RAIL TRANSPORT 2023

Contributing editor
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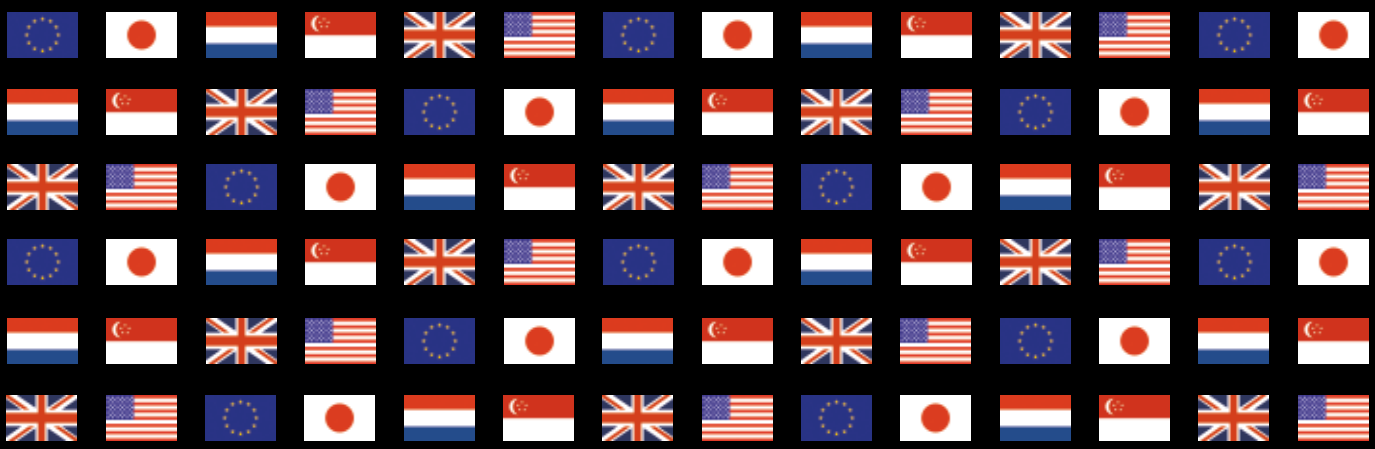

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Lexology Getting the Deal Through is delighted to publish the fifth edition of *Rail Transport*, which is available in print and online at www.lexology.com/gtdt.

Lexology Getting the Deal Through provides international expert analysis in key areas of law, practice and regulation for corporate counsel, cross-border legal practitioners, and company directors and officers.

Throughout this edition, and following the unique Lexology Getting the Deal Through format, the same key questions are answered by leading practitioners in each of the jurisdictions featured. Our coverage this year includes a new chapter on the United Kingdom.

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Every effort has been made to cover all matters of concern to readers. However, specific legal advice should always be sought from experienced local advisers.

Lexology Getting the Deal Through gratefully acknowledges the efforts of all the contributors to this volume, who were chosen for their recognised expertise. We also extend special thanks to the contributing editor, Matthew J Warren of Sidley Austin LLP, for his continued assistance with this volume.

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Global overview

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From the very outset, railways have been a global phenomenon. 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 starkly 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 Amtrak in the US and VIA Rail in Canada.) 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.

Canada's regulatory system also underwent 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 Railway, have extensive operations in the United States, and operate successfully in both countries.

In 2021, Canadian Pacific proposed to merge with the Kansas City Southern, a US railway with extensive operations in Mexico, which would create the first north-south transcontinental railway linking Canada, the United States, and Mexico (if such a merger receives regulatory approvals). At the time of writing, Canadian Pacific and Kansas City Southern are in the midst of proceedings seeking approval of their merger, which would be the first merger of Class I railways in nearly a quarter century. A decision on approval is expected in early 2023.

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.

As described in the European country chapters, to some degree these separated models have been implemented to comply with European Union 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 focus is 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 eventually will 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 European Union's progress in developing unified interoperability standards is a key trend to watch.

Even where rail lines do not cross borders, rail technologies increasingly do. For example, proposals are under way in multiple countries to use Japanese Shinkansen technology to develop high-speed train routes. China's Belt and Road Initiative is developing major rail infrastructure projects in a number of countries. Indeed, the markets for locomotives, rolling stock, and the increasingly sophisticated signalling and communications technologies that underlie rail operations are all increasingly global. Consequently, it will be particularly important for manufacturers to keep abreast of developing equipment and safety standards in different jurisdictions.

In 2022, both freight and passenger railways across the world continued recovery from the covid-19 pandemic. Freight railways have seen significant supply chain disruptions, driven in part by labour shortages. Many passenger railways have seen reduced passenger demand due to travel restrictions and contagion concerns, although recovery continues.

Despite significant jurisdictional differences, international understanding and cooperation is 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.

European Union

Tom Marshall, John Williams, Christophe Lefort, Oliver Grabowski, Tim Briggs and Max Kaufman

Herbert Smith Freehills LLP

GENERAL

Industry structure

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

The EU has passed a series of legislative packages in relation to rail since the start of the century (the first in 2001, the second in 2004, the third in 2007, a recast of the first in 2012 and the fourth in 2016). These legislative packages have focused on three related areas: (1) the separation of infrastructure management and the provision of rail transport services (or unbundling); (2) the liberalisation of the rail transport services market; and (3) the development of a single, integrated European rail area through the promotion of interoperability and the harmonisation of technical and safety standards. The first two of these, in particular, have had a strong impact on how the rail transport industry is structured in member states.

Subject to certain exceptions for urban, suburban or regional railways, Directive 2012/34/EU (as amended) requires financial, legal and organisational separation between the management of infrastructure and the provision of rail transport services, but does not go as far as to require full structural vertical separation (ie, an infrastructure manager is permitted to be in the same legal group as a provider of rail transport services as long as certain safeguards are in place). In addition, member states must ensure that the infrastructure manager has decision-making independence regarding its essential functions (such as train path allocation and infrastructure charging) within certain frameworks established by the member state. To this end, members of the supervisory board or management board of an infrastructure manager must act in an impartial, non-discriminatory manner free from conflicts of interest and cannot be members of the supervisory board or management board of a provider of rail transport services. In practice, the manner of separation between infrastructure management and rail transport services varies between the member states.

The EU market for rail freight services has been fully open (ie, for both international and domestic freight) to competition since 2007 in accordance with Directive 2007/58/EC, and the EU market for international passenger transport services has been open to competition since 2010 in accordance with Directive 2004/51/EC. While certain member states have voluntarily opened up domestic passenger services to competition through tendering public service contracts and by introducing rights of access to rail infrastructure for new operators, Directive 2016/2370/EU has now made this a requirement for the working timetable starting on 14 December 2020.

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?

EU law is, in principle, neutral on the issue of state ownership and state operation of the railways: the public and private sectors are both permitted to participate in the ownership and control of rail infrastructure and the provision of rail transport services in the EU. However, Directive 2012/34/EU imposes additional requirements to preserve independence where an infrastructure manager or rail transport service provider is owned or controlled by a member state. In practice, it is common for member states to participate, at least to some extent, in the ownership of the railway infrastructure and providers of rail transport services.

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

There is no requirement in EU law for freight and passenger services to be operated by separate companies. However, in accordance with Directive 2012/34/EU, separate financial statements must be prepared for business relating to the provision of rail freight transport services and the provision of passenger transport services and there must be no cross-subsidisation between the two. It is typically the case that separate companies operate freight and passenger services in member states.

Regulatory bodies

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

Rail transport in the EU is regulated by the European Commission (the Commission) and a sector-specific regulator, the European Union Agency for Railways (the Agency).

The Agency was established pursuant to Regulation (EU) 2016/796 and replaced the European Railway Agency. Its main objectives relate to the interoperability and safety of the rail network across the EU and to improving the competitive position of the rail industry. It seeks to develop viable common technical standards and safety measures and works in collaboration with the rail industry, national authorities in member states and other EU institutions.

Directive 2016/797/EU and Directive 2016/798/EU (each as amended) give the Agency an enhanced role in relation to issuing safety certificates to undertakings providing rail transport services and vehicle authorisation, respectively.

Regulation (EU) 2021/2085 established Europe's Rail Joint Undertaking (known as EU-Rail), which replaced the previous Shift2Rail Joint Undertaking established in 2014. EU-Rail is the European body for rail research and innovation and aims to accelerate the development of

innovative technologies and support EU policies and objectives for the rail sector.

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, Directive 2012/34/EU requires undertakings providing rail transport services ('railway undertakings') to be licensed to be granted access rights to railway infrastructure (subject to certain exceptions). The Directive sets out broad principles for granting licences and requires that the procedures for granting licences are transparent and non-discriminatory.

Each member state is required to designate a licensing authority responsible for issuing licences. In order to apply for a licence, a railway undertaking must demonstrate to the licensing authority that it meets requirements relating to 'good repute, financial fitness, professional competence and cover for its civil liability', which are detailed in Directive 2012/34/EU.

In accordance with Directive 2016/798/EU, each member state is required to establish a national safety authority. The national safety authority is responsible for approving and issuing safety certificates to railway undertakings. However, an important change introduced by Directive 2016/798/EU is that safety certificates will be issued by the European Union Agency for Railways (rather than a national safety authority) except where the relevant operations are limited to one member state and the applicant opts to apply to the national safety authority. To be issued with a safety certificate, a railway undertaking must demonstrate that its safety management system complies with the interoperability technical specifications, common safety methods and common safety targets, along with any national rules. There are limited exceptions to the requirement for an operator to hold a safety certificate. Infrastructure managers must also obtain safety authorisations from the national safety authority.

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

There is no railway industry-specific requirement for regulatory approval for a change in control of a rail transport provider in the EU. However, article 24(5) of Directive 2012/34/EU provides that in the event of a change affecting the legal situation of an undertaking and, in particular, in the event of a merger or takeover, the national licensing authority may decide that the licence needs to be resubmitted for approval. In practice, regulatory approval for a change in control is required in a number of member states – for example, licences issued to operators may be non-transferable or transferable only with the approval of the regulator and rail concession agreements between operators and the government may contain restrictions on change of control.

The general EU merger control regime applies to the railway industry. This regime applies to mergers (and acquisitions, and some joint ventures) with an 'EU dimension' that meet particular turnover thresholds. It is intended to prevent such transactions that would 'significantly impede effective competition in the common market or in a substantial part of it, in particular as a result of the creation or strengthening of a dominant position'.

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

There is currently no foreign direct investment (FDI) regime at an EU level. Regulation (EU) 2019/452 sets common standards and mechanisms that member states should include if they introduce their own FDI regime but does not establish a regime at an EU level. Pursuant to that Regulation, where a national FDI regime requires an FDI notification in relation to the acquisition of a rail transport company, the member state FDI authority is obliged to notify the European Commission and other member states about the transaction.

The only EU-level approval that would be required (which applies equally to EU-owned or controlled entities) is the EU merger control regime established by Regulation (EC) No. 139/2004 (the EUMR). If the acquisition or control of a rail transport company meets the relevant thresholds in the EUMR, it would be subject to a competition law review.

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

Planning approvals for the construction of a new rail line are generally a matter for each member state to determine. However, broader EU law will be relevant – for example, major projects will be subject to the EU Directive on Environmental Impact Assessments regarding the need to submit an environmental impact assessment to the decision-making authority before a planning decision is made.

EU rules relating to interoperability mean that where new infrastructure is to be put into service, it must first be assessed against the relevant interoperability standards set under EU law and approved by a notified body (subject to exceptions and derogations). Notified bodies are independent organisations that are appointed by member states and registered with the European Commission as bodies that are suitable for carrying out interoperability assessments.

In addition, Regulation (EU) No. 913/2010 establishes freight corridors and governance arrangements for those freight corridors, including coordination of all works on infrastructure and equipment along a freight corridor that would restrict capacity.

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?

This is generally a matter for member states, but under Regulation (EC) No. 1371/2007 there is an obligation on railway undertakings (or competent authorities responsible for public service railway contracts) to make public any decision to discontinue services in advance. Public service contracts may also restrict the ability of a rail transport company to discontinue a service that forms part of a public service obligation.

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 European Union Agency for Railways (the Agency) has the power to amend, suspend or revoke single safety certificates and vehicle authorisations it issues in accordance with Regulation (EU) 2016/796. The holder of such a certificate or authorisation has the right to appeal

a decision made by the Agency to amend, suspend or revoke its certificate or authorisation. Such an appeal is made to the Board of Appeal established in accordance with Regulation (EU) 2016/796, and after that appeal process has been followed, there is also scope to appeal a decision to the Court of Justice of the EU.

Under Directive 2016/798/EU, national safety authorities can request that the Agency revoke or restrict a single safety certificate if the relevant national safety authority determines that the holder of such a certificate no longer satisfies the conditions for certification.

National licensing authorities are required to suspend or revoke a railway undertaking's operating licence where it is satisfied that it can no longer meet the requirements of Chapter III of Directive 2012/34/EU.

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 no sector-specific coordination of insolvency rules under EU law in relation to rail transport providers. Insolvency for rail transport providers is treated in the same way as any other company under Regulation (EU) 2015/848 (the EU Regulation on Insolvency Proceedings). That Regulation provides for the automatic recognition of insolvency proceedings opened in one member state in other member states. Certain member states have specific regimes for insolvency proceedings in the rail industry under domestic legislation.

COMPETITION LAW

Competition rules

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

The general EU competition rules apply to rail transport. In summary, these comprise the EU rules against anticompetitive agreements under article 101 of the Treaty on the Functioning of the EU (TFEU), abuses of dominance under article 102 TFEU, the rules concerning state aids under articles 107 to 109 TFEU and mergers under the EUMR. Rail transport is additionally subject to specific rules on state aid for inland transport set out in articles 93 and 96 TFEU, and Regulation (EC) No. 1370/2007. There is specific guidance relating to the application of state aid rules for rail transport companies.

Regulator competition responsibilities

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

There is no EU-level sector-specific regulator responsible for the enforcement of competition law. Instead, the European Commission's (the Commission) Directorate-General for Competition is responsible for the enforcement of EU competition laws in relation to anticompetitive agreements under article 101 TFEU, abuses of dominance under article 102 TFEU, state aids under articles 93, 96, 107 to 109 TFEU and mergers under the EU Merger Regulation (EUMR). Member states' competition authorities have concurrent, but subsidiary, powers to apply articles 101 and 102 (but not the state aid rules or the EUMR).

Competition assessments

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

To assess the competitive impact of a merger involving rail transport companies, the Commission examines whether the transaction would significantly impede effective competition (SIEC) in the relevant market; if a transaction does so, it will be prohibited unless effective remedies are offered that, in the view of the Commission, resolve the SIEC.

