework includes:

- the national safety rules relating to the principles applicable to the safe operation of railway infrastructure, relating to the requirements applicable to safety staff and staff of entities in charge of maintenance, relating to the requirements applicable to rolling stock and relating to the requirements applicable to railway infrastructure;
- the technical specifications for the use of the network and the operational procedures relating to the safe operation of the railway infrastructure;
- the organisational provisions relating to the safe operation of the railway infrastructure;
- the rules relating to the investigation of accidents and incidents;
- the requirements relating to the circulation of heritage vehicles;
- internal safety rules; and
- rules relating to the transport of dangerous goods by rail.

The government determines:

- the following national security rules:
    - the principles applicable to the safe operation of the railway infrastructure;
    - the requirements applicable to safety staff and staff of entities in charge of maintenance;
    - the requirements applicable to rolling stock; and
    - requirements applicable to railway infrastructure;
- rules for the investigation of accidents and incidents; and

- requirements relating to the circulation of heritage vehicles on the network.

In the absence of interoperability technical specifications (TSIs) or as a complement to the TSIs, the infrastructure manager shall identify and adopt the technical specifications for the use of the network and the operational procedures relating to the operational safety of operation of its railway infrastructure, with regard to the operational interface between itself and the railway undertakings or tourist associations. Railway undertakings and tourist associations shall comply with these specifications and procedures in their relations with the infrastructure manager and shall integrate these specifications and procedures into their internal safety rules and apply them to the staff concerned. These specifications and procedures, and their modifications, shall be submitted for the assent of Belgium's safety authority, in accordance with a procedure determined in law.

Safety measures are also implemented through public service contracts entered into by the National Railway Company of Belgium (SNCB) and Infrabel, which also include safety-related investments. In the context of those contracts, SNCB and Infrabel are developing a master plan for the improvement of safety on the railway network in Belgium. This plan foresees the quick installation of the TBL1+ system. Infrabel has also worked on a programme to implement the European Train Control System (ETCS) and aims to equip all lines of the entire network with some type of ETCS by 2022. From 2025 onwards, the ETCS should be the only protection system in operation.

According to the Department for Railway Safety and Interoperability's (DRSI) annual report, as of 2015, railway undertakings have been subject to inspections and monitoring on-site by the DRSI. In addition, 2016 saw the introduction of the auditing system aimed at determining the maturity level of the various elements constituting the safety management system.

Competent body

26 | What body has responsibility for regulating rail safety?

The role of the National Safety Agency pursuant to article 3 of Directive (EU) 2016/798 is entrusted to the DRSI. The authority was established following the transposition of the second EU rail legislative package into Belgian law. The DRSI is independent from any rail undertaking or from the infrastructure manager. Its independence is safeguarded by its organisation, legal structure and the manner by which it takes decisions, and the fact that it is under the direct authority of the minister responsible for the Middle Class, Self-employed, Small- and Medium-Sized Enterprises, Agriculture and Social Integration.

Manufacturing regulations

27 | What safety regulations apply to the manufacture of rail equipment?

Directive (EU) 2016/797 of the European Parliament and of the Council of 11 May 2016 on the interoperability of the rail system within the European Union lays forth that each part

and subpart of the European rail system must comply with certain TSIs. These TSIs must also be taken into account by manufacturers to establish the European Union declaration of conformity or suitability for use of an interoperability constituent.

Maintenance rules

28 | What rules regulate the maintenance of track and other rail infrastructure?

The maintenance of the rail infrastructure is entrusted to the infrastructure manager pursuant to article 199(1) of the Law of 21 March 1991 reforming certain economic public companies. In practice, Infrabel maintains several infrastructure logistics centres throughout Belgium, which serve as a basis for carrying out maintenance work on rail infrastructure.

29 | What specific rules regulate the maintenance of rail equipment?

Commission Regulation (EU) 2019/779 of 16 May 2019 laying down detailed provisions on a system of certification of entities in charge of maintenance (ECMs) of vehicles pursuant to Directive (EU) 2016/798 of the European Parliament and of the Council and repealing Commission Regulation (EU) No. 445/2011 establishes a system of certification of entities in charge of maintenance for freight wagons. In Belgium, the certification of ECMs is entrusted to accredited bodies (by Belac) for product certification (according to the standard EN ISO/CEI 17065). To date, Belgorail is the only Belgian body authorised to certify ECMs and has certified four rail undertakings.

Furthermore, the SNCB is the owner and provider of rolling stock maintenance throughout the maintenance workshops network under its property. The SNCB will grant access to its maintenance services to other rail undertakings in accordance with article 9 of the Railway Code, transposing the requirements of Directive 2012/34/EU. The pricing principles and the amount owed for these services are established in accordance with articles 49 and 51 of the Railway Code.

Accident investigations

30 | What systems and procedures are in place for the investigation of rail accidents?

The organisation competent within this area is the Investigation Body for Railway Accidents and Incidents (IB) within the Federal Public Service Mobility and Transport. The IB investigates serious operational accidents, particularly train collisions and derailments, that result in:

- the death of at least one person;
- serious injury to five or more persons; or
-

extensive damage to the rolling stock, the infrastructure or the environment (ie, more than €2 million), occurring on the Belgian rail network.

It may also investigate accidents and incidents with consequences for railway safety. The safety investigations carried out aim to determine the circumstances and causes of the event, and are not intended to apportion blame.

The investigation procedure is initiated with a notification to the IB of the accident. The IB then communicates the opening of the investigation to the European Union Agency for Railways (ERA), the DRSI, the railway undertaking and the infrastructure manager concerned. The first stage of the investigation commences with factual data collection by investigators on the site of the accident or incident. All the information, proof and declarations available are assessed to evaluate the most probable cause of the accident. The IB will prepare a preliminary report, which is sent to the parties to the accident in order to allow them to make comments. At the conclusion of the investigation, the IB will make recommendations. After one year, the parties to whom the recommendations were addressed must follow up on the actions undertaken in this regard.

The IB may request assistance from its counterparts in other member states or ERA in certain circumstances (ie, by providing their expertise or by carrying out inspections, analyses or technical assessments).

Accident liability

31 Are there any special rules about the liability of rail transport companies for rail accidents, or does the ordinary liability regime apply?

Regulation (EU) 2021/782 on rail passengers' rights and obligations establishes special rules for the liability of railway undertakings for passengers in article 13 and title IV, Title VI and Title VII of Annex I. The payment of damages in the case of death is provided for in articles 27 and 28 of Annex I of Regulation 2021/782. In other cases of bodily harm, national law shall determine whether and to what extent the rail undertaking must pay damages in accordance with article 29 of Regulation 2021/782.

FINANCIAL SUPPORT

Government support

32 Does the government or government-controlled entities provide direct or indirect financial support to rail transport companies? What is the nature of such support (eg, loans, direct financial subsidies, or other forms of support)?

The National Railway Company of Belgium (SNCB) receives an endowment from the federal government for the realisation of investments and for the operation of the service. Furthermore, the SNCB also receives state subsidies for the implementation of antiterrorist safety measures. In total, the rail sector receives the majority of state aid in Belgium, which amounts to roughly €3 billion per year.

Requesting support

33 Are there sector-specific rules governing financial support to rail transport companies and is there a formal process to request such support or to challenge a grant of financial support?

EU state aid rules that prohibit the granting of unlawful aid in accordance with article 107 of the Treaty on the Functioning of the European Union (TFEU) are applicable to the rail sector. In addition, the European Commission adopted interpretative guidelines on state aid for railway undertakings in 2008, which explain the EU rules on state aid for the public funding of railway undertakings and provide guidance on the compatibility of state aid for railway companies with the EU treaties. As there is no body in Belgium that can hear claims contesting the grant of state aid, competitors and interested parties that feel that the obligation to notify state aid pursuant to article 108(3) TFEU has been encroached may only seize the national courts.

In addition, there is the following financial scheme open to rail undertakings that allow them to benefit from state funding in relation to rail freight transport: in order to contribute to the modal shift in favour of rail, in line with the Belgian federal government's objective of doubling the share of volume transported by rail by 2030, a mechanism for reducing the fee for the use of the Belgian rail infrastructure has been set up for freight transport. A budget of €13.245 million per year has been earmarked for this aid mechanism for the period from 1 January 2022 to 31 December 2025.

In addition, three projects by Infrabel and one project by the SNCB have been selected by the European Commission (following calls for tenders) to receive EU funds under the Connecting Europe Facility totaling €85 million. These projects contribute to the development and improvement of the trans-European transport network (TEN-T).

LABOUR REGULATION

Applicable labour and employment laws

34 Are there specialised labour or employment laws that apply to workers in the rail transport industry, or do standard labour and employment laws apply?

Infrabel, the National Railway Company of Belgium (SNCB) and HR Rail (the state-owned companies) have two distinct labour regimes for their employees. One labour regime is covered by the Law of 23 July 1926 concerning the SNCB and the staff of the Belgian railways, and the Royal Decree of 11 December 2013 concerning the staff of the Belgian railways. Employees under this regime have a special status akin to that of civil servants. In effect, they cannot be laid off for economic reasons, but only for disciplinary reasons. Furthermore, these employees also get additional benefits. About 85 per cent of SNCB's workforce is covered by this regime.

The other labour regime is covered by the Employment Contracts Act (of 3 July 1978, as amended). Employees under this regime work on the basis of an employment contract (temporary or permanent) similar to the private sector.

Other rules govern access to certain rail professions. For instance, becoming a train conductor requires a European or national licence issued by the Department for Railway Safety and Interoperability, and the applicant must undergo medical and psychological examinations.

ENVIRONMENTAL REGULATION

Applicable environmental laws

35 | Are there specialised environmental laws that apply to rail transport companies, or do standard environmental laws apply?

Following the Belgian state reform of the 1980s, the Flemish, Walloon and Brussels-Capital regions are competent to regulate on most environmental matters. However, the federal government maintains limited environmental competence, such as in the area of product standards, protection against radiation or asbestos, and permits for offshore activities. Belgian environmental legislation is based on EU treaties and their corresponding regulations and directives, and is regulated nationally by each region's environmental regulatory authority.

Special rules in the case of damage or imminent threat of damage to the environment apply as stipulated by the Royal Decree of 8 November 2007 on the prevention and reparation of environmental damage caused by transport by road, rail, waterway or air.

UPDATE AND TRENDS

Key developments of the past year

36 | Are there any emerging trends or hot topics in your jurisdiction?

On 11 January 2019, Belgium adopted a law modifying the Railway Code to transpose Directive 2016/2370/EU – the Market Pillar Directive. This law allows other providers, not just the National Railway Company of Belgium (SNCB), to access the domestic rail transport market, and allows for the possibility to bid for public contracts on access to routes already served by rail undertakings. Furthermore, it strengthens the independence of the infrastructure manager. The expected date for the liberalisation of the domestic market was 2023. However, Belgium has awarded a 10-year public service obligation contract to SNCB without a call for tenders for the period 2023-2032, renewing the previous direct award of 2008.

The general competition rules were amended in the early part of 2019 and on 17 March 2022, the Law of 28 February 2022 entered into force, transposing the ECN+ Directive (ie, Directive 2019/1 to empower the competition authorities of the member states to be more effective enforcers and to ensure the proper functioning of the internal market)

into Belgian law. The legislator used this opportunity to include several other changes to procedural elements to remedy difficulties encountered by the Belgian competition authority in practice.

On 25 May 2023, the Belgian Parliament adopted a law to support night trains with departures from, or arrivals in, Belgium. The law provides that Infrabel will pay the railway infrastructure fee and the traction energy costs for operators of such night trains. In return for this financial support to night train operators, Infrabel receives financial compensation from the federal state.

In this context, on 13 July 2022, the Regulatory Service for Railway Transport and for Brussels Airport Operations (the Regulator) issued a Communication containing the Guidelines for the Notification of a New Rail Passenger Service within the Framework of the Economic Equilibrium Test Procedure. These guidelines are intended to clarify when a notification should or should not be submitted in accordance with the applicable rules. These guidelines were modified by the Communication of 28 April 2023 to take into account to the new public service contract awarded to SNCB for the period 2023–2032. After the publication of these guidelines, on 24 August 2023 the Regulator received a notification from Leo Express for a new transport passenger service for the Oostende/Bratislava and Bratislava/Oostende routes. This notification relates to access to the Belgian railway network and is part of the information obligation provided for in both Belgian and EU regulations. Prior to the publication of the guidelines, on 4 July 2022, another notification was received by the Regulator from the European Sleeper Cooperatie for a new transport passenger service for the Amsterdam/Barcelona and Barcelona/Amsterdam routes.

The new EU Regulation for rail passenger rights, which replaces the current Regulation 1371/2007, has applied since 7 June 2023. It strengthens passengers' protection in case of disruptions, includes a strengthened complaint-handling mechanism, and reinforces the obligation for the national enforcement bodies to cooperate. Under this new Regulation, passengers with reduced mobility have more flexibility when making travel arrangements, as they are only obliged to notify the operator of their travel plans 24 hours in advance instead of the 48-hour notice period under Regulation 1371/2007, and any required accompanying person travels free of charge. Passengers with reduced mobility using an assistance dog are also given assurances that the animal can travel with them.

The European Commission has approved under the EU Merger Regulation the acquisition of sole control of Belgium-based THI Factory (THIF) by France-based Société Nationale des Chemins de Fer Français (SNCF). THIF is active in the management and operation of international high-speed passenger rail services between France, Belgium, the Netherlands and Germany under the name Thalys. The parent companies of Thalys are SNCF (France) and SNCB (Belgium), which jointly control it. SNCF is active in rail passenger and freight transport, station and infrastructure management and engineering activities. SNCF controls Eurostar International Limited, the operator of international high-speed passenger rail services linking the United Kingdom to France, Belgium and the Netherlands through the Channel Tunnel between the United Kingdom and France. The Commission concluded that the proposed concentration would not raise competition concerns given its very limited impact on market structure. The transaction was examined under the normal merger control procedure.

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UPDATE AND TRENDS

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GENERAL

Industry structure

1 How is the rail transport industry generally structured in your country?

Canadian National Railway Company (CN) and Canadian Pacific Kansas City Railway (CPKC), both of which operate across Canada, dominate the freight rail industry in Canada. They control the most important segments of rail trackage in Canada and move the vast majority of Canadian rail freight. Many shortline freight railways also operate in Canada, often to connect branch lines to the networks of CN and CPKC. Railway companies typically, but not always, own the track over which they operate.

VIA Rail is a publicly-owned national rail carrier that provides passenger rail service, as do various regional commuter railways in major metropolitan areas. In some areas of the country, shortline railways provide rail tours.

Some American rail service providers such as BNSF Railway Company and CSX Transportation Inc. operate to a limited extent in Canada.

In general, federal jurisdiction extends to all railways that cross provincial or international boundaries, while railways that operate wholly within a province are subject to provincial jurisdiction. As CN and CPKC handle the majority of rail traffic in Canada, this section will primarily focus on federal statutes, regulations and rules.

Ownership and control

2 Does the government of your country have an ownership interest in any rail transport companies or another direct role in providing rail transport services?

National passenger carrier VIA Rail is a Crown corporation wholly owned by the federal government. Regional commuter railways in the Montreal, Toronto, and Vancouver areas are also owned by their respective provincial governments. Most passenger operations occur over track owned by Canada's two major freight railways.

The Canadian federal government is not directly involved in providing freight rail service.

3 | Are freight and passenger operations typically controlled by separate companies?

Freight and passenger operations are typically controlled by separate companies, with a few limited exceptions serving remote areas.

Regulatory bodies

4 | Which bodies regulate rail transport in your country, and under what basic laws?

The Canadian Transportation Agency is the primary economic regulator of federal railway companies under the Canada Transportation Act. The provinces regulate provincial railways to varying extents.

The Minister of Transport, and his department, Transport Canada, regulate the safety of federal railway companies under the Railway Safety Act and regulations, rules and standards thereunder.

MARKET ENTRY

Regulatory approval

5 | Is regulatory approval necessary to enter the market as a rail transport provider? What is the procedure for obtaining approval?

A person wishing to operate a federal railway in Canada must obtain both a certificate of fitness and a railway operating certificate before beginning operations.

Any person may apply to the Canadian Transportation Agency (the Agency) for a certificate of fitness. The application must include a completed certificate of insurance form along with a list of the termini and route of each operation. The Agency must be satisfied that there will be adequate third-party liability

insurance coverage for passenger rail services, or the applicable minimum liability insurance coverage for rail freight railway companies, as defined in the Canada Transportation Act and its regulations.

Railway companies must also apply to the Minister of Transport for a railway operating certificate before commencing operations. The application must include a description of the proposed operations of the company, as well as all relevant safety rules and requirements applicable to those operations. The Minister may issue railway operating certificates subject to terms and conditions.

Individual provinces each have their own approval processes for railways under their jurisdiction that require similar information about operations, insurance and safety rules.

6 Is regulatory approval necessary to acquire control of an existing rail transport provider? What is the procedure for obtaining approval?

A proposed merger or acquisition that meets certain prescribed financial thresholds requires pre-merger notification filings under the Competition Act. Where a proposed notifiable transaction involves a 'transportation undertaking', the proposed acquirer must also notify the Minister of Transport, who may determine that the proposed transaction requires review to determine whether the transaction is in the public interest.

7 Is special approval required for rail transport companies to be owned or controlled by foreign entities?

The Investment Canada Act applies to non-Canadians who seek to obtain control of any Canadian business, including railway companies. If the value of the acquisition meets certain prescribed thresholds, pre-closing approval is required. Any investment by a non-Canadian may be subject to national security review if the investment could be 'injurious to national security'. No special foreign investment rules apply to acquisitions of railway companies.

8 Is regulatory approval necessary to construct a new rail line? What is the procedure for obtaining approval?

Railway companies must obtain the approval of the Canadian Transportation Agency before constructing new rail lines other than a rail line within the right of way of an existing rail line or within 100 metres of the centre line of an existing rail line for a distance of no more than three kilometres. Approval is generally granted if the Agency considers the location of the new rail line to be reasonable, taking into consideration requirements for rail operations and services and the interests of affected localities.

An application for approval must contain a detailed description of the proposed rail line construction and operations, as well as information about the location of the proposed rail line and any alternative locations that were considered. The company must also provide notice and information regarding the proposed construction to any relevant local or other government bodies, including any potentially affected Indigenous groups, and conduct engagement activities with impacted stakeholders. The company may also be required to conduct an environmental assessment with respect to the proposed project area.

Additionally, under certain circumstances, the railway company may be required to obtain approval for the construction of the rail line from other federal authorities such as Transport Canada, Fisheries and Oceans Canada, or territorial authorities.

MARKET EXIT

Discontinuing a service

9 What laws govern a rail transport company's ability to voluntarily discontinue service or to remove rail infrastructure over a particular route?

Regulatory approval is not required to sell, lease or otherwise transfer a rail line, or an operating interest in a rail line, for continued operation.

However, if a railway company wishes to discontinue service on a rail line, it must comply with a series of prescribed steps.

First, the railway company must publish its intent to discontinue the line in a three-year plan. The company must notify the Canadian Transportation Agency, the

federal Minister of Transport (Minister), and any provincial or local governments or urban transit authorities through whose territory the rail line passes, of any changes made to the plan. A railway company may not take steps to discontinue operating a rail line before the company's intention to discontinue operating the line has been indicated in its plan for at least 12 months.

Thereafter, if the company intends to proceed with discontinuance, it must advertise the availability of the line for transfer for continued operations and engage in good faith negotiations with any party expressing an interest in acquiring the line. This part of the process can take anywhere from 60 days (the time during which the company must remain open to receiving expressions of interest) to eight months (the time for expressions of interest plus a prescribed six-month period to reach an agreement with an interested party). Either party to such a negotiation can seek a determination by the Agency of the net salvage value (NSV) of the line.

If no transfer results from this process, the company may decide to continue operating the line, in which case it must amend its three-year plan accordingly. If the company still intends to proceed with discontinuance, it must offer to transfer the line at NSV to the governments and urban transit authorities through whose territory the line passes.

If no transfer results from the foregoing process, the railway may file a notice of discontinuance with the Agency and stop providing service on the railway line.

The discontinuance process does not apply to yard trackage, sidings or spurs. Before dismantling a siding or spur in a metropolitan area, however, a railway company may, depending on the location of the track be required to provide advance public notice and to offer to transfer it to specified public entities.

A modified discontinuance process applies to certain grain-dependant lines identified in the Canada Transportation Act.

10 On what grounds, and what is the procedure, for the government or a third party to force a rail transport provider to discontinue service over a particular route or to withdraw a rail transport provider's authorisation to operate? What measures are

available for the authorisation holder to challenge the withdrawal of its authorisation to operate?

The Minister of Transport may suspend or cancel a company's railway operating certificate if the company no longer meets the requirements for obtaining the certificate, or if the company breaches any provision of the Railway Safety Act (RSA) or any regulations, rules, standards, orders, or emergency directives made under the RSA. Other enforcement measures short of suspension or cancellation of a railway operating certificate are possible. Any decision to suspend or cancel a railway operating certificate may be appealed to the Transportation Appeal Tribunal of Canada.

The Agency must suspend or cancel a certificate of fitness if it determines that the holder does not maintain the liability insurance coverage required by the Canada Transportation Act.

Insolvency

11 Are there sector-specific rules that govern the insolvency of rail transport providers, or do general insolvency rules apply? Must a rail transport provider continue providing service during insolvency?

General bankruptcy and insolvency statutes, regulations and rules apply to federal railway companies. The Canada Transportation Act does not relieve a railway company from its service obligations during bankruptcy or insolvency.

COMPETITION LAW

Competition rules

12 Do general and sector-specific competition rules apply to rail transport?

Under the Competition Act, the Commissioner of Competition (Commissioner) may review any merger (which is defined broadly to include direct and indirect leases of shares or assets, amalgamations, combinations or other transactions that result in control over, or significant interest in, the whole or a part of a business of a competitor, supplier, customer or other person) to assess its competitive impact.

Generally, and subject to narrow exemptions under the Competition Act, if a merger exceeds certain prescribed 'size-of-party' and 'size-of-transaction' thresholds, each of the parties to the merger must prepare and file a pre-merger notification (PMN) with the Commissioner that includes prescribed information. The parties also typically file a narrative description of the transaction that analyses any competitive overlap between the parties, the extent of which can vary significantly depending on the circumstances.

Following both parties' PMN filings, the parties are subject to a statutory obligation not to complete the transaction for 30 days, during which period the Commissioner may determine whether further information is required to assess the transaction.- If further information is required, the Competition Bureau (Bureau) may issue a supplementary information request (SIR), whereby the parties must submit further information if they still wish to proceed, which triggers a further waiting period. Once the parties have submitted their SIR responses and certified their completeness, the Commissioner has a further 30 days within which to apply to the Competition Tribunal for a remedial order, during which time the parties are subject to a statutory obligation not to close the transaction.

The Canada Transportation Actapplies to the rail industry in the context of a merger. If a proposed merger is notifiable under the Competition Act (ie, requires the parties to prepare and file PMNs) and involves a 'transportation undertaking', such as a federal railway line, the parties must also notify the Minister of Transport (Minister) at the same time as the Commissioner. Following notification, the Minister may decide that a public interest review is necessary, in which case the Minister likely would consider the factors outlined in its Guidelines for Mergers and Acquisitions involving Transportation Undertakings, including economic, environmental, safety, security and social factors. If the transaction raises public interest issues related to national transportation, it cannot proceed without the approval of the Governor in Council, which may be granted subject to any terms and conditions that the Governor in Council considers appropriate.

Regulator competition responsibilities

13 Does the sector-specific regulator have any responsibility for enforcing competition law?

The Commissioner of Competition and the Competition Bureau, and not the transportation regulators (Minister of Transport and the Canadian Transportation Agency), are responsible for enforcing competition law, except in the context of the Minister's review of the public interest in a notifiable merger involving a transportation undertaking, as explained above.

Competition assessments

14 | What are the main standards for assessing the competitive effect of a transaction involving rail transport companies?

Under the Competition Act, the Commissioner of Competition assesses mergers involving railways in the same manner as for other mergers; that is, to assess whether the merger prevents or lessens, or is likely to prevent or lessen, competition substantially.

The Competition Bureau has published Merger Enforcement Guidelines that outline the factors the Commissioner considers when assessing the competitive effects of a transaction. The Bureau will analyse the relevant product and geographic markets, including both downstream and upstream markets. Typical analysis includes the combined post-merger market share of the merged entity (unilateral conduct), the post-merger four-firm concentration ratio (combined market shares of the largest four firms), the extent to which effective competition remains in the relevant product and geographic markets, the extent to which barriers to entry exist, the extent to which substitutes for the applicable products or services are available in the relevant markets, and other factors.

PRICE REGULATION

Types of regulation

15 | Are the prices charged by rail carriers for freight transport regulated? How?

Federal railway companies can establish prices for the transportation of freight from origin to destination (rates) and related services (ancillary charges) either unilaterally by issuing and publishing tariffs of rates and charges or by entering a confidential contract with a shipper.

The rates a railway company may charge for transferring or 'interswitching' freight traffic between a point of origin or destination on its network and the connection with another railway within a prescribed radius are determined annually by the Canadian Transportation Agency. Rates differ based on distance 'zones' and size of shipment, with shipments in larger blocks of railcars attracting lower rates.