The Commission will first define the relevant market on both a product and geographic basis. In the rail transport sector, the markets that can be typically affected by a transaction are passenger rail services, ownership and operation of railway infrastructure and stations and freight transportation services. In some instances, the Commission has considered sub-segments such as regional or long-distance passenger rail transport or siding services.

For the geographic market, the starting point is that the relevant markets are national. The Commission has, however, sometimes adopted a different geographic frame of reference (for example, in relation to international routes the market will be based on the area served, while for regional services the market may be defined by reference to the relevant point-to-point flows or routes).

The Commission will typically have concerns where the merging parties overlap on the same product and geographic markets (ie, where in the absence of the transaction the parties would be competitors). Where the merged entity will have significant market shares (which will turn on the structure of the relevant market) or will reduce the number of active competitors such that the parties could obtain incremental market-power, the EC will make a finding of a SIEC.

PRICE REGULATION

Types of regulation

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

The EU does not directly regulate the prices charged by rail carriers for freight transport within member states or in terms of international freight operations within the EU. However, the basis on which infrastructure managers or services providers may charge for access to the railway infrastructure or service facilities or associated services, a key determinant of freight transport prices, is regulated by the EU.

Article 5(3) of Directive 2012/34/EU provides that railway undertakings (such as freight carriers) are free to 'control the supply and marketing of services and fix the pricing thereof'. This is to be done by reference to any general policy guidelines published by the member states in which the railway undertaking operates. In setting prices for freight transport, rail carriers will also need to comply with EU and member state competition laws, particularly in terms of ensuring there are no abuses of dominant positions or anticompetitive agreements.

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

Generally, the EU does not regulate the prices charged by rail carriers for passenger transport within member states or the EU. Article 5(3) of Directive 2012/34/EU provides that railway undertakings (including those that provide international or domestic passenger services) are free to 'control the supply and marketing of services and fix the pricing thereof'. This discretion is without prejudice to any requirements imposed by member states relating to public service contracts for the delivery of public service obligations pursuant to Regulation (EC) No.

1370/2007. Public service contracts may establish maximum tariffs for certain categories of passengers (or all passengers).

Railway undertakings, ticket vendors and tour operators are required under Regulation (EU) 2021/782 to offer terms and tariffs to the general public without direct or indirect discrimination on the basis of a passenger's nationality or place of establishment within the EU. To ensure that disabled persons and persons with reduced mobility (whether caused by age, disability or other factors) are able to access rail services on a non-discriminatory basis, article 19(2) of Regulation (EC) No. 1371/2007 provides that reservations and tickets must be offered to disabled persons and persons with reduced mobility at no additional cost. Regulation (EC) No. 1371/2007 applies to all rail journeys that are provided by licensed railway undertakings.

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

As the EU does not directly regulate the prices offered to freight shippers or passengers, there is no specific regulatory process to challenge such prices at the EU level. Where freight shippers or passengers consider that prices being offered are in contravention of EU competition law or consumer protection legislation as reflected in the relevant member state then they may submit complaints to the relevant authority in that member state.

Article 30 of Regulation (EC) No. 1371/2007 requires member states to appoint an independent body or bodies responsible for enforcement of rail passengers' rights and obligations under the Regulation. Passengers may complain to such body about an alleged infringement of their rights by railway undertaking that would include a failure to provide tickets and reservations for disabled persons and persons with reduced mobility at no additional charge.

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

Passenger and freight rail companies may charge different prices to freight shippers and passengers who request similar services as long as such pricing does not contravene EU and member state competition and consumer protection laws. In addition, in accordance with Regulation (EC) No. 1371/2007, licensed passenger rail undertakings must not discriminate against disabled persons or persons with reduced mobility by imposing additional charges for reservation or tickets.

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?

Yes, railway undertakings must be granted, on an equitable, non-discriminatory and transparent basis, the right to access the railway infrastructure in member states for the purpose of operating all types of rail freight and passenger services (including rights of cabotage in member states) in accordance with article 10(1) and (2) of Directive 2012/34/EU (as amended).

Infrastructure managers must also provide railway undertakings a minimum access package. This package comprises services such as the handling of requests for railway infrastructure capacity, use of electrical supply equipment for traction power (where available) and train control including signalling, train regulation and dispatch. Similarly, operators of service facilities must supply non-discriminatory access to all railway undertakings in accordance with article 13 of Directive 2012/34/EU.

Directive 2012/34/EU applies to the use of railway infrastructure for domestic and international rail services in the EU but is subject to a number of exceptions. In accordance with article 2(1), the requirements regarding access to railway infrastructure do not generally apply to railway undertakings that only operate urban, suburban or regional services on local and regional stand-alone networks or on networks intended only for the operation of urban or suburban rail services.

Under article 11, a member state may limit access where the grant of access for passenger services between two places would compromise the economic equilibrium of a public service contract, where such public service contract covers the same or an alternative route.

Access pricing

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

The basis on which infrastructure managers may charge railway undertakings for access to railway infrastructure is regulated by Directive 2012/34/EU (as amended). The Directive sets out a framework establishing the scope and nature of access charges. Within this framework member states must establish a charging framework and either establish specific charging rules or delegate such power to the infrastructure manager in accordance with article 29 of that Directive.

In turn, infrastructure managers must determine and collect charges for use of railway infrastructure in accordance with the established charging framework and charging rules. The charging scheme must be based on the same principles over the infrastructure manager's entire network other than in certain limited circumstances and must result in equivalent and non-discriminatory charges for railway undertakings that perform services of an equivalent nature in a similar part of the market.

The key principle underpinning the charging framework is that charges for the minimum access package and for access to infrastructure connecting service facilities must be set at the cost that is directly incurred as a result of operating the train service. Regulation (EU) 2015/909 sets out the modalities for calculating the cost that were directly incurred by an infrastructure manager as a result of the operation of a train service.

The charging scheme must encourage railway undertakings and the infrastructure manager to minimise disruption and improve the performance of the railways through a performance regime. The performance regime may include penalties for acts that disrupt performance, compensation for railway undertakings that suffer from disruption and bonuses that reward better than planned performance.

There are rules concerning setting charges relating to capacity constraints, access for maintenance, incentivising the efficient use of capacity, discounts, mark-ups and recovery of investment costs.

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 EU's policy for railways has been focused on the development of a single European rail area and removing barriers that hinder or restrict the freedom of railway undertakings based in one member state to operate passenger and freight services in other member states. In practice this has been done through: (1) promoting the interoperability of railway infrastructure and systems; (2) ensuring that there is a common approach to safety and the harmonisation of standards; and (3) opening the rail markets in member states to competition.

SERVICE STANDARDS

Service delivery

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

EU law does not place a legal obligation on railway undertakings to serve all customers who request service. However, there are requirements in relation to non-discriminatory access for disabled people and people with reduced mobility.

Article 4 of Regulation (EC) No. 1371/2007 concerning transport contracts with passengers provides for certain rights of exclusion that may be included in conditions of carriage such as where the passenger presents a danger to the safety and good functioning of the operations or to the safety of other passengers.

The carriage of dangerous goods by rail is subject to Directive 2008/68/EC (as amended). However, member states are entitled to impose more stringent requirements if they wish.

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

Regulation (EC) No. 1371/2007 requires that railway undertakings define service quality standards and implement a quality management system to maintain service quality. The service quality standards must cover at least each of the following: information and tickets, punctuality of services and general principles to cope with disruption to services, cancellation of services, cleanliness of rolling stock and station facilities, customer satisfaction survey, complaint handling, refunds and compensation for non-compliance with service quality standards, assistance provided to disabled persons and persons with reduced mobility. Railway undertakings are required to monitor their own performance in relation to the services quality standards and publish an annual report on their performance.

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 (EC) No. 1371/2007 requires railway undertakings to set up a complaints handling mechanism and make this widely known to passengers. Passengers may submit complaints on information, accessibility, assistance and service quality standards, among others, to the relevant undertaking. Within a month of a complaint the railway undertaking concerned must either give a reasoned reply to a complaint or, where justified, inform the passenger of the date by when they can expect a reply that must be within three months of the complaint.

Each member state must designate an independent body or bodies responsible for the enforcement of passengers' rights and obligations under article 30 of Regulation (EC) No. 1371/2007. Passengers may complain to the relevant body or bodies regarding alleged infringements of their rights under the Regulation.

SAFETY REGULATION

Types of regulation

25 | How is rail safety regulated?

Directive 2004/49/EC introduced a common regulatory framework for railway safety across the EU aimed at ensuring the development and improvement of safety on the railways as well as improved access to the market. It provided for the development of common safety targets and safety methods and requires member states to establish a national safety authority entrusted, among other things, with the issue of safety authorisations in respect of railway infrastructure and safety certificates to railway undertakings (but see below regarding the increased role of the European Union Agency for Railways (the Agency)) as well as defining common principles for the management, regulation and supervision of railway safety.

Directive 2004/49/EC was recast by Directive 2016/798/EU (as amended) and repealed on 31 October 2020. Many of its provisions were carried over into Directive 2016/798/EU. However, an important change was a revision to the regime for issuing safety certificates to railway undertakings, which will be issued by the Agency (rather than a national safety authority), except where the relevant operations are limited to one member state and the applicant opts to apply to the national safety authority. National safety authorities continue to be responsible for issuing safety authorisations in respect of the operation and management of rail infrastructure.

Competent body

26 | What body has responsibility for regulating rail safety?

There is no single rail safety regulator at a European Union level, but the Agency has the power to issue safety certificates and vehicle authorisations to railway undertakings. Member states are required under Directive 2016/798/EU to have a designated national safety authority.

Manufacturing regulations

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

Directive 2008/57/EC requires that the rail system, its subsystems and the components on which its interoperability depends meet the relevant essential requirements set out in Annex III to that Directive. Member states are required to ensure that structural subsystems forming the rail system located or operated in their respective territory are designed, constructed and installed in a way as to meet the essential requirements when they are installed into the rail system. In general, the essential requirements are satisfied by conforming with the relevant interoperability technical specifications. Before being used on a network, a vehicle must be authorised by the relevant national safety authority (but see below regarding increased role of the Agency).

Directive 2008/57/EC was recast by Directive 2016/797/EU (as amended) and repealed on 31 October 2020. Many of its provisions were carried over into Directive 2016/798/EC. However, an important change was a revision to the regime for issue of vehicle authorisations and vehicle type authorisations that are to be issued by the Agency (rather than a national safety authority), except where the relevant operations are limited to one member state and the applicant opts to apply to the national safety authority.

Maintenance rules

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

EU safety legislation applies in relation to the maintenance of rail infrastructure and requires that infrastructure managers obtain a safety authorisation from the national safety authority in the member state where the infrastructure is situated.

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

Before being used on the network, Directive 2016/798/EU requires that each vehicle must be assigned an entity in charge of maintenance (ECM) responsible for ensuring that the vehicle is in a safe state of running. The ECM must be registered in the vehicle register in accordance with Directive 2016/797/EU.

In the case of freight wagons and, following the implementation of Regulation (EU) 2019/779, for other vehicles where the ECM is not a railway undertaking or infrastructure manager maintaining vehicles exclusively for its own operations, the ECM must be certified by an accredited or recognised body or by a national safety authority. The certification system must provide evidence that the ECM has an established maintenance system to ensure the safe running of the relevant vehicles. Regulation (EU) 2019/779 also introduces a new system for the management of safety-critical components.

Accident investigations

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

Article 20 of Directive 2016/798/EU requires member states to ensure that an investigation is carried out after any serious accident with the objective of improving, where possible, railway safety and preventing accidents. The body undertaking the investigation must be independent of any infrastructure manager, railway undertaking and other parties whose interests could conflict with the tasks entrusted to it. It must also be independent of the member state's national safety authority, the Agency and any other regulator of railways.

The legal status of any such investigation is defined within the respective legal systems of individual member states. However, member states are to ensure cooperation by the authorities and access to information to enable the investigation to be carried out efficiently and within the shortest time. The investigating body is required to make public the final report normally no later than 12 months after the date of the accident and may make safety recommendations to the member state's national safety authority, to other bodies or authorities in the member state concerned or to other member states.

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?

Article 11 of Regulation (EC) No. 1371/2007 establishes special rules for the liability of rail undertakings in respect of passengers and their luggage. These include, subject to exceptions, a requirement to pay damages in the case of death of, or personal injuries or other physical or mental harm to, a passenger caused by an accident arising out of the operation of a railway.

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 EU provides certain financial support to the rail industry. This includes grants through the Connecting Europe Facility, which acts as a form of seed funding that is intended to attract additional funding from member states and from the private sector for projects of common interest (including in the transport sector) and through the Cohesion Fund, which is intended to provide financial support for projects in member states with lower than average gross national income.

The extent of compensation that member states may provide to rail transport companies delivering public services obligations is set out in Regulation (EC) No. 1370/2007 (as amended). Generally, rail transport companies providing public service obligations must not be overcompensated. This is determined by reference to the costs incurred and revenues generated by the rail transport companies in complying with the public service obligations, as well as a reasonable profit.

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?

Under article 107 of the Treaty on the Functioning of the European Union (TFEU), aid granted by a member state to a rail transport company that distorts or threatens to distort competition by favouring such a company is prohibited unless determined by the European Commission (the Commission) to be compatible with the EU's internal market. Financial support from a member state is likely to comprise aid for this purpose if it is both selective (ie, it favours one firm or sector over another) and if it confers an economic advantage on the rail transport company in receipt of the aid.

Where financial support is granted to provide a service of general economic interest (ie, public services) and meets the relevant cumulative criteria (set out in Case C-280/00 *Altmark*) or is provided in line with normal market conditions (termed the Market Investor Principle), it would not be considered aid for the purposes of article 107 TFEU. Separately, Regulation (EC) 1370/2007 sets out a framework under which member states may lawfully grant compensation for the operation of public passenger services.

There are specific Guidelines (2008/C 184/07 – Community Guidelines on State aid for railway undertakings), which set out the approach that the Commission will take in assessing particular types of aid granted to the rail transport companies in the EU.

If a member state wishes to grant aid or alter existing aid given to a rail transport company, it is generally obliged to notify such aid to the Commission. However, public service compensation for public passenger services that complies with Regulation (EC) No. 1370/2007 is exempt from the prior notification requirement generally applicable to state aid. Should a member state fail to notify relevant aid, third parties may complain and the Commission may then initiate an investigation. Following notification or pursuant to an investigation, the Commission will assess whether the financial support comprises aid for the purposes of article 107 TFEU and, if so, whether it is compatible with the EU internal market. Aid that is determined to be incompatible is liable to be recovered from the recipient.

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?