The transportation of grain grown in Western Canada is subject to revenue cap regulation. While railways are entitled to set their own grain rates, this regime constrains pricing by imposing a maximum revenue entitlement (MRE) on each of Canada's two major railways, Canadian National Railway Company and Canadian Pacific Kansas City Railway. The Agency determines each railway company's MRE annually using a formula that reflects changes in grain volumes transported, length of haul and railway input prices. Excess revenue and a penalty are payable if a railway exceeds its MRE.

The Canada Transportation Act also provides for several types of complaint-driven proceedings, in which rates or ancillary charges are determined on a case-by-case basis.

16 | Are the prices charged by rail carriers for passenger transport regulated? How?

Federally regulated passenger railways are generally free to set their own prices but must publish them in tariffs that contain the information prescribed by regulation. In relation to the carriage of persons with disabilities, the Accessible Transportation for Persons with Disabilities Regulations prohibit a passenger railway from imposing any fare or other charge for certain services that the railway is required by the Regulations to provide to passengers with disabilities.

17 | Is there a procedure for freight shippers or passengers to challenge price levels? Who adjudicates those challenges, and what rules apply?

A freight shipper who is dissatisfied with the freight rates charged or proposed to be charged by a federal railway company can submit the rates for the movement of goods and any conditions associated with that movement to the Canadian Transportation Agency for final offer arbitration (FOA). At the request of either party, FOA proceedings are confidential.

The Canada Transportation Act (CTA) mandates the steps in the FOA process and associated timelines. Subject to agreement between the parties, these may be supplemented by procedural rules established by the Agency (Procedures for the conduct of final offer arb itration pursuant to part IV of the CTA).The Agency acts as a clearing house for the exchange of the parties' final offers, appoints the arbitrator and adjudicates any preliminary railway objections to a referral to an arbitrator. It can also provide administrative, technical or legal assistance if requested by the arbitrator.

The arbitrator must select one of the two final offers in its entirety, having regard to whether there is available to the shipper an 'alternative, effective, adequate and competitive means of transporting the goods' to which the FOA relates. Unless the parties agree to an extension, the arbitrator must render a decision within 60 days after the shipper's initial submission. The decision is retroactive to the date of that submission and remains in effect for a period of up to two years, as agreed by the parties or, failing agreement, as requested by the shipper in its initial submission.

With respect to prices for incidental services, excluding freight rates, a shipper may apply to the Agency to challenge the reasonableness of charges for the movement of traffic and associated conditions contained in a tariff that applies to multiple shippers. In making its determination, the Agency must consider the objective of the charge or conditions, industry practice and the existence of an effective, adequate and competitive alternative to the provision of the incidental service. If the Agency finds the challenged tariff provisions unreasonable, it may establish new charges or associated conditions to remain in effect for up to one year. The process is governed by procedural rules established by regulation (Canadian Transportation Agency Rules (Dispute Proceedings and Certain Rules Applicable to All Proceedings)).

While the CTA contains a number of other remedies related to freight rates, these have either never been used or fallen out of use.

There is no procedure under Canadian federal law for challenging prices charged for the transportation of passengers by rail generally. In relation to the transportation of persons with disabilities, Part V of the CTA allows the Agency, on application, to determine that specific fees or charges constitute an undue barrier to mobility and to require the carrier to take appropriate corrective action.

18 Must rail transport companies charge similar prices to all shippers and passengers who are requesting similar service?

There is no such requirement under federal law.

NETWORK ACCESS

Sharing access with other companies

19 Must entities controlling rail infrastructure grant network access to other rail transport companies? Are there exceptions or restrictions?

Railway companies are generally not required to grant network access to other parties, subject to the narrow, and generally unused, exceptions in the Canada Transportation Act (CTA).

Section 138 of the CTA allows a railway company, defined as a person who already holds a certificate of fitness, but not a shipper or other interested party, to apply to the Agency for the right to operate its trains over and on any portion of the network of any other railway company.

The Agency may grant the right and impose any conditions as appear just or desirable to the Agency, having regard to the public interest. No contested running rights application under section 138 has ever succeeded, and few cases have been decided under predecessor statutes.

Section 139 of the CTA allows the Governor in Council to order that two or more railway companies allow joint or common use of a right-of-way. To our knowledge, no public decision has ever been issued under the current section 139 of the CTA.

Access pricing

20 Are the prices for granting of network access regulated? How?

If a railway company agrees to grant access to its network to another carrier, the pricing for such access is not subject to regulatory oversight.

In theory, if a railway company were to succeed in obtaining running rights over the line of another railway company under section 138, the Canada Transportation Act (CTA) would require the Agency to fix the amount of the access charge. Similarly, if the Governor in Council orders that two or more railway companies allow joint or common use of a right-of-way, the Governor in Council may, by order, fix the amount to be paid. Given the failure of contested running rights applications and the lack of public orders for joint or common use under section 139 of the CTA, the potential access prices are unaddressed under Canadian law.

The CTA allows urban transit authorities and other specified public passenger service providers to apply to the Agency for a determination of any matter, including access prices, raised in the context of the negotiation of any agreement concerning the use of the railway company's railway, land, equipment, facilities, or services by the public passenger service provider. Other passenger rail service providers may use the final offer arbitration remedy in respect of rates or conditions associated with the provision of services by a railway company.

Competitor access

21 Is there a declared policy on allowing new market entrants network access or increasing competition in rail transport? What is it?

Canada does not have a declared policy on allowing access to existing rail networks. However, the national transportation policy set out in the Canada Transportation Actstates that competition and market forces, both within and among the various modes of transport, are the prime agents in providing viable and effective transport services.

SERVICE STANDARDS

Service delivery

22 Must rail transport providers serve all customers who request service? Are there exceptions or restrictions?

Sections 113 to 116 of the Canada Transportation Act (CTA) require federally regulated railway companies to provide 'adequate and suitable accommodation' for receiving all freight traffic offered for carriage on their railway. The service obligations extend to providing adequate facilities for connecting private sidings to the rail network and for transferring freight between rail carriers.

While a federal railway company accordingly cannot refuse to carry traffic, the service obligations are not absolute but have been described as requiring the railway company to provide the highest level of service that is reasonable in the circumstances. Jurisprudence going back more than 100 years has recognised exceptions in various circumstances beyond the railway's control and that it could not reasonably have anticipated and managed or avoided. The availability of such justification is driven by the facts of each case.

Federal legislation does not address passenger service obligations generally. The Accessible Transportation for Persons with Disabilities Regulations prohibit federal passenger railways from refusing certain services to passengers with disabilities, provided the services are requested within prescribed timelines. In the absence of advance notice, a carrier must make 'every reasonable effort' to provide those services.

23 Are there legal or regulatory service standards that rail transport companies are required to meet?

Federally regulated freight railway companies must meet the standards enshrined in sections 113 to 115 of the Canada Transportation Act. A considerable body of jurisprudence addresses these standards in the context of specific disputes over railcar supply, frequency of service, embargoes and the rail infrastructure needed to accommodate traffic. Where these standards are particularised or modified by confidential contract, the terms of that contract are binding in any proceeding about service inadequacy, but the mere existence of a confidential contract does not set aside the statutory service standards.

Apart from the standards set out in the Accessible Transportation for Persons with Disabilities Regulations, there are no federal legal or regulatory service standards for passenger transportation by rail.

Challenging service

24 Is there a procedure for freight shippers or passengers to challenge the quality of service they receive? Who adjudicates those challenges, and what rules apply?

The statutory service obligations in respect of freight transportation and any service-related terms in a confidential contract are enforceable on complaint to the Canadian Transportation Agency (Agency). Complaints may be brought by a shipper or another party in the rail logistics chain, such as a transloader. The process is governed by the Canadian Transportation Agency Rules (Dispute Proceedings and Certain Rules Applicable to All Proceedings). The Agency's remedial powers include the ability to direct the allocation of equipment, the acquisition of property and generally the manner in which service must be provided, in addition to the power to award compensation for out-of-pocket expenses incurred due a service failure. An Agency finding that a rail carrier has breached its service obligations also provides the basis for a court action for damages.

Since 2018, the Agency also has the ability to initiate a service investigation on its own motion.

While a complaint under section 116 is necessarily based on past or ongoing service shortfalls, a shipper may also require its rail carrier to offer to enter a forward-looking confidential contract dealing with service obligations. Where no agreement is reached, the shipper may initiate an arbitration before an arbitrator appointed by the Agency. The steps in this arbitration process and the relevant timelines are mandated by statute, supplemented by theRules of Procedure for Rail Level of Service Arbitration.The arbitrator's decision sets operational terms governing service for one year from the date of the decision (unless the parties agree otherwise) and is deemed to be a confidential contract.

Service obligations related to the transportation of persons with disabilities are enforceable by application to the Agency. The procedural rules are the same as for complaints in respect of freight. If the Agency finds an undue barrier to the mobility of persons with disabilities, it may order corrective measures as well as financial compensation.

SAFETY REGULATION

Types of regulation

25 | How is rail safety regulated?

The Railway Safety Act (RSA) governs safety of federal railway companies. It provides for the development of safety rules by the rail industry, subject to approval by the Minister of Transport (Minister), and requires federal railway companies to establish safety management systems. The Minister is responsible for railway safety regulation within federal jurisdiction.

Provincial governments are responsible for regulating the safety of railways under their jurisdiction. Provincial legislation often incorporates some or all of the requirements contained in federal statutes, regulations, rules and standards.

The Minister may enter into agreements with provincial ministers responsible for provincial railways regarding the administration of any law respecting railway safety and security.

Competent body

26 | What body has responsibility for regulating rail safety?

The Minister is responsible for railway safety regulation within federal jurisdiction. Provinces are generally responsible for railway safety regulation within the legislative authority of the province.

Manufacturing regulations

27 | What safety regulations apply to the manufacture of rail equipment?

The Railway Safety Appliance Standards Regulations apply to the manufacture of rail equipment.The Railway Locomotive Inspection and Safety Rules require new freight and passenger locomotives to be designed and constructed as a minimum in accordance with the latest revision of the 'Association of American Railroads Manual of Standards and Recommended Practices' or an equivalent standard. The Railway Freight Car Inspection and Safety Rules contain similar requirements for new freight cars.

Maintenance rules

28 | What rules regulate the maintenance of track and other rail infrastructure?

Part II of the Railway Safety Act regulates the maintenance of railway lines as well as road and utility crossings.

The Rules Respecting Track Safety prescribe minimum safety requirements for federally regulated standard gauge railway track, although a railway may adopt more stringent requirements. Railway companies must conduct track inspections in compliance with the Rules. Track inspectors, track supervisors, and track maintenance persons must have certain qualifications.

29 | What specific rules regulate the maintenance of rail equipment?

Rules regulating the maintenance of railway equipment and established under the Railway Safety Act include the Railway Freight Car Inspection and Safety Rules, the Railway Locomotive Inspection and Safety Rules and the Railway Passenger Car Inspection and Safety Rules.

Accident investigations

30 | What systems and procedures are in place for the investigation of rail accidents?

The Canadian Transportation Accident Investigation and Safety Board Act (CTAISBA) establishes the Canadian Transportation Accident Investigation and Safety Board (Board) and governs the investigation of rail accidents.

The Board may investigate any transportation occurrence (including in relation to rail) on its own initiative or at the request of a government department, the lieutenant governor in council of a province or the Commissioner of NWT, Nunavut or Yukon, and must do so if requested by the Governor in Council.

The Board may enter into an agreement with a province relating to investigations into transportation accidents.

Regulations under the CTAISBA govern investigations of transportation accidents, including in respect of the preservation of information and the rights and privileges of observers attending an investigation.

Reporting of certain types of accidents to the Board is mandatory.

Accident liability

31 Are there any special rules about the liability of rail transport companies for rail accidents, or does the ordinary liability regime apply?

The ordinary liability regime generally applies.

However, Division VI.2 of the Canada Transportation Act relates to liability for accidents involving crude oil and other designated goods. In such circumstances, the railway company is liable regardless of fault or negligence. Damages and costs are limited to the amount of the minimum liability insurance coverage the company is required to carry, unless the accident resulted from an act or omission that was committed either with intent to cause the accident or recklessly and with knowledge the accident would probably result.

FINANCIAL SUPPORT

Government support

32 Does the government or government-controlled entities provide direct or indirect financial support to rail transport companies? What is the nature of such support (eg, loans, direct financial subsidies, or other forms of support)?

The Canadian government provides both direct and indirect financial support to industry. Railway companies are eligible for and have received funding through various initiatives and programmes, including the Canada Infrastructure Bank, which uses equity loans and other products to invest in infrastructure generally, as well as direct grants under programmes that are more narrowly focused on trade

and transportation, including the National Trade Corridors Fund (NTCF). In 2016 the federal government announced the allocation of C$2 billion over 11 years to the NTCF, with an additional $5 billion to be invested in trade and transportation projects through the Canada Infrastructure Bank.

Requesting support

33 Are there sector-specific rules governing financial support to rail transport companies and is there a formal process to request such support or to challenge a grant of financial support?

Rules governing various government funding initiatives apply generally.

LABOUR REGULATION

Applicable labour and employment laws

34 Are there specialised labour or employment laws that apply to workers in the rail transport industry, or do standard labour and employment laws apply?

The Canada Labour Code (the Code) governs labourrelations and employment standards for federally regulated industries, including railway companies. The Code allows for regulations or orders to apply to specific classes of employees or industrial development. Sector-specific regulations include regulations governing the safety of employees on moving trains and exempting railway running-trades employees from general hours of work standards.

ENVIRONMENTAL REGULATION

Applicable environmental laws

35 Are there specialised environmental laws that apply to rail transport companies, or do standard environmental laws apply?

Railway companies in Canada are subject to both federal and provincial environmental laws and specialised regulations, tailored to address the impacts associated with rail operations. The Canadian Environmental Protection Act 1999-pan> serves as a foundational law, ensuring the regulation of pollutants released into the environment and setting out penalties for non-compliance. This Act applies broadly to various sectors, including rail transport. The Transportation of

Dangerous Goods Act 1992pan>, also plays an important role in governing the safe transportation of dangerous goods across all transport modes.

In addition, railway companies must adhere to specific rules and regulations designed for their sector. For instance, the Locomotive Emissions Regulations under the Railway Safety Act (RSA)directly address the rail transport sector by regulating emissions from locomotives. Additionally, the Railway Safety Administrative Monetary Penalties Regulations allow for monetary penalties for contraventions of certain provisions of the RSAor its regulations, including those related to environmental protection.

Provincial environmental laws and regulations apply to railways within their legislative authority. Municipal and local laws and bylaws may also apply.

UPDATE AND TRENDS

Key developments of the past year

36 | Are there any emerging trends or hot topics in your jurisdiction?

In its October 2022 final report, a National Supply Chain Task Force (NSCTF) established by the federal Minister of Transport, identified several rail-focused recommendations that would require changes to existing legislative and regulatory provisions applicable to freight transportation by rail.

Responding to one of these recommendations, the federal government introduced amendments to the Canada Transportation Act that expanded the availability of regulated interswitching. Under regulated interswitching, a railway company serving a point of origin or destination that is located within a prescribed radius of a connection with another railway must transfer freight traffic to or from the connecting railway at rates set annually by the Canadian Transportation Agency. The 2023 amendments expanded the prescribed radius in three Canadian provinces from 30 kilometres to 160 kilometres for a period of 18 months.

Other issues identified in the report of the NSCTF are part of a stakeholder consultation process Transport Canada launched in the summer of 2023. The consultation seeks input on a range of potential legislative changes in relation to such matters as: administrative monetary penalties to enforce railway company

obligations; recourse against certain railway surcharges and contracting practices; the Canadian Transportation Agency's power to act on its own initiative; the availability of regulatory costing data in freight rate arbitrations; transparency of rail capacity planning; the regulatory regime applicable to the transportation of grain; and measures to support the viability of shortline railways.

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Summary

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UPDATE AND TRENDS

GENERAL

Industry structure

1 How is the rail transport industry generally structured in your country?

The state controls and manages rail infrastructure. Access to rail infrastructure for cargo and passenger transport is free.

The state-owned company that manages and controls rail infrastructure for public use of international, national and local importance is HŽ Infrastruktura (HŽI). Rail infrastructure is public domain. The Railway Act provides that infrastructure management and control is for public use. HŽI manages 2,617 km of a total of 2,988 km of railways in public use.

The remaining railways are privately owned by companies for their internal non-public use and by local authorities for commuter use.

HŽI is in charge of organising, maintaining, upgrading, constructing and regulating the use of the railways. Approximately 55 per cent of the rail infrastructure is in the international rail transport network. It functions as a crossway, connecting the rail networks of all European and Middle Eastern countries. The rail infrastructure for international connections is integrated into the Trans-European Transport Network (TEN-T).

Since Croatia became a member of the European Union (EU) in 2013, the national railway infrastructure has gained significant importance in EU rail transportation projects as an integral part of three pan-European corridors. EU membership provides access to various financing funds available to a new member state for investment in the modernisation and development of EU railway infrastructure. At present, more than 20 modernisation and construction projects involving rail infrastructure, worth more than €2 billion, are under way, in various stages of progress.

HŽI must ensure free access to rail infrastructure for private cargo and passenger operators. To ensure that all private cargo operators receive equal treatment, general terms and conditions for access to rail infrastructure are in force and are binding for all individual contracts that HŽI concludes with rail operators. There are 15 operators who have entered into individual contracts with HŽI, comprised of 13 private operators and two state-owned operators: Hrvatske Željeznice Cargo, Zagreb (HŽC) and Hrvatske Željeznice Putni ki Promet, Zagreb (HŽPP).

In the freight transport sector, private rail operators compete with the state-owned HŽC.

Despite the fact that passenger rail operations have been available to private operators since 2019, at the time of writing no private passenger carrier has applied for approval with the Ministry of Maritime Affairs, Transport and Infrastructure.

Passenger rail transportation is organised by the state-owned company HŽPP, which is the national passenger rail carrier.

Ownership and control

2

Does the government of your country have an ownership interest in any rail transport companies or another direct role in providing rail transport services?

The rail network infrastructure is owned by the government. It was inherited from the previous political system when the rail infrastructure was under public 'social ownership'. The rail infrastructure was built by the state and made available to rail operators under social ownership. The ownership transformation that took place at the end of the twentieth century followed the previous structure and organisation of rail activity. The rail infrastructure – including freight and passenger transport – has not been privatised, but rather opened to private rail operators.

The government also has ownership interests in both rail operations (freight and passenger transportation services) as the service provider via HŽC and HŽPP. These two rail operators were formerly rail operators under social ownership and were transformed into state-owned entities.

Freight and passenger operations are open to the private sector.

In cargo rail services, the state-owned HŽC competes with more successful private operators. HŽC has suffered losses for a number of years.

With regard to passenger transport, in 2018 the Ministry of Maritime Affairs, Transport and Infrastructure entered into a 10-year Public Services Agreement with HŽPP, enabling HŽPP to cover losses in passenger operations by means of state subsidies. Subsidies also enable HŽPP to invest in passenger rail transport vehicles, equipment and passenger transport in general. The grounds for the Public Service Agreement can be found in the Treaty of Accession of Croatia from 2011. The Public Service Agreement ensures that passenger transport is upheld as an activity of national interest.

3 | Are freight and passenger operations typically controlled by separate companies?

The regulations applicable to freight and passenger transport differ, and from a regulatory point of view it is more convenient for the shareholders to divide freight and passenger operations into separate companies.

However, in practice there are no shareholders apart from the government, which established two separate companies for both operations.

Only the government has established separate companies: HŽC for freight and HŽPP for passenger operations. The others are freight operations companies only.

Regulatory bodies

4 | Which bodies regulate rail transport in your country, and under what basic laws?

There are three regulatory bodies: the Ministry of Maritime Affairs, Transport and Infrastructure; the Croatian Regulatory Authority for Network Industries (HACOM); and the Croatian Railway Safety Agency (CRSF).

The Ministry of Maritime Affairs, Transport and Infrastructure regulates rail carrier requirements and grants licences for cargo and passenger rail carriers. A rail carrier licence is a basic approval that a rail operator must obtain to operate in Croatia and the EU. All data on rail carriers' licences is shared within the EU members' respective regulatory bodies; they enable rail operators to operate within the EU.

HACOM is the national regulatory body that regulates the rail services market for the benefit of rail operators and for the development of the European rail market. Furthermore, HACOM ensures a free market and fair competition for rail service providers and provides protection for rail passengers.

The CRSF is the state regulatory body that regulates the safety of rail infrastructure, transport vehicles and equipment.

Licensing rail operators, free market access and safety are the purposes of the three rail regulatory authorities divided between three different government bodies.

The Railway Act, Rail Services Act, Rail Services Market Regulations and Passengers Protection Act, and Rail Safety and Interoperability Act are the basic laws that provide the regulatory structure and authorities of the Ministry of Maritime Affairs, Transport and Infrastructure, HACOM and the CRSF.

Apart from these basic laws, there are a number of other national laws and regulations that affect the regulatory bodies and are applicable to rail transport organisations and standards, rail service providers, freight and passengers as rail service customers, market access, pricing, security, etc. Rail activity and related operations are well regulated, not only on a national level but also within the EU.

The EU rail rules and regulations are an integral part of the national legislation and are incorporated directly or through harmonisation processes as the *acquis communautaire*. All national basic laws are harmonised with the EC *acquis communautaire*.

MARKET ENTRY

Regulatory approval

5 Is regulatory approval necessary to enter the market as a rail transport provider? What is the procedure for obtaining approval?

Regulatory approval is required to be able to enter the market as a rail transport provider.

The Ministry of Maritime Affairs, Transport and Infrastructure grants rail carriers approval for rail service providers. To obtain an approval, a rail carrier must meet certain requirements, which may include good standing, financial and rail expertise requirements and mandatory and voluntary insurance cover requirements.

Approval granted by the Ministry of Maritime Affairs, Transport and Infrastructure to a rail carrier is effective within all EU countries and vice versa, and the approval obtained by a rail carrier in other EU countries is recognised in Croatia as well.

The procedure is an administrative proceeding regulated by the Railway Act and Rail Services Act as lex specialis substantive law legislation. The Administrative Proceedings Act and Administrative Trial Act are procedural laws lex generalis.

6 Is regulatory approval necessary to acquire control of an existing rail transport provider? What is the procedure for obtaining approval?

Regulatory approval is not required to acquire control of an existing rail transport provider unless it affects an existing granted carrier's licence.

A licensed rail carrier must notify the Ministry of Maritime Affairs, Transport and Infrastructure of any change of control within 30 days from the date of change in control.

The Ministry of Maritime Affairs, Transport and Infrastructure must consider whether such a change in control affects the existing granted licence. It decides whether the licence should be upheld, amended or set aside because of the change of control.

Certain Croatian Regulatory Authority for Network Industries (HACOM) approvals might also be required if the acquired control affects free market and competition issues supervised and regulated by HACOM.

Furthermore, general market competition protection regulations are applicable in the case of the acquisition or merging of rail operators.

7 Is special approval required for rail transport companies to be owned or controlled by foreign entities?

No, there is no approval requirement for rail transport companies to be owned by foreign entities. It should be noted that EU state entities are not considered foreign entities, and they have free access on the same terms and conditions as any other domestic entity.

8 Is regulatory approval necessary to construct a new rail line? What is the procedure for obtaining approval?

HŽ Infrastruktura (HŽI) is the only entity that can construct a new railway line for public use. The decision on the construction of a new railway line must be passed by the government, and it must be proposed to the government by the Ministry of Maritime Affairs, Transport and Infrastructure.

The Croatian Railway Safety Agency grants approval on the technical and safety aspects of the construction of a new railway line.

In addition, HŽI should satisfy general approval requirements for infrastructure construction projects.

Croatia has a well-developed national and regional rail network for public use, and there is no need for the construction of new railway lines. However, the existing rail network has not been maintained properly; it has not been upgraded or modernised. The government's rail development policy is to modernise the existing network according to EU standards rather

than constructing and investing in new railway lines. Some new railway lines have been or will be constructed to replace the old ones that it is not possible or worth it to modernise.

MARKET EXIT

Discontinuing a service

9 What laws govern a rail transport company's ability to voluntarily discontinue service or to remove rail infrastructure over a particular route?

Only HŽ Infrastruktura (HŽI) can, by virtue of a government decision and a previous proposal by the Ministry of Maritime Affairs, Transport and Infrastructure, remove rail infrastructure over a particular route. It is not explicitly regulated by the Railway Act, but it arises from the provision on the closure of rail from public use. The closure of a railway excludes it from public use, but it does not necessarily mean the removal of the infrastructure on the respective route.

In freight and passenger transport, a licensed rail carrier may not freely or voluntarily discontinue services if it will significantly affect its existing carrier's licence. Whether the discontinuation is significant depends on the elements based on which the carrier's licence was granted. To ascertain the significance, the Ministry of Maritime Affairs, Transport and Infrastructure considers how the discontinuation of services would affect a previously granted licence. If the carrier's licence would be significantly affected by the discontinuation of the service, the Ministry of Maritime Affairs, Transport and Infrastructure will not allow the discontinuation.

The Railway Act governs the discontinuation of services, closure of rail routes and removal of rail infrastructure.

A passenger rail carrier that is recognised as the national passenger rail carrier and bound by the Public Services Agreement, as is the case with Hrvatske Željeznice Putni ki Promet, Zagreb (HŽPP), cannot voluntarily discontinue passenger services. Continuous and uninterrupted passenger transport is in the national interest, and no voluntary actions that would jeopardise this are allowed by law. The purpose of the Public Services Agreement is to prevent unilateral voluntary actions of the rail operator in the passenger transport sector that might jeopardise regular passenger transport.

10 On what grounds, and what is the procedure, for the government or a third party to force a rail transport provider to discontinue service over a particular route or to withdraw a rail transport provider's authorisation to operate? What measures are available for the authorisation holder to challenge the withdrawal of its authorisation to operate?

When the Ministry of Maritime Affairs, Transport and Infrastructure is allowed to suspend a rail carrier's licence, the rail operator is forced to discontinue services on a particular route. The ground for this lies in changes to the rail carrier's licence requirements, and when the existing carrier's licence is significantly affected by new circumstances that were not present at the time of approval of the carrier's licence.

The procedure is administrative. No second instance administrative proceedings on appeal are provided. The carrier's licence holder may file the administrative writ with the administrative court for the court's review of the administrative act passed by the Ministry of Maritime Affairs, Transport and Infrastructure and run the administrative trial versus the Ministry of Maritime Affairs, Transport and Infrastructure.

Insolvency

11 Are there sector-specific rules that govern the insolvency of rail transport providers, or do general insolvency rules apply? Must a rail transport provider continue providing service during insolvency?

The general regulations on insolvency for companies in difficulties and bankruptcy apply to rail transport operators.

However, sector-specific financial and good-standing requirements are provided for obtaining and upholding the rail carrier's licence. In the case that these sector-specific financial and good-standing requirements are no longer satisfied, a rail carrier approval might be temporarily or permanently suspended.

If a rail carrier holds approval, it must provide services even if insolvent.

In the case of bankruptcy, a rail operator must prove that financial restructuring will enable the continuation of services; otherwise, the carrier's approval will be suspended. The latter may be considered a sector-specific rule. A general bankruptcy regulation is that the company in bankruptcy ceases its business activities, and only the completion of contractual duties performance started before the bankruptcy is allowed.

COMPETITION LAW

Competition rules

12 Do general and sector-specific competition rules apply to rail transport?

Both general and sector-specific competition rules apply to rail transport. Both are harmonised with the EU competition regulations.

The Croatian Competition Agency is the regulatory body for general free market competition protection.

The Croatian Regulatory Authority for Network Industries (HACOM) is the sector-specific free market rail transport competition regulatory body.

The exception is Hrvatske Željeznice Putni ki Promet, Zagreb, which has a Public Services Agreement with the government for passenger transport.

Regulator competition responsibilities

13 Does the sector-specific regulator have any responsibility for enforcing competition law?

HACOM must ensure, on a non-discriminatory basis, free and fair market competition and equal market access to rail infrastructure to all rail operators. HACOM also supervises tariffs and considers complaints of rail operators on violation of free and fair market access and competition.

HACOM has no responsibility for enforcing sector-specific competition law. However, HACOM's rulings are administrative acts that may be reviewed in administrative trials by administrative courts in two instances, and even further by the Constitutional Court, as free market and free entrepreneurship are constitutional rights and values protected by the Constitution.

Competition assessments

14 What are the main standards for assessing the competitive effect of a transaction involving rail transport companies?

HŽ Infrastruktura's General Terms and Conditions; individual contracts with rail operators; and operators' tariffs supervised by HACOM create standards for free and fair market access and for assessing competitive effects to all rail carriers.

Rail operators who think they are faced with unfair competition can file a complaint and apply for remedies with HACOM. HACOM must follow and apply the same non-discriminatory standards in all matters, whether at the request of an interested party or ex officio when provided by the rules of law.

PRICE REGULATION

Types of regulation

15 Are the prices charged by rail carriers for freight transport regulated? How?

As a general rule, prices in freight transport are not regulated.

However, tariffs are supervised by the Croatian Regulatory Authority for Network Industries (HACOM) and prices should fall within the standards of free and fair market competition, following the *acquis communautaire*. The majority of freight rail carriers are engaged in the international rail transport of containers and bulk cargo within neighbouring countries and within the EU.

HACOM also has an inspection and advisory role with regard to pricing. In these roles, HACOM must submit annual reports, which also include price status and which create and affect pricing standards.

16 Are the prices charged by rail carriers for passenger transport regulated? How?

As a general rule, the prices charged for passenger transport are not regulated. However, the prices and tariffs must meet standards for passenger transport and follow the *acquis communautaire*.

Since Hrvatske Željeznice Putni ki Promet, Zagreb receives subsidies for interrupted passenger transport and is, for the time being, the sole passenger carrier, passenger prices are indirectly regulated by provisions of the Public Services Agreement.

In addition, the government has passed regulations on privileged discounted rates for passenger categories on the basis of social welfare, including students, retired people and disabled people.

17 Is there a procedure for freight shippers or passengers to challenge price levels? Who adjudicates those challenges, and what rules apply?

Price levels cannot be challenged, but HACOM has a duty to supervise that a certain standard established in practice is maintained in tariffs. No procedure is provided for the adjustment of price levels.

On an individual basis, a passenger who is harmed by an operator may file a complaint with HACOM. HACOM should decide on the complaint within 30 days through an administrative proceeding.

HACOM also has inspection authorities for the protection of passengers. Fines in misdemeanour proceedings may be charged in case of the violation of passengers' rights.

The Rules of Rail Services Market Regulations and the Passengers Protection Act apply to passengers' protection as substantive law, and the Administrative Proceedings Act and Administrative Trial Act as procedural law.

18 Must rail transport companies charge similar prices to all shippers and passengers who are requesting similar service?

No; as a matter of law, they must charge similar prices to all shippers and passengers who are requesting similar services.

If the service is the same, charging different prices might constitute discriminatory action and violation of access to a free and fair market – as such, unfair competition rules may apply.

In practice, certain standards are established by HACOM's supervision and inspection authorisations. To be competitive, rail carriers have similar prices and service terms that may vary slightly, mostly because of particularities of transport (for instance modern and functional wagons as a more advanced service).

NETWORK ACCESS

Sharing access with other companies

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19 Must entities controlling rail infrastructure grant network access to other rail transport companies? Are there exceptions or restrictions?

Yes – as the rail infrastructure manager, HŽ Infrastruktura (HŽI) must grant network access to all licensed rail carriers. The Railway Act and HŽI's General Terms and Conditions provide legal, administrative, technical and financial aspects of access to the rail infrastructure.

Individual contracts on access to rail infrastructure are signed by HŽI with a rail carrier granting access to the infrastructure on a non-discriminatory basis.

There are no exemptions or restrictions on a discriminatory basis.

The Croatian Regulatory Authority for Network Industries' (HACOM) regulatory and supervisory duty is to ensure equal access to infrastructure to all licensed rail carriers.

Furthermore, HACOM must resolve complaints submitted by an individual injured party concerning discriminatory actions or other actions that violate the party's right to free and equal access to rail infrastructure.

Access pricing

20 Are the prices for granting of network access regulated? How?

HŽI's General Terms and Conditions set out the pricing principles that are followed in individual contracts with each rail carrier and its tariffs.

HACOM supervises the General Terms and Conditions; individual contracts of rail carriers; and their tariffs, which all must be within the main standards established not only on a national level but also at the EU level as the *acquis communautaire*.

HACOM also has an inspection and advisory role with regard to infrastructure access and pricing. In the scope of these roles, HACOM must submit annual reports, which create and affect pricing standards for infrastructure access and also include the status of prices.

Competitor access

21 Is there a declared policy on allowing new market entrants network access or increasing competition in rail transport? What is it?

No, there is no declared policy on allowing new market entrants network access or increasing competition in rail transport. As a matter of national law and the EU *acquis communautaire*, all market entrants should have equal free and fair market access to the rail infrastructure network under the same competition terms.

However, technical and safety requirements on some network routes may limit new entrants or increase competition demands in access to network routes.

SERVICE STANDARDS

Service delivery

22 Must rail transport providers serve all customers who request service? Are there exceptions or restrictions?

Rail transport providers must serve all customers who request service.

The basic principle of the EU *acquis communautaire,* which binds Croatia either directly or via harmonisation of national legislation, provides universal European rail network and free market access on a non-discriminatory basis. There are no exemptions or restrictions in this regard.

23 Are there legal or regulatory service standards that rail transport companies are required to meet?

Yes, legal and regulatory service standards that rail transport companies are required to meet are provided in the EU *acquis communautaire* and these standards should be met directly or via implementation in national legislation.

These standards are established and maintained by the Croatian Regulatory Authority for Network Industries' (HACOM) inspection and advisory role. HACOM must submit annual reports, which deal with all aspects of HACOM's authorities, including tariffs, prices and infrastructure access.

Challenging service

24 Is there a procedure for freight shippers or passengers to challenge the quality of service they receive? Who adjudicates those challenges, and what rules apply?

Shippers and passengers can complain about the quality of services they receive from carriers or HŽ Infrastruktura to HACOM. In administrative proceedings, HACOM is obliged to decide on complaints.

Service receivers are entitled to initiate an administrative trial against HACOM's decision with the administrative court. The rules of the Administrative Litigation Proceedings Act apply in the administrative trial.

SAFETY REGULATION

Types of regulation

25 How is rail safety regulated?

The Rail Safety and Interoperability Act provides that Croatian Railway Safety Agency (CRSF) is the regulatory body responsible for rail safety.

In addition, the Railway Act, with safety principles and a number of rules and regulations on technical safety requirements regulates safety aspects that should be implemented by rail transport participants, from HŽ Infrastruktura (HŽI) and rail carriers to contractors of construction works and service providers on the stations.

National safety regulation is fully harmonised with the *acquis communautaire* through the implementation of the Common Safety Methods of the European Railway Agency.

Competent body

26 | What body has responsibility for regulating rail safety?

The CRSF is the body responsible for regulating rail safety.

The CRSF has four departments, which deal with:

- the rail infrastructure;
- rail carriers;
- rail vehicles; and
- the rail inspection of safety aspects.

Each of these departments is responsible for the regulation, implementation and supervision of the safety of aspects of the rail network.

Manufacturing regulations

27 | What safety regulations apply to the manufacture of rail equipment?

The EU *acquis communautaire* known as the Common Safety Methods – Risks Evaluation and Assessments (the CSM-REA) is the basic guidance for national regulations on the manufacture of rail equipment.

The CRSF regulates, provides implementation and supervises on an operative basis whether manufactured products and equipment meet regulatory requirements. Certification of manufactured products and equipment according to regulatory requirements is the activity of the CRSF's departments for rail vehicles and rail equipment.

Maintenance rules

28 | What rules regulate the maintenance of track and other rail infrastructure?

The CSM-REA is the basic guidance for national regulations on the manufacture of rail equipment.

The CRSF regulates, provides implementation and supervises on an operative basis whether manufactured products and equipment meet regulatory requirements. Certification of manufactured products and equipment according to regulatory requirements is the activity of CRSF's Departments for rail vehicles and rail equipment.

29 | What specific rules regulate the maintenance of rail equipment?

The CSM-REA is the basic guidance for national regulations on the maintenance of rail equipment.

The CRSF regulates, provides implementation and supervises rail equipment maintenance on an operative basis. Upholding of certification of manufactured products and equipment according to the regulatory requirements is the activity of CRSF's Department for Rail Equipment.

Accident investigations

30 | What systems and procedures are in place for the investigation of rail accidents?

The Air, Maritime and Railway Traffic Accidents Investigation Agency (AIN) is a state agency, established according to the EU *acquis communautaire,* that investigates rail accidents. Their investigations are public; they explain the circumstances of an accident, its causes and deficiencies in the rail organisation and system. AIN recommends measures to prevent similar accidents. Their findings and report are published on their website and are publicly available.

HŽI must perform internal investigations, which are primarily focused on the rail infrastructure conditions and HŽI's omissions as rail infrastructure managers. An HŽI investigation should also establish the required measures and improvements for the prevention of similar accidents.

The public prosecutor is also obliged to perform investigations and press criminal charges in all cases involving severe accidents. Severe accidents are those where the material damage exceeds a value of approximately €100,000, or those that caused severe personal injuries or fatal consequences.

Accident liability

31 | Are there any special rules about the liability of rail transport companies for rail accidents, or does the ordinary liability regime apply?

The ordinary liability regime applies to rail transport companies and is generally applicable to other cargo and passenger transports.

National legislation requires mandatory liability insurance for damages caused to passengers in the passenger transport sector and to third persons in the case of tort liability. Furthermore, additional voluntary insurance is required to obtain the rail carriers' licence.

FINANCIAL SUPPORT

Government support

32 Does the government or government-controlled entities provide direct or indirect financial support to rail transport companies? What is the nature of such support (eg, loans, direct financial subsidies, or other forms of support)?

HŽ Infrastruktura (HŽI) and Hrvatske Željeznice Putni ki Promet, Zagreb (HŽPP) receive direct and indirect support for investment in rail infrastructure and passenger transport.

In general, according to EU free market and competition policies, direct subsidies for covering the losses of companies in financial difficulties are not allowed.

However, funding, grants and even subsidised tenders of the EU via the Croatian government for a number of investment projects in the national economy open various opportunities for governmental support of rail companies and rail-related facilities. In addition, Croatia is still utilising EU access funding.

Requesting support

33 Are there sector-specific rules governing financial support to rail transport companies and is there a formal process to request such support or to challenge a grant of financial support?

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LABOUR REGULATION

Applicable labour and employment laws

34 Are there specialised labour or employment laws that apply to workers in the rail transport industry, or do standard labour and employment laws apply?

The Labour Act applies as the basic employment legislation for all employees in Croatia.

In addition, the Labour Act provides that collective agreements should establish employees' benefits in greater detail based on the rights and principles set out in the Labour Act.

HŽ Infrastruktura, Hrvatske Željeznice Putni ki Promet, Zagreb and Hrvatske Željeznice Cargo, Zagreb traditionally have very strong union organisations that represent, negotiate and organise employees of these state-owned rail companies. Since the terms of collective agreements generally have limited effectiveness, negotiations for new collective agreement terms between rail companies' management and unions are very often connected with strikes and other legally permitted pressure tools to achieve better terms of employment for rail staff.

ENVIRONMENTAL REGULATION

Applicable environmental laws

35 | Are there specialised environmental laws that apply to rail transport companies, or do standard environmental laws apply?

There are no rail sector-specific laws; standard environmental laws apply. However, rail companies run environment-friendly policies and implement specific environmental protection measures in their respective businesses.

UPDATE AND TRENDS

Key developments of the past year

36 | Are there any emerging trends or hot topics in your jurisdiction?

Following a focus on the highway, airports and ports on the Adriatic coast, modernisation of the rail infrastructure has taken priority on the government's recent agenda. According to modernisation plans that will be supported by EU funding, modernisation of the railway infrastructure will be the main infrastructure investment project in the coming decade.

Tourism, sea and land transportation and transportation-related services create and hold an important share of the national economy.

Modern highways, airports and Adriatic Sea ports enable a huge number of tourists and cargo, the latter especially in containers, to arrive in the country and flow via these transportation facilities. However, a sub-standard rail network became and was finally recognised as a bottleneck for tourism, transportation and transportation-related services to be able to operate at full capacity.

Considering the EU's integrated Trans-European Transport Network; covid-19 pandemic consequences; energy crises; environment-friendly regulations; and green business requests and regulations, the modernisation of the Croatian railways is a strategic interest that will remain in focus for a longer period of time.

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Summary

FINANCIAL SUPPORT

LABOUR REGULATION

ENVIRONMENTAL REGULATION

UPDATE AND TRENDS

GENERAL

Industry structure

1 | How is the rail transport industry generally structured in your country?

Four types of railway undertakings exist: federally owned railway undertakings, privately held railway undertakings, railway undertakings owned by Germany's federal states or local authorities, and incumbent railway companies from other EU member states, either directly or through subsidiaries.

Deutsche Bahn AG (DB AG) is the historic, incumbent rail transport company. Its subsidiaries govern, administer and maintain the German railway network and infrastructure, and are also responsible for the maintenance and exploitation of the passenger railway stations and provision of related services.

Ownership and control

2 | Does the government of your country have an ownership interest in any rail transport companies or another direct role in providing rail transport services?

DB AG is a public company – 100 per cent of its shares belong to the German state. DB Mobility Logistics AG was a wholly owned subsidiary of DB AG, bundling together several subsidiaries in view of a potential partial or complete privatisation of DB AG. It was dissolved with effect from 1 January 2016. Direct subsidiaries of DB AG include DB Fernverkehr AG and DB Regio AG (passenger transport), DB Cargo AG (freight transport) and DB Netz AG (infrastructure).

3 | Are freight and passenger operations typically controlled by separate companies?

Yes. In the DB Group, separate subsidiaries control freight (DB Cargo) and passenger operations (DB Fernverkehr, DB Regio). In both the freight and passenger rail transport markets, apart from the companies that belong to the DB group, privately held railway undertakings, railway undertakings owned by Germany's federal states or local authorities, and incumbent railway companies from other member states, either directly or through subsidiaries, are all active.

Regulatory bodies

4 | Which bodies regulate rail transport in your country, and under what basic laws?

Rail transport is mainly regulated by the European Commission, Council and Parliament, the European Union Agency for Railways (ERA), the Federal Railway Authority (EBA),

the Eisenbahn-CERT (EBC), and the Federal Network Agency for Electricity, Gas, Telecommunication, Post and Railway (BNetzA).

The European Union adopted a series of legislative packages that gradually liberalised the internal rail market with the aim of creating a single European railway area. This process was completed with the fourth EU railway package of 2016.

Following the entry into force of Regulation (EU) No. 2016/796 on the European Union Agency for Railways (part of the technical pillar of the fourth EU railway package) on 15 June 2016, the ERA replaced and succeeded the European Railway Agency. The ERA's main objectives are interoperability of the Trans-European Rail system through the draft of mandatory technical specifications for interoperability, which are then adopted by a European Council decision. The ERA also provides recommendations to the European Commission on common safety indicators, methods and targets, and on the system of certifications of bodies in charge of safety.

The EBA is the supervisory and licensing authority in Germany, and was established by the Act on the Federal Administration of Railway Traffic of 27 December 1993, last amended on 9 June 2021. It operates under the authority of the Federal Ministry for Digital and Transport (BMDV). The EBA's tasks include issuing licences and safety certificates (valid for both rail freight and passenger transport) and the authorisation of rolling stock, verification of subsystems, declarations of conformity of constituents, authorisations for placing on the market, including the corresponding registration numbers, safety certificates, safety authorisations, notifying national safety rules, publication of annual reports, maintaining a register of infrastructure and a rolling stock register, safety reporting and monitoring interoperability.

The EBC carries out the tasks of the notified body according to Directive (EU) No. 2016/797. It is an autonomous organisation under public law and acts as a financially and legally independent department of the EBA. The main tasks of the EBC are to assess the conformity or suitability for use of the interoperability constituents and to carry out the 'EC' (European Community) verification of the subsystems, as mandated by this Directive.

The BNetzA is an independent, cross-sector authority and has been responsible for regulation of the railway sector since 2006. It is tasked with monitoring rail competition and is responsible for ensuring non-discriminatory access to railway infrastructure. It monitors compliance with the rules governing access to the infrastructure, especially in relation to the preparation of the timetable, decisions on the allocation of railway paths, access to service facilities, usage conditions and charging.

Pursuant to Directive (EU) No. 2016/798, the role of national investigation body in Germany is assigned to the Investigation Office for Rail Accidents of the Ministry of Transport. According to article 21 of this Directive, its tasks focus on the different elements of accident investigation.

MARKET ENTRY

Regulatory approval

5 Is regulatory approval necessary to enter the market as a rail transport provider? What is the procedure for obtaining approval?

A licence is necessary to enter the market as a rail transport provider. Article 6-6e of the General Railway Law of 27 December 1993, last amended on 26 July 2023 (AEG), sets out the relevant requirements. Article 6(3) of the AEG provides that the applicant must have its seat in Germany or a registered office in Germany. The company must have a management structure as well as reliability, financial standing and professional aptitude (article 6a ff. AEG). Reliability means that the company should not have been subject to fines of more than €100,000 for violations of labour law, customs law or traffic law and no person in charge of management should have received sentences of at least one year for violations of labour law or social obligations, customs law or traffic law. Proof of the professional expertise can be provided with an assignment of a certified rail operations manager – in other words, a person who is trained as an engineer, has three years of experience as an engineer in the rail sector and has passed a special exam (article 6d (2) AEG).

The licence as a rail transport provider alone does not entitle a company to take part in public railway operations in cross-border services. A valid single safety certificate according to article 7a (1) of the AEG will be required. A single safety certificate is valid for a given area of operation (ie, a network or networks within one or more member states where the railway undertaking intends to operate). Article 1(2) of the Ordinance on Railway Safety of 17 June 2020 excludes railway undertakings that are exclusively operating on local networks from the obligation to obtain a safety certificate. Articles 14-14d of the AEG require the applicant to have liability insurance.

6 Is regulatory approval necessary to acquire control of an existing rail transport provider? What is the procedure for obtaining approval?

Article 6g (5) of the AEG provides that in the case of a change affecting the legal status of a company, in particular in cases of mergers or takeovers, it shall inform the licensing authority accordingly. The licensing authority has to check whether the company still fulfils the requirements of sections 6a–6e of the AEG. The company concerned may continue operations unless the licensing authority determines by order that safety is at risk. In such a case, the company in question has to cease operations immediately.

Article 6g (6) of the AEG provides that if an enterprise intends to significantly change or expand its business, it shall inform the licensing authority accordingly, and it must fulfil the requirements of sections 6a-6e of the AEG. Further general authorisations may need to be obtained from the Federal Cartel Office or the European Commission subject to the merger control rules.

7 Is special approval required for rail transport companies to be owned or controlled by foreign entities?

The only restrictions for foreign ownership or control of railway undertakings result from the German rules on foreign investment.

On the basis of article 55 of the Foreign Trade and Payments Ordinance of 2 August 2013, last amended on 19 December 2022 (AWV), the Federal Ministry for Economic Affairs

and Climate Action (the Ministry) may review the acquisition of domestic companies by foreign buyers in individual cases. Any acquisition of at least 25 per cent of the voting rights of a company resident in Germany by investors located outside the European Union or the European Free Trade Association region can be investigated. In principle, the rules on foreign investment apply to any industry sector. To obtain legal certainty undertakings can submit a voluntary notification. The Ministry can prohibit the transaction or impose conditions if it considers that public order or security in Germany is threatened.

The provisions list certain industry sectors constituting critical infrastructure, which are subject to special scrutiny. In these cases a notification of the transaction to the Ministry is mandatory. Article 2(10) section 1 of the Act on the Federal Office for Information Security (in connection with the Ordinance on the definition of critical infrastructure determines that passenger and freight transport by rail are part of the critical infrastructure. Acquisitions in this area can, therefore, already be investigated if at least 10 per cent of the voting rights of a domestic company are acquired. According to article 55a (2), No. 6 of the AWV this can also comprise undertakings developing software for the operation of facilities or systems for the transport of passengers and freight by rail. A threshold of 20 per cent applies to an additional second category of sectors relevant to security. A decision issued by the Ministry can be challenged before an administrative court.

8 Is regulatory approval necessary to construct a new rail line? What is the procedure for obtaining approval?

The operation of railway tracks, train command and control systems and of train platforms requires authorisation according to article 6(1) No. 3 of the AEG. In addition, the construction and alteration of railway systems in Germany requires a project planning procedure. For the federal railways, the Eisenbahn-CERT is the responsible authority for conducting this procedure, which entails an examination of the technical and legal aspects of the project. The procedure is governed by article 18 of the AEG and the German Federal Administrative Procedures Act. The Federal Railway Authority (EBA) will examine whether the project is technically feasible, whether it fulfils safety requirements, whether an environmental impact assessment is necessary, whether it affects the interests of the public or third parties, and how these can be taken account of. A project planning procedure is initiated upon submission of the application and it generally takes from one to three years. On 6 December 2020, the EBA took over the responsibility for the consultations to be conducted in the context of a planning procedure from the previously competent regional authorities. At the end of the procedure, the EBA grants formal planning permission for the project to which it can add auxiliary conditions to address any problems the project might cause in relation to its surroundings and the environment.

MARKET EXIT

Discontinuing a service

9 What laws govern a rail transport company's ability to voluntarily discontinue service or to remove rail infrastructure over a particular route?

The procedure for releasing and closing down rail infrastructure is detailed in article 11 of the General Railway Law (AEG). Before infrastructure may be closed down, it must be checked whether any other infrastructure manager might be interested in taking it over. Responsibility for this lies with the Eisenbahn-CERT for federally owned railways, and with the railway supervisory authorities of the states for non-federally owned railways. Lines that have not been closed down must be operated as normal.

10 On what grounds, and what is the procedure, for the government or a third party to force a rail transport provider to discontinue service over a particular route or to withdraw a rail transport provider's authorisation to operate? What measures are available for the authorisation holder to challenge the withdrawal of its authorisation to operate?

Article 6g (1) sentence 1 of the AEG provides that if there is reasonable doubt that a company to which it has granted a business licence meets the requirements of articles 6a-6e of the AEG, the licensing authority may at any time verify that it actually complies with these requirements. The approval authority (ie, the Federal Railway Authority at the federal level and the authority designated by the government in each state at regional level) shall revoke the business licence if it determines that the company does not meet these requirements (article 6g (1) sentence 2).

Notwithstanding the second sentence of paragraph 1, the approval authority may refrain from withdrawing the undertaking's authorisation for non-compliance with the financial capacity requirements and set a reasonable deadline for the re-establishment of financial capacity if safety is not compromised (article 6g (3) sentence 1). This provision also applies in the case of a restoration of reliability or professional suitability. The period under sentence 1, also in conjunction with sentence 2, must not exceed six months. If a set period has elapsed without the restoration being successful, the approval must be revoked (article 6g (3) of the AEG).