Directive 2005/47/EC provides for specific working time conditions that are applicable to the rail sector. For example, daily driving is limited to nine hours for a day shift and eight hours for a night shift, while there is a maximum limit of 80 hours' driving in a fortnight. Directive 2007/59/

EC (as amended) establishes minimum requirements for train drivers in the EU in terms of medical requirements, basic education and professional skills. Under the Directive, all drivers must hold a licence that they satisfy the minimum conditions and a certificate for the infrastructure in which they are authorised to drive.

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 specialised EU environmental laws that apply only to rail transport companies. However, some rail-related EU laws include environmental provisions. For example, Directive 2016/797/EU sets out 'essential requirements' that must be met by the EU rail system, the sub-system and components on which its interoperability depends. These include 'Environmental Protection' requirements that state that 'the environmental impact of establishment and operation of the rail system must be assessed and taken into account at the design stage of the system in accordance with Union law'. There are limited provisions in Directive 2016/797/EU in relation to emissions of fumes, noise, vibration and energy supply.

Rail transport companies must also comply with Directive 2008/68/EC (as amended) in relation to the carriage of dangerous goods within or between member states.

UPDATE AND TRENDS

Key developments of the past year

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

In order to maintain momentum following the European Year of Rail in 2021, the EU announced an action plan focusing on boosting long-distance and cross-border passenger rail services and increasing high-speed rail capacity. This focus on improving infrastructure aims to encourage a modal shift towards rail in both passenger and freight sectors and aligns with the EU's sustainability targets.

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GENERAL

Industry structure

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

The Ministry of Land, Infrastructure, Transport and Tourism (MLIT), the sector-specific regulator, usually classifies the rail transport industry into four categories from historic and economic backgrounds: (1) Japan Railway (JR) companies, that is, seven JR companies (six rail transport providers for passenger transport and one for freight); (2) major private railways; (3) local private railways; and (4) local public-private joint ventures (or 'semi-public sector companies').

The first category, JR companies, have common roots in the former Japan National Railway (JNR), the nation-owned rail transport provider both for passenger transport and freight. In 1987, the JNR was privatised and split into seven joint-stock companies that, at that time, were established in 1987 by the Act on the Rail Companies for Passengers and Japan Freight Railway Company (Act No. 88 of 1986) (the JR Companies Act). At the beginning, the government owned all of the shares of JR companies through the Japan Railway Construction, Transport and Technology Agency (JRTT), a government affiliate organisation. Thereafter, initial public offers for shares of four out of six companies for passenger transport were successful, and the JR Companies Act is no longer applicable to JR East, JR West, JR Central and JR Kyushu. The shares of the remaining three companies, JR Hokkaido, JR Shikoku and JR Freight, are still owned by the JRTT. While JR companies still keep their mutual extension operations, they are not independent of each other.

The second category, major private railways, has its origin in inter-urban and commuter rail transport providers that commenced services in the early 20th century in Tokyo, Osaka, Nagoya and Fukuoka, the most urbanised areas in Japan. From the beginning, they diversified their businesses in real estate development for commercial and residential properties, restaurants, hotels, department stores, travel agencies and other services, which have been successful, and some formed robust regional company groups. Before 1987 the JNR was prohibited from diversifying its businesses like private railway companies. Now, the JR Companies have become strong competitors to major private railways; not only in passenger transport services but also in associated business activities.

The third and fourth categories are smaller in scale. Most of them are struggling with fewer passengers or freight service demands in local areas. Central and local governments are supporting them through various subsidy mechanisms.

From a technology perspective, a narrower gauge of 1,067mm was adopted nationwide from the first introduction of a railway system in 1872, even in main routes. Because of this, the train speeds were limited to 120 to 130km per hour. To overcome this speed-limit, the high-speed rail system, as known as 'Shinkansen', adopted a wider gauge of 1,435mm from 1964, which now enables the trains to run with a maximum speed of 320km per hour. JR East is now testing the train running with a maximum speed of 360km per hour. Furthermore, separate from the existing high-speed rail, JR Central commenced construction of the Maglev line between Tokyo and Nagoya (and subsequently being extended to Osaka), planning to operate the passenger transport service with a maximum speed of 505km per hour.

The total length of the rail transport network is approximately 27,000km. As at 2019, approximately 25 billion passenger-kilometres and 45 billion ton-kilometres of cargo used rail transport. Approximately 200,000 employees work in the rail transport sector and the whole business sector earned approximately ¥7.6 trillion revenue, of which ¥6.9 trillion (91 per cent of the total revenue) is from passenger transportation services, in 2019. In the covid years (ie, 2020 and 2021) the number of passengers had fallen sharply, and the rail transport sector is seriously impacted.

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 central government does not have direct ownership in any railway nor does it take a direct role in providing rail transport services. One exception is the newly built Shinkansen lines. Since JR companies cannot afford the construction costs of new Shinkansen lines, the government enacted the Act on Construction of Nationwide Shinkansen Network (Act No. 71 of 1970) (the Shinkansen Construction Act) to let the JRTT construct and own the new lines. Construction costs will be borne by the central and local governments. The government designates an operating company from one of the JR companies that operated the existing lines. Shinkansen operating JR companies pay rent to the JRTT.

The unique feature of the Shinkansen Construction Act is that, if a new Shinkansen line is built and completed, it will allow JR companies to stop operations on the corresponding old lines. It is highly likely that the areas where new Shinkansen lines are built usually have a sparse population. Because of this, JR companies that undertake Shinkansen line operations usually desire to avoid over-supply of rail passenger services. If a JR company gives up the old commuter line, a local government establishes public-private joint ventures to take over the commuter services of the old lines. Recently, some local governments have opposed this system and refused to raise funding for the new Shinkansen lines, which has caused political frictions between neighbouring local governments, particularly in the West-Kyushu Shinkansen project.

Some local governments directly own and operate, or own and lease rail transport systems. Underground rail transport services are provided by the city governments of Yokohama, Nagoya, Sapporo and six other big

city governments. Tokyo Metro and Osaka Metro were transformed into a form of joint-stock company, and planned to offer their shares to the public, but this has not yet been done. Until the initial public offering, the shares are owned by central and local governments. Another type of local government ownership of shares is found in public-private joint ventures for local or regional rail transport.

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

Generally, rail transport services for passengers and freight are provided by different companies, with some exceptions. Among the JR companies, the land, facilities and equipment for the rail network are generally owned by six JR companies for passenger transport. JR Freight purchases the transportation capacity from these six JR companies, and in some part, from local public-private joint venture companies for passenger services. The central government provides adjustment funds to fill the gaps between the required capacity fees and the amount that the JR Freight can afford.

Exceptions are some local rail transport providers for freight, most of which are owned and operated by public-private joint ventures. Some of them also provide local commuter services for passengers in addition to the freight transport services.

Regulatory bodies

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

The Railway Bureau of the MLIT, regulates all rail transport operations under the Railway Business Act (Act No. 92 of 1986) (RBA), the Light-Rail Act (Act No. 76 of 1921) and the Railway Operation Act (Act No. 65 of 1999) (ROA).

In addition, the Japan Transport Safety Board (JTSB), an independent administration committee established under the JSTB Establishment Act (Act No. 113 of 1973) (the JTSB Act), has given the authority to investigate traffic accidents, including rail traffic accidents. The JSTB's mission is to investigate the cause of accidents and to give recommendations or advice to the providers as well as the regulators.

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, regulatory approval is necessary to be a rail transport provider. The Railway Business Act (RBA) sets out three types of approval for rail transport providers (RBA, article 2):

- Category I: businesses that provide transport services by using their own railway facilities;
- Category II: businesses that provide transport services by using facilities owned by third parties (ie, a Category I railway business provider or a Category III railway business provider); and
- Category III: businesses that construct railway facilities for the purpose of transferring the business to a Category I railway business provider, and businesses that construct and maintain railway facilities for the purpose of leasing them to a Category II railway business provider.

A party that plans to be a rail transport provider must apply to the Minister of the Ministry of Land, Infrastructure, Transport and Tourism (MLIT) for its approval (RBA, article 4). Applicants must prepare an application form, including a 'Basic Business Plan' (RBA, article 4(1)(6)), at least, with the following supporting documents stipulated in the Regulations of Enforcement of the Railway Business Act (Ministry of Transportation Ordinance No. 6 of 1987, the RBA Regulation) (articles 2 and 6, not exhaustive):

- a revenue estimate;
- a construction cost estimate;
- initial capital cost and its finance;
- a planned date of commencement of operation;
- drawings of the planned railway line;
- drawings and documents of the existing railway line;
- a photocopy of conveyance or lease agreement of railway line; and
- a basic business plan, which includes description of rail assets and equipment, maximum speed, maximum planned passing tonnage, planned transport supply capacity, locations and names of stations, etc.

To grant the licence for a railway business, the Minister of the MLIT has to review the following requirements (RBA, article 5):

1 the appropriateness of the plan from a business perspective;
2 the appropriateness of the plan from a safety perspective;
3 how effective the plan will be for conducting business if it fulfils requirements other than (1) and (2); and
4 the applicant's ability to properly conduct the business by itself.

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

Yes, but it depends on a form of acquiring control of the rail transport operation or business.

With regard to the transfer of a rail transport operation, or a merger or company split, MLIT approval is necessary (RBA, article 26). The applicants, both parties to the transaction, must submit applications with supporting documents. The MLIT will grant approval based on the standards for the rail transport operation or business approval (RBA, articles 5 and 6). The only exception is a case where an existing rail transport provider merges with a non-rail transport provider (RBA, article 26(2)).

With regard to acquiring the controlling shares of an existing rail transport provider, MLIT approval is not necessary; however, if a purchaser of the shares is a foreign investor, the Foreign Exchange and Foreign Trade Control Act (Act No. 228 of 1949) will apply.

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

There is no special requirement for foreign entities under the RBA. However, the Foreign Exchange and Foreign Trade Act (Act No. 228 of 1949) (FEFTA) and its subordinate regulation, the Cabinet Ordinance on Inward Direct (the Direct Investment Ordinance) apply as part of the general rules for investment by foreign entities.

An investment in a rail transport operation or business is categorised as business relating to national security, which is known as the core business (Direct Investment Ordinance, article 3(2)(3)). Although the Direct Investment Ordinance provides complicated schemes for requirements and exemptions, it generally requires that a foreign entity that plans to (1) acquire no less than 10 per cent of the shares of the listed rail transport providers or (2) acquire the shares of the unlisted rail transport providers, shall file a 'report' to the Minister of Finance and the Minister of the MLIT in advance.

As a result of the Ministers' review, it may be recommended that the investment plan be changed or cancelled if (1) national security is

impaired, (2) public order is disturbed or the protection of public safety is hindered, or (3) the smooth management of the Japanese economy will be significantly adversely affected.

As at 2020, it seems that foreign investors own minor percentages of the shares of the listed Japan Railway companies. In contrast, it seems that foreign investors have more percentages of shares in the holding companies of major private rail transport providers, such as Tokyu Corporation and Hankyu-Hanshin Holdings, Inc, according to their website information. They are well known as successful business models that have diversified their business categories, although they were rail transport providers at the beginning and they still own rail transport provider companies as their subsidiaries.

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

Yes, regulatory approval is necessary for the construction of a new rail line.

A party that plans to become a transport provider in any category (Category I, II or III) shall submit an application for approval to the Minister of the MLIT. This application must meet the requirements for approval of rail transport providers as set out in the RBA (articles 5 and 6).

A rail transport provider must apply for a separate approval upon commencement of the construction work (RBA, article 8). The applicant must ask for the MLIT's specific approval if there are any changes, including those to the planned completion time, except de minimus changes (RBA, article 9(1)(2)). De minimus changes shall be reported to the MLIT (RBA, article 9(3)). Upon completion of such construction work, the applicant shall ask for the MLIT's inspection on the completed work (RBA, article 10).

The RBA specifically requests that the applicant apply for inspection of facilities and equipment by the MLIT upon the completion of such facilities (RBA, articles 11). Likewise, the applicant shall ask for the MLIT's approval if there are any changes, except de minimus changes (RBA, article 12).

Further, if the applicant is a Category I or II rail transport provider, the RBA requests that it apply for the MLIT's confirmation on the rolling stocks (RBA, article 13(1)). The MLIT will scrutinise the design of the rolling stocks, with reference to the technical standards issued by the MLIT. Any changes to the design of the rolling stocks shall be reported for the MLIT's confirmation (RBA, article 13(2)).

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 Railway Business Act (RBA) governs a rail service provider's ability to suspend or to voluntarily discontinue services or to remove rail infrastructures. In principle, a rail service provider need not obtain approval from the authority. The RBA provides slightly different processes and necessary time periods for services for passengers and freight as follows:

- Suspensions: the rail transport provider shall submit a report of suspension to the Ministry of Land, Infrastructure, Transport and Tourism (MLIT). The period of suspension cannot exceed one year (RBA, article 28).
- Discontinuation of rail transport service for passengers: the railway business provider shall submit an abolition report to the MLIT one year prior to the date of abolition. The Minister hears the opinions of the relevant local municipalities and the stakeholders on whether the public will be inconvenienced if the service is abolished, and if the Minister finds that there is no risk of this happening, the railway service provider will be notified of the Minister's decision. The rail service provider may advance the date of abolition upon receipt of the Minister's notice (RBA, article 28-2(1) to (5)).
- Abolition of a railway service for freight: the railway business provider shall, in principle, submit an abolition report to the MLIT six months prior to the date of the service being abolished (RBA, article 28-2(6)).

In practice, rail service providers indicate the possible discontinuation of a particular route or line several years prior to the possible date of discontinuation, considering possible utilisation promotion plans as well as the local government's financial support. If the utilisation is not improved even after such promotion and support, the providers then propose an alternative transport service such as bus transit services. Although MLIT approval is not required, the MLIT will set up a hearing for the related parties (ie, local governments) and give notice to the applicant (article 28-2(2)(3)). As an effect of receiving notice, an applicant may change the discontinuation date earlier than originally scheduled, with a prior notice to the MLIT (article 28-2(4)). For freight services, the prior reporting period is six months (article 28-2(6)). In practice, to avoid reputation decline, most rail transport providers take gradual steps, which sometimes takes a lot longer than the legally required period, to discontinue rail transport services.