If a company has ceased operations for six months or has not commenced operations within six months of obtaining a business licence, the approval authority must verify that the company still meets the requirements of articles 6a-6e AEG. In the case of a start-up, the company may request that the period of sentence 1 be extended taking into account the specific nature of the services to be provided (article 6g (4) of the AEG).

Article 6g (8) of the AEG states that paragraphs 1 to 7 are without prejudice to the administrative procedural rules on the annulment of administrative acts, which remain unaffected.

Following the implementation of the fourth EU railway package the procedural rules on amendment and withdrawal of safety certificates are now contained in articles 9 to 11 of the Ordinance on Railway Safety of 17 June 2020.

Insolvency

11 Are there sector-specific rules that govern the insolvency of rail transport providers, or do general insolvency rules apply? Must a rail transport provider continue providing service during insolvency?

The general insolvency rules apply to rail transport providers. Pursuant to article 6g (7) of the AEG, the approval authority must revoke the business licence of a company against which insolvency proceedings or similar proceedings have been initiated, if it is satisfied that a prospective restructuring is not to be expected within a reasonable time.

COMPETITION LAW

Competition rules

12 | Do general and sector-specific competition rules apply to rail transport?

General competition rules apply to rail transport. Article 12(7) of the General Railway Law grants an exemption from competition law for agreements between railway undertakings and with other passenger transport undertakings in so far as they aim to ensure sufficient supply of regional transport capacities, in particular by way of cooperation and the alignment of tariffs and schedules. Such agreements require notification and approval of the respective authority.

Regulator competition responsibilities

13 | Does the sector-specific regulator have any responsibility for enforcing competition law?

The Federal Railway Authority is not responsible for enforcing competition law.

Competition assessments

14 | What are the main standards for assessing the competitive effect of a transaction involving rail transport companies?

A transaction involving rail transport companies may be caught by the German merger control provisions, which are enforced by the Federal Cartel Office (BKartA). The current legislation can be found in Chapter VII of the Act against Restraints of Competition of 1958, version of 26 June 2013, last amended on 23 June 2023 (GWB). The GWB sets out a comprehensive list of events constituting a concentration, which includes not only the acquisition of control and the creation of joint ventures, but also the acquisition of minority shareholdings or of a material competitive influence below the level of control. A merger must be prohibited by the BKartA if it would significantly impede effective competition, in particular if it leads to the creation or strengthening of a dominant market position.

The competition rules on dominance and anticompetitive agreements may also apply to railway transport companies. Unilateral conduct by undertakings with market power is governed by articles 18, 19, 19a and 20 of the GWB, which prohibit an undertaking's abuse of a (single-firm or collective) dominant position, and specific types of abusive behaviour by

undertakings of paramount significance or that have 'relative' market power as compared to small or medium-sized enterprises (as trading partners or competitors).

The principal national rules on cartels are found in articles 1 and 2 of the GWB. These rules essentially reproduce articles 101(1) and 101(3) of the Treaty on the Functioning of the European Union (TFEU) at national level. Article 1 of the GWB prohibits all agreements between competing corporations, decisions by associations of corporations and concerted practices that have as their object or effect the prevention, restriction or distortion of competition. Agreements restricting competition are prohibited by article 1 of the GWB only if they have an appreciable effect on competition. Agreements (and concerted practices) that fall within the scope of article 1 of the GWB are exempted from the prohibition contained therein if they meet the requirements under article 2 of the GWB. Article 2 exempts cartels from article 1 under the same standards as provided by article 101(3) of the TFEU. However, the prohibition provided for in article 101(1) of the TFEU does not apply to certain agreements and certain groups of small and medium-sized businesses, as defined in and according to Regulation (EC) No. 169/2009 applying rules of competition to transport by rail, road and inland waterway.

PRICE REGULATION

Types of regulation

15 | Are the prices charged by rail carriers for freight transport regulated? How?

The prices charged by rail carriers for freight transport are not regulated. Article 12(1) of the General Railway Law merely defines tariffs as consisting of the prices for carriage and the conditions of carriage. Pursuant to this provision, railway companies are obliged to cooperate in setting the tariffs for freight and passenger transport.

16 | Are the prices charged by rail carriers for passenger transport regulated? How?

Article 12(1) of the AEG defines tariffs as consisting of the prices for carriage and the conditions of carriage. Pursuant to this provision, railway companies are obliged to cooperate in setting the tariffs for freight and passenger transport. The railway undertakings cooperate within the Tariff Association of Federal and Non-Federal Railways.

In addition, article 12(2) of the AEG obliges public railway undertakings to set tariffs that contain all the information necessary for calculating the prices for passenger transport and to apply them in the same manner for all users. According to article 12(3) of the AEG, railway companies require prior authorisation for their conditions of carriage in rail passenger transport. However, the prices the railway undertakings set for passenger carriage do not require prior authorisation.

17 | Is there a procedure for freight shippers or passengers to challenge price levels? Who adjudicates those challenges, and what rules apply?

The price levels for freight shippers or passengers are not regulated.

18 Must rail transport companies charge similar prices to all shippers and passengers who are requesting similar service?

Article 12 (2) of the AEG obliges public railway undertakings to set tariffs that contain all the information necessary for calculating the prices for passenger transport and to apply them in the same manner for all users. This excludes the possibility to justify a differential treatment on the basis of objective reasons. According to article 28 (2) of the AEG an infringement of these obligations can lead to an administrative fine of up to €50,000.

This obligation does not apply to freight transport.

NETWORK ACCESS

Sharing access with other companies

19 Must entities controlling rail infrastructure grant network access to other rail transport companies? Are there exceptions or restrictions?

According to article 10 of the Railway Regulation Act of 29 August 2016, last amended on 9 June 2021 (ERegG), all railway infrastructure enterprises have to grant access to their railway infrastructure. Article 68 of the ERegG authorises the Federal Network Agency for Electricity, Gas, Telecommunication, Post and Railway (BNetzA) to issue decisions specifically prohibiting railway infrastructure enterprises from impairing the right of 'non-discriminatory use of the railway infrastructure'. These provisions transpose the requirements of article 10 of Directive (EU) No. 2012/34, which states that railway undertakings shall be granted, under equitable, non-discriminatory and transparent conditions, the right of access to the railway infrastructure in all member states for the purpose of operating all types of rail freight services or international passenger service. The duty of all the subsidiaries of German railways Deutsche Bahn (DB AG) is to ensure non-discriminatory conditions for all the companies to use railway infrastructure and to establish objective calculation methods of charges and use of infrastructure.

In November 2021, the European Commission opened infringement proceedings against Germany regarding the incorrect transposition of Directive (EU) No. 2016/2370 on the opening of the market for domestic passenger transport services by rail, and the governance of railway infrastructure. It establishes the right for railway undertakings established in one member state to operate all types of passenger service anywhere in the European Union, and it strengthens the rules on the impartiality of infrastructure managers.

Access pricing

20 Are the prices for granting of network access regulated? How?

The prices for granting network access are regulated at EU level through the Commission Implementing Regulation (EU) 2015/909 of 12 June 2015 on the modalities for the calculation of the cost that is directly incurred as a result of operating the train service. Charges payable by passenger and freight transport undertakings for access to tracks, stations and other facilities are regulated in the ERegG, which came into force on 2 September 2016. It contains specific requirements based on the principles of non-discrimination. The access charges for train movements on the rail network and associated services are set out in the infrastructure managers' list of track access charges, which also provides details of the charges for any supplementary and ancillary services available in connection with the use of the tracks. The most recent version of the list is contained in the DB Netz AG Network Statement for 2023 (NBN 2023), which entered into force on 11 December 2022.

Both passenger and freight companies must negotiate with DB subsidiary for infrastructure DB Netz AG to obtain access to DB tracks. In Germany, open access rules apply to all companies that possess infrastructure, pursuant to the symmetric approach to the network access regulation. The full cost of track access is apportioned to the train operating companies. The charges for track access comprise three elements:

- base charges dependent upon the type of track and the company's utilisation;
- charges linked to prioritisation in scheduling; and
- surcharges for particular circumstances such as for heavier weights, special trains, etc.

BNetzA is entitled to verify and permit access charges before they are introduced.

Competitor access

21 Is there a declared policy on allowing new market entrants network access or increasing competition in rail transport? What is it?

The Monopolies Commission is an independent expert committee, which advises the federal government and has statutory mandates for special reports in the field of network industries, including railway transport pursuant to article 78 of the ERegG. In its eighth special report published in July 2021 the Monopolies Commission focused on the strengthening of competition in the railway sector. It pointed out that a planned equity increase in favour of DB AG by the German government could carry the risk of competitive distortions and recommended a vertical separation of the infrastructure from operations within the DB AG. The Act on the Further Development of Railway Regulation came into force in June 2021 and provides the legal basis for the introduction of the synchronised timetable, the Deutschlandtakt. In this context the Monopolies Commission recommends the introduction of either competitive tendering or a concession model in the long-distance railway transport market to offer all railway operators the opportunity to participate in the Deutschlandtakt. Finally, the Monopolies Commission required that digitalisation opportunities in the railway sector are made use of and that all sales platforms be given non-discriminatory access to real-time data to strengthen the diversity in online sales.

SERVICE STANDARDS

Service delivery

22 Must rail transport providers serve all customers who request service? Are there exceptions or restrictions?

Pursuant to article 10 of the General Railway Law (AEG), public rail passenger transport providers are required to carry passengers and baggage if the conditions of carriage are complied with, transport by regular means is possible, and the carriage is not prevented by circumstances that the railway undertaking cannot avert and that it could not remedy.

23 Are there legal or regulatory service standards that rail transport companies are required to meet?

Article 29 of Regulation (EU) 2021/782 states that railway undertakings shall define service quality standards and implement a quality management system to maintain service quality. Annex III of this Regulation lists the following minimum quality service standards:

- information and tickets;
- punctuality of services and general principles to cope with disruptions to services
- cancellations of services;
- cleanliness of rolling stock and station facilities (air quality in carriages, hygiene of sanitary facilities, etc);
- customer satisfaction survey;
- complaint handling, refunds and compensation for non-compliance with service quality standards; and
- assistance provided to disabled persons and persons with reduced mobility.

These rules are directly applicable in Germany.

Challenging service

24 Is there a procedure for freight shippers or passengers to challenge the quality of service they receive? Who adjudicates those challenges, and what rules apply?

On 29 April 2021, Regulation (EU) 2021/782 of the European Parliament and of the Council on rail passengers' rights and obligations was adopted. It applies from 7 June 2023 and replaced Regulation (EC) No. 1371/2007.

Pursuant to article 28(1) of Regulation (EU) 2021/782, railway companies are obliged to set up a complaints handling mechanism, and to make their contact details and working languages widely known to passengers. In accordance with article 28(2) of Regulation (EU) 2021/782, passengers may submit a complaint to any railway undertaking involved. Within

one month, the addressee of the complaint shall either give a reasoned reply or, in justified cases, inform the passenger by what date within a period of less than three months from the date of the complaint a reply can be expected.

Passengers who are not satisfied with the response from the railway undertaking may also complain to the Federal Railway Authority (EBA) pursuant to article 33 of Regulation (EU) 2021/782. First, the EBA examines the facts. If the complaint is legitimate, it will conduct an administrative procedure to persuade the company to comply with its obligations to safeguard the passenger's rights (eg, to pay compensation or reimbursement). Germany had notified a national exemption, and therefore, Regulation 1371/2007 was not applicable for certain urban, suburban and regional services, and in particular for services run mainly on account of their historical significance or for the purposes of tourism. With the application of Regulation (EU) 2021/782 as of 7 June 2023, this national exemption no longer applies.

SAFETY REGULATION

Types of regulation

25 | How is rail safety regulated?

Directive (EU) No. 2016/798 on railway safety, which is part of the fourth EU railway package, repealed Directive 2004/49/EC. To transpose the Directive, on 16 March 2020, the German legislator adopted the Law on the implementation of the technical pillar of the fourth EU railway package. The relevant national safety rules for the rail system in Germany were first notified to the European Commission in 2006. The current notification of German national safety rules under Directive (EU) No. 2016/798 is still under evaluation by the European Union Agency for Railways (ERA). A list of national safety rules as of October 2022 is available on the EBA website. The European Commission has issued Implementing Regulation (EU) No. 2018/763 of 9 April 2018, establishing practical arrangements for issuing single safety certificates to railway undertakings. The Ordinance on Railway Safety of 17 June 2020 complements this Commission Implementing Regulation. EBA has published a guidance document on the application for single safety certificates last updated on 28 March 2023.

Regulations by the Federal Railway Authority (EBA), guidelines by the Association of German Transport Companies and German railways Deutsche Bahn (DB AG), as well as DIN Standards (ie, the 27200 series of technical standards) regulate technical aspects of rail safety. These rules apply in Germany for regular public railways, as far as they do not operate networks of regional transport or service facilities or regional railways. The above-mentioned guidelines and DIN Standards qualify as recognised rules pursuant to article 2 of the Railway Construction and Operating Regulations (EBO), thus creating a code of practice.

Competent body

26 | What body has responsibility for regulating rail safety?

Following the transposition of the fourth EU Railway Package, the ERA is responsible for the issuance of single safety certificates if operations are to take place in more than one member state (one stop shop). If operations are to be limited to Germany the applicant can choose whether to address ERA or the EBA. The EBA will remain responsible for assessing compliance with national safety rules in the certification procedure and for monitoring ongoing compliance throughout the duration of the validity of the certificate. The EBA has to inform the ERA if the holder of a safety certificate issued by the ERA poses a significant security risk (article 5a (2) of the General Railway Law (AEG)). The EBA also has to inform other national safety authorities in the case of security relevant findings with respect to railway undertakings operating cross-border (article 5a (2a) AEG). Applicants can request the review of a negative decision by a safety certification body pursuant to article 14 of Regulation (EU) No. 2018/763. A procedure can be lodged against decisions by the EBA before German administrative courts. For decisions taken by the ERA an appeal can be brought before a board of appeal and then before the European Court of Justice pursuant to articles 58 and 63 of Regulation (EU) No. 2016/796.

Manufacturing regulations

27 | What safety regulations apply to the manufacture of rail equipment?

The following safety regulations apply to the manufacture of rail equipment: the EBO, the Technical Principles for the Approval of Safety Systems published by the EBA, Guidelines 406 for Driving and Building and Guidelines 807 Aerodynamics/Crosswind published by DB AG. The third part of the EBO (paragraphs 18–33) lays down the specifications for vehicles, and modules 807.400–807.499 of Guidelines 807 include the technical requirements regarding aerodynamics and crosswind.

Maintenance rules

28 | What rules regulate the maintenance of track and other rail infrastructure?

The maintenance of track and other rail infrastructure is regulated by a performance and financing agreement (LuFV) between Germany, represented by the BMDV, railway infrastructure companies (ie, DB Network AG, DB Station & Service AG and DB Energy GmbH) and DB AG. On 1 January 2020, the LuFV III entered into force. It has a duration of 10 years (2020–2029). Under this agreement, infrastructure companies will receive around €63.4 billion for repairs in the existing network and also spend €1.3 billion of own funds. The railway infrastructure companies also undertake to spend a total of at least €22.78 billion on the maintenance of railways during the contract period.

This agreement provides the railway infrastructure companies with funds for the infrastructure to use at their discretion and increases their planning security. In return, they undertake to invest in repairs in the railways at least at the agreed level, to make a minimum maintenance contribution, to contribute to the maintenance and modernisation of the existing network, and to maintain the infrastructure in a high-quality condition. The EBA is tasked with monitoring the implementation of the agreement.

29 | What specific rules regulate the maintenance of rail equipment?

Pursuant to article 4a (1) of the AEG, owners of rolling stock are responsible for the maintenance of their rolling stock and may transfer this task to a third party responsible for maintenance. Commission Implementing Regulation (EU) 2019/779 of 16 May 2019 laying down detailed provisions on a system of certification of entities in charge of maintenance (ECM) of vehicles repealed Commission Regulation (EU) No. 445/2011 and has been applicable since 16 June 2020. It extended the previous system of certification of the entity in charge of maintenance for freight wagons to all rail vehicles. The EBA is responsible for accreditation and recognition of ECM certification bodies under Regulation (EU) 2019/779.

The rules that are contained in the 27200 series of the DIN standards specify the technical requirements for safety-relevant systems and components of rolling stock with standard gauge. They create a uniform safety framework for the condition of rolling stock in operation for all railway undertakings operating railway traffic on the federal rail network.

Accident investigations

30 | What systems and procedures are in place for the investigation of rail accidents?

The Federal Railway Accident Investigation Board is the national investigation body pursuant to Directive (EU) No. 2016/798 on railway safety.

Serious accidents pursuant to article 20 (1) and (2) of Directive (EU) No. 2016/798 are systematically examined in four steps: initial measures, recording the accident investigation, fact-finding and factual analysis. The result of the investigation will be summarised and published in an investigation report.

Accident liability

31 | Are there any special rules about the liability of rail transport companies for rail accidents, or does the ordinary liability regime apply?

Regulation (EU) 2021/782 of 29 April 2021 on rail passengers' rights and obligations in article 26 renders rail transport companies liable for the loss or damage resulting from the death of, personal injuries, or any other physical or mental harm, to a passenger, caused by an accident arising out of the operation of the railway and happening while the passenger is in, entering or alighting from railway vehicles regardless of the railway infrastructure used. The Regulation also stipulates the circumstances in which it is relieved from liability in this context.

The Liability Act of 4 January 1978, last amended on 17 July 2017, creates special rules for the liability of rail transport companies for rail accidents. It establishes a strict liability regime. Liability is excluded if the event is attributable to force majeure.

FINANCIAL SUPPORT

Government support

32 Does the government or government-controlled entities provide direct or indirect financial support to rail transport companies? What is the nature of such support (eg, loans, direct financial subsidies, or other forms of support)?

Cargo transport and long-distance passenger transport are not supported by government subsidies. Federal states are, however, responsible for procuring subsidised regional passenger rail services from rail companies, and for financing them within franchise contracts. The franchising system is, therefore, based on the transfer of financial resources, the Regionalisierungsmittel, from the federal budget to the federal states at an annual level of approximately €8.2 billion with an agreed annual increase of 1.8 per cent. In November 2022 it was decided that the Federal States will receive additional subsidies of €1 billion and that the annual increase amounts to 3 per cent from 2023. This change was implemented through the eighth amendment to the Regionalisation Act. The introduction of the so-called 'Deutschlandticket', a low-cost public transport ticket plan for regional transport, led to the need for additional subsidies and in March 2023 agreement was reached on the payment of €1.5 billion annually from the federal budget to the federal states. The federal government also gives grants annually for noise abatement measures.

Requesting support

33 Are there sector-specific rules governing financial support to rail transport companies and is there a formal process to request such support or to challenge a grant of financial support?

Regulation (EU) No. 1370/2007 defines the conditions in which the competent authorities can intervene in the area of public passenger transport (rail and road transport) to guarantee the provision of services of general interest. It applies to regular and non-discriminatory access, and national and international public passenger transport services by, inter alia, rail.

The competent authority, meaning the public authority or authorities with the power to intervene in public passenger transport within a given geographical area, is obliged to conclude a public service contract with the operator to which it grants an exclusive right or compensation in exchange for discharging public service obligations. Obligations that aim to establish maximum tariffs for all or certain categories of passengers may also be subject to general rules.

The competent authority, defined in article 15 of the General Railway Law, grants compensation for the net financial impact occasioned by compliance with the contractually defined public service obligations or pricing obligations established in the general rules. Public service contracts are awarded according to the rules laid down in this Regulation. Subject to certain reservations detailed in article 5 of the Regulation, competent local authorities may provide public transport services themselves or assign them to an internal operator over which they have control comparable to that over their own services. Any

competent authority who uses a third party other than an internal operator must award public service contracts by means of transparent and non-discriminatory competitive procedures that may be subject to negotiation. In the exceptional cases set out in article 5 (4) to (6) of Regulation (EU) No. 1370/2007 the obligation to instigate competitive procedures does not apply to rail transport.

Granting financial support by the state to private undertakings falls under EU state aid rules. The Commission has issued guidelines on the application of state aid rules for railway companies. These guidelines apply to railway companies as well as to urban, suburban or regional passenger transport companies with regard to aid for the purchase and renewal of rolling stock. They cover support by means of infrastructure funding; aid for the purchase and renewal of rolling stock; debt cancellation by states with a view to the financial restructuring of railway undertakings; aid for restructuring railway undertakings; aid for coordination of transport; and state guarantees for railway companies. The rules applicable to state aid in the form of guarantees for railway companies are also set out in the Commission notice on the application of articles 87 and 88 of the EC Treaty.

In January 2022, the European Commission opened an in-depth investigation regarding certain aid measures in favour of DB Cargo. The European Commission suspects that an open-ended profit and loss transfer agreement concluded between Association of German Transport Companies and German railways Deutsche Bahn and DB Cargo might constitute illegal State aid.

LABOUR REGULATION

Applicable labour and employment laws

34 Are there specialised labour or employment laws that apply to workers in the rail transport industry, or do standard labour and employment laws apply?

Article 25 sentence 1 of the General Railway Law states that public railways alone decide when jobs need to be filled to provide railway services and to maintain and operate the railway infrastructure according to business needs. The co-determination right of the works council pursuant to article 87(1) No. 2 of the Works Constitution Act with regard to the working time regulations for the employment of the employees during the occupation times specified in sentence 1 remains unaffected. If a public authority awards a public contract for passenger transport services by rail article 131(3) GWB foresees that, where there is a change of operator, the selected operator shall take on the employees who were employed by the previous operator as if there had been a transfer of business in the sense of article 613a of the German Civil Code. The obligation is limited to those employees who are actually required for provision of the transport services being transferred. This requirement is based on article 4(5) of Regulation (EU) No. 1370/2007 but, in comparison to the EU provision, the German legislator has limited the wider discretion available to the contracting authority under the Regulation in terms of ordering a takeover of employees by making it the rule.

ENVIRONMENTAL REGULATION

Applicable environmental laws

35 | Are there specialised environmental laws that apply to rail transport companies, or do standard environmental laws apply?

According to article 4(6) of the General Railway Law, the Federal Railway Authority (EBA) is responsible, inter alia, for environmental supervision, in particular with regard to the approval and monitoring of facilities of the federal railways. In this context, the legal framework within which the EBA operates is the Federal Emission Control Act, the Federal Soil Protection Act, the Water Resources Act, the Plant Protection Act and the regulations based on these acts.

Railway rolling stock is required to meet certain noise emission limits. This obligation, applicable only to newly built wagons, was introduced under the Railway Interoperability Directive through Commission Regulation (EU) No. 1304/2014 on the technical specification for interoperability relating to the subsystem 'rolling stock – noise'. On 16 May 2019, Commission Implementing Regulation (EU) 2019/774 was adopted and extended the requirements to existing rolling stock. Freight wagons that do not meet the noise emission limits are not to be operated on quieter routes from 8 December 2024 onwards. A quieter route is defined as a part of the railway infrastructure with a minimum length of 20km on which the average number of daily operated freight trains during the night-time as defined in national legislation transposing Directive 2002/49/EC of the European Parliament and of the Council was higher than 12. In accordance with Appendix D.1 Germany has provided the European Union Agency for Railways with a list of its quieter routes.

UPDATE AND TRENDS

Key developments of the past year

36 | Are there any emerging trends or hot topics in your jurisdiction?

The Monopolies Commission presented its ninth Sector Report Railways on 4 July 2023. It laid out its views on a possible restructuring of the DB Group, currently envisaged by the German government, whereby the infrastructure units DB Netz and DB Station & Service are to be merged into one unit (InfraGO). The Monopolies Commission stressed the need for extensive economic and organisational independence of this new unit from the other companies of the DB Group. The report also discusses the poor quality of rail infrastructure and states that the railway regulation should provide stronger incentives for the infrastructure operator to invest sustainably in the quality of the infrastructure. Quality control should, in the future, be incorporated into the regulatory framework for charges. Finally, the Monopolies Commission pointed to the lack of competition in sales. Independent sales service providers must be able to access infrastructure data from the Association of German Transport Companies and German railways Deutsche Bahn (DB AG).

In December 2022, the Acceleration Commission for the Railways delivered its final report. The proposals include operational adjustments in the construction and uses of the railway

network, for example, in relation to capacity utilisation and automation. The Commission also recommends reducing the scope and duration of approval procedures for small and medium-sized measures and it supports the reorganisation of the DB Group.

On 26 June 2023, the Bundeskartellamt (BKartA) decided that DB AG had abused its market power in relation to mobility platforms. It found that DB used its key position on the transport and infrastructure markets to restrict competition from third-party mobility platforms. In addition, mobility platforms do not have continuous and non-discriminatory real-time access to all the traffic data controlled by DB AG. The BKartA has therefore imposed a package of measures on DB AG. It will, for example, no longer be able to enforce restrictions on advertising it had included in contracts with third-party mobility platforms. Further measures concern bans on discounts, compensation for carrying out bookings and payment processes and access to real time data.

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UPDATE AND TRENDS

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GENERAL

Industry structure

1 How is the rail transport industry generally structured in your country?

There are 14 railway infrastructure managers in Poland that manage the railway infrastructure and make the tracks available to rail operators. The largest manager is the state-controlled company PKP Polskie Linie Kolejowe SA, which is responsible for the maintenance of rail tracks, managing the rail traffic across the country, scheduling train timetables and managing the railway land. More than 96 per cent of the infrastructure is managed by this company and the remaining part of the infrastructure is managed by local railway operators (eg, metropolitan railways, power plants, mines). A separate entity, PKP Energetyka SA, which was privatised in 2015, provides nationwide maintenance and emergency response services to the railway network.

Ownership and control

2 Does the government of your country have an ownership interest in any rail transport companies or another direct role in providing rail transport services?

The government owns 100 per cent of shares in PKP SA, which controls leading nationwide rail passenger carrier, PKP Intercity SA. A second nationwide rail passenger carrier is Polregio SA, which on 1 December 2021 changed its legal form from a limited liability company to a joint stock company. The majority owner of the operator's stocks is the Industrial Development Agency (a state-controlled company responsible for implementing restructuring processes). Regional self-government units and cities are owners or the majority shareholders of regional or metropolitan rail passenger carriers (currently there are 10 such regional and municipal carriers). The government also indirectly controls over 30 per cent of stocks in PKP Cargo SA, a freight carrier listed on the Warsaw Stock Exchange.

3 Are freight and passenger operations typically controlled by separate companies?

Yes, freight and passenger operations are usually controlled by separate companies, but there are examples of companies conducting both types of operations.

Regulatory bodies

4 Which bodies regulate rail transport in your country, and under what basic laws?

Under section 3 of the Railway Transport Act, the president of the Office of Rail Transport, appointed by the Prime Minister, is the regulatory authority responsible for rail transport in Poland.

MARKET ENTRY

Regulatory approval

5 Is regulatory approval necessary to enter the market as a rail transport provider? What is the procedure for obtaining approval?

Provision of passenger or freight transport services by rail (as well as the provision of traction services) is subject to approval issued by the president of the Office of Rail Transport (ORT). To apply for an approval, the rail transport provider must fulfil the following criteria: have good standing, financial credibility and professional competence; possess stock at its disposal; and be insured from third-party liability. The president of the ORT must issue the approval within three months after having obtained the application with all necessary documents.

6 Is regulatory approval necessary to acquire control of an existing rail transport provider? What is the procedure for obtaining approval?

Approval from the railway regulatory authority is not necessary to acquire control over an existing rail transport provider and standard antitrust laws apply. Therefore, if the total global turnover of entrepreneurs in the fiscal year preceding the acquisition exceeds the equivalent of €1 billion or the total turnover in Poland exceeds the equivalent of €50 million, the consent of the president of the Office of Competition and Consumer Protection is required (the president may issue an approval, a conditional approval or prohibit the concentration).

7 Is special approval required for rail transport companies to be owned or controlled by foreign entities?

No, there is no such requirement.

8 Is regulatory approval necessary to construct a new rail line? What is the procedure for obtaining approval?

The voivode (who is a representative of the government administration in the voivodeship) issues the decision on establishing the location of the rail line at the request of PKP Polskie Linie Kolejowe SA, the SPV established for the development of the Solidarity Transport Hub or the competent local government unit. The application to issue a decision should be preceded by a number of written arrangements, such as arrangements with managers of public roads that the railway will cross. The voivode further informs the property owners where the railway is to be located about the commencement of the proceedings. As of the date the owners are informed, no building permits may be issued with respect to such property and the landowners have to inform the voivode about the sale of land within the area where the new railway is to be located. The voivode should issue the decision within three months from the date of filing the complete application. However, in the case of the

construction of a private railway siding, the above procedure will not apply. The investor will be required to declare the intention to build a railway line or submit an application for the building permit to the relevant municipality.

MARKET EXIT

Discontinuing a service

9 What laws govern a rail transport company's ability to voluntarily discontinue service or to remove rail infrastructure over a particular route?

The procedure of closing a railway is set out in the Railway Transport Act. The manager of a particular route may apply to the Minister of Infrastructure to approve closure of a railway route (and, as a consequence, removal of infrastructure) if the revenue from operations carried out on this route does not cover the costs incurred by the manager for maintenance of that route, and if no financing from the state treasury or the local government unit's budget was provided to cover the manager's loss. The closing procedure may also be stopped if the relevant local government or its appointed manager enters into an agreement to take over the railroad line for management free of charge for its continued operations.

10 On what grounds, and what is the procedure, for the government or a third party to force a rail transport provider to discontinue service over a particular route or to withdraw a rail transport provider's authorisation to operate? What measures are available for the authorisation holder to challenge the withdrawal of its authorisation to operate?

Under the provisions of the Railway Transport Act, the president of the Office of Rail Transport (ORT) is obliged to withdraw the approval for a railway operator in the following circumstances:

- upon commencement of insolvency proceedings;
- when the operator is deprived of the right to conduct business activities based on a final and non-appealable court judgment; or
- when the rail transport operator's approval was suspended owing to irregularities and these irregularities were not corrected within the deadline prescribed by the president of the ORT.

The withdrawal of the approval (as well as the approval itself) is issued in the form of an administrative decision and, as such, it may be appealed before an administrative court.

Insolvency

11 Are there sector-specific rules that govern the insolvency of rail transport providers, or do general insolvency rules apply? Must a rail transport provider continue providing service during insolvency?

If insolvency proceedings have commenced, the president of the ORT is obliged to withdraw the railway operator's licence. In these circumstances, the railway operator should discontinue providing services when the decision to withdraw the licence becomes final.

COMPETITION LAW

Competition rules

12 | Do general and sector-specific competition rules apply to rail transport?

Sector-specific competition rules apply to the access to infrastructure. General competition rules apply to antitrust practices and competitiveness.

Regulator competition responsibilities

13 | Does the sector-specific regulator have any responsibility for enforcing competition law?

The president of the Office of Rail Transport (ORT) supervises non-discriminatory treatment of all applicants in the field of access to infrastructure. The president also monitors the state of competition in the rail transport market, cooperates with competent authorities in counteracting the use of monopolistic practices, coordinates the operation of the rail transport market and respects passengers' rights. With the implementation of the Fourth Railway Package, the president of ORT was given new powers to strengthen competitiveness in the rail sector.

Competition assessments

14 | What are the main standards for assessing the competitive effect of a transaction involving rail transport companies?

The railway sector is supervised in the same way as in other industries. First, the president of the ORT will check whether the activities do not adversely affect passengers, and subsequently whether the transaction would result in a large company using its dominant position towards suppliers when concluding contracts.

PRICE REGULATION

Types of regulation

15 | Are the prices charged by rail carriers for freight transport regulated? How?

Prices for freight transport are not subject to regulations and are charged on a free-market basis.

16 | Are the prices charged by rail carriers for passenger transport regulated? How?

As a rule, transport prices are not regulated, but if the railway route is of a public utility nature and is co-financed, pursuant to the Act on Public Collective Transport, local government units' councils may set maximum prices for such journeys. In addition, pursuant to the Act on Entitlements to Concessionary Public Transport, public rail carriers, which constitute the majority of railway carriers, are obliged to apply discounts specified for passenger groups (eg, students, pensioners, soldiers, veterans and disabled persons) that will be refunded to them from the state budget.

17 | Is there a procedure for freight shippers or passengers to challenge price levels? Who adjudicates those challenges, and what rules apply?

Neither freight shippers nor passengers can challenge price levels. However, the passenger railway operators are bound by the Transportation Law, which requires that the tariffs applied by a given operator be situated in visible places. In case of serious delays, passengers are entitled to reimbursement of the price of the ticket and to compensation payable by the operator.

18 | Must rail transport companies charge similar prices to all shippers and passengers who are requesting similar service?

In the case of freight transport, the parties individually set the prices for transport and they do not have to be the same, although the principal freight operator, PKP Cargo SA, publishes price tariffs on its website and some companies may use these prices for reference. For passenger transport, the same prices for services must be established if it is subsidised as public transport. In the case of commercial passenger transport services, prices may vary.

NETWORK ACCESS

Sharing access with other companies

19 | Must entities controlling rail infrastructure grant network access to other rail transport companies? Are there exceptions or restrictions?

The applicants can submit requests for infrastructure capacity to the infrastructure managers. If the infrastructure manager refuses to consider the request or refuses to allocate the infrastructure capacity, the applicant can submit a complaint to the president of the Office of Rail Transport (ORT), who may state that the refusal is valid or that the infrastructure manager's decision should be modified or withdrawn. The infrastructure

manager is bound by the decision. Once the capacity is allocated, an agreement for use of the capacity should be entered into by the applicant and the infrastructure manager.

Access pricing

20 | Are the prices for granting of network access regulated? How?

Railway infrastructure managers are required to develop a uniform, non-discriminatory price list for the duration of a yearly train timetable. The infrastructure manager is obliged to submit the draft price list to the president of the ORT for approval no later than nine months before the start of the annual train timetable. The president must approve or reject the price list within 90 days of receiving it. If the decision is not issued within this period, the price list is considered approved.

Competitor access

21 | Is there a declared policy on allowing new market entrants network access or increasing competition in rail transport? What is it?

All Polish market participants, including market entrants, are entitled to minimum access to the railway infrastructure (with observance of equal treatment rules), including, inter alia, having the right to review their capacity allocation application, use the services of controlling the railway traffic, and use railway stations and ancillary infrastructure. Market participants from other member states of the European Union are entitled to minimum access to the railway infrastructure only for the purposes of performing international passenger transport and freight services. Notwithstanding this, the infrastructure manager may limit minimum access to the railway infrastructure because of technical parameters of rolling stock or by prohibiting railway vehicles carrying dangerous goods to enter the tunnels.

SERVICE STANDARDS

Service delivery

22 | Must rail transport providers serve all customers who request service? Are there exceptions or restrictions?

Under article 6 of the Act of 3 December 2010 on the implementation of some regulations of the European Union regarding equal treatment, any discrimination in access to the services offered publicly based on gender, race, ethnicity or nationality is forbidden.

23 | Are there legal or regulatory service standards that rail transport companies are required to meet?

Service standards are set out in the legislation both at the European Union level (Regulation No. 1371/2007 of the Parliament and the Council) and at the national level in the Railway Transport Act and in the Transportation Law.

Challenging service

24 | Is there a procedure for freight shippers or passengers to challenge the quality of service they receive? Who adjudicates those challenges, and what rules apply?

In the case of infringement of their rights guaranteed by European and national legislation, rail passengers may submit complaints to the president of the ORT. There is an independent rail passengers' rights adviser working alongside the Office of Rail Transport (ORT) who conducts out-of-court proceedings and settles the disputes between passengers and rail operators.

SAFETY REGULATION

Types of regulation

25 | How is rail safety regulated?

Pursuant to the Act on Railway Transport, the president of the ORT supervises safety management systems in accordance with the principles set out in Commission Delegated Regulation 2018/762 of 8 March 2018 establishing common safety methods for assessing safety in relation to requirements for a safety management system under Directive 2016/798 of the European Parliament and of the Council and repealing Commission Regulations (EU) No. 1158/2010 and (EU) No. 1169/2010. One of the pillars of the Fourth Railway Package was to strengthen rail safety primarily through the introduction of a single safety certificate.

Competent body

26 | What body has responsibility for regulating rail safety?

The president of the ORT is the administrative body responsible for regulating rail safety.

Manufacturing regulations

27 | What safety regulations apply to the manufacture of rail equipment?

There are both national and EU rules regulating the manufacturing of rail equipment. A regulation of the Minister for Infrastructure and Development lays out the grounds for authorisation for placing in service certain types of structures, equipment and railway

vehicles. At EU level ,many pieces of legislation have been issued, the most relevant being Regulation No. 2016/919 on the technical specification for interoperability relating to the 'control-command and signalling' subsystems of the rail system in the European Union.

Maintenance rules

28 | What rules regulate the maintenance of track and other rail infrastructure?

There are both national and EU rules regulating the maintenance of track and other rail infrastructure. At the national level, the Regulation of the Minister for Infrastructure and Development on common safety indicators deals with, among other things, such matters as the length of tracks and the number of level crossings or pedestrian crossings on the railway lines. The above Regulation was amended in 2021 after the implementation of IV Railway Package. In the European context, there is Commission Regulation (EU) No. 1078/2012, which regulates the European common safety method for monitoring to be applied by railway undertakings, infrastructure managers after receiving a safety certificate or safety authorisation.

29 | What specific rules regulate the maintenance of rail equipment?

The maintenance of rail equipment is regulated in the provisions of the Act on Rail Transport and the Regulation of the Minister of Infrastructure of 12 October 2005 on general conditions for railway vehicles operation, amended by the Regulation of the Minister of Transport of 7 November 2007, the Regulation of the Minister for Infrastructure and Development of 10 December 2014 and the Regulation for the Minister of Infrastructure and Construction of 28 July 2017.

Accident investigations

30 | What systems and procedures are in place for the investigation of rail accidents?

The detailed procedure is specified in the Regulation of the Minister Infrastructure and Construction of 16 March 2016 on serious accidents, accidents and incidents in rail transport. If an accident occurs, the railway employee must notify the supervisor and the dispatcher of the infrastructure administrator, whose tracks the siding is connected to. If necessary, the employee should notify the emergency services, including the police. The president of the ORT (either directly or through a competent local branch) and the chair of the State Commission for Investigation of Railway Accidents should be notified of the accident. If the accident is a threat to the environment, the voivodeship inspector for environmental protection must be notified. If there are dangerous goods on the railway siding, the voivode should be notified. Depending on the size of the siding, the employee should check whether the other tracks are trafficable. Victims should be assisted and material should be secured to help determine the cause of the accident. The State Commission for Investigation of Railway Accidents will investigate the accident or incident

and attempt to determine the cause and circumstances of the accident or incident, estimate losses and draw preventive conclusions; however, it will not establish fault or liability. Members of the Commission include, inter alia, a railway siding user and a railway carrier who operates the siding.

Accident liability

31 Are there any special rules about the liability of rail transport companies for rail accidents, or does the ordinary liability regime apply?

The ordinary liability regime applies to road transport accidents, but EU law requires railway undertakings to have adequate insurance or appropriate warranties under market conditions to cover their civil liability. This insurance must cover, in particular, passengers, luggage, parcels, mail and third parties. Ultimately, the minimum amount of civil liability of railway carriers is €100,000 for carriers licensed to use only narrow-gauge tracks, €250,000 for carriers that use a railway that is under their administration and €2.5 million for all other railway carriers.

FINANCIAL SUPPORT

Government support

32 Does the government or government-controlled entities provide direct or indirect financial support to rail transport companies? What is the nature of such support (eg, loans, direct financial subsidies, or other forms of support)?

State and local railway companies receive financial support in accordance with the principles established in the Treaty on the Functioning of the European Union and EU regulations regarding state aid in the railway sector. The aid may take the form of direct payments in the case of restructuring and the cancellation of debt of the railway companies. In addition, the railway companies may receive compensation payments for providing sustainable and accessible railway services within the territory of local government units.

Requesting support

33 Are there sector-specific rules governing financial support to rail transport companies and is there a formal process to request such support or to challenge a grant of financial support?

The sector-specific rules governing financial support to rail transport companies are regulated at EU level. Generally, all public aid should be prohibited unless it qualifies as an exception. Sectoral aid, granted to companies acting in a given sector, is characterised by some specific rules. As regards transport, public aid may be granted only for passenger transport. EU legislation sets forth that certain actions made by the governments of EU member states with the aim to support passenger transport companies will not

constitute the prohibited state aid. For instance, Regulation No. 1370/2007 concerning the opening of the market for domestic passenger transport services by rail lays down that competent authorities may decide to take appropriate measures to ensure effective and non-discriminatory access to suitable rolling stock.

LABOUR REGULATION

Applicable labour and employment laws

34 Are there specialised labour or employment laws that apply to workers in the rail transport industry, or do standard labour and employment laws apply?

Generally, standard labour and employment regulations, such as the Labour Code or the Trade Unions Act, apply to the rail transport industry. Additionally, appendices to the Rail Transport Act constitute some specific requirements concerning particular posts (eg, train dispatcher, conductor) and sector workers' duties. Specific rules concerning workers in the rail transport industry are set out in regulations of the Minister of Infrastructure and Development, which lay down the requirements for the personnel employed in posts directly related to the operation and safety of rail traffic, and driving certain types of railway vehicles (which requires a specific driving licence and certificate). Certification of train drivers operating locomotives and trains on the railway system in the European Union are regulated in Directive 2007/59/EC. The rail industry has traditionally been and continues to be a highly unionised sector.

ENVIRONMENTAL REGULATION

Applicable environmental laws

35 Are there specialised environmental laws that apply to rail transport companies, or do standard environmental laws apply?

There are no special environmental laws that apply to the rail transport industry (including rail transport companies). Standard environmental regulations apply. According to these regulations, building and rebuilding railway lines constitutes an investment that is deemed to have a potentially significant effect on the environment and should, therefore, be preceded by an environmental assessment report. An additional obligation imposed on railway infrastructure managers is the preparation of strategic noise maps every five years.

UPDATE AND TRENDS

Key developments of the past year

36 Are there any emerging trends or hot topics in your jurisdiction?

Infrastructure preparation is under way for the Polish section of Rail Baltica to connect Warsaw with Lithuania, Latvia and Estonia. Currently, the modernisation of the Bia

ystok–E k section is under way. The investment is important from both an international and domestic point of view, as it will enable much faster access along the entire route. According to announcements by Polish State Railways and Rail Baltica, the Warsaw-Bialystok route will take less than two hours, and Warsaw–Vilnius four hours.

Moreover, Representatives of the Solidarity Transport Hub (which is still the most vital Polish investment concerning the railway industry) and RB Rail AS signed an agreement on cooperation and coordination of plans. The companies are to cooperate in training, research and innovation projects. In May 2023, four tenders were launched for preparatory work for the construction of the Solidarity Transport Hub rail lines.

The modernisation of the Warsaw West railway station planned for 2023 has been significantly delayed. The station, which is supposed to be the largest interchange in Poland, despite being under renovation since 2021, is only halfway through the renovation work. The entire reconstruction of the station is scheduled to be completed by the end of 2024.

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GENERAL

Industry structure

1 How is the rail transport industry generally structured in your country?

Most of the national rail network in Great Britain is owned by Network Rail, a company limited by guarantee that does not pay dividends. Since 2014, it has been classified as a public sector organisation owing to its government debt support.

Operation of this national rail network in Great Britain is split between infrastructure and rolling stock: the infrastructure is owned and operated by Network Rail and train services are separately operated by passenger train operating companies (TOCs) and freight operating companies (FOCs).

Railways in Northern Ireland, in contrast, are vertically integrated, with track and rolling stock operated by Northern Ireland Railways, and are not dealt with in this chapter (save that some Northern Ireland specific exceptions to the position in Great Britain are identified, though these are not comprehensive).

This chapter focuses on the Network Rail owned national rail network in Great Britain, but there are also several mainly urban regional networks in Great Britain where other structural models can be found. Examples include the Edinburgh Tram, owned and operated by Transport for Edinburgh; the Blackpool Tram network owned and operated by Blackpool Borough Council; and Sheffield Supertram, whose infrastructure is publicly owned by South Yorkshire Passenger Transport Executive and privately operated under a concession by Stagecoach. In addition, the London Underground network is owned and operated by Transport for London, and the existing HS1 high-speed line is operated under a Concession Agreement with the UK government and has different regulatory and operational arrangements to those described in this chapter.

The rail industry in Great Britain is currently being restructured following the publication of a White Paper, 'The Williams-Shapps Plan for Rail', in May 2021. The proposed reforms to the industry's legal structure have not yet been brought into effect; a Transport Bill to do so is anticipated before April 2023. In the meantime, the government is consulting on details of the reforms and, to the extent possible, the industry is taking practical steps to reorganise itself to align with the anticipated legal structure. This chapter includes reference to these reforms and their likely impact throughout.

Ownership and control

2 Does the government of your country have an ownership interest in any rail transport companies or another direct role in providing rail transport services?

The owner of the national rail network, Network Rail, is classified as a public sector organisation. It is a company limited by guarantee with no shareholders and one member – the secretary of state for transport.

As for TOCs, wholly owned public sector entities are responsible for operating certain passenger services in Wales and Scotland. In England, most TOCs are privately owned, but rail franchising authorities (the Scottish ministers in Scotland, the Welsh government in Wales, and the secretary of state for transport in England) have a statutory duty to provide or secure the provision of passenger services where a franchise agreement in respect of those services ceases and is not replaced by another franchise agreement. This duty has become increasingly prominent: following the failure of the East Coast passenger rail franchise in 2018, the government appointed a wholly owned public sector entity to act as the 'operator of last resort' to take over the franchise; an operator of last resort is also currently responsible for operating each of the Northern and Southeastern franchises.

Franchising authorities are also responsible for specifying franchised services, and, as counterparty to franchise agreements, are closely involved in managing the performance of franchisees.

At the start of the pandemic, franchise agreements were paused and the secretary of state for transport entered into Emergency Measures Agreements (EMAs) with TOCs to provide them with financial protection and ensure continuity of service during this period. In late July 2020, it was announced that, partly as a result of these agreements being put in place, TOCs were to be reclassified by the Office for National Statistics as public non-financial corporations. EMAs were largely replaced by Emergency Recovery Measures Agreements (ERMAs) and, in most cases, these have subsequently been replaced by National Rail Contracts (NRCs) or a Services Agreement (for those franchises run by an operator of last resort). In due course, when the Williams-Shapps reforms have been implemented, the contract will evolve again to become a passenger service contract (PSC).

Unless the context makes it clear that this is not the case, this chapter will use the terms 'franchise agreements' to refer to any type of passenger service train contract between the secretary of state and a TOC, including EMAs, ERMAs, NRCs and PSCs and 'franchise' to refer to the TOC's passenger train service business.

The secretary of state for transport provides grant funding to Network Rail and has a role in setting its priorities. There is also a 2014 framework agreement between Network Rail and the secretary of state for transport dealing with, among other things, governance and financial management.

Also, East West Rail Company Limited is wholly owned by the UK government to accelerate the East West Railway Project, a proposed new railway between Cambridge and Oxford.

3 | Are freight and passenger operations typically controlled by separate companies?

Track access rights are granted to operators for passenger or freight services, not both. Most passenger services are operated by TOCs that have a franchise agreement with the rail franchising authority. Freight operators, in contrast, are open access operators that have no contract with the public sector requiring them to provide services, and negotiate track access rights with Network Rail.

Regulatory bodies

4 | Which bodies regulate rail transport in your country, and under what basic laws?

The Office of Rail and Road (ORR) was established under the Railways and Transport Safety Act 2003, and its powers and duties are set out in the Railways Act 1993. These are likely to be supplemented and refocused in the forthcoming Transport Act. The ORR is responsible for the public interest, economic and safety regulation of Network Rail (which is expected to become Great British Railways (GBR) under the forthcoming Transport Act) and (to a lesser extent) of TOCs and FOCs. It is also responsible for competition regulation and for regulation of access to railway facilities (track, stations and depots). In discharging its functions, the ORR must comply with its general duties under section 4 of the Railways Act 1993 (RA93), which include promoting improvements in railways service performance and promoting the use of the railway.

The ORR's main functions are the following:

- Licences: the grant, modification and enforcement of licences to operate trains, networks, stations and light maintenance depots. This includes Network Rail's network licence. When GBR comes into being the expectation is that it will be granted a new licence by the secretary of state for transport and the ORR will also be charged with monitoring and enforcing GBR's compliance with this new licence.
- Financial regulation: regulation of the monopoly power of owners of rail infrastructure, most particularly of the monopoly owner and operator of the national infrastructure in Great Britain, Network Rail. The ORR will have a similar role in relation to GBR.
- Access: rail facility access agreements are void without the ORR's approval, and it can also direct mandatory access to railway facilities and enhancement of existing railway facilities. Amendments to the access regime are also anticipated as part of and alongside the forthcoming Transport Act.
- Competition: the ORR has certain powers concurrently with the Competition and Markets Authority.

The government also has key regulatory functions, as follows:

- Franchising authority: the franchising authority is responsible for establishing which rail passenger services should be delivered, and for appointing franchisees to operate those services under a franchise agreement with the authority. The forthcoming Transport Act will mean that GBR takes on the second of these roles, becoming responsible for procuring passenger service contracts.
- Track access charges: there is a periodic review process under which the ORR reviews and fixes Network Rail's track access charges for each five-year control period. This process is guided by the Railways Act 2005, under which the secretary of state for transport (in respect of England and Wales) and Scottish ministers (in respect of Scotland) are required to define the high-level outputs they require and provide a statement of the funds available from the government, each of which informs the charges the ORR ultimately sets. Indications are that the planned Transport Act will make minor changes to the periodic review process to recognise that, in addition to its role regarding infrastructure, GBR will also be taking on a

role regarding passenger services. GBR will be required to produce an integrated Business Plan as part of periodic review processes following its establishment.

- Competent authority for the purposes of the Railway (Interoperability) Regulations 2011: in Great Britain, this is the secretary of state for transport and in Northern Ireland, this role is fulfilled by the Department for Infrastructure. The competent authority's functions in relation to interoperability include determining applications for derogation from the need to have authorisation for placing rolling stock and other subsystems into service.

MARKET ENTRY

Regulatory approval

5 Is regulatory approval necessary to enter the market as a rail transport provider? What is the procedure for obtaining approval?

In most cases, rail transport providers must have an operating licence and a related statement of national regulatory provisions (SNRP).

In Great Britain, the licensing authority is the ORR, and licences (currently known as Railway Undertaking Licences) and SNRPs are granted pursuant to the Railway (Licensing of Railway Undertakings) Regulations 2005.