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 the MLIT has the power to order suspension of services or cancel approval if the following grounds exist (RBA, article 30):

- if the railway business breaches the RBA, an order based on the Act or an administrative decision that directly forms or decides the rights and obligations of the people, or breaches the conditions of the approval or the licence;
- if the railway business fails to perform the action approved or licensed without any reasonable ground;
- if the railway business performs any action that falls under the reasons for disqualification in article 6 (excluding item (ii) thereof) of the RBA;
- if the railway business does not receive approval to commence construction under article 8.1 of the RBA;
- for a Category I railway business provider, abolition of the railway business or cancellation of approval for the licence granted to the Category III railway business provider that is the counterparty of the assignee of the rail line in relation to the railway business in question, for the route relating to that line;
- for a Category II railway business provider, abolition of the railway business or cancellation of approval for the licence granted to the Category III railway business provider, who is the granter of the use of the rail line in relation to the railway business in question, on the route relating to that line; and
- for a Category III railway business provider, abolition of the railway business or cancellation of approval for the licence granted to:
    - the Category I railway business provider that is the counterparty of the assignee of the rail line in relation to the railway business in question; or

- all of the Category II railway business providers that are users of the rail line in relation to the railway business in question, on the route relating to that line.

Other third parties are not expressly entitled to force a railway business to discontinue services or cancel the licence.

If the licence holder would like to challenge the validity of the cancellation or suspension of the licence, two options are available: (1) an administrative procedure in accordance with the Administrative Appeal Act (Act No. 68 of 2014); or (2) he or she can bring a lawsuit against the government in a judicial procedure in accordance with the Administrative Case Litigation Act (Act No. 139 of 1962). It is possible for a licence holder to start (2) after failure to win in procedure (1).

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 are no sector-specific insolvency rules applicable to rail transport providers. However, bankruptcy is a reason for disqualification (RBA, article 6(3)). Other insolvency procedures will not directly affect the rail transport provider's legal status. Furthermore, if a rail transport provider is a legal corporation, it must obtain approval from the Minister of the MLIT before it begins the process of dissolution (RBA, article 29).

COMPETITION LAW

Competition rules

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

As for general competition rules, the Act on Prohibition of Private Monopolisation and Maintenance of Fair Trade (Act No. 54 of 1947) (the Antitrust Act) applies to rail transport providers. The Antitrust Act regulates against the following types of business activities or organisations: private monopolisation (article 2(5)); unreasonable restraint of trade (ie, cartel) (article 2(6)); unfair trade practices (article 2(7)); and business associations (article 8). In the Antitrust Act, there is no exemption applicable to rail transport providers.

As for sector-specific competition rules, there are no statutes or regulations. The only exception is the Fair Trade Commission's (FTC) 'Designation of Unfair Trade Practices', which designates 'Logistics' as one of the categories of 'Special Designation'. In summary, this special designation plans to protect subcontractors in the logistics industry. Although not specific to rail transport, this designation is applicable to the freight service providers that retain subcontractors for combined transport.

Regulator competition responsibilities

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

The MLIT, as the sector-specific regulator, is responsible for enforcing the RBA and the Railway Operation Act.

The Antitrust Act and its subordinate regulations and rules are enforced by the FTC.

Competition assessments

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

No standards for assessment of the competitive effect of a transaction are set out in the Antitrust Act. However, the FTC published several guidelines for particular forms of transactions, which refer to factors to be considered in assessing the competitive effect. In addition, as for unfair trade practices, the FTC also published the 'General Designations' (FTC Publication No. 15 of 1982) and 'Special Designations' (for the transactions of newspapers, logistics and large-scale retail) as prohibited forms of practices.

PRICE REGULATION

Types of regulation

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

No, the prices charged by rail transport providers for freight are not regulated. The former regulation scheme was abolished in 2003 because the freight carrier service market seems to be very competitive.

Rail transport for freight accounts for approximately 1 per cent of the volume of shares in the domestic freight transportation industry. If the conveying distance is included, this increases to 5 per cent. Generally, rail transport for freight is not seen as having dominant power in the industry. For domestic freight transportation, coastal shipping and truck transportation are very competitive generally due to Japan's geographic and geocentric position.

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

Yes, the upper limits of the fares and surcharges charged by rail carriers for passenger transport must be approved (Railway Business Act (RBA), article 16(1)). The Ministry of Land, Infrastructure, Transport and Tourism (MLIT) will scrutinise such upper limits and approve or reject them.

Rail transport providers will determine the actual fares and surcharges within such upper limits, and report the determined prices to the MLIT. If the actual fares and surcharges are changed, rail transport providers must report this to the MLIT (RBA, article 16(3)).

Rail transport providers may set out special surcharges for special luxury services in addition to the fares and regular surcharges, beyond the upper limits. If such special surcharges are determined, or thereafter changed, rail transport providers must report this to the MLIT (RBA, article 16(4)).

Moreover, the MLIT may order a rail transport provider to change the fares and regular or special surcharges for passengers if specific passengers are treated in a discriminatory manner or the fare or surcharges may cause unreasonable competition with other rail transport providers (RBA, article 16(5)).

In addition, any increase to the fares and surcharges must be published seven days prior to the enforcement date (Railway Operation Act, article 3).

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

Theoretically, there are several legal measures and procedures by which shippers or passengers may sue rail transport providers; however, the two cases that have attempted this thus far have been unsuccessful.

The first was a case where a user of one of the major private rail transport providers challenged the level of surcharge for limited express services (judgment of the Supreme Court on 13 April 1989, *Kintetsu* case). The second was a case where commuter train users of another public-private joint-venture rail transport provider challenged the level of regular fares that were comparatively higher than other commuter rail transport providers in neighbouring areas (judgment of the Supreme Court on 21 April 2015, *Hokuso Railway* case).

Since the plaintiffs challenged the MLIT's approval, these two cases were heard as administrative litigation cases. The Supreme Court dismissed the challenges due to the plaintiffs' lack of standing. It is not easy for the general public to challenge the level of prices or their upper limit by administrative litigation.

If a particular shipper or passenger is treated in an extraordinarily unfair or unreasonable manner with respect to the prices, the Antitrust Act, the Consumer Contract Act (Act No. 61 of 2000) and the Civil Code (Act No. 89 of 1896), which also sets out a basis for contract and tort claims, may be applicable. Among others, abuse of dominant position, which is stipulated in the FTC's General Designation, may be possible grounds for business-to-business transaction disputes. But no cases have been reported publicly as to rail transport providers.

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

For rail transport for freight, there is no express rule in the RBA by which the company must charge similar prices to all shippers.

For rail transport for passengers, if specific passengers are treated in a discriminatory manner, the MLIT may order a change in price level from the railway companies (RBA, article 16(5)).

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?

Entities controlling rail infrastructures do not have specific obligations to grant network access to other rail transport providers. It is each entity's business decision whether or not to grant access to the other rail transport providers.

Among the three categories of rail transport providers, many of the Category III providers will lease the rail facilities to the Category II providers for their operation. The terms and conditions of the lease and operation agreement or arrangement need to be approved by the Ministry of Land, Infrastructure, Transport and Tourism (MLIT), upon the rail transport providers' application (Railway Business Act (RBA), article 15).

In practice, there are many 'mutual accesses' between commuter rail transports providers. A typical example of mutual access services is between intercity commuter transport and downtown metro and underground transport, by which users' benefits are significantly improved. For these mutual accesses, rail transport provides shall report and submit a copy of a mutual access agreement to the MLIT (RBA, article 18). If they make any changes to it, the same applies. Although the parties to such agreement may agree to the detailed terms and conditions, the MLIT ordinance sets out necessary issues and items to be agreed upon for the party's report to the MLIT.

Access pricing

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

No, there is no specific price mechanism or regulation of the prices for granting network access. In the case of mutual access, it is common for parties to get access to the other party's route to the same extent (ie, using an index of the number of rolling stocks multiplied by the operating distance in the counter-party's route).

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.

First, for high-speed rail (Shinkansen), intercity rail transport and local commuter rail transport, the government does not seem to recognise that rail transport has dominant power among all the transportation service providers, such as airlines, expressway and local bus transit services.

Second, for commuter rail transport in metropolitan areas, the central and local governments focus more on the promotion of network and the service level of existing and newly built rail transport. Particularly in the downtown area, owing to high construction costs and lack of capacity, even existing rail transport providers cannot construct new lines by themselves and have to collaborate with central and local governments to prepare long-term construction plans for new routes or rehabilitation of existing routes. Through this collaboration, an operating company for new or rehabilitated lines may be the company that had contributed to the project. Because of this, the issue of competitor's access has rarely been raised in Japan so far.

SERVICE STANDARDS

Service delivery

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

No. Rail transport providers do not have to serve customers:

- who are not in compliance with the laws and regulations on railway transport;
- who request a special condition for transport from the rail transport provider;
- whose transport would be against the public interest; and
- whose transport by rail would not be appropriate; or whose transport is inappropriate because of unavoidable circumstances, including but not limited to acts of God (Railway Operation Act (ROA), article 6).

More generally, the Act on Promotion of Smooth Transit of Elderly and Handicapped Persons (Act No 91 of 2006) also applies to rail transport. Under this Act, for example, a station that has more than 5,000 users per day needs to eliminate large steps by installing escalators or elevators. In practice, for smaller stations, many rail transport providers in urban areas dispatch assistance staff for users' prior requests, but this depends on the service standard of each rail transport providers.

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

Yes, the ROA and the Rail Transport Rules (Ordinance of the Ministry of Rail Transport No. 3 of 1942) together provide the minimum mandatory service standard for rail transport. Rail transport companies usually prepare their own rules, which are more friendly to shippers or passengers, and apply them.

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?

If a particular shipper or passenger is treated in an extraordinary, unfair or unreasonable manner with respect to the quality of services, the Act on Prohibition of Private Monopolisation and Maintenance of Fair Trade, the Consumer Contract Act (Act No. 61 of 2000) and the Civil Code (Act No. 89 of 1896), which also sets out a basis for contract and tort claim, may be applicable.

Additionally, abuse of a dominant position, which is stipulated in the Fair Trade Commission's General Designation, may be one of the possible grounds for business-to-business transaction disputes. But no cases have been reported publicly as to rail transport businesses. The ROA and the Rail Transport Rules do not directly entitle shippers and passengers to claim against rail transport providers; any breach thereof may be referred to in determining whether the level of a provider's services is in breach of rules or illicit.

SAFETY REGULATION

Types of regulation

25 | How is rail safety regulated?

Rail transport providers must stipulate their own Safety Rules and report them to the Ministry of Land, Infrastructure, Transport and Tourism (MLIT). If there are any changes to them, the same applies (Railway Business Act (RBA), article 18-3(1)).

Safety Rules must contain several statutory issues, including safety management organisation, safety management methods and the appointment of a safety manager or a transport operation manager, among others.

The MLIT may order that the proposed Safety Rules be changed if it finds them not in compliance with the statute (RBA, article 18-3(2)[1] to [6]). The MLIT may order the rail transport provider to replace the safety manager or the transport operation manager if it finds that the manager has failed to perform their mission and hinder the safety transport operation (RBA, article 18-3[7]).

Finally, if the MLIT finds that the rail transport provider breached or violated the statutory obligations under the RBA, it may rescind the approval, after consulting with the Transportation Council (Unyu-Shingikai) (RBA, article 30 and 64-2).

Competent body

26 | What body has responsibility for regulating rail safety?

The MLIT is responsible for regulating rail safety. In addition, the Japan Transport Safety Board (JTSB) has the authority to advise the parties involved in a railway accident and to publish an opinion relating to the accident.

Manufacturing regulations

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

The Railway Operation Act (ROA) gives a basis for stipulating subordinate and technical rules on construction, equipment and operation of rail transport (ROA, article 1). Based on this, the MLIT has stipulated several rules from a safety perspective, such as (not exhaustive):

- the Ordinance on Railway Technology Standard (MLIT Ordinance No. 151 of 2001);
- the Notification on Periodical Inspection of Equipment and Rolling Stocks (MLIT Notification No. 1786 of 2001); and
- the Notification on Special Railway Technology Standard (MLIT Notification No. 1785 of 2001).

Furthermore, many de facto standards for construction, manufacturing and maintenance were historically developed by the former Japan National Railway (JNR) and other railway companies, which are now succeeded to and accepted, with updates and revisions, by Japan Railway (JR) companies and others. Some of them are published and available in the market. Details may differ widely to best suit the systems and infrastructures the rail transport companies actually operate and maintain.

In addition to the ROA regulation framework, the RBA requests that the MLIT carries out the following to ensure that rail transport providers comply with the rules and standards:

- inspect completion of the works, namely buildings and civil works (RBA, article 10);
- inspect the railway facilities and equipment (RBA, article 11); and
- confirm the rolling stocks (RBA, article 13).

Maintenance rules

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

The ROA gives a basis for stipulating subordinate and technical rules on construction, equipment and operation of rail transport (ROA, article 1). Based on this, the MLIT has stipulated several rules from a safety perspective, such as (not exhaustive):

- the Ordinance on Railway Technology Standard (MLIT Ordinance No. 151 of 2001);
- the Notification on Periodical Inspection of Equipment and Rolling Stocks (MLIT Notification No. 1786 of 2001); and
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29 | What specific rules regulate the maintenance of rail equipment?

The ROA gives a basis for stipulating subordinate and technical rules on construction, equipment and operation of rail transport (ROA, article 1). Based on this, the MLIT has stipulated several rules from a safety perspective, such as (not exhaustive):

- the Ordinance on Railway Technology Standard (MLIT Ordinance No. 151 of 2001);

- the Notification on Periodical Inspection of Equipment and Rolling Stocks (MLIT Notification No. 1786 of 2001); and
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Accident investigations

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

The JTSB has the authority to investigate rail accidents. Subject to the consent of both houses of parliament, the Minister of the MLIT appoints the chairperson and members of the JTSB (JTSB Act, article 8). The JTSB exercises its power independently (JTSB Act, article 6) but does not have the authority to punish or sanction parties. In relation to the railways, the JTSB investigates the following:

- accidents caused by collision of trains;
- accidents caused by derailment (except for those relating to working snowploughs);
- accidents caused by fire;
- any other types of accidents, which are limited to:
    - accidents that caused the death of a passenger, member of the train crew, etc;
    - accidents that caused a minimum of five casualties, including at least one death;
    - accidents that involved a death that might have been caused by rail staff, or disorder, damage or destruction of railway facilities;
    - accidents that involved a death at a railway crossing without a barrier; and
    - particularly abnormal accidents; and
- material 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?

No, there are no special rules about the liability of rail transport for rail accidents. The ordinary liability regime applies to rail accidents. The Civil Code governs the liability of private companies. In relation to the transportation services provided by the local government, the State Redress Act (Act No. 125 of 1947) may apply, although such cases seem to be very rare, because the provision of transportation series is not characterised under the 'exercise of public authority of a state or of a public entity' (State Redress Act, article 2).

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)?