In Northern Ireland the licensing authority is the Department for Infrastructure, and licences (known as European Licences) and SNRPs are granted pursuant to the Railways Infrastructure (Access, Management and Licensing of Railway Undertakings) Regulations (Northern Ireland) 2016.

The licensing authority must be satisfied that the licence applicant meets requirements as to good repute, financial fitness, professional competence and insurance cover for civil liability, and there are detailed guidelines about what must be taken account of in determining if those requirements are met.

Each rail facility operator (whether the facility is a track, a station or a light maintenance depot) will also need to have an operating licence for that facility granted by the ORR pursuant to the Railways Act 1993, or an exemption from the need to obtain one.

Any rail transport provider will, in addition to obtaining relevant licences, also need to obtain a safety certificate (where operating services) or an authorisation (where operating infrastructure).

6 Is regulatory approval necessary to acquire control of an existing rail transport provider? What is the procedure for obtaining approval?

Licences and SNRPs may be terminated if control of the licence holder changes and the ORR has not approved the change of control, or the change of control does not cease within three months of a notice from the ORR that it served within one month of becoming aware of the change of control.

An approval application form must be submitted, and the ORR will usually make its decision to approve or reject the change of control within four weeks.

Passenger operator franchise agreements and national rail contracts typically contain change of control restrictions that require the consent of the secretary of state for transport (or equivalent) before a change of control arises.

A change of control, whether in respect of a passenger or freight operator, could also trigger a competition investigation.

7 Is special approval required for rail transport companies to be owned or controlled by foreign entities?

There are no specific additional approval criteria that arise where the owning or controlling entity is non-UK based. However, the licensing, control and competition restrictions identified above would equally apply in this case.

While not a specific approval requirement, the newly introduced Economic Crime (Transparency and Enforcement) Act 2022 contains a statutory framework for the creation and maintenance of a register of the beneficial ownership of overseas entities that own land in the UK (OE Register). This is likely to extend to station and depot leases and other railway land. The OE Register will impact all overseas investors into UK real estate. It is not yet known when the provisions of the Act will come fully into force.

The National Security and Investment Act (NSIA) came into force in the UK on 4 January 2022. The NSIA allows the UK government to intervene in transactions of any size that occur on or after 12 November 2020. Certain acquisitions of control that meet legal tests set out in the NSIA must be notified to the secretary of state and receive approval before completion, where the entity being acquired carries on particular activities in any of 17 key sectors. Such acquisitions are called ‘notifiable acquisitions’. None of the 17 key sectors specifically refer to rail transport companies (the 'transport’ sector is limited to ports and airports). However, under the NSIA, parties can voluntarily notify the secretary of state of an acquisition in any area of the economy (where this is not a notifiable acquisition) where the parties consider that the acquisition may give rise to a national security risk.

8 Is regulatory approval necessary to construct a new rail line? What is the procedure for obtaining approval?

Approval is required to construct a new rail line, with different regimes applying in England, Wales and Scotland.

In England, the process for obtaining approval for the construction of a new rail line will depend on whether or not it falls within the definition of nationally significant rail scheme. A rail line will only fall within this classification if it involves the laying of a continuous stretch of track of more than 2km, and meets other defined criteria under section 25 of the Planning Act 2008 (as amended by the Highway and Railway (Nationally Significant Infrastructure Project) Order 2013).

A nationally significant rail scheme requires development consent under the Planning Act 2008. The consent takes the form of a statutory instrument (a piece of secondary legislation), termed a development consent order (DCO). A DCO can grant planning consent for the works, but also include other powers, for example, the power to acquire land compulsorily and the disapplication of local legislation.

The process is heavily front-loaded at the pre-application stage. Applicants have a statutory duty to consult on their proposals prior to submission; the length of time to prepare and consult on an application will vary depending on its complexity and scope. An application for development is submitted to the Planning Inspectorate, which, on behalf of the secretary of state, then has 28 days to determine whether the application meets the required standards to proceed to examination.

If it is accepted, members of the public can then make representations on the application and a preliminary meeting will be held, setting the examination timetable. This stage usually takes around three months but there have been cases where this stage has taken materially longer.

The application then starts the examination stage. Up to five independent inspectors appointed by the secretary of state for transport examine the application over a six-month period. The development consent process is focused on written submissions, but hearings will be held on specific topics (eg, compulsory acquisition, environmental impacts). The examining panel will issue a recommendation to the secretary of state for transport within three months of the close of the examination. The secretary of state then has a further three months to issue a decision, but has the power to extend that deadline and has done so in a number of recent cases.

If the proposed new rail line is not nationally significant then the most common consenting route is via an order under the Transport and Works Act 1992. Again, the consent takes the form of a statutory instrument. Applications are made to the Transport Infrastructure Planning Unit that processes the application on behalf of the secretary of state for transport in England or the Welsh government in respect of applications in Wales. Like a DCO, an order under the Transport and Works Act 1992 can also include compulsory acquisition powers.

Decisions on both DCO and Transport and Works Act order applications can be challenged by judicial review in the High Court within six weeks of the publishing of the order and the notice of determination the secretary of state's decision respectively.

The DCO regime for rail does not extend to Scotland or Wales. In Wales, an application for a rail line with a stretch of track of more than 2km would be made to the Welsh government under the Planning (Wales) Act 2015. These schemes – referred to as developments of national significance – follow a broadly similar process to that in England, albeit with shorter time frames applying. In Scotland, it is likely that an order will be required under the Transport and Works (Scotland) Act 2007 (a TAWS order), with an application being made to the Scottish ministers. Prior to the 2007 Act coming into effect, guided transport schemes were normally authorised by way of a private Act of the Scottish Parliament, but a TAWS order can grant similar rights and powers, and it is now unlikely that the Scottish Parliament would entertain a private bill for matters that can be authorised by a TAWS order.

For the very largest schemes that are of national importance, a hybrid bill could be used. Procedure requires that to do so the rail line must affect the general public but would also have a significant impact on a specific group (eg, a particular geographical area will be impacted). Such bills have been used in the development of both Crossrail and High Speed 2. Hybrid bills are a combination of public and private bills and subject to parliamentary process, involving debates in the House of Commons and House of Lords.

Theoretically, it would also be possible to authorise a new rail line in Scotland by way of a hybrid bill, but the Scottish Parliament has only considered one hybrid bill to date and that was not for a rail project.

MARKET EXIT

Discontinuing a service

9 What laws govern a rail transport company's ability to voluntarily discontinue service or to remove rail infrastructure over a particular route?

The Railways Act 2005 sets out the statutory procedures governing proposals for the closure of passenger services, passenger networks and stations. The secretary of state for transport, Welsh and Scottish ministers are required to publish guidance outlining how closure proposals should be assessed and processed.

Certain minor modifications, such as those that are determined not to affect the use of a station, require additional changes or increase journey times, are exempt from the closure regime.

Special rules apply to London Services, which are services provided by TfL or are designated as such by the secretary of state.

10 On what grounds, and what is the procedure, for the government or a third party to force a rail transport provider to discontinue service over a particular route or to withdraw a rail transport provider's authorisation to operate? What measures are available for the authorisation holder to challenge the withdrawal of its authorisation to operate?

There are customary default provisions in each track access contract that can lead to suspension or early termination of a track access agreement by Network Rail.

Railway Undertaking licence holders are subject to ongoing monitoring of whether they satisfy the requirements as to good repute, financial fitness, professional competence and insurance cover for civil liability. The licence may be revoked if they do not, or if specified circumstances of insolvency arise.

In addition, each operating licence includes provisions dealing with its revocation.

The ORR may (after consulting with the franchising authority if the operator has a franchise) revoke the licence:

- at any time by agreement with the operator;

- on three months' notice if it has made an enforcement order under the Railways Act 1993 (RA93) in respect of any contravention or apprehended contravention of a licence condition that the licence holder has not complied with within a period of three months;
- if the licence holder has not started licensed activities within a given period of the licence coming into force, or if the holder ceases to carry on its licensed activities for a given period;
- if control of the licence holder changes;
- if the licence holder is convicted under section 146 of the RA93 of making false statements in its application for a licence; or
- by notice of not less than 10 years, but the notice must not be given earlier than 25 years after the date that the licence takes effect.

If the ORR has made any enforcement order against a licence holder it may apply to court for the order to be overturned on the grounds that it was not within the ORR's powers under the RA93, or that procedural requirements have not been complied with.

An operator's safety certificate may be revoked if the operator is in breach of its conditions and a significant risk arises, or if the operator has not operated as intended pursuant to the certificate for a year after it was issued. Before revoking the certificate, the ORR must notify the operator and allow at least 28 days for it to make representations.

The operator may appeal to the secretary of state for transport if it is aggrieved by a decision of the ORR to revoke its safety certificate. The revocation shall be suspended pending the final determination of the appeal.

Insolvency

11 Are there sector-specific rules that govern the insolvency of rail transport providers, or do general insolvency rules apply? Must a rail transport provider continue providing service during insolvency?

There is a special railway administration regime that overlays the general rules of insolvency. The regime only applies to a protected railway company, which is defined as a private sector operator that holds a network licence, a passenger licence, a station licence or a depot licence. Differences between an ordinary administration and a railway administration include that the purpose of a railway administration is more limited. Its purpose is solely to transfer to another company as much of the undertaking as is necessary to ensure that the relevant licensed activities may be properly carried on, and to carry on those activities until the transfer is made. The transfer of the business to the new operator will occur under a statutory transfer scheme.

COMPETITION LAW

Competition rules

12 | Do general and sector-specific competition rules apply to rail transport?

The general duties of the Office of Rail and Road (ORR) under section 4 of the Railways Act 1993 (RA93) include a duty to promote competition in the provision of railway services for the benefit of users of such services. A June 2022 consultation by the Department for Transport (DfT) proposes widening the scope of the ORR's duty to promote competition to provide that, in addition to users, the ORR also takes public sector funding of rail services into account when complying with its duty.

The ORR is required to consider whether the use of its competition powers is more appropriate before using its sectoral powers (including licence enforcement) to promote competition.

The prohibitions under the Competition Act 1998 (CA98) apply to rail transport in the UK: Chapter I prohibits agreements between businesses that prevent, restrict or distort competition; and Chapter II prohibits the abuse of a dominant position in a market.

With regard to the Chapter I prohibition, A DfT consultation in June 2022 proposes to create powers to issue directions requiring train operating companies to share information and undertake collaborative activities with each other that might otherwise have given rise to concerns under the CA98 powers where it will lead to benefit to the railway to issue directions.

Under the Enterprise Act 2002 (EA02), it is possible for the ORR to make a market investigation reference (MIR) to the Competition and Markets Authority (CMA) where any features of a market for goods or services relating to railways in the UK prevents, restricts or distorts competition. An MIR may be preceded by a market review or formal market study under the EA02.

Market distortions, discrimination and undesirable competition developments are also regulated by the ORR under the Railways (Access, Management and Licensing of Railway Undertakings) Regulations 2016 (RAMs).

Regulator competition responsibilities

13 | Does the sector-specific regulator have any responsibility for enforcing competition law?

The Office of Rail and Road (ORR) has concurrent competition powers with the Competition and Markets Authority (CMA) to apply and enforce Chapter I and Chapter II of the Competition Act 1998, where the relevant activities relate to the supply of services relating to railways in Great Britain.

Under the Enterprise Act 2002 (EA02), the Office of Rail and Road has concurrent powers to: undertake market studies; make an MIR in relation to the rail sector (although only the CMA can undertake a market investigation); agree undertakings in lieu of a reference; and make recommendations to the government in relation to the rail sector. It must respond to super-complaints made to it by designated consumer bodies under the EA02 if the complaint concerns the rail sector in Great Britain.

The ORR does not have concurrent powers in relation to criminal cartels, which are investigated by the CMA and the Serious Fraud Office. It does not have a formal role in respect of mergers, although in practice will advise the CMA on the implications of mergers in the rail sector.

Competition assessments

14 What are the main standards for assessing the competitive effect of a transaction involving rail transport companies?

A transaction or merger between rail transport companies is subject to the UK merger control regime in the Enterprise Act 2002 (EA02). The Competition and Markets Authority (CMA) has jurisdiction to consider a merger where the business being acquired generates UK turnover of more than £70 million, or where the merged entity would create or increase a share of supply of 25 per cent or more in the UK, or a substantial part of the UK.

Assuming the UK jurisdictional threshold is met, the CMA will assess whether the transaction could give rise to a substantial lessening of competition within any markets in the UK. Under the Railways Act 1993, entering into a rail franchise agreement constitutes an acquisition of control of an enterprise under the EA02. The CMA's assessment of rail franchise awards will focus on the impact of the award on competition between the winning bidder's existing rail, bus, tram or coach services and the rail franchise routes. As a starting point for the analysis, the CMA will identify point-to-point journeys (ie, flows) on which the rail services of the new franchise overlap with the existing transport services provided by the winning bidder.

The CMA will examine whether fare increases or degradation of services (or both) might arise where the successful bidder for a rail franchise already operates transport services on the same flows and routes.

Where a significant number of overlaps are identified, the CMA will apply a series of filters for prioritisation purposes to focus its analysis on the flows most likely to raise competition concerns. The CMA has published detailed guidance on its methodology for reviewing franchise awards.

PRICE REGULATION

Types of regulation

15 Are the prices charged by rail carriers for freight transport regulated? How?

While rail freight operators are broadly free to determine the prices they charge, they are indirectly impacted by the regulatory charging framework that determines the basis on which those rail freight operators are granted access to the network. Freight shippers and customers are also able to enter into access agreements with Network Rail directly in order to secure access rights. The government has announced proposals for a new rules-based access regime in Great Britain as part of reforms proposed under the Williams-Shapps plan for rail, which may indirectly impact on the prices charged by rail carriers.

When setting prices, freight operators may also need to consider any potential breach of competition legislation, including the Competition Act 1998.

16 | Are the prices charged by rail carriers for passenger transport regulated? How?

Around half of passenger rail fares are regulated by the government pursuant to section 28 of the Railways Act 1993. They include standard returns and weekly season tickets. These fares are linked to indexation to determine the maximum amount by which they can rise.

Fares that are not regulated by the government, such as first-class tickets and advance purchase fares, are set by passenger operators. A collective agreement that those passenger operators adhere to, known as the Ticketing and Settlement Agreement, also sets rules on how fares are created and sold. Prices are also theoretically limited by competition law, which would make it illegal for a train operating company to take advantage of consumers. For example, in 2016 the Competition and Markets Authority capped unregulated fares on certain routes to prevent a substantial lessening of competition.

Simplification of fares is a key commitment within the Williams-Shapps Plan for Rail White Paper and the covid-19 pandemic has accelerated calls for flexible season tickets.

17 | Is there a procedure for freight shippers or passengers to challenge price levels? Who adjudicates those challenges, and what rules apply?

Passengers can directly challenge a passenger operator if they believe they have been wrongly overcharged for a fare. If they are not satisfied with the response they can take their case to the Rail Ombudsman who has the power to hold passenger operators to account. Passengers can also take action in the courts, such as the ongoing claim against several train operators (the *Gutmann* claim), which argues that passengers were charged twice for parts of their journey. More generally, regulated fares are controlled by the Department for Transport, which can enforce any breach of fares regulation under the terms of the relevant passenger operator's franchise agreement.

A freight shipper entering into access agreements directly with Network Rail can appeal to the Office of Rail and Roads under Regulation 32 of the Railways (Access, Management and Licensing of Railway Undertakings) Regulations 2016 (RAMs) or the Railways Act 1993 (RA93) in relation to the level or structure of railway infrastructure charges that it is required to pay. Facility licences also contain a duty on facility owners not to discriminate and freight shippers may be able to utilise the broad appeal rights under RAMs or the RA93 in this respect as well. The prices charged by freight operators could also be challenged under competition legislation.

18 | Must rail transport companies charge similar prices to all shippers and passengers who are requesting similar service?

Generally, passenger operators cannot discriminate between passengers when charging them for the same type of ticket. However, fares regulation distinguishes between adult

and child fare prices in determining the maximum price for regulated fares. In addition, the government has created a series of discount fare schemes pursuant to section 28 of the Railways Act 1993 for specific groups, including young persons, disabled persons and senior citizens. Other concessionary travel schemes also exist together with specific schemes for rail company employees. Passenger operators can also charge different prices to customers for the same service depending on how far in advance they purchase their ticket or the flexibility of their ticket.

NETWORK ACCESS

Sharing access with other companies

19 Must entities controlling rail infrastructure grant network access to other rail transport companies? Are there exceptions or restrictions?

Access to railway facilities, including track, station and light maintenance depots, is regulated by the Office of Rail and Road (ORR) under the Railways Act 1993 (RA93), unless the facility concerned has been granted an exemption. This means that access contracts for a non-exempt facility entered into without ORR approval are void. The ORR also publishes model clauses for inclusion in access contracts.

Section 17 of the RA93 provides that the ORR may, upon the application of any person, give directions to a facility owner requiring it to enter into an access contract with the applicant unless the facility is exempt, performance of the access contract would necessarily involve the facility owner being in breach of another access contract, or the consent of a third party is required by the facility owner because of an obligation that arose before the RA93 came into force.

In addition, subject to what is said below:

- under the Railways (Access, Management and Licensing of Railway Undertakings) Regulations 2016 (RAMs), an infrastructure manager must ensure that infrastructure capacity is allocated on a fair and non-discriminatory basis; and
- except insofar as the ORR may otherwise consent, facility owner operating licences all require that the facility owner must not in its licensed activities unduly discriminate between particular persons or between any classes or descriptions of person.

An access applicant may appeal to the ORR if it believes that it has not been granted access rights to railway infrastructure on equitable, non-discriminatory and transparent conditions, or is in any other way aggrieved by decisions of the infrastructure manager concerning the handling of requests for infrastructure capacity in accordance with the RAMs. Similar provisions apply to service providers in respect of the provision of access to service facilities.

The RAMs permit access rights for international passenger services to be restricted where they would compromise the economic equilibrium of a public service contract. In addition, after suitable consultation, and as long as suitable alternative routes for other types of services exist, an infrastructure manager may designate particular railway infrastructure for specified types of rail service. In that case, it may give priority to that ‘specialised’

type of service in allocating capacity. In addition, where infrastructure capacity has been determined to be 'congested' the infrastructure manager may, after undertaking capacity analysis, set priority criteria for allocating infrastructure capacity. Network Rail issued a Code of Practice outlining how it would do this in June 2021.

In addition to the specific regulations designed to address access issues (described above), competition law may require the infrastructure owner to grant third-party access, if the infrastructure is an 'essential facility'.

The regulatory approach to access is one of the areas that is being reviewed under the Williams-Shapps Plan for Rail White Paper. Potential areas for change include policies for managing access to and use of the railway. The current proposals suggest that overall aspirations for the access regime will be set by the secretary of state for transport, with the proposed new railway 'guiding mind' that will take over from Network Rail (Great British Railways) to provide detailed policies to deliver those aspirations, and the Office of Rail and Road to be given a new duty to facilitate furtherance of those policies.

Access pricing

20 | Are the prices for granting of network access regulated? How?

The general licence condition that requires the facility owner not to unduly discriminate between particular persons or classes of person is overlaid by provisions relating to reviewing and setting charges for network access in the Railways Act 1993 (RA93), the Railways Act 2005 and the Railways (Access, Management and Licensing of Railway Undertakings) Regulations 2016 (RAMs), as follows. The template terms for access to the national rail infrastructure provide for the Office of Rail and Road (ORR) to undertake reviews of the access charges payable by operators. Schedule 4A of the RA93 sets out procedures required to be followed by the ORR to undertake such access charges reviews. In summary, the ORR mandates a detailed framework for track access charging by Network Rail. Charges depend on whether the operator concerned operates freight or passenger services, and whether or not it has a franchise. It includes both fixed and variable elements.

Under the RAMs, the ORR must establish a charging framework and specific charging rules in relation to infrastructure for which an infrastructure manager is responsible, and must ensure that charges for railway infrastructure comply with rules set out in those regulations. It must also ensure that under normal business conditions and over a reasonable period (up to five years), the accounts of an infrastructure manager balance revenue from infrastructure charges and other sources with railway infrastructure expenditure.

Separate rules apply to charges levied by service providers in respect of service facilities.

Competitor access

21 | Is there a declared policy on allowing new market entrants network access or increasing competition in rail transport? What is it?

The Office of Rail and Road (ORR) publishes guidelines about its approach to allocation of track access.

The ORR mandates that open access operators (unlike operators that have a franchise agreement) pay variable track access charges for short-run costs and do not pay fixed track access charges, unless they are an operator in the interurban market that must pay an infrastructure cost charge.

Nearly all passenger rail miles on the national rail network are operated by operators that have a franchise agreement. The ORR has calculated that non-franchise operators (open access operators) run just 1 per cent of passenger rail miles. At present, the ORR will only approve access rights for a new open access operator if the new service satisfies the 'not primarily abstractive test'. To pass the test, the new service must provide added passenger benefits on top of the benefits provided by those franchised services with which it will compete, measured as a ratio of new revenue from the open access operation to revenue abstracted from the franchisee (less any infrastructure cost charge payable) of at least 0.3 to 1. The ORR will also assess if new open access rights will compromise the economic equilibrium of any public service contract (such as under a franchise agreement), meaning that the new service would have a substantial negative impact on the profitability of services operated under the public service contract or the net cost for the competent authority.

Access is one of the areas being looked as a result of the Williams-Shapps Plan for Rail White Paper and there is therefore the potential for changes to this regime.

SERVICE STANDARDS

Service delivery

22 Must rail transport providers serve all customers who request service? Are there exceptions or restrictions?

Under the National Rail Conditions of Travel any individual purchasing a valid ticket is entering into a binding contract with each of the passenger operators whose trains that ticket allows the individual to use. Passenger operators are not required to provide a service to individuals who do not possess a valid ticket for that service (or, if relevant, the appropriate accompanying documentation, such as a photocard).

Passengers can be prevented from travelling on services under various provisions. For example, railway by-laws enable passenger operators to refuse to allow certain individuals on their services. Any person reasonably believed by an authorised person to be in breach of those by-laws can be asked to leave the railway immediately and, if refusing to do so, may be removed by an authorised person using reasonable force. An authorised person in this context is an employee or agent of the passenger operator, any other person authorised by that passenger operator, or a constable acting in connection with their duties in connection with the railway. This right of removal is in addition to any penalty that can be levied for a breach of those by-laws.

Passenger transport operators generally cannot discriminate between customers wishing to use their services. Such operators must comply with equalities legislation, must produce

an Accessible Travel Policy as a requirement of their licence, and must comply with provisions in both the National Rail Conditions of Travel and their franchise agreement that relate to assisting passengers with disabilities.

In respect of freight, facility licences contain a duty on facility owners not to discriminate between potential beneficiaries and freight shippers may be able to utilise the broad appeal rights under the Railways (Access, Management and Licensing of Railway Undertakings) Regulations 2016 or the Railways Act 1993 in this respect. The prices charged by freight operators might also be challenged under competition legislation.

23 Are there legal or regulatory service standards that rail transport companies are required to meet?

Passenger operating licences contain a number of requirements relating to service standards. These include a requirement to comply with the National Rail Conditions of Travel. Regulation (EC) No. 1371/2007 of the European Parliament and of the Council of 23 October 2007 on rail passengers' rights and obligations (the PRO Regulation) (as now incorporated in UK law) also creates a number of passenger rights, for example, relating to compensation for delays.

Passenger operators must comply with service standards set out in their franchise agreement, National Rail Contract or concession agreement, as mandated by the Department for Transport or equivalent body devolved/local body. These include general standards of service and a number of key metrics. Typically, these metrics will be split between:

- operational performance standards, covering performance in areas such as cancellations, delays, short formations, and in some cases availability, headway between services and capacity; and
- service quality standards, covering areas such as train and station cleanliness, equipment functionality, customer satisfaction and ticket queuing times.

In national rail contracts, customer satisfaction continues to be measured through the use of National Rail Passenger Surveys, which are conducted periodically across the industry.

Freight haulage agreements usually contain some form of performance regime. Typical measures of performance include safety performance, successful service scheduling, punctuality (but typically with less stringent arrival times than passenger services) and delivery (usually measured by goods delivered as a percentage of planned loading).

Both passenger and freight operators are separately subject to performance regimes under their track access agreements, which penalise them for delays that they cause to other passenger or freight operators or Network Rail.

Challenging service

24 Is there a procedure for freight shippers or passengers to challenge the quality of service they receive? Who adjudicates those challenges, and what rules apply?

Passengers are entitled to compensation where services are cancelled or delayed beyond specified time limits. The current National Rail Conditions of Travel allow passengers who decide not to travel because their intended train is cancelled, delayed or rescheduled to return their unused ticket to the original retailer or passenger operator from whom it was purchased in exchange for a full refund with no administration fee being charged. This also applies to passengers who have begun their journey but are unable to complete it owing to delay or cancellations and return to their point of origin. If a train arrives 60 minutes late or more at a passenger's destination, the passenger is entitled to a minimum of 50 per cent of the price paid (for a single or the relevant leg of a return journey) or the discount or compensation arrangements in the relevant passenger operator's Passenger Charter (in the case of a season ticket).

Each passenger train operator is required to put in place a Passenger's Charter, which typically includes enhanced rights beyond those specified in the National Rail Conditions of Travel.

Passengers are also able to make a claim against a passenger operator under the Consumer Rights Act 2015.

Freight shippers' ability to challenge the quality of service they receive from freight operators is largely determined by the terms of their haulage agreement. Freight operators must also abide by the Railways (Access, Management and Licensing of Railway Undertakings) Regulations 2016.