Yes, the government enacted many statutes that give a basis for giving subsidies or loans to rail transport providers. Such statutes are (not exhaustive):

- Japan Railway Construction, Transport and Technology Agency (JRTT) Act;
- Act on the Rail Companies for Passengers and Japan Freight Railway Company (Act No. 88 of 1986);
- Shinkansen (high-speed rail) Construction Act (Act No. 71 of 1970);
- Act on Promotion of Convenience of Urban Railway (Act No. 41 of 2005);
- Rail and Light Rail Construction Act (Tetsudo-Kido-Seibiho) (Act No. 169 of 1953);
- Special Measure Act on Promotion of Integrated Development of Residential Development and Railway Construction (Act No. 61 of 1989);
- Special Measure Act on Promotion of Construction of Certain Urban Railways (Act No. 41 of 1986); and
- Local Transportation Promotion and Rehabilitation Act (Act No. 59 of 2007).

Most popular government support is given to JR Hokkaido and JR Shikoku. At the time of the establishment of the JR companies, the government set up a fund to stabilise the operation of these two companies. These two companies may give loans to the JRTT by using this fund and received interest under the JRTT Act. However, these schemes have not been sufficient to set off two companies' deficit recently. The central government has given special support to these two companies as well as JR Freight.

In addition to them, some local private and public-private joint venture rail transport providers are struggling with consistent population decrease in rural areas. Local governments sometimes give financial support to them. The central government also gives support to them by using a scheme under the Rail and Light Rail Construction Act and Local Transportation Promotion and Rehabilitation Act. Typically, these schemes are used to fund the capital investment to reconstruct and rehabilitate the tracks, bridges and other rail transport facilities if they are severely damaged by natural disasters.

As for subsidies given from a city-planning perspective, any rail transport company that owns rail assets and equipment may receive subsidies for the integrated development of rail assets and city districts. For example, if the local government plans to build a new multi-level crossing over existing railways in a city, it will bear a larger portion of the construction costs. The central government may give special treatment as long as the project meets the requirement under each act.

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?

Some acts, such as the Rail and Light Rail Construction Act and the Local Transportation Promotion and Rehabilitation Act, provide mechanisms of capital investment or special treatments to rail transport providers with certain requirements.

One of the sector-specific mechanisms is '(temporary) additional fares' in rail transport. Rail transport providers are allowed to charge additional fares on top of regular fares. These additional fares are not deemed to be a permanent increase of regular fares, and the rail transport company needs to pool them into a fund to improve or expand transportation capacity. Although the government does not substantially give any subsidies, rail transport businesses can enjoy interest-free funds with government authorisation.

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?

No. There are no specialised labour and employment laws applicable to workers in the rail transport industry.

ENVIRONMENTAL REGULATION

Applicable environmental laws

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

While general laws on the environment (ie, the Basic Act on Environment (Act No. 91 of 1993) and the Environment Impact Assessment Act (Act No. 81 of 1997)) are applicable to the rail transport business, there are some guidelines specifically applicable to rail transport in connection with environmental impact assessment.

As for the construction phase of the rail project, it is necessary to consider various factors such as other infrastructure projects.

One of the hot topics in the area of environmental regulation is the water-flow preservation request by Shizuoka governor against JR Central's Maglev Project. The governor refers to the River Act (Act No 167 of 1964) and holds the construction works in Shizuoka prefecture. It may need more time to resolve this difference of opinion.

UPDATE AND TRENDS

Key developments of the past year

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

In 2021 and early 2022, rail transport services for passengers are still struggling with the decreases in the volume of passengers. Even though the number of commuters is gradually recovering, it has not recovered to pre covid-19 levels.

Concurrently, due to the nationwide population decrease (except the Tokyo Metropolitan area), local transportation sectors are suffering serious business deterioration. The JR East and West, which have many local routes in sparsely populated areas, announced and raised a problem in early 2022 that their local route networks needed to be restructured, including discontinuation of rail services and transformation to other modes of transportation, in most of the cases, bus transportation. This problem persistently existed even at the end of the 20th century, which emerged because JR companies are finding it difficult to continue cross-subsidisation between urban and local networks.

This problem evoked strong objections from some local governors. Furthermore, a high-ranking official indicated that JR needed to further communicate with the local government if it plans to discontinue rail services, although it is not expressly stipulated in the relevant statutes.

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GENERAL

Industry structure

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

From 1938 to 1994, Dutch Railways (NS) was the only state-owned rail transport company operating in the Netherlands. Although it was a private company, 100 per cent of the shares were owned by the state. NS was the owner of rail infrastructure and was the only organisation providing all internal rail transport (freight as well as passengers), the management of the rail infrastructure, the education of railway employees such as locomotive drivers, and the design and ordering of the rail equipment (eg, locomotives, wagons). For decades, it was heavily subsidised by the state. Foreign railway companies were allowed to cross the border only for certain agreed international transport and under conditions controlled by NS; open access was impossible.

In 1991, the European Community enacted Directive 91/440 on the development of the Community's railways. The aim of this Directive was to have railways within the Community adopt the needs of the single market and to increase their efficiency. To this end, member states had to ensure the management independence of railway undertakings, separate the management of railway operations and infrastructure from the provision of railway transport services, and allow access to the networks of member states for – at that time – international groupings of railway undertakings and for railway undertakings engaged in the international combined transport of goods. These goals implicated a reorganisation of the rail sector and established the first step to open access.

In the Netherlands, the more rigorous option was chosen to separate the management of the rail infrastructure and the operation of rail transport at an organisational and institutional level. First, NS was changed into a market party, although its shares continued to be owned by the state. In 1995, the company lost the ownership of railway infrastructure. In 2002, the ownership was formally transferred to the state. The managerial tasks, such as allocation of infrastructure capacity and the maintenance and renewal of the infrastructure, were split off from NS and dedicated to a new private rail infrastructure manager, ProRail, which has been in operation since 2003. Arrangements between the Dutch state and NS were made to reduce the subsidies to zero. Passenger transport and rail freight transport were also split up. The rail freight part of NS (NS Cargo), which at the time was the only rail goods carrier in the Netherlands, was separated in 1999. This was essentially the starting point for a sometimes arduous liberalisation of the rail (freight) market. In the 20 years since then, freight transport has been provided by a growing number of rail freight undertakings concurrently on the whole of the Dutch rail infrastructure (about 7,000km).

NS, whose tasks are now focused on rail passenger transport, is still responsible for the main part of Dutch rail passenger transport. In 2000, it received, without any tendering, an exclusive 10-year concession for rail transport from the Minister of Infrastructure, and a new, exclusive concession once the 10 years had expired. Instead of receiving subsidies from the state, NS has to pay for the performance of the concession, since 2010 about €80 million each year. In June 2020, the Ministry of Infrastructure informed the Second Chamber of the Dutch parliament that again, without any tendering, the main and financially most favourable part of the Netherlands' network will be awarded directly to the incumbent, NS, for another period of 10 years. This new direct award seems to stretch the period allowed for direct awards of a public service contract to the maximum allowed by the European Railway Directives (compare Regulation (EC) No. 1370/2007 changed by Regulation (EU) 2016/2338). Nevertheless, NS is not the only railway company active in the Netherlands. The more regional lines are generally open tendered for periods of 10 years. The rail passenger transport over these lines is operated by the (sole) passenger rail transport company that wins the respective tenders. The railway transporters on these decentralised lines score very high with regard to their performance. Even though the regional lines form 25 per cent of the Dutch rail infrastructure, only around 10 per cent of rail passengers are transported over them. This means that in spite of the liberalisation, 90 per cent of rail passenger transport is exclusively provided by the incumbent. The national public rail passenger transport is mainly provided by several companies: NS, Arriva, Transdev (formerly known as Connexxion), Keolis and QBuzz. International rail passenger transport from and to the Netherlands is carried out by different rail passenger transporters.

Meanwhile, the EU has extended the right of access for rail services in all member states. The right of entrance already existed for rail freight transporters and international passenger rail services, but article 10 section 2 of the Single European Railway Directive (Directive (EU) 2012/34 EU, amended by Directive (EU) 2016/2370), has included all passenger rail services in this right of access. Although the access right is not absolute, it opens the railway market once more. This possibility turns out to be a real stimulation for new train services. Several railway companies have reported to the Authority for Consumers & Markets (ACM) the start of new national and international 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?

NS is a limited liability company under Dutch law, and the sole shareholder is the Dutch state. It is managed by a managing board, which is guided by a supervisory board. These organs are independent of each other. Both bodies are accountable for their performance to the general meeting of shareholders, which in fact means that they report to the state. The role of shareholder is fulfilled by the Ministry of Finance.

The government plays an important and influential role, not only as sole shareholder of NS, but also because the Ministry of Infrastructure

grants the rail passenger transport concession for the main and most profitable part of the Dutch railway infrastructure. Other companies than NS are interested in obtaining the concession for this beneficial part of the infrastructure. However, this concession is granted to NS without a tendering procedure for two subsequent periods of 10 years each. In 2020, the State Secretary of Transport communicated the intention to grant the concession for a third time to NS without any tendering after 2023 for a new 10-year period until 2035. Several rail passenger transporters brought a case against this. They stated that granting the concession would infringe Regulation (EU) 2016/2338, concerning the opening of the market for domestic passenger transport service by rail. Whether the action is contrary to Regulation 2016/2338 could not be determined by the District Court of the Hague in preliminary relief proceedings. The Court judged that it is up to the Court of Justice of the EU to ultimately decide on the interpretation of an EU Regulation.

Regional concessions for rail passenger transport are granted by regional governments. These regional concessions are tendered. NS is allowed to register for these regional tenders, but the regional concessions are almost always granted to other railway undertakings in which the Dutch government does not have any ownership.

The state also owns 100 per cent of the shares of ProRail, which is a limited liability company under Dutch law. In 2015, ProRail received a 10-year management concession from the Minister of Infrastructure. As part of this concession, the government instructs ProRail on its managerial tasks and clear agreements between both parties are made, for example, concerning the number of disruptions on the rail infrastructure.

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

Since the liberalisation of the rail industry, freight and passenger operations are carried out by separate rail companies. There are also holding companies that operate both freight and passenger transport, the operations of which are carried out by its subsidiaries.

Regulatory bodies

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

Competition aspects, including those specific to the railway industry, such as open and fair access to the market for railway undertakings, are regulated by the Authority for Consumers and Markets (ACM). Appeals against the decisions of the ACM can be lodged before the Trade and Industry Appeals Tribunal

Rail safety is regulated by the Minister of Infrastructure and by the Human Environment and Transport Inspectorate, which fulfils the role of the railway safety authority. Its decisions are appealable, first at the District Court of Rotterdam and finally at the Trade and Industry Appeals Tribunal.

The main laws are the Railway Act and the Passenger Transport Act. The decrees and ministerial regulations under these acts mostly elaborate on different aspects regulated in the Railway Act. For example, there are regulations on safety conditions that concern railway infrastructure, 'safety functions' in the railway sector (eg, the train driver) and the railway undertakings that want to operate on the railway infrastructure.

There is also local railway infrastructure, which is regulated by the Act on Local Railway Infrastructure. This Act is mainly concerned with tram and metro transport in and around cities. Provincial councils regulate this section of rail.

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 railway undertaking that intends to provide rail transport services and to gain access to the Netherlands' railway infrastructure must comply with a large number of legal requirements. These requirements derive mainly from European directives that regulate both the safe participation in rail traffic and the qualifications for access to the rail transport market. The conditions are established in the Railway Act and its decrees and regulations. The fundamental requirements that the railway undertaking must satisfy are the following:

- a valid business (operation) licence;
- a valid safety certificate or a test certificate;
- an access agreement with the rail infrastructure manager; and
- liability insurance.

The railway undertaking has to submit an application for a business licence and safety certificate to the Transport Inspectorate (the Inspectorate). The undertaking must meet the requirement of good repute by demonstrating that it and the persons in charge of its management have not been convicted of serious criminal offences (including offences of a commercial nature), have not been declared bankrupt, have not been convicted of serious offences set out in specific legislation applicable to transport and have not been convicted of serious or repeated failure to fulfil social or labour law obligations. It must also demonstrate that it meets requirements relating to financial fitness, professional competence and cover for civil liability. Therefore, the fourth requirement mentioned above (liability insurance) must also be satisfied when applying for a business licence. The minimum cover is €10 million per event.

The licensing authority has to make a decision on an application as soon as possible; in principle, this should not be more than three months after all the relevant information has been submitted. If a licence is refused, the grounds for refusal must be stated in the decision, which is communicated to the undertaking.

As mentioned above, the application for a safety certificate must be submitted to the Inspectorate or, in certain cases, the European Railway Agency. There are different types of safety certificates for rail freight transporters and rail passenger transport providers.

Regarding the third requirement listed above, the railway undertaking must conclude a contract with the railway infrastructure manager (ProRail). As ProRail is a monopolist, there is little room for negotiation.

With regard to the new right of entrance for rail passenger transporters (not only on international but also on purely national routes) some kind of approval of the Authority of Consumers and Markets (ACM) could be necessary. This right of entrance may be restricted if one or more public service contract(s) have been concluded for the relevant route and the exercise of the right of entrance would compromise the economic equilibrium of a public service contract. It is the ACM that determines whether the economic equilibrium would be compromised. The decision has to be taken on the basis of an objective economic analysis and be based on pre-determined criteria. The legal basis for this is article 19 of the Passenger Transport Act, which refers to article 11 of the EU Single European Railway Area Directive. The procedure and criteria for the application of the economic equilibrium are set out in Regulation (EU) 2018/1795. In 2021, the ACM published a renewed Decision concerning the procedure and criteria to determine whether the economic equilibrium of a public service contract for rail transport would be compromised by a new rail passenger service.

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

There are no special approvals related to a change of control as long as the entity of a railway company can be identified as such. When a railway undertaking provides rail transport on the Dutch main railway infrastructure it must have all the relevant (control) documents. A business licence is valid throughout the territory of the Netherlands (and the European Union) as long as the railway undertaking and its legal successor fulfil the obligations of good repute, etc (articles 28 to 31 of the Railway Act) and as long as it disposes of the required licence and safety certificate. The requirements for the business licence are worked out in the Decree on Business Licence and exemptions for the safety certificate (State Journal 2019, 203).

The safety certificate issued by the Inspectorate has to be renewed upon application by the railway undertaking and at intervals not exceeding five years. It must be fully or partly updated whenever the type or extent of the operation is substantially altered. The procedure to obtain this document is generally the same as it is for obtaining a business licence (articles 32 to 35 of the Railway Act in conjunction with the Decree on Business Licence and exemptions on the safety certificate.

The rail access agreement, which has to be concluded between all railway undertakings and the railway infrastructure manager, has to be renewed and concluded every year. Normally, after a change of control, the legal successor of the rail transport provider will take over its contractual obligations and rights automatically, by operation of law.

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

Most requirements apply to all railway undertakings, regardless of whether the owner is Dutch or foreign. It is an EU principle that railway undertakings shall be granted under equitable, transparent and non-discriminatory principles, the right of access to the railway infrastructure of all EU member states. National passenger transport may be restricted on certain routes.

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

The Minister of Infrastructure (according to article 5 of the Railway Act) and ProRail have the authority to approve the construction of railway infrastructure. Besides, the construction of railway infrastructure requires a project planning procedure including comprehensive strategic environment assessments.

Companies and natural persons can construct rail lines on their own property, for which certain municipal and other licences are required (eg, concerning environmental requirements), but these rail lines cannot connect to the main railway infrastructure without permission and assistance from ProRail and the state (eg, ProRail must provide technical information and grant licences, among other things). As privately owned plots of land are not very extensive in the Netherlands, the construction of private railways would be unpopular.

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?

Rail transport is regulated in several EU directives and regulations, in the Passenger Transport Act, the Railway Act and in other subsidiary legislation. Passenger transport is not only considered to be a business, but also a social responsibility. For that purpose the state governs the 'main' passenger transport by granting a concession to Dutch Railways (NS). During the concession period (10 years), discontinuing service is not an option for the rail transport company because it would be breaching the agreements made in the concession. For example, the minimum number of train stops per hour is agreed for large stations (from 6am to midnight at least two times per hour in each direction) and other stations (at least once per hour in both directions).

Local authorities grant regional concessions in public tenders to ensure regional passenger rail traffic. In these concessions the continuation of passenger railway services is also guaranteed. Discontinuation of service and even a reduction in the number of stops at a station would require lengthy discussions between the Minister (or the local authorities at the regional level) and the passenger railway undertaking.

ProRail acts on the basis of several EU regulations, the Railway Act, various Dutch decrees and regulations, and the management concession it has granted with the Minister of Infrastructure. Removing main rail infrastructure cannot be carried out without the permission of the Minister or at least ProRail. Almost all the main rail infrastructure in the Netherlands is owned by Railinfratrust, a state-owned company (whose shares are also owned by the state). Private companies such as Tata Steel with private railway infrastructure on their property can remove their own railway infrastructure. This concerns only a very small part of freight railways in the Netherlands. These wholly private freight railways are governed by the Decree on Special Railways.

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?

Only railway undertakings that hold a valid business licence, a valid safety certificate or test certificate, that are insured against risks related to statutory liability and that have concluded an access agreement with the network manager are allowed to provide railway services. For most rail passenger transport, a concession from the government is also obligatory.

If a company is convicted of a serious criminal offence, such as breaching the rules for transport of dangerous goods, the rail safety authority could withdraw its business licence. Without this licence, a railway undertaking is prohibited from providing rail services.

The Transport Inspectorate (the Inspectorate), as rail safety authority, also audits railway companies on a regular basis in relation to the requirements for these licences and certificates. When it appears that safety rules are not sufficiently respected by a company, the Inspectorate will give instructions to this company and intensify the audits. If after a certain period of time no significant improvement is made, the Inspectorate can withdraw the company's business licence or safety certificate. As of the moment of withdrawal, access to the railways of the Netherlands is denied for the company involved. The relevant stakeholders, such as the infrastructure manager, will be

informed about the withdrawal of the licence or safety certificate. The railway undertaking involved can ask the court of first instance for a provisional injunction to suspend the withdrawal.

ProRail is also authorised to stop the service of a rail transport provider. When no access agreement is concluded between the network manager and a railway undertaking, the railway undertaking no longer has access to the rail infrastructure, even if it had an access agreement in the past. This means that the network manager can also force a railway undertaking to stop its operations. Because of the monopolistic character of ProRail and the legal obligation for railway undertakings to obtain an access agreement with ProRail, a certain degree of contract coercion is assumed. In any case, a valid reason must exist for not concluding a contract. If no access agreement is concluded, the railway undertaking can initiate summary proceedings in civil court.

Concerning rail passenger transport, it is theoretically possible that the state or the local authority that granted the transport concession (which gives an exclusive right to the concessionaire) can also withdraw the concession, for example, when the transport company infringes several important obligations. As continuity of passenger transport is considered very important, this remedy is not applied quickly.

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?

No specific insolvency rules apply. All railway undertakings seeking to access rail infrastructure must prove that they are financially fit to obtain the necessary business licence. The Inspectorate verifies financial fitness by examining a railway undertaking's annual accounts or balance sheet, among other things. The licensing authority will not consider an undertaking to be financially fit if it has considerable or recurrent arrears of taxes or social security as a result of its activities. The Inspectorate may require the submission of an audit report and suitable documents from a bank, accountant or auditor to assess financial fitness. When a railway undertaking becomes insolvent or is declared bankrupt after it obtained a business licence, it no longer meets the requirements of the licence. There are no legal obligations to continue providing rail freight services if the transporter becomes insolvent (other than its contractual obligations).

A rail passenger transporter must meet its obligations during the concession period. If the concessionaire becomes insolvent during this period, it has to continue its transport obligations until the end of the concession period.

Owing to the covid-19 crisis, the transporters lost a lot of passengers and with that, a considerable part of their revenues. Although subsidies are provided to compensate a part of the loss, the companies had to reduce their costs. Most companies have reduced their timetables in consultation with their concessionaires. After the crisis, the rail transport providers perform their services at the levels agreed in the concession.

COMPETITION LAW

Competition rules

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

General competition rules are applicable to rail transport, for example regarding abuse of a dominant position. In addition, quite a few sector-specific rules are applicable to facilitate and promote competition. The railway policy of the European Union regards competition among railway undertakings as a key element to achieve efficient operations (Directive 91/440/EEC). Because the European and Netherlands railway markets were traditionally dominated by state enterprises with a total railway monopoly (both managerial and in operations), several supporting rules were necessary to enable a phased introduction of open access and a level playing field.

An important obligation is that member states ensure the separation of infrastructure management and transport operations (article 6 of Directive 2012/34/EU). This requires the organisation of distinct divisions within a single undertaking or that the infrastructure and transport services shall be managed by separate entities. The Netherlands chose the more rigorous option to separate the infrastructure manager and the (incumbent) railway company into two different entities in 2003 (Dutch Railways (NS) and ProRail).

To ensure transparency for all railway undertakings and non-discriminatory access to rail infrastructure and to rail service facilities, the network manager is obliged to publish all the information required to use access rights in a network statement. The Railway Act includes provisions to ensure that the procedures maintaining and amending licences for railway undertakings are transparent and in accordance with the principle of non-discrimination. Railway capacity has to be allocated in a fair and non-discriminatory manner (Decree on Railway Capacity Allocation). In addition, EU rules are implemented in the Railway Act to ensure that railway undertakings shall be granted, under equitable, non-discriminatory and transparent conditions, the right to access the railway infrastructure for the purpose of operating all types of rail freight services.

Regulator competition responsibilities

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

The sector-specific regulator is the Authority for Consumers & Markets (ACM), whose powers are not only based on acts containing provisions for enforcing competition law, but also acts and regulations that apply to the rail industry. If a company fails to comply with the rules, the ACM has various legal instruments at its disposal to force compliance. It also has the competence to impose fines for violations of railway law and competition law, which can be imposed on both the firm and the individuals involved. The ACM has used this power more than once in relation to the railway market.

In 2016, for example, it concluded that Dutch Railways (NS) had abused its dominant position during the tender process in 2014 for the public transport contract in Limburg (a southern province) and put its competitor at a disadvantage in this regional tender process. The ACM imposed a fine of €40.95 million on NS. On 27 June 2019, the District Court of Rotterdam annulled this decision and with it the fine. It argued that the ACM did not thoroughly investigate and establish whether under the terms of the NS-concession NS, for decades the national incumbent, actually can determine its market behaviour independently of the state and the end-users as its customers. There is indeed a lack of competition on the main passenger rail network, but nevertheless, regarding the District Court, the ACM should have investigated whether the negotiations with the state on the concession terms and the uncertainty about the extension of the concession after the (second) 10-year period serve as countervailing power for independent market behaviour by NS. For the District Court, this motivation was sufficient to annul the ACM fine. Additionally, the District Court considered the causal link between the behaviour of NS in the Limburg Tender on the one hand, and on the other hand, the potential abuse of a dominant position on the main passenger rail network market, including the effects on that market, were not sufficiently established. In June 2021, the Administrative High Court for Trade and Industry upheld the verdict of the District Court. This

decision shows that the burden of proof for the ACM in establishing an abuse of dominance infringement is remarkably high.

The ACM can do research on the matter of railway competition. In 2019 it has identified what risks exist for disrupting the level playing field in regional railway tender processes. ACM identified as a serious risk that not all the providers have access to the relevant data. Another risk can be loss-making bids by railway undertakings that have a dominant position and that also have an incentive to exclude a competitor from a tender process.

In the context of a tender process, providers of certain service facilities (stations, technical services and fuel plates) are obliged to inform the ACM of the intended charges for getting access to these facilities (article 68c, Railway Act). They have to submit their offers to ACM for approval before the tender begins. In this way, the ACM ensures transperancy about the rates of the facilities and thus a level playing field at the start of a tender. In May 2022, the ACM approved the conditions and charges for facilities provided by ProRail and by NS in the context of the tender for the concession Twente/Zutphen-Hengelo-Oldenzaal (Decision ACM/22/177202 and Decision ACM 22 / 177203).

The ACM plays also a role with regard to the access of railway infrastructure, service facilities and rail-related services supplied in those facilities. The allocation of train paths in these facilities has to meet the requirements set out in Regulation (EU) 2017/2177. In the Netherlands, ProRail is the central operator of most service facilities. It has to operate transparent and non-discriminatory. Where a request for access to service facilities cannot be accommodated after coordination, ProRail shall indicate possible alternatives. ACM supervises the correct application of the rules. In 2020 and 2021, Lineas, a rail freight transporter, did not receive the capacity requested in certain important service facilities located in the port of Rotterdam. Lineas complained about the proceeding, the lack of transparency and a lack of possible alternatives, which ProRail had to provide, but failed to do. In February 2022, ACM declared the complaint on most points well founded. ProRail had not acted sufficiently transparent, it had not applied properly the priority criteria and it had discriminated against Lineas (case number ACM/21/052117). The decision thus gives direction to the way ProRail should deal with requests for access in the future.

Competition assessments

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

The abuse of a dominant position is an important standard. Fair and non-discriminatory treatment, for example by ProRail, is also a main standard. An example to illustrate this: passenger railway undertakings complained about the tariff for the use of railway infrastructure. They felt it did not reflect the (lower) costs connected with the lighter trains they usually use, in comparison with the heavier trains used by NS and rail freight transporters. The ACM concluded that the network manager had infringed the principles of fair and non-discriminatory treatment in regard to this aspect of the tariff. Consequently, ProRail reduced the tariff for lighter trains and, at the instruction of the ACM, reorganised the weight classes, taking these lighter trains into account.

Another example concerns the capacity allocation on the 'Valley Line' between two cities in the east of the Netherlands. By winning the concession for this line, rail passenger transporter Connexxion entered the rail transport market for the first time in 2007. The ACM established that ProRail had not treated Connexxion's request in the same way as it had NS's request, and that it had unlawfully given priority to the latter. ProRail was fined €776,000 (see www.acm.nl/en/publications/publication/6347/NMa-fines-ProRail-for-violating-Dutch-Railway-Act).

The decision of the ACM, and so the fine, were annulled. First by the District Court of Rotterdam, finally by the Trade & Industry Appeals Tribunal (see ECLI:NL:CBB:2012:BW2273).

In addition to the above-mentioned standards, the European Regulation (EU) 2016 / 2338 concerning the opening of the market for domestic passenger services by rail, sets certain standards, for example, 'performance requirements'. These requirements have to cover punctuality of services, frequency of train operations, quality of rolling stock and transport capacity for passengers. In the open-access regime starting in 2021, rail passenger transporters other than the concession holders are allowed to operate train services in the concession areas. One important criterion is that the new service cannot jeopardise the economic equilibrium of an existing concession. Such could be the case if, for example, a concession's profitability is substantially reduced because the new train service attracts too many passengers from the existing concession holder (see https://www.acm.nl/en/publications/acm-has-set-method-assessing-effects-new-train-services-concessions).

PRICE REGULATION

Types of regulation

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

Rail freight transporters can set their own prices, which are not regulated.

All railway undertakings have to pay a cost-based rail access charge to the rail infrastructure manager, ProRail, that covers the main services needed to run a train. ProRail must use a clear method for allocating costs for its services of this minimum access package. This method describes which costs are allocated to the services in the minimum access package (article 30(8) Directive 2012/34/EU). The method must be approved by the Authority for Consumers & Markets (ACM). In April 2021, the ACM approved ProRail's method for 2023–2025.

There is no obligation to include these costs in the tariff that is charged to railway customers.

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

Prices charged by rail carriers for passenger transport are part of the deal of their transport concessions.

All rail passenger transporters who perform a public rail concession, have to consult with consumer organisations about intended tariff changes regarding travel rights. This follows from article 31 of the Passenger Transport Act.

For the main part of the rail network the annual rate increase is limited for 'protected travel rights' (article 54 of the passenger transport concession from the Minister of Infrastructure to Dutch Railways (NS)). Protected travel rights are the rights of travellers with a second-class single train ticket and certain domestic second-class subscriptions.

The other passenger train companies Arriva, Connexxion, QBuzz and Keolis, operating on the publicly tendered regional rail lines in the Netherlands, share a common tariff system with NS.

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

Prices for rail freight transport are negotiated between the rail freight companies and their clients. There are no legally fixed prices or a cap on prices for rail freight transport.

The price increases for 'protected' rail passenger transport tickets (which enable a passenger to travel across all rail lines in the Netherlands) are limited in the passenger transport concessions and are subject to feedback from advisory consumer organisations. The concessionaire has to ask for feedback from consumer organisations at least once a year (article 31 of the Passenger Transport Act). It can ignore the advice of the consumer organisations, but must explain its motivation for doing so.

A passenger can file a complaint about tariffs to the train operating company and to a specialised ombudsman for better public transport, OV Ombudsman. These procedures are free and there are no specific instructions for making a complaint. In addition, a passenger can submit a complaint to a civil court.

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

There is no rule requiring an undertaking to use uniform prices in rail freight transport. However, the prices have to be equal for all passengers who are requesting the same service.

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 entity controlling railway infrastructure (ProRail) is separated from entities that are operating on the infrastructure. The network manager must ensure that infrastructure capacity is allocated in a fair and non-discriminatory manner and in accordance with EU law (article 39 of Directive 2012/34/EU). This principle is implemented in article 27, section 1 of the Railway Act and specified in the Regulation concerning the allocation of railway capacity on main railways.

Exceptions apply on private railway infrastructure located on company territories, not freely accessible for the public. An example forms several service locations of enterprises for maintenance of railway vehicles, such as Shunter. This is regulated in the Decree for special railway infrastructure.

Access pricing

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

The infrastructure manager has to supply the minimum access package to all railway undertakings in a non-discriminatory manner. Part of this package concerns the handling of requests for rail infrastructure capacity and the right to utilise the capacity that is granted (article 13, section 1 and Annex II of Directive 2012/34/EU, implemented in article 62 of the Railway Act). Railway undertakings have to pay for the minimum access package – the track access charge (TAC) – which is determined and collected by the network managers. This TAC reflects only the costs directly incurred by the train service. These are the costs that ProRail 'can objectively and robustly demonstrate that they are triggered directly by the operation of the train service' (article 31, section 3 of Directive 2012/34/EU and Regulation (EU) 2015/909). Over the past decade, there has been a lot of discussion about the calculation of these costs. In the Netherlands, several proceedings are being conducted about the direct costs that ProRail wanted to charge railway undertakings (see https://www.acm.nl/en/publications/publication/6336/NMa-ProRail-must-lower-rail-tariff-charged-to-NS). The same applies for other European countries. The European Commission wanted to clarify which elements can be included in the TAC and which cannot. To this end, the Commission has set out the modalities for the calculation of these costs in Regulation (EU) No. 2015/909.

The price for granting access to the network has to be addressed in the access agreement between ProRail and the railway undertaking, which these parties have to renew and conclude every year (article 59, section 1 of the Railway Act).

The ACM should be able to check whether the different charging principles are applied consistently with the information ProRail provided to them. Therefore, Annex IV of Directive 2012/34/EU requires the infrastructure manager to specify in the network statement the methodology, rules and, where applicable, scales as regards both costs and charges. At the request of four passenger rail transport companies, the Authority for Consumers & Markets (ACM) examined the TAC for 2015 and 2016, and ruled that the information provided by ProRail was not sufficient (see https://www.acm.nl/en/publications/publication/14576/ProRail-is-to-adjust-its-train-tariffs). Based on article 63 (2) of the Railway Act and the Decree implementing Directive 2012/34/EU (State Journal 2015, 461), the rail access charge must be approved by the ACM prior to its application. In 2018, the ACM approved ProRail's method for 2020–2022 and, in April 2021, it approved the method for 2023–2025.

Unfortunately, railway undertakings could not rely on this approved method. In May 2022, ProRail requested permission to index the costs for 2022 and 2023 in a different way that leads to an indexation of at least 7.5 per cent. ProRail's request was without any questions allowed by ACM.

Competitor access

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

To obtain network access, a railway undertaking needs a company licence, a safety certificate, an access agreement with the network manager and liability insurance. The conditions for an undertaking to obtain the licence and safety certificate are harmonised in the European Union by Directive 95/18/EC and its subsequent legislation, including Directive 2012/34/EU, which is amended by Directive (EU) 2016/2370. These conditions are implemented in articles 28 to 31 (on company licences) and in articles 32 to 35 (on safety certificates) of the Railway Act. The requirements for obtaining the company licence and safety certificate are outlined in a subsidiary regulation (State Journal No. 661, 2004). In addition, it is important that rail vehicles (eg, locomotives, wagons) can be used throughout the European Union without technical or administrative impediments. To increase competition and to facilitate cross-border activities from railway undertakings, EU directives set out standards to reach these goals. The network manager, in a non-discriminatory manner, must supply all railway undertakings that request access to the network with the minimum access package. The price for this minimum access package is regulated to ensure fair treatment.

To increase competition, open access was introduced for domestic transport. This means that, in general, concessions are no longer obliged to carry out railway passenger transport. Any railway undertaking that meets the requirements mentioned above, has, in principle, this open access in the whole European railway area. The further opening of the market for domestic passenger transport services by rail is regulated by Directive 2012/34/EU and Regulation (EU) 2016/2338 and (EU) 2018/1795.

The open-access politics stimulates rail transport. In June 2021, the ACM received several notifications from Arriva, a rail passenger transporter, about its intention to offer new passenger transport services on national railway tracks in the Netherlands. Two of these notifications have Schiphol, the largest airport in the Netherlands where

NS is traditionally the only rail transporter, as their destination. The right of access is limited by a public service contract (granted to NS), which partly covers the same route or an alternative route as provided in article 11(1) of Directive 2012/34. At the request of the Dutch Ministry of Infrastructure, the ACM had to decide whether or not the economic equilibrium of the public service contract granted to NS would be compromised by the new proposed services. This was the first time ACM carried out this assessment. In September 2021, ACM decided that the services requested by Arriva do not have a substantial negative impact on the profit margin of the public services contract of the main railway network, exploited by NS. ACM has therefore given permission to Arriva for the operation of three new train services.

The international subsidiary of NS, NS International, also notified various new rail passenger services (all international, with destinations abroad, but sometimes with intermediate stops in the Netherlands). A recent example is European Sleeper Coöperatie, a railway undertaking dedicated to night trains on international tracks that notified trips from Belgium via the Netherlands to the Czech Republic and Poland.

SERVICE STANDARDS

Service delivery

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

There is no legal obligation for passenger train operating companies or rail freight transporters to serve all customers who request service. For passengers, the right to be transported existed until 1999. This changed with the entry into force of the Uniform Rules concerning the Contract of International Carriage of Passengers by Rail (CIV) and the Protocol of 3 June 1999 for the Modification of the Convention concerning International Carriage by Rail (COTIF). The general terms and conditions of a rail transport undertaking may provide that a passenger who refuses to pay the carriage charge (or the surcharge upon demand if he or she did not buy a ticket before the start of his or her journey), may be required to discontinue his or her journey. The same applies for passengers that present a danger for safety and the good functioning of the operations or for the safety of other passengers, and for passengers who inconvenience other passengers in an intolerable manner (article 9, COTIF-CIV). The Passenger Transport Act codifies mostly the same rules for Dutch rail passenger transport.

Although there is no legal obligation to serve all customers who request service, railway undertakings have to respect the principle of non-discrimination regarding their passengers. A passenger can file a complaint with the Human Rights Committee when this principle is infringed. An example: a passenger complained that she was discriminated by Dutch Railways (NS) on the basis of disability or chronic illness. During works on the railway infrastructure, train passengers had to change from a train to a bus. Due to her disability, it was very difficult to get on the bus. The Human Rights Committee judged that NS indeed had discriminated on the aforementioned basis. The rules prescribe that a passenger has to be informed in advance about the accessibility of public transport facilities. NS had provided insufficient information in advance about the possible inaccessibility of the bus, which replaced the train (Human Rights Committee, judgment 2021-86).

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

Train operating companies are required to meet a number of legal and regulatory standards in the form of international conventions, European Union law and national legislation, which increasingly incorporate the provisions of international conventions and EU law. The transport concessions also contain additional obligations to serve passengers.

International rail passenger transport in most EU countries, including the Netherlands, has for almost 130 years been dominated by conventions agreed by the Intergovernmental Organisation for International Carriage by Rail. This organisation developed international service standards for passengers for cross-border rail traffic in Europe, parts of Asia and the Maghreb. Most relevant is the CIV, which forms attachment A of COTIF (www.cit-rail.org/secure-media/files/documentation_de/passenger/civ/civ1999-f-d-e.pdf?cid=21961). COTIF regulates in particular the private law aspects of rail passenger transport, and most of its rules are mandatory. For example, a passenger can carry luggage, even living animals, if he or she takes care of this luggage. Important liability principles are also codified. In principle, the carrier shall be liable for the loss or damage resulting from the death of, personal injury to, 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 (articles 26 to 31 of the CIV). The passenger is entitled to be compensated for loss or damage resulting from the fact that, by reason of cancellation, the late running of a train or a missed connection, his or her journey cannot be continued on the same day.

In addition to COTIF, EU law also establishes service standards. Regulation (EC) No. 1371/2007 of the European Parliament and of the Council of 23 October 2007 (Regulation 1371/2007) aims to safeguard users' rights for rail passengers and to improve the quality and effectiveness of rail passenger services to increase the share of rail transport in relation to other modes of transport. The CIV is fully incorporated into Regulation 1371/2007 as Annex 1. Service standards in Regulation 1371/2007 include the rights of users to receive information regarding the train service before as well as during the journey, and it strengthens the rights of disabled persons and persons with reduced mobility (whether caused by disability, age or any other factor) to have opportunities for rail travel comparable to those of other citizens. It also strengthened rights of compensation and assistance in the event of delay, missed connection or cancellation of a service.

As a result of the direct effect of Regulation 1371/2007 in the Netherlands, the CIV became increasingly important for national rail passenger journeys. The rules concerning national transport of passengers in Dutch civil law (article 8:100-116a of the Civil Code) are only relevant insofar as the CIV allows for national rules, but, in fact, the rules in the Civil Code mainly became important for other modes of transport such as national buses and the metro.

Service standards are expanded on in the transport concessions. Minimum service levels are agreed; for example, the rail passenger transporter has to serve all stations on business days from 6am to 8pm two times per hour in each direction and it must improve its performance in regard to, among other things, the following:

- the availability of seats for passengers;
- the comfort of passengers at the stations and on the trains;
- the cleanliness of trains and stations, including toilets;
- the accessibility of the trains to all passengers; and
- having a user-friendly and accessible public transport payment system.

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?

All concessions contain several quality requirements. The performance of the railway undertaking with regard to these requirements

is evaluated in midterm reviews and at the end of a concession period. The same goes for the concession to the railway manager, ProRail. Furthermore, the performances are internationally benchmarked.

On the level of passengers, article 12 of the Passenger Transport Act provides that each transport company has to establish an arbitration committee. Furthermore, the passenger has the option to submit a complaint to the transport undertaking itself. Any complaint concerning rail transport can be handled by this committee. The fee for each complaint is €27.50. This amount will be paid back if the committee rules in favour of the passenger.

In addition, OV Ombudsman hears complaints regarding public transport. It handles complaints that public transport companies have not dealt with or resolved to the satisfaction of the passenger, and, where necessary, it will mediate when resolving these complaints. OV Ombudsman is considered to be very approachable, and does not present any financial or other barriers. It cannot, however, force a passenger transport company to enter into a mediation process, or to follow up its recommendations. One of OV Ombudsman's strengths is that it is has the competence to publicly pillory transport companies that have failed to perform well.

Passengers or passenger organisations can also bring a lawsuit to the civil courts. The rules of civil proceedings in the Netherlands are applicable. This means, among other things, that the complaining party has to be represented by a barrister, and has to pay court and counsel fees. For example, a lawsuit was initiated in 2017 by a traveller who complained that he did not have a seat during his journeys with NS because the trains were frequently overcrowded and he was forced to stand. The judge rejected his claim for a seat with references not only to the general terms and conditions of NS, but also to the Dutch Civil Code and Regulation 1371/2007: a passenger has (in principle) the right to be transported but does not have the right to a seat during his or her journey (District Court of Midden-Nederland, Utrecht, 6 May 2018).

SAFETY REGULATION

Types of regulation

25 | How is rail safety regulated?

Rail safety is regulated at several levels, the first level being the railway company and the network manager. All railway undertakings must have a company licence. To obtain this, a company is obliged to have a safety certificate.

The network manager must have a concession for network management from the Ministry of Infrastructure. Like railway undertakings, the network manager is obliged to have a safety certificate that has to meet several safety standards (article 16a of the Railway Act, Directive (EC) No. 2016/798 and Commission Delegated Regulation (EU) 2018/762 establishing common safety management system).

Railway infrastructure and all rail vehicles must also meet certain safety standards. These are set out in Directives (EU) 2016/797 and (EU) 2016/798 on the safety and interoperability of the rail system within the European Community, and in technical specifications for interoperability (TSI). The TSI set all the conditions that railway infrastructure and rail vehicles must adhere to, and the procedure to be followed in assessing conformity. Every rail constituent must also undergo the conformity assessment and suitability assessment for the use indicated in the TSI, and have the corresponding certificate (articles 36 to 47 of the Railway Act and its implementing Regulations).

After several level crossing accidents and related fatalities, the safety of railway crossings that are not actively protected is a hot issue. An amendment to the Railway Act to increase the safety at unsecured level crossings is being prepared (TK 2022, 29893, No. 257). The proposal aims to regulate a ministerial designation power with which measures can be taken for unsecured level crossings. The amendment is pending.

Finally, rail personnel with a position related to rail safety, such as the train driver and the shunter, must undergo training, and complete physical and psychological tests (articles 49 to 53 Railway Act and its implementing Regulations).

Competent body

26 | What body has responsibility for regulating rail safety?

The Transport Inspectorate (the Inspectorate) monitors and encourages compliance with both national and European railway legislation and regulations in favour of safe and sustainable railway transport. Its tasks, both preventive and reactive, are based on articles 55 and 56 of Directive 2012/34/EU. The supervision carried out by the Inspectorate has to meet the standards set out in the Railway Act and, among others, Directive 2016/798/EU and the Commission Delegated Regulation (EU) 2018/761.

For vehicles, the role of the European Railway Agency is increased in order to make the issuing of single safety certificates to railway undertakings more efficient and impartial. Therefore, the European Agency for Railways is assigned a central role. If the area of operation is limited to one member state, the railway undertaking concerned now has the possibility of choosing whether to submit its application for a single safety certificate to the (national) Inspectorate or to the Agency. Directive (EU) 2016/798 is to provide for this and the requirements are worked out in Regulation (EU) 2016/796.

Manufacturing regulations

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

The manufacture of rail equipment is regulated in detail in Directive 2016/798/EU on railway safety, Directive 2016/797/EU on the interoperability of railway systems and in several TSI. Each subsystem covered by TSI needs to be controlled and certified by a specialised notified body before it can be used for the (further) construction of rail equipment. The manufacturer confirms with an EC declaration of verification that the vehicle complies with the specifications. Thereafter the railway vehicle (as a whole) has to be licensed by the European Railway Agency or by the national safety authority (the Inspectorate). Articles 26k–26t of the Railway Act and the Regulation on rail vehicle assessment 2020 incorporate these rules into the laws of the Netherlands.

Maintenance rules

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

The maintenance of railway infrastructure is regulated by EU Directives and by TSI. The rules are generally the same as for the construction of railway vehicles.