SAFETY REGULATION

Types of regulation

25 | How is rail safety regulated?

All railway operations in the UK are subject to the same general safety duties and obligations applicable to all businesses, as contained in the Health and Safety at Work Act 1974 (HSWA), and certain key safety regulations passed under it. UK safety legislation is risk based legislation and the key statutory duties apply to employers, to ensure, so far as is reasonably practicable, the safety of their own employees and also non-employees who are affected by their undertakings. Whereas the Health and Safety Executive is generally the enforcing authority for the purposes of the HSWA, enforcement of the statutory provisions, so far as they relate to the operation of the railway, is the responsibility of the Office of Rail and Road (ORR). There is a memorandum of understanding between the ORR and HSE setting out arrangements for managing interfaces and cooperation between them.

This general safety legislation is supplemented by rail-specific safety legislation. The key railway-specific legislation in Great Britain is:

- the Railways and Other Guided Transport Systems (Safety) Regulations (2006) (ROGs);
- the common safety method on risk evaluation and assessment – EU Regulation 402/2013/EU (CSM RA), which is retained EU law with effect in the UK; and
- the Railways (Interoperability) Regulations 2011 (RIRs).

Northern Ireland has its own specific legislation (such as the Railway Safety Act (Northern Ireland) 2002 and the Railways Safety Management) Regulations (Northern Ireland) 2006) covering much of the same ground as the GB legislation.

The railway sector is also subject to a large body of safety standards and industry rules governing specific areas of railway operation and infrastructure renewal and maintenance.

No person is permitted to operate a train on the mainline railway unless that person has established and is maintaining a safety management system and holds a safety certificate.

No infrastructure manager may operate mainline railway infrastructure unless that person has established and is maintaining a safety management system and holds a safety authorisation.

Railway operators are obliged to cooperate with each other to comply with ROGs and achieve the safe operation of the transport system.

Competent body

26 | What body has responsibility for regulating rail safety?

The Office of Rail and Road (ORR) has primary responsibility for regulating the safety of railway maintenance, renewal and operation in Great Britain (in Northern Ireland it is the Department for Infrastructure).

The ORR is responsible for enforcing the provisions of the Health and Safety at Work Act 1974 (HSWA) and of health and safety regulations insofar as they relate to the operation and maintenance of the railway. Principally this means that ORR is responsible for regulating and enforcing safe practices and operations by the network operator, train and freight operating companies and other employers operating on or around the railway network. The responsibility of the ORR extends to enforcement of the general duties of manufacturers to ensure that articles are 'so designed and constructed . . . [to] . . . be safe and without risks to health at all times when . . . being set, used, cleaned or maintained by a person at work' when that article is to be used exclusively or primarily in the construction or operation of a railway.

The operation of a railway includes:

- activities of an entity in charge of maintenance; and
- construction work for maintenance, repair, etc, of existing infrastructure, and the extension or enlargement of infrastructure if that work is in such close proximity to the operation of a railway that it creates a risk to the health, safety or welfare of those engaged in the work.

The ORR is also the Safety Authority pursuant to the Railways and Other Guided Transport Systems (Safety) Regulations (2006) (ROGs) and the Railways (Interoperability) Regulations 2011 (RIRs), except in Northern Ireland where this role is fulfilled by the Department For Infrastructure.

The Safety Authority

- issues safety certificates to railway operators and safety authorisations to infrastructure operators; and
- grants authorisation for placing new or upgraded trains and other subsystems into service.

The competent authority for the purposes of the RIRs (ie, the secretary of state for transport in Great Britain and DRDNI/DFI in Northern Ireland) is responsible for determining applications for exemptions from the need to have authorisation for placing rolling stock and other subsystems into service.

The secretary of state for transport is also responsible for:

- setting standards to be complied within the design, construction, placing into service, upgrading, renewal, operation and maintenance of parts of the rail system, to be set out in National Technical Specification Notices (NTSNs) (subject to the position in Northern Ireland described below);
- setting standards to supplement those in National Technical Specification Notices, to be contained in National Technical Rules; and
- determining applications for exemptions from the need to apply National Technical Specification Notices.

The UK's NTSNs only apply in Great Britain. In Northern Ireland, Technical Specifications for Interoperability issued by the European Union Agency for Railways (TSIs) remain of direct effect. At present, of the 13 UK National Technical Specification Notices, 11 largely reproduce equivalent TSIs.

Other authorities with statutory functions relevant to railway safety include the British Transport Police (responsible for investigating serious safety incidents to establish whether any severe criminal offences have been committed); the Health & Safety Executive (while not responsible for safety on the railway, they are responsible for regulating the safety of some of the constructions work carried out at the early stages of railway construction).

Manufacturing regulations

27 | What safety regulations apply to the manufacture of rail equipment?

Structural subsystems such as command and control equipment and rolling stock may not be placed into service unless they have been authorised by the Safety Authority under the Railways (Interoperability) Regulations 2011 (RIRs). To grant such authorisation, the Safety Authority must be satisfied that:

- the equipment is technically compatible with the rail system into which it is being integrated; and

- it has been designed, constructed and installed to meet the essential requirements set out in the RIRs.

Also, subcomponents (such as engines) of structural sub-systems ('interoperability constituents') for which there is an applicable National Technical Specification Notice technical specification must not be placed on the market unless they comply with relevant essential requirements.

Maintenance rules

28 | What rules regulate the maintenance of track and other rail infrastructure?

General safety duties, including those under the Health and Safety at Work Act 1974 (HSWA) (governing the safety management of railway renewal and maintenance work) and the Railways and Other Guided Transport Systems (Safety) Regulations (2006) (ROGs) (governing the authorisations, safety certificates and technical safety requirements associated with operations and upgrades to infrastructure), apply.

All renewal and maintenance work on the railway network must accordingly be conducted in accordance with HSWA, which generally involves ensuring that all activities are properly trained, risk assessed and controlled, and further ensuring that all relevant industry standards and rules are followed. Among other things, the ROGs mandate that the infrastructure manager must manage and use the infrastructure in accordance with a safety management system that meets the requirements of the ROGs. These requirements include the following:

- the common safety methods and common safety targets are met;
- the system complies with national safety rules; and
- the system ensures control of risk, including risks relating to the supply of maintenance and material, and the use of contractors.

Network Rail's network licence has obligations relating to the safe operation, maintenance, renewal and enhancement of the network, among other things in order to satisfy the reasonable requirements of persons providing services to railways and funders.

In terms of the detailed operational safety requirements relating to the renewal and maintenance work itself, the safety procedures and practices that must be followed by track renewal and maintenance and other railway infrastructure workers are specialised and industry-specific. These detailed requirements are not established in legislation but in detailed railway industry standards and rules, for example, the 'Rule Book' maintained by the Railway Safety and Standards Board and Network Rail standards set at company level by the network operator. The Rule Book establishes detailed procedures for specific drainage, construction, track renewal and maintenance operations, including procedures for controlling vehicle movements within work sites and in relation to track safety practices.

29 | What specific rules regulate the maintenance of rail equipment?

General safety rules, including those under the Health and Safety at Work Act 1974 and the Railways and Other Guided Transport Systems (Safety) Regulations (2006) (ROGs), apply. In addition, the ROGs provide that no person may use a vehicle on the mainline railway unless it has an entity in charge of maintenance assigned to it that is registered in the National Vehicle Register.

The entity in charge of maintenance must ensure by a system of maintenance that the vehicle is in a safe state of running. The system must ensure maintenance in accordance with the maintenance file, maintenance rules and applicable technical specifications.

Accident investigations

30 | What systems and procedures are in place for the investigation of rail accidents?

Following any major safety incident on the railway, a number of investigations will take place, which taken together can span many years after an incident. There is likely to be a police investigation, to assess whether a serious criminal offence such as manslaughter has been committed. There is also likely to be an investigation by the Office of Rail and Road (ORR), to assess whether there has been a breach of the Health and Safety at Work Act 1974 and other relevant safety legislation. Police and ORR investigations following major incidents are likely to focus on relevant operational and maintenance standards, and can involve the consideration of a very large quantity of evidence and multiple witness statements. Since criminal offences may have been committed, the investigations may also include interviews conducted under caution. In the event of a fatal accident, there will also be a coroner's inquest to establish the cause of death. Following very major (national scale) incidents there may also be a public inquiry.

Also, the Department for Transport has a Rail Accident Investigation Branch (RAIB) to investigate railway accidents. Its role includes determining and reporting on the cause of an accident, but subject to that its role is not to consider or determine blame or liability. RAIB inspectors have statutory powers to enter premises, gather evidence and require information to be provided in the conduct of investigations. The Chief Inspector of Rail Accidents may also direct persons involved in managing or controlling railway property where an accident took place, or that were involved in the accident, to conduct investigations, and the manner in which those investigations shall be conducted. Industry parties have duties to notify the RAIB of accidents and incidents.

Accident liability

31 | Are there any special rules about the liability of rail transport companies for rail accidents, or does the ordinary liability regime apply?

There are two types of liability that arise from rail accidents: civil liability to pay compensation and damages to injured parties and those affected by an accident; and criminal liability arising in connection with offences committed by the companies and individuals involved in an incident.

With respect to civil liability, the ordinary liability regime applies to the liability of railway undertakings, save that it is a standard licence condition for all railway undertakings that they accede to the claims allocation and handling agreement (CAHA).

The CAHA deals with the allocation of liability for third-party liability claims that arise in connection with the operation of railway assets or on land owned or controlled by a party to the CAHA, which was being used in connection with the operation of railway assets. This agreement provides that compensation for damage below a minimum threshold is dealt with by operators in accordance with pre-agreed allocations set out in a schedule to the CAHA. Claims above the threshold or not in the schedule are handled by a lead party and the allocation of liabilities is agreed among the CAHA members involved. Disputes can be referred to mediation, to arbitration or the courts as determined by the CAHA rules and the nature of the dispute.

The CAHA is meant to keep costs down and to provide a unified face to claimants behind which industry parties allocate liabilities between them. It should mean an injured party does not have to pursue more than one industry party.

Also, regulations provide that, in the case of death or injury, the passenger operator must make an advance payment no later than 15 days after the identification of the natural person entitled to compensation. The payment must enable their immediate economic needs to be met, and be proportional to the damage suffered. It may be offset against civil liability.

All licensed operators are required to hold third-party liability insurance on terms approved by the Office of Rail and Road. Those requirements include that the limit of cover must be at least £155 million.

With respect to criminal liability, the same rules apply to railway undertakings as to other businesses within the UK. Most breaches of duty and specific safety obligations under UK law will amount to a criminal offence, punishable by a fine imposed in the criminal courts. In the event of gross breaches of duty, in addition to health and safety offences there is the risk of liability under the law of manslaughter. As a result of sentencing guidelines in England and Wales (the Health and Safety Offences, Corporate Manslaughter Definitive Guideline, effective from 1 February 2016), the size of fines imposed for safety breaches has increased significantly over the past few years.

FINANCIAL SUPPORT

Government support

32 Does the government or government-controlled entities provide direct or indirect financial support to rail transport companies? What is the nature of such support (eg, loans, direct financial subsidies, or other forms of support)?

Until the pandemic led to the introduction of Emergency Measures Agreements and Emergency Recovery Measures Agreements, which allowed the government to provide financial support, the position was that some mainline passenger franchise operators received subsidy payments under their franchise agreements, although franchisees of

more profitable mainline routes paid a premium. Most franchise agreements for the mainline network also contained revenue risk-sharing mechanisms.

Under the Williams-Shapps Plan for Rail reforms the intention is to move to a new contracting model with passenger operators entering into Passenger Service Contracts. These will be entered into with Great British Railways, the new rail 'guiding mind' that will be established under the reforms. The indications are that Passenger Service Contracts will be based on a concession model, with operators being paid a fee for running the services, and (at least at the outset for most routes) will not include revenue risk-sharing mechanisms.

Franchised operators are also indirectly subsidised by the subsidy support provided to Network Rail.

Open access operators receive no subsidy other than indirectly by means of their track access rights by the subsidy support provided to Network Rail. Also, whereas franchise operators pay variable and fixed track access charges, open access operators do not pay the fixed track access charges, save that ORR have decided that new entrants to open access will have to pay a limited contribution to fixed infrastructure costs.

Under section 54 of the Railways Act 1993, the franchising authorities are empowered to exercise their franchising functions with a view to encouraging railway investments and may enter into agreements undertaking to do so. In practice, section 54 undertakings have frequently been given to a financier of a given railway asset that, for a given period, the franchising authority will procure a replacement lessee of the asset concerned if the existing lease ends during that period.

Under section 6 of the Railways Act 2005, the government may agree to provide financial assistance for the purpose of securing the provision, improvement or development of railway services or assets, or for any other purpose relating to a railway or railway services.

The government provides financial support to Network Rail, owner of the national rail network in the form of grants and, pursuant to powers under section 6 of the Railways Act 2005, a loan facility under a facility agreement signed on 28 March 2019. For the period 2019 to 2024, the loan facility totals £32.3 billion.

Requesting support

33 Are there sector-specific rules governing financial support to rail transport companies and is there a formal process to request such support or to challenge a grant of financial support?

There is a periodic review process under which the Office of Rail and Road reviews and fixes Network Rail's track access charges, and which is informed by and helps set the level of government support available to Network Rail. This process is guided by the Railways Act 2005. There are also rules regarding financial management set out in a 2019 framework agreement between Network Rail and the secretary of state for transport.

Prior to the pandemic, subsidy levels to (or, where applicable, premiums paid by) the train operating company under each franchise agreement were in effect set by the competitive process to award the franchise. Since the introduction of Emergency Measures Agreements and Emergency Recovery Measures Agreements, the level of subsidy to train

operators on those types of agreement has been set at the level required to ensure key services specified by the secretary of state continue running. As a result of this in August 2020, the Office for National Statistics decided that such companies should be classified as belonging to the public sector.

There is no formal process for requesting or awarding section 54 undertakings or assistance under the Railways Act 2005. However, prior to the pandemic the availability of a section 54 undertaking was sometimes expressly stated in a franchise competition invitation to tender.

The UK Subsidy Control Act 2022 will govern government financial support. The Act received Royal Assent in April 2022 and is expected to enter into full force in autumn 2022. Draft subsidy control guidance has been published under the Act, and contains elements relevant to rail investment, although there is no specific or standalone guidance for rail available as at 19 July 2022.

LABOUR REGULATION

Applicable labour and employment laws

34 Are there specialised labour or employment laws that apply to workers in the rail transport industry, or do standard labour and employment laws apply?

Rail transport workers are not subject to specialised employment laws in the UK. However, much of the industry is unionised, therefore collective agreements often supplement employees' individual terms of employment, and unions campaign for their members' rights. Strike action is also prevalent in certain parts of the sector. Given the safety-critical nature of some work, working time and health and safety matters are highly regulated, and alcohol and drug control is closely monitored. Long service in the industry is common, often leading to generous employee benefits under legacy schemes. The outsourcing of services or transfer of assets to third parties are both common events in the sector. This can often lead to the transfer of employees' employment, who are connected to the services or assets, to the third party. In this situation, the employees' employment and terms and conditions are preserved.

ENVIRONMENTAL REGULATION

Applicable environmental laws

35 Are there specialised environmental laws that apply to rail transport companies, or do standard environmental laws apply?

In the UK, the rail transport sector does not have its own specific set of environmental laws. However, both the network operator and all rail transport companies must comply with standard environment laws and regulations. Areas of environmental law most relevant to the railway sector include statutory nuisance (especially in relation to the generation of noise), water and drainage law including flood protection, waste management legislation, the law on energy efficiency in buildings, environmental permitting, the remediation of

contaminated land, the conservation of species and habitats, and the carriage of hazardous and dangerous cargo. The network operator, in maintaining and operating the railway infrastructure, is required to have in place an environmental policy and comply with it. It is also required under the Natural Environment and Rural Communities Act 2006 (NERCA) to have regard to the conservation of biodiversity. This conservation law duty on the network operator may be enhanced in the near future under new powers introduced by the Environment Act 2021.

In terms of the regulation of the environmental impacts of railway operations and railway land, the primary regulators of environmental law are the Environment Agency (EA) and local authorities. The EA is responsible for environmental permitting and the protection of controlled waters (rivers, streams and other natural water bodies) including flood protection. Local authorities are responsible for statutory nuisance and contaminated land. Natural England, Scottish Natural Heritage and Natural Resources Wales are responsible for conservation of species and habitats and the protection of areas that are designated for specific legal protection because of their environmental significance. Water companies, often referred to as statutory water and sewage undertakers, are also relevant to the railway as they are responsible for the operation of the public water and sewerage network. The Office of Rail and Road (ORR) is not responsible for environmental regulation though it does have a statutory duty under the Railways Act 1993 to contribute to the achievement of sustainable development and to have regard to the effect on the environment of activities connected with the provision of railway services. The ORR also has an obligation under the Natural Environment and Rural Committees Act 2006 to have regard for the purpose of conserving biodiversity.

The ORR complies with its statutory duty with respect to the environment principally through its licensing role. All operators are required to produce an environmental policy within six months of their licence coming into effect, and the ORR environmental guidance must be taken into account when the operator prepares its policy.

In addition to obligations imposed by the ORR, rail transport companies must operate in accordance with all other environmental legislation, including the Environmental Protection Act 1990, The Environment Act 1995, the Environment Act 2021, the Conservation of Habitats and Species Regulations 2017, the Carriage of Dangerous Goods and Use of Transportable Pressure Equipment (Amendment) Regulations 2011 and the Environmental Permitting (England and Wales) Regulations 2016.

UPDATE AND TRENDS

Key developments of the past year

36 | Are there any emerging trends or hot topics in your jurisdiction?

The Williams-Shapps Plan for Rail White Paper was published in May 2021. It proposed a wide-ranging reorganisation of the industry with the railways to be integrated under the leadership of a single guiding mind, Great British Railways (GBR), a body that will both act as infrastructure manager of the majority of the network and be responsible for procuring the passenger services that run on them. It also proposed replacing franchise agreements with passenger service contracts using a concession model, and an overhaul of the access

regime and adjustment of responsibilities of government, the regulator and other industry bodies.

On 9 June 2022, the Department for Transport (DfT) published a consultation on new legislation and legislative changes required to put the proposals outlined in the Williams-Shapps Plan for Rail into effect. The intention is for a Transport Bill to be introduced to Parliament before April 2023. As currently anticipated, the Transport Bill will contain provisions allowing the establishment of GBR as a new public body responsible for running the railways safely and efficiently to maximise social and economic value. GBR will be responsible for procuring passenger services in England, subject to definition of the required services by the secretary of state. Devolved administrations in Scotland and Wales may also delegate their contracting authority to GBR. GBR will be subject to a new licence setting out its duties and functions and that licence will be enforced by the ORR. The legislation will also include reforms around the access regime and open and transparent use of data. There will be a new framework agreement between GBR and the DfT and there will also be a new governance framework and the secretary of state will have the power to give binding directions to GBR.

In the meantime, industry reorganisation has already started to take place. The GBR Transition Team has been formed to work, amongst other things, on the creation of GBR and consulting on and establishing a 30-year strategic plan for the industry (the Whole Industry Strategic Plan).

On 27 July 2020, the European Commission put forward a proposal to authorise France to negotiate an agreement supplementing the Treaty of Canterbury (which is the bilateral agreement that underpins the arrangements for the Channel Tunnel). The proposal seeks to make amendments in relation to safety and disputes. What, if any, changes to the arrangements regarding the Channel Tunnel occur as a result is not yet clear. The proposal was adopted on 21 October 2020 in Decision 2020/1531, but the supplemental agreement has not yet been concluded. Regulations and agreements between the UK and France have however been made dealing with some aspects of the application of railway safety and interoperability rules, train driving licences and certificates and railway undertaking licences.

** The information in this chapter is accurate as of July 2022.*

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UPDATE AND TRENDS

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GENERAL

Industry structure

1 How is the rail transport industry generally structured in your country?

The freight rail industry in the United States is almost all privately owned. Unlike in some jurisdictions, where separate entities control rail infrastructure and rail operations, in the United States, rail infrastructure and operations over that infrastructure are typically controlled by the same entity. Railways may also enter into agreements with one another to share infrastructure or operations on a line. For example, a railway may have trackage rights to operate its trains over the lines of another railway or switching agreements whereby another railway agrees to provide switching access to a customer facility. These arrangements are typically voluntary, but there are limited circumstances in which a railway may be forced to give another railway access to its infrastructure.

Freight railways are categorised as Class I, Class II or Class III based on their annual operating revenues. Railways with over US$1.032 billion in annual revenues are Class I railways, which are subject to more rigorous regulation and reporting requirements. The six Class I railways are BNSF Railway Co; CSX Transportation, Inc; Grand Trunk Western Railroad (the US affiliate of Canadian National Railway); and the recently merged Canadian Pacific Kansas City Ltd (which includes Canadian Pacific's US affiliate, the Soo Line Railroad, and what was the Kansas City Southern Railway Co); Norfolk Southern Railway Co; and Union Pacific Railroad Co. In addition, there are over 550 Class II (between US$46.3 million and US$1.032 billion in annual revenues) and Class III railways (less than US$46.3 million in annual revenues) in the United States, which include regional railways, short-line railways and switching and terminal railways.

Passenger rail is largely government-owned or supported. The largest passenger rail system is the National Railroad Passenger Corporation (Amtrak), which is owned by the federal government and provides intercity passenger rail service. Amtrak owns and controls some rail lines and infrastructure, particularly in the Northeast Corridor between Washington, DC and Boston. Outside the Northeast Corridor, Amtrak trains typically operate over the lines of freight railways. Some other intercity passenger systems are in various stages of development. The privately owned Brightline in Florida has operations between West Palm Beach and Miami, and is planning to extend service north to Orlando in 2023. Other private intercity passenger systems have been proposed in various states, and construction has begun on a state-supported high-speed rail system in central California.

There are also numerous commuter railways that transport passengers in and around a single metropolitan region. Commuter railways are typically supported by state and local governments and often operate over rail lines owned by other railways.

Ownership and control

2 Does the government of your country have an ownership interest in any rail transport companies or another direct role in providing rail transport services?

In general, the US government is a regulator of freight rail services, not a provider. A very small number of short-line freight railways are owned by state and local governments or government entities, such as port authorities, most of whom purchased them from private railways to preserve rail service. In the passenger sphere, the federal government owns Amtrak, and state and local governments often own or financially subsidise commuter railways.

3 | Are freight and passenger operations typically controlled by separate companies?

In general, US railways carry either freight or passengers, but not both. There is no regulatory prohibition against a railway transporting both freight and passengers, however, and historically this was a common practice. Many rail lines host operations by both freight railways and passenger or commuter railways.

Regulatory bodies

4 | Which bodies regulate rail transport in your country, and under what basic laws?

The Surface Transportation Board (STB) regulates most non-safety-related rail transport issues, including rates, service, entry and exit, and transactions involving rail carriers. The STB succeeded to the functions of the Interstate Commerce Commission (ICC) in 1996. The Interstate Commerce Act (49 USC 10101–16106) and regulations promulgated by the STB at 49 Code of Federal Regulations (CFR) Parts 1000–1333 govern these issues. The Interstate Commerce Act dates back to 1887, and it has been subject to several significant amendments that substantially changed the scope of rail regulation. The most relevant amendments for railways today are the Staggers Rail Act of 1980 (which partially deregulated the rail industry) and the ICC Termination Act of 1995 (ICCTA) (which further deregulated the industry and transferred the ICC's remaining functions to the STB).

The United States Department of Transportation, through several of its component agencies, is the safety regulator of the railway industry. Chief among these agencies is the Federal Railroad Administration (FRA). The primary laws governing rail safety are the Federal Railroad Safety Act (FRSA) and safety regulations promulgated by the FRA at 49 CFR Parts 200–299. Other disparate laws affect rail safety, such as the Safety Appliances Act, Hours of Service Act and Railroad Safety Enhancement Act. Commuter railways are outside the jurisdiction of the STB. They are regulated on the safety side by FRA and in other areas by the Federal Transit Administration.

Amtrak was originally established by the Rail Passenger Service Act of 1970. While Amtrak is statutorily exempt from most STB regulation, the STB retains jurisdiction over other intercity passenger railways that operate in more than one state or that otherwise connect to the interstate rail network.

MARKET ENTRY

Regulatory approval

5 Is regulatory approval necessary to enter the market as a rail transport provider? What is the procedure for obtaining approval?

In general, regulatory approval from the Surface Transportation Board (STB) is required to enter the market as a rail transport provider, whether by the construction of a new line or by the acquisition or operation of an existing rail line. The STB has the authority to approve an application to the agency, and it also has the power to issue exemptions from the obligation to file a full application. The STB can exempt a person or transaction if it finds that formal regulation is not necessary to carry out US rail transport policy, and either the transaction or service is of limited scope, or regulation is not needed to protect shippers from an abuse of market power. The STB can grant petitions for exemption in individual cases and has also established class exemptions that allow parties to obtain regulatory approval through an even more expedited process for certain types of transactions. The type of regulatory process that is required to enter the market as a rail transport provider varies based on the type of transaction and the identity of the new entrant.