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

Each railway vehicle must have a registered entity in charge of maintenance (ECM), according to article 36, section 1 of the Railway Act and article 14 of Directive 2016/798/EU. The ECM must be certified for maintenance by the Inspectorate. To obtain this certificate, the ECM has to have several qualifications specified in Directive 2016/789, which have been implemented into Dutch law (article 37 Railway Act). The ECM must ensure that the vehicle is in a safe condition and maintained in accordance with international standards. In Regulation (EU) No. 1078/2012, a common safety method is set out for monitoring, which should be

applied by the ECM. It is forbidden to have maintenance performed by persons others then natural persons or legal entities recognised by the Minister (article 37 section 1 Railway Act).

Accident investigations

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

A railway undertaking involved in an accident has to report all railway incidents and accidents to the Inspectorate without delay. In many cases, the Inspectorate will start an investigation and publish the outcome in a public report. If it deems it necessary, it will take enforcement measures. In addition to the Inspectorate, the Dutch Safety Board can investigate railway accidents. It then operates as a research institute as provided for in Directive 2016/798/EU. When conducting research on accidents, there is always an emphasis on safety to avoid recurrence.

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?

In general, the liability framework outlined in the Civil Code is applicable.

Railway undertakings have to be insured for liability with a legal minimum of €10 million per event (article 55 Railway Act in conjunction with article 7 of the Decree on the Business Licence and exemptions on the Safety Certificate. Liability towards rail passengers is limited (article 8:85 of the Civil Code).

The network manager must conclude an access agreement with each railway undertaking. The network manager's terms and conditions are attached to this agreement, and include several liability clauses. These clauses not only regulate the relationship between the infrastructure manager and the contracting railway undertaking, but also the liability between railway undertakings themselves (third-party clause). It regulates that a railway undertaking that has an access agreement with the infrastructure manager can rely on the liability regime in the general terms and conditions of this access agreement not only towards its contract partner (the network manager) but also to the other railway undertakings that concluded an access agreement with the network manager.

There is a more specific contract for the use of wagons, the General Contract of Use for Wagons (GCU). This is a multilateral contract based on the Contract of International Carriage by Rail (COTIF), Appendix D to COTIF (Uniform Rules concerning Contracts of Use of Vehicles in International Rail Traffic (CUV)). The GCU sets out the conditions for the provisions of wagons for use as a means of transport by railway undertakings in national and international traffic. Railway undertakings are not obliged to participate. Since the start in 2006, the GCU has grown to a network of more than 600 signatories with around 600,000 wagons declared in the GCU-database. Most of the railfreight undertakings in the Netherlands are GCU-signatories. The GCU has its own liability regime with clauses for the loss and damage of wagons and damage caused by wagons. It also regulates liability for staff and other persons.

In 2019 the District Court of Rotterdam judged that a railway undertaking was not liable for damage of wagons under the GCU-regime, because it did not have 'use and custody' of the wagon – the railway undertaking did not accept the wagon, but, on the contrary, refused custody and use, because the wagon was already seriously damaged before use.

Liability was also rejected in a case in which the freight transporter had no custody of the wagon at the time of the railway accident. Therefore it could not be qualified as a railway undertaking that had custody, and custody is a condition for liability in the regime of the GCU.

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 concessionaire of the main part of Dutch passenger rail transport (NS) has to pay for the exclusive concession it received without any tendering from the state (article 66 of the concession). Nevertheless, the Dutch State provided NS in 2019 with a subsidy of €6.7 to establish an international train connection from Amsterdam to Vienna and Innsbruck, the 'Nightjet'. This connection was a (not-tendered) extension of the concession earlier accepted by NS and the subsidy would be necessary to cover the operating deficit. Practically all other rail operators active in the Netherlands filed an appeal against this state of affairs, but the Trade & Industry Appeals Tribunal decided in May 2022 that the subsidy and the expansion of the concession were not unlawful (see ECLI:NL:CBB:2022:234).

The passenger transporters that won the concessions for regional rail passenger transport receive financial support from the regional governments. Generally, regional passenger transport is not very profitable; however, because of the importance of having good passenger transport throughout the country, it is subsidised.

Rail freight transporters operate, in principle, without any financial support from the government and in competition with each other. Nevertheless, the Track Access Charge is sometimes subsidised by the state to stimulate rail freight transport and to create a more level playing field with, for example, inland shipping, which is a form of transport that can use the main waterways without any charge.

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?

With the exception of some financial support related to regional concessions and, sometimes, to decrease the Track Access Charge, there is no financial support to rail transport companies.

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?

Standard labour legislation applies, as well as several specialised national decrees. In the standard labour acts, general issues are set down, for example, job protection, employment conditions, working hours and salary standards. The specialised rail decrees cover requirements regarding typical railway positions, such as the role of the train driver, the shunter and the rail wagon inspector. The requirements relate to the minimum age, to the physical and psychological health of rail personnel, and the knowledge and experience required for the different positions.

ENVIRONMENTAL REGULATION

Applicable environmental laws

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

The Act concerning transport of dangerous goods has a specialised Decree for rail transport of dangerous goods (State Gazette No. 250, 1998, recently updated by State Gazette No. 23,654, 2018). In general, the standard environmental laws apply, principally the Environmental Act. These acts contain, among other things, standards for noise and vibration emissions that railway undertakings have to meet.

UPDATE AND TRENDS

Key developments of the past year

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

The transition of the network manager ProRail, until now a purely private enterprise, into an independent administrative body is prepared. The political idea is that it will be easier for the Minister to monitor the activities and finances of ProRail when it has become an independent administrative body. Sector-wide, there is resistance to this transition. Due to the covid-19 pandemic, the conversion of ProRail has been delayed.

Starting in 2021, railway undertakings can offer international and domestic train services without a concession, when they meet certain standards. This right to open access follows European rules. In the Netherlands, the main railway network, which is active on the basis of a direct granted concession, is exempted from open access through 2025.

The Minister of Transport is preparing a new Railway Act. Railway law is now dispersed over two codes, 18 orders in council and 14 ministerial regulations. The Minister proposes a recodification in which all these acts and decrees are combined in a more integrated and modernised framework. On 1 April 2021, the draft bill was presented in an internet consultation. Eighteen parties have responded, including several railway undertakings. The Ministry is processing the responses, but this recodification project is also delayed.

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GENERAL

Industry structure

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

Public rail transport in Singapore consists of a metro system known as the mass rapid transit (MRT) system as well as various light rail transit (LRT) lines (collectively, the Rapid Transit Systems).

Previously, the operating assets of the Rapid Transit Systems (such as trains, signalling systems and maintenance equipment) were owned by private rail operators such as SMRT Corporation Limited (SMRT) and SBS Transit Limited (SBS). In a move to ensure timely investments in capacity expansion and the replacement and upgrading of the Rapid Transit Systems, the Singapore government implemented the New Rail Financing Framework (NRFF), which required the transfer of ownership of all rail operating assets to the public sector (ie, the Land Transport Authority (LTA)).

Currently, all existing Rapid Transit Systems rail lines now operate under the NRFF, so that the LTA owns all such rail operating assets.

The operation of the rail assets and systems continue to be carried out by private rail operators, SMRT and SBS, under licences issued by the LTA. The private rail operators are also responsible for the maintenance of these operating assets with maintenance requirements prescribed by the LTA.

Apart from the planned extensions of the existing MRT Lines, upcoming additions to the MRT system include the development of the Thomson-East Coast Line, the Jurong Region Line and the Cross Island Line.

In addition, there is a shuttle train service that links the Woodlands Train Checkpoint in Singapore with Johor Bahru Sentral in Malaysia known as the Tebrau Shuttle (on the KTM Line). Keretapi Tanah Melayu (KTM) owns and operates the KTM Line. KTM is owned by the government of Malaysia. There are plans to develop a Singapore to Johor Bahru rapid transit system from Woodlands North Station to Bukit Chagar station, to ease congestion on the causeway between Singapore and Johor Bahru.

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 Singapore government, through the LTA, has a direct role in providing rail transport services as the owner of all operating assets of the Rapid Transit Systems. The LTA makes direct decisions in respect of building up, replacement and upgrading of the Rapid Transit Systems. The LTA is also 'operator of last resort' under the Rapid Transit Systems Act 1995 (Chapter 263A) (the RTS Act) to operate any rapid transit system in the event there is, for any reason, no licensee to operate the system.

As regards ownership interests in private rail operators, the Singapore government owns (through its sovereign wealth fund Temasek Holdings) a 100 per cent interest in SMRT. At the time of writing, SBS Transit is a publicly listed company on the Singapore Stock Exchange.

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

To the best of our knowledge, there are currently no freight rail operations in Singapore.

Regulatory bodies

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

The main statutes governing rail transport are the RTS Act, the Railways Act 1905 (Chapter 263) (the Railways Act) and the Public Transport Council Act 1987 (the PTC) (Chapter 259B), and their relevant subsidiary legislation. The Rapid Transit Systems are governed by the RTS Act. The Railways Act does not apply to the LTA or the Rapid Transit Systems as its application is specifically excluded to the Rapid Transit System, under the Railway Act itself.

The construction, maintenance, operation and regulation of cross-border railways between Singapore and Malaysia in accordance with bilateral railway agreements are governed by the Cross-Border Railways Act 2018 (No. 21 of 2018).

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?

The Rapid Transit Systems Act (the RTS Act) prohibits the operation of any rapid transit system (subject to the RTS Act) by any person (other than the Land Transport Authority (LTA)) unless that person is licensed by the LTA to do so.

Interested applicants will typically have to participate in an invitation to tender conducted by the LTA for the right to operate a rapid transit system. An applicant shall be required to state the amount that it is willing to pay for the grant of a licence (cash bid). The cash bid shall be payable if the applicant is granted a licence (the operator licence).

The LTA will then grant the selected company an operator licence to operate the relevant rapid transit system for the period specified in the licence unless the licence has been revoked, cancelled or suspended.

The granting of an operator licence is discretionary. The LTA will have regard to the financial standing of the applicant and its ability to maintain an adequate, satisfactory, safe and efficient service.

The proposed licensee will also have to pay:

- a licence fee, which is prescribed under the Rapid Transit Systems (Fees) Regulations; and
- a licence charge, which is determined by the LTA and specified in the licence after taking the following into account:
  - the relative viability of operating and maintaining the relevant rapid transit system in the network of rapid transit systems;
  - the long-term operational and maintenance needs of the railway network and the long-term sustainability of each rapid transit system comprised in the network; and
  - the benefits and burdens that the operation and maintenance of the relevant rapid transit system are likely to bring to and impose on the network.

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

In relation to the Rapid Transit Systems, this will depend on the conditions imposed in the relevant operator licence granted to the rail operator.

The RTS Act entitles the LTA to, as part of the issuance of the relevant operator licence, impose conditions as it thinks fit, including such conditions relating to the control and restriction, directly or indirectly, on the creation, holding and disposal of shares in the licensee or of interests in the undertaking of the licensee.

Separately, the RTS Act also prohibits the transfer or assignment of any operator licence unless the licence contains a condition authorising the transfer or assignment and the LTA consents in writing to the transfer or assignment.

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

There are no express prohibitions against the ownership of interests by foreign entities in rail transport companies.

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

Generally, the construction of new railway lines for the Rapid Transit Systems is undertaken by the LTA (through its contractors).

The LTA is entitled to prepare plans and maps to delineate areas of land that may be acquired for the purposes of and incidental to any railway (including the construction of new railways). These will be prepared in accordance with the Planning Act 1998 (Chapter 232).

The RTS Act further entitles the LTA (or any person authorised by the LTA) to do the following:

- in relation to state land, at any reasonable time, to enter upon and subject to the approval of the Collector of Land Revenue, lay, construct and operate a railway on, under or over such state land; and
- in relation to land that is not state land but is within or adjoining the railway area, to enter upon and take possession of any land to lay and construct a railway. The LTA is, however, required to give a minimum of two months' notice (to the relevant owner and occupier of the relevant land) of its intention to exercise such right.

The construction of new railways that are not part of the Rapid Transit Systems will be governed by the Railways Act, which will require the approval of the President of Singapore.

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?

Regarding the voluntary discontinuation of services for the Rapid Transit Systems, this is likely to be dealt with in the conditions of the operator licence that is issued to the relevant rail transport company by the Land Transport Authority (LTA). In particular, the LTA may impose conditions that must be complied with before the licence can be transferred or assigned. The Rapid Transit Systems Act (the RTS Act) also prohibits the surrendering of any operator licence without the consent in writing of the LTA, and any surrender or purported surrender of a licence shall be void if the consent is not obtained.

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 RTS Act prescribes the grounds on which the LTA may, by notice in writing (the notice), suspend or cancel an operator licence. These grounds include if the licensee:

- contravenes or fails to comply with, or fails to secure the compliance of its employees, agents or contractors with, any conditions of its licence to operate any rapid transit system or with any provision of the RTS Act that is applicable to the licensee and for which no criminal penalty is prescribed for a contravention of the provision;
- is convicted of any offence under the RTS Act;
- in the opinion of the LTA, fails or is likely to fail to provide and maintain an adequate, safe and satisfactory service;
- fails to comply with any code of practice issued or approved by the LTA;
- fails to comply with any direction given by the LTA;
- fails to comply with any provisional order;
- goes into compulsory or voluntary liquidation other than for the purpose of reconstruction or amalgamation; or
- makes any assignment to, or composition with, its creditors.

If the licensee is aggrieved by the LTA's decision to suspend or cancel the operator licence, it may appeal to the Minister of Transport (the Minister) within 14 days of receipt of the notice.

The Minister may then confirm, vary or reverse any decision of the LTA or amend any licence condition, code of practice or direction affecting the licensee. Such a decision in any appeal is final.

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 insolvency rules under the law will continue to apply to rail transport providers (subject to the RTS Act) to the extent that they are not excluded or varied by the provisions of the RTS Act.

The RTS Act provides for certain specific provisions that may apply to a rapid transit system licensee (which is a company) in cases relating to insolvency. For example, the RTS Act provides that:

- such licensee shall not be wound up voluntarily without the consent of the LTA;
- no judicial management order under Part 7 of the Insolvency, Restructuring and Dissolution Act 2018 (Part 7) (the IRD Act) may be made in relation to such licensee;
- no step shall be taken by any person to enforce any security over the licensee's property except where that person has served 14 days' notice of his or her intention to take that step on the LTA;
- the LTA shall be a party to any proceedings under the IRD Act relating to the winding up of the affairs of such licensee; and
- no application under section 210 of the Companies Act 1967 or section 71 of the IRD Act may be made in relation to the licensee, unless that person has served 14 days' written notice of that person's intention to make the application on the LTA.

Additionally, the LTA may make an application to the Minister for a railway administration order to be made in relation to a licensee on (among others) the grounds that the licensee is or is likely to be unable to pay its debts. The express purposes of such an order are broad-ranging and include, without limitation:

- ensuring the safety, security and continuity of the supply of railway passenger services and facilities;
- the