Under the expedited class exemption process, an entity seeking to acquire or operate a rail line files a verified notice providing specified details about the transaction. The notice must certify whether the proposed transaction involves any 'interchange commitments' that may limit future interchange with connecting carriers, and provide specified information about such commitments. If the projected annual revenue of the rail lines to be acquired or operated, together with the acquirer's projected annual revenue, exceeds US$5 million, the applicant must post a notice of the proposed transaction at least 60 days in advance at the workplace of affected employees. The class exemption will be effective 30 to 45 days after the notice is filed (depending on the size of the new carrier). Potential opponents may seek to revoke the exemption for cause, but a petition to revoke does not automatically stay the exemption.

6 Is regulatory approval necessary to acquire control of an existing rail transport provider? What is the procedure for obtaining approval?

The process for regulatory approval to control a rail carrier varies depending on whether the acquiror is a carrier or a non-carrier, and if the latter, whether the non-carrier acquiror already controls other rail carriers. The approval process also varies depending on the class of the carrier(s) involved (ie, Class I, II or III). A non-carrier may acquire control of an existing carrier without approval or exemption by the STB, so long as the non-carrier does not control any other rail carrier. Because such a transaction does not require STB approval, it may be subject to pre-merger notification and waiting period requirements under the Hart–Scott–Rodino Antitrust Improvements Act of 1976. This act requires persons contemplating mergers or acquisitions meeting certain jurisdictional thresholds to notify the Federal Trade Commission and the Department of Justice and wait a specific period (usually 30 days) before consummating a proposed acquisition. If the reviewing agency believes that a proposed transaction may violate antitrust laws, it may seek an injunction in federal court to prohibit consummating the transaction.

For control or merger transactions that do require STB approval, the STB classifies transactions as 'major', 'significant', 'minor' or 'exempt', depending on the circumstances. Major transactions involve the merger of two or more Class I railways, and significant

transactions are those that do not involve the merger of two or more Class I railways but are found to be 'of regional or national transportation significance'. Exempt transactions are those for which the agency has found that regulation is not necessary to carry out US rail transport policy and has thus adopted a class exemption (eg, the acquisition of non-connecting carrier(s) where no Class Is are involved). Transactions that are not major, significant or exempt are minor transactions.

Major, significant and minor transactions all require applications of varying complexity. Applicants in major and significant transactions also must submit a pre-filing notification describing the proposed transaction for publication in the Federal Register. The STB's rules prescribe the information that will be included in the notice and the application, which differ based on the type of transaction. The STB will also establish a procedural schedule allowing interested parties to comment and request conditions, submit responsive applications or seek other relief. The procedural schedule will allow the evidentiary proceeding to be completed within one year for major transactions, 180 days for significant transactions and 105 days for minor transactions, with a final decision issued within 45 to 90 days thereafter.

The STB is required by statute to approve significant and minor transactions unless it finds both that the transaction is likely to cause a substantial lessening of competition and that the anticompetitive effects of the transaction outweigh the public interest in meeting significant transport needs.

Major transactions, by contrast, may only be approved if the STB finds the transaction is 'consistent with the public interest'. STB rules adopted in 2001 governing major transactions indicate that the agency does not favour Class I consolidations that reduce transport alternatives 'unless there are substantial and demonstrable public benefits to the transaction that cannot otherwise be achieved', including 'improved service, enhanced competition, and greater economic efficiency'. No major transactions have been scrutinised under the STB's 2001 rules governing major transactions, however. The acquisition of Kansas City Southern (KCS) by Canadian Pacific Railway was recently approved under the STB's pre-2001 merger rules pursuant to a waiver granted by the STB for major transactions involving KCS.

Under the streamlined class exemption process, which is applicable for the control of non-connecting carrier(s) where no Class Is are involved, parties to transactions that qualify for a class exemption must file a verified notice of the transaction with the STB at least 30 days before the transaction is consummated. The verified notice should certify whether the proposed transaction involves any interchange commitments that may limit future interchange with connecting carriers, and provide specified information about such commitments. Potential opponents may seek to revoke the exemption for cause, but a petition to revoke does not automatically stay the exemption.

The STB has the authority to place conditions on its approval of a transaction. These conditions are typically required to include labour protections for workers affected by the transaction, and they also may contain environmental mitigation or measures to preserve competitive options.

7 Is special approval required for rail transport companies to be owned or controlled by foreign entities?

The STB's standards for review and approval of acquisitions, ownership and control of rail carriers do not distinguish between domestic and foreign entities. However, applicants for a major merger that would involve transnational operations are required to address certain cross-border issues in their application. The Committee on Foreign Investment in the United States – known as CFIUS – may also review a transaction that would result in a foreign entity controlling a US railway.

8 Is regulatory approval necessary to construct a new rail line? What is the procedure for obtaining approval?

The construction of new rail lines that extend a railway into new territory requires regulatory approval or exemption by the STB, whether the construction is proposed by a new carrier or an existing carrier. However, no STB approval is needed for an existing carrier to construct ancillary tracks to facilitate service on its existing lines. For example, no STB approval is necessary to construct passing sidings or side tracks along existing tracks or to construct additional yard tracks.

The STB must authorise a new rail line construction project unless it finds it to be 'inconsistent with the public convenience and necessity'. The STB may impose modifications or conditions it finds to be 'necessary in the public interest'.

Parties seeking approval for new rail line construction may either apply to the STB, including the information specified by the agency's rules (49 CFR Part 1150), or submit an individual petition for exemption. Under either approach, parties must comply with the STB's environmental regulations (including consulting with the STB at least six months in advance to identify environmental issues). The STB must comply with the National Environmental Policy Act (NEPA) before granting a construction application or petition for exemption, which will typically require an environmental impact statement. There is also a class exemption available for the construction of short connecting track.

MARKET EXIT

Discontinuing a service

9 What laws govern a rail transport company's ability to voluntarily discontinue service or to remove rail infrastructure over a particular route?

A rail carrier may not abandon or discontinue operations over any part of its railway lines unless the STB finds that the 'present or future public convenience and necessity require or permit the abandonment or discontinuance'. However, no STB approval is needed for the abandonment or discontinuance of ancillary track.

Railways can submit applications to abandon or discontinue service, which the STB shall grant if it finds that the public convenience and necessity standard is satisfied. Most abandonments and discontinuances occur through a class exemption that is available for any line that has been out of service for two years or more. Abandonment or discontinuance can also be sought through a petition for exemption.

After an abandonment or discontinuance application, petition, or notice of class exemption is filed, any person (including a government entity) may submit an 'offer of financial assistance' to subsidise or purchase the rail line at issue. If the STB finds that the offeror is financially responsible, the abandonment or discontinuance shall be postponed until the parties have reached agreement on a transaction for subsidy or sale of the line. If they cannot agree, the conditions and amount of compensation are established by the STB.

Parties also have an opportunity to request that a line proposed for abandonment be set aside for interim trail use or offered for sale to be used for public purposes. Interim trail use is only permitted if the abandoning railway consents and the trail proponent agrees to certain conditions (including that rail service could be reactivated on the corridor). Under STB regulations, interim trail use negotiations may occur for one year, with extensions permitted by the Board if the trail sponsor and railroad agree. A condition that the property be offered for sale for public purposes may be imposed even if the railway objects, but the STB cannot force such a sale, and the condition may not be in place for more than 180 days, after which the abandoning railway is free to sell the property to whomever it chooses.

10 On what grounds, and what is the procedure, for the government or a third party to force a rail transport provider to discontinue service over a particular route or to withdraw a rail transport provider's authorisation to operate? What measures are available for the authorisation holder to challenge the withdrawal of its authorisation to operate?

The same legal standard (public convenience and necessity) governs applications for abandonment and discontinuation of service filed by third parties seeking to force a railway to abandon a line. (Such third-party abandonment is often called adverse abandonment.) The STB must consider the impact of abandonment on all interested parties, including the railway, shippers who have used the line and the community involved. In general, the STB will not grant adverse abandonment where the incumbent railway or shippers on the line can demonstrate a need for continued rail service.

A rail carrier opposing adverse abandonment has the right to contest abandonment before the STB and to seek judicial review if necessary.

Insolvency

11 Are there sector-specific rules that govern the insolvency of rail transport providers, or do general insolvency rules apply? Must a rail transport provider continue providing service during insolvency?

A special subchapter of the Bankruptcy Code (11 US Code Subchapter IV – Railway Reorganization) applies to railway bankruptcies and reorganisations. This subchapter requires the bankruptcy court and the trustee to 'consider the public interest' in addition to the interests of the debtor, creditors and equity security holders.

A railway in bankruptcy may be required to continue operations until it is authorised to abandon some or all of its lines, or until it is liquidated. But courts have recognised that

in some situations a railway that has insufficient funds to pay its employees and suppliers simply cannot operate and requirements to do so prevent an orderly liquidation.

COMPETITION LAW

Competition rules

12 | Do general and sector-specific competition rules apply to rail transport?

Both general and sector-specific competition rules apply to rail carriers, with some exceptions. A rail carrier engaged in a consolidation, merger, or control transaction approved by the STB is exempt from the antitrust laws (and 'all other law') as necessary to allow it to carry out the approved transaction. This means, for example, that a rail carrier engaged in a merger approved by the STB cannot be found liable for violating the antitrust laws simply for carrying out that merger. Similarly, rates for rail transport, which are subject to STB rate regulation in some cases, cannot be challenged under antitrust law.

Regulator competition responsibilities

13 | Does the sector-specific regulator have any responsibility for enforcing competition law?

The STB does not enforce federal antitrust laws, although it may consider antitrust principles in assessing whether a particular transaction should be approved or exempted.

Competition assessments

14 | What are the main standards for assessing the competitive effect of a transaction involving rail transport companies?

The STB's principal concerns in merger or control cases are the preservation of competitive rail service where it exists and the enhancement of rail competition. The STB is particularly focused on avoiding or remediating any situation where a transaction would reduce the number of competitors from two to one (and, to a lesser extent, from three to two), as well as, in certain instances, where a transaction would reduce forms of indirect competition (eg, competitive pressure from build-out/build-in options due to a competitor operating nearby). The STB usually requires that direct or indirect competitive rail service by at least two rail carriers be maintained wherever it existed before a merger or control transaction.

PRICE REGULATION

Types of regulation

15 | Are the prices charged by rail carriers for freight transport regulated? How?

Some prices for freight transport are regulated by the STB. The STB has no jurisdiction to regulate the following rates: rates that are agreed to in rail transport contracts; rates for transport that is subject to 'effective competition' from another railway or mode of transport (ie, the railway is not market-dominant); and rates with a revenue to variable cost ratio (R/VC) of 180 per cent or less. The R/VC is calculated by dividing the challenged rate by the variable costs for the movement as calculated by an STB costing model called the Uniform Railroad Costing System. Further, the STB has granted commodity exemptions that preclude rate or other regulation of various commodities and equipment types that have been determined to be subject to effective competition; however, the STB retains the power to revoke these exemptions in whole or for particular movements.

Shippers wishing to challenge rates that do not fall within the above categories have the right to file a rate reasonableness complaint with the STB.

16 | Are the prices charged by rail carriers for passenger transport regulated? How?

The STB has statutory authority to determine the reasonableness of passenger rates for intercity transport within its jurisdiction, but it has never done so and has no rules governing such determinations. Amtrak is exempt from STB jurisdiction on most matters, and the prices it charges are unregulated. There are no generally applicable rules as to the fares charged by commuter rail lines, although state and local laws may apply.

17 | Is there a procedure for freight shippers or passengers to challenge price levels? Who adjudicates those challenges, and what rules apply?

For traffic that is subject to rate regulation, shippers may file a complaint with the STB asking it to rule that the rate is unreasonably high. The STB has adopted several methodologies to adjudicate rate complaints, the most commonly used of which is the standalone cost (SAC) test. Other available methodologies that have been used by the STB include a simplified SAC methodology and a three-benchmark methodology designed for use in smaller cases. A new methodology for smaller cases, Final Offer Rate Review, was adopted in December 2022. The methodology has not yet been used, and the STB's decision to adopt the methodology has been appealed to a federal circuit court.

A shipper that successfully proves that its rate was unreasonable under its chosen methodology may receive reparations for rates paid above the maximum reasonable level and a prescription requiring the railway to charge a lower rate in future. Rate disputes are also eligible for arbitration under the STB's arbitration programme, though the programme has never been used. In December 2022, the STB adopted rules that would create a new arbitration programme for rate disputes if all Class I railroads agree to participate. Two petitions to reconsider aspects of the arbitration rules are pending before the STB. A federal circuit court appeal has also been filed, although briefing in that appeal is stayed pending resolution of the reconsideration petitions.

18 | Must rail transport companies charge similar prices to all shippers and passengers who are requesting similar service?

No, unless the shippers are requesting identical service (eg, the same types of shipments between the same origins and destinations) and the railway cannot identify another sound reason for pricing the identical services differently.

NETWORK ACCESS

Sharing access with other companies

19 | Must entities controlling rail infrastructure grant network access to other rail transport companies? Are there exceptions or restrictions?

In general, entities that control rail infrastructure are not required to grant network access to other rail providers. The STB has authority to impose various forms of network access upon complaint, but under the STB's current rules, such relief is only granted if the agency finds an abuse of market power or service failure. The STB also sometimes imposes network access as a condition to a transaction to mitigate a loss of competition that might otherwise result from a merger.

Freight railways are required to grant Amtrak access to their network at Amtrak's request. The terms and conditions of such access are negotiated between the freight railroad and Amtrak; the STB has the authority to set reasonable terms and conditions if an agreement cannot be reached.

While in most instances railways are not required to give other railways network access, railways must cooperate with other railways to allow for the uninterrupted flow of traffic over the national rail network. Railways are required to provide switch connections to the track of other railways, accept traffic from other railways when necessary to complete rail service, provide reasonable facilities for interchanging traffic with other railways, establish reasonable through routes with other railways, and allow for crossings over railway property by other railways.

Access pricing

20 | Are the prices for granting of network access regulated? How?

Prices for network access are negotiated in the first instance by the railways involved. If the railways cannot agree on pricing, the STB has jurisdiction to set a price. The STB has not established a uniform methodology for pricing network access.

Competitor access

21 | Is there a declared policy on allowing new market entrants network access or increasing competition in rail transport? What is it?

There is no declared policy specifically regarding access for new market entrants. The Rail Transportation Policy in the Interstate Commerce Act encourages the STB to allow competition and the demand for services to establish reasonable rates to the maximum extent possible. The STB's policy statement regarding Class I mergers encourages proposals that would enhance competition, in part to offset other possible harm that could arise from such transactions.

SERVICE STANDARDS

Service delivery

22 Must rail transport providers serve all customers who request service? Are there exceptions or restrictions?

Freight railways have a common carrier obligation to provide service to freight customers upon reasonable request. Common carriers generally cannot discriminate in providing service and must respond to reasonable requests for service.

Generally, Amtrak and commuter railways do not have a federal common carrier obligation but may be subject to certain other state or federal legal requirements that limit their ability to refuse service to potential customers.

23 Are there legal or regulatory service standards that rail transport companies are required to meet?

Freight railways do not have specific service standards required by law or regulation, but they are required to provide service upon reasonable request, and to establish reasonable rules and practices for providing service. Railways are also required to maintain a safe and adequate supply of rail cars. The Surface Transportation Board (STB) requires Class I railways to regularly report on various service metrics.

Challenging service

24 Is there a procedure for freight shippers or passengers to challenge the quality of service they receive? Who adjudicates those challenges, and what rules apply?

Freight shippers can bring complaints to the STB alleging that a railway is engaging in an unreasonable practice or is violating its common carrier or car supply obligations. The STB's rules allow each party to present evidence and arguments, after which the STB will make its decision.

In service emergencies where a railway is not providing adequate service, the STB has the power to issue emergency service orders that temporarily direct the handling of traffic or order another railway to provide service (49 USC section 11123). Such emergency service orders may be in place for a maximum of 270 days. The STB is currently considering

changes to its emergency service order regulations that are intended to clarify standards and expedite proceedings.

The STB also has rules in place to issue temporary access orders to address serious service issues that do not necessarily rise to the level of an emergency.

SAFETY REGULATION

Types of regulation

25 | How is rail safety regulated?

Freight, passenger and commuter rail are all subject to federal safety regulation, primarily by the Federal Railroad Administration (FRA). The FRA uses its broad authority granted by the Federal Railroad Safety Act (FRSA) to 'promote safety in every area of railway operations and reduce railway-related accidents and incidents' (49 USC section 20101). The FRA typically promulgates regulations in the Code of Federal Regulations (CFR) under the authority granted by these statutes. These detailed regulations include standards for inspection, types of equipment, hours of work, operations and record-keeping. The FRA enforces these rules and regulations through inspections and by issuing notices and civil penalties for any violations. The FRA can also issue emergency orders under certain circumstances to initiate immediate actions (see 49 USC section 20104). Some relevant statutory provisions and FRA regulations specifically reference and incorporate standards set by the Association of American Railroads (AAR) as a minimum or safe harbour for compliance with the FRA's regulations.

Broadly, if the FRA has issued regulations on a rail safety issue, FRSA pre-empts state or local regulations on that issue. If the FRA has not acted, in some circumstances, states may issue more stringent regulations to address an essentially local safety or security hazard.

Competent body

26 | What body has responsibility for regulating rail safety?

The FRA has primary responsibility for regulating rail safety. The Pipeline and Hazardous Materials Safety Administration (PHMSA) has some oversight over hazardous materials moved by rail, and the Transportation Safety Administration has some oversight where safety and security concerns overlap. The Federal Transit Administration does not have direct safety oversight of railways but does work with commuter railways on some safety issues, including technical assistance. Finally, the National Transportation Safety Board (NTSB) may issue non-binding recommendations after investigations.

Manufacturing regulations

27 | What safety regulations apply to the manufacture of rail equipment?

Federal statutes (see, eg, 49 USC section 20701 et seq; 49 USC section 20133; 49 USC section 20155) and multiple FRA regulations (see, eg, 49 CFR Parts 215, 221, 223, 224, 229, 231 and 232) apply safety standards for freight cars, passenger cars, locomotives and other rolling stock, many of which require actions by the manufacturer for such equipment to be used by US railways. The PHMSA also has regulatory authority over rail equipment used to move hazardous materials.

There are also AAR standards for equipment that AAR members comply with and that are sometimes incorporated in regulation.

Maintenance rules

28 | What rules regulate the maintenance of track and other rail infrastructure?

Federal statutes (see, eg, 49 USC section 20142; 49 USC section 20134) and multiple FRA regulations (see, eg, 49 Code of Federal Regulations (CFR) Parts 213, 232, 233 and 237) address the maintenance of track, signal systems and other rail infrastructure.

29 | What specific rules regulate the maintenance of rail equipment?

Federal statutes and multiple FRA regulations address the maintenance of rail equipment, including required inspections and reporting on such inspections. Some of the most relevant provisions by equipment type are:

- locomotives: 49 USC section 20702 and 49 CFR Part 229;
- freight cars: 49 CFR Part 215;
- passenger cars: 49 USC section 20133 and 49 CFR Part 238; and
- brakes: 49 CFR Part 232.

Accident investigations

30 | What systems and procedures are in place for the investigation of rail accidents?

Railways are required to report all accidents to the FRA. The FRA investigates serious train accidents, including all accidents involving fatalities to railway employees or contractors. However, no part of a report of an FRA accident investigation may be admitted as evidence in a suit for damages for the accident.

The NTSB also investigates major transport accidents, including railroad accidents. Railroads are obligated to report such accidents to the NTSB. Investigations are conducted by NTSB staff, who designate parties to participate in the investigation. The NTSB will issue a factual report, including a determination of probable cause for the accident and any safety recommendations. To ensure that NTSB investigations focus only on improving transport safety, the NTSB's analysis of factual information and its determination of probable cause

cannot be entered as evidence in a court of law. Unlike the FRA, the NTSB does not have direct regulatory authority over railways to mandate compliance with any safety recommendations it makes. However, NTSB recommendations typically carry persuasive weight, and they may be implemented by other regulatory agencies.

Accident liability

31 Are there any special rules about the liability of rail transport companies for rail accidents, or does the ordinary liability regime apply?

There is a statutory limitation on liability for injury, death or damage to property of a passenger arising in connection with the provision of rail passenger transport of US$200 million (49 USC section 28103). The US$200 million liability limit applies to all awards to all passengers from all defendants arising from a single accident or incident. There is no similar limitation on damages arising from freight operations.

FINANCIAL SUPPORT

Government support

32 Does the government or government-controlled entities provide direct or indirect financial support to rail transport companies? What is the nature of such support (eg, loans, direct financial subsidies, or other forms of support)?

Government entities provide little or no direct financial support to freight rail carriers, although carriers sometimes benefit indirectly from broad-based tax policies and incentives. Freight rail carriers sometimes partner with states and regional authorities on an ad hoc basis to finance major transport infrastructure investments and improvements, including with the support of various federal grant programmes. In addition, the United States Department of Transportation administers the Railroad Rehabilitation and Improvement Financing programme, through which low-interest, long-term loans can be obtained to finance freight or passenger projects. Short-line railroads can also take advantage of the 45G tax credit programme, which supports track maintenance. On the passenger side, Amtrak is subsidised by the federal government, and state and local governments often own or financially subsidise commuter railways. Moreover, some short-line railways are owned by state and local governments. The nature of financial support for these commuter railways and short lines varies widely, and may include loans, tax benefits and direct financial subsidies. An emerging area of government support for passenger rail is private activity bonds, which are issued by state and local governments to attract financing for a private project by taking advantage of the tax-exempt nature of government bonds.

Requesting support

33

Are there sector-specific rules governing financial support to rail transport companies and is there a formal process to request such support or to challenge a grant of financial support?

There are no sector-specific rules governing financial support to rail carriers. The processes for requesting or challenging such support are ad hoc and case by case. Most passenger and commuter railways receive some form of public subsidy.

LABOUR REGULATION

Applicable labour and employment laws

34 Are there specialised labour or employment laws that apply to workers in the rail transport industry, or do standard labour and employment laws apply?

Labour relations between rail carriers and their employees are governed by the Railway Labor Act (RLA), which sets forth specialised labour laws that are broadly applicable to freight railways; Amtrak; select commuter railways that retain some freight rail functions; and entities that provide services related to rail transport for which there is common ownership or control between the entity and an RLA carrier. The RLA generally does not apply to any wholly intra-state railways, including street, interurban or suburban electric railways. When the RLA applies, it occupies the entire field of rail labour law and preempts state labour laws entirely.

The RLA differs significantly from standard federal labour laws set forth in the National Labor Relations Act (NLRA). Unlike the NLRA, one of the RLA's main purposes is to avoid any interruption to interstate commerce. As such, the RLA prescribes an elaborate scheme of mandatory and time-consuming procedures that must take place before self-help measures are permitted. The RLA imposes a positive duty on both carriers and employees to exert every reasonable effort to make and maintain collective bargaining agreements and to settle all disputes. The RLA creates federal entities, including the National Mediation Board and the National Railway Adjustment Board, for adjudicating disputes under the Act. Actions to enforce the RLA can be litigated in federal court. The U.S. Congress has historically stepped in to settle labour disputes legislatively to avoid or minimise disruptions to interstate commerce.

ENVIRONMENTAL REGULATION

Applicable environmental laws

35 Are there specialised environmental laws that apply to rail transport companies, or do standard environmental laws apply?

In general, standard federal environmental laws apply to rail transport companies. The Environmental Protection Agency has specialised rules governing locomotive emissions. Both the Federal Railroad Administration and Surface Transportation Board are subject to the National Environmental Policy Act, which requires agencies to consider the

environmental impact of any major federal action. As such, any matter that requires agency action (such as approval of an application or the grant of an exemption) is subject to an environmental review of the impact of the action.

Many state and local regulations, including environmental regulations, are inapplicable to railways because of the pre-emption provisions of the ICC Termination Act. Whether a particular state or local regulation is pre-empted by federal law must be analysed case by case. For example, California has recently issued locomotive pollution rules that are being challenged.

UPDATE AND TRENDS

Key developments of the past year

36 | Are there any emerging trends or hot topics in your jurisdiction?

There are three major issues that are receiving a substantial amount of attention in US rail circles currently.

First, the derailment of a train carrying hazardous materials in East Palestine, Ohio has brought significant attention to rail safety issues, including proposed (and some recently enacted) federal and state legislation. Regulators are also increasing their focus on safety issues, including studying concerns about longer freight trains, proposing new regulations, and issuing safety advisories relating to train length, train makeup and wayside detection, among other actions. Even prior to the East Palestine derailment, federal regulators were considering a 'two-person-crew' rule, which would require that trains always have at least two crew members.

Second, the Biden administration has contributed to a renewed focus on passenger rail from the US government, including substantial funding for passenger rail that was included in the Infrastructure Investment and Jobs Act, a five-year infrastructure funding bill. At the same time, the contours of Amtrak's ability to access the freight rail network are being tested in proceedings at the STB. An Amtrak-initiated STB proceeding to operate a Gulf Coast passenger service on the rail lines of two freight railroads between New Orleans and Mobile was recently settled after a lengthy STB evidentiary hearing. Although the settlement is confidential, it will support both freight and passenger service on the corridor. Amtrak also initiated a case against Union Pacific (and other railroads) because of alleged substandard on-time performance of its Sunset Limited service.

Third, early in 2023, the STB approved the acquisition of Kansas City Southern (KCS) by Canadian Pacific with certain conditions, including a requirement that gateways (interchange points between the new CPKC and other railroads) remain open to third-party railroads on commercially reasonable terms. The acquisition represents the first Class I merger since the STB revised its major merger rules in 2001 (although the acquisition was not subject to the new merger rules pursuant to a KCS-related exception). The railroads have officially combined, although the Board's decision has been appealed and reconsideration has been sought.

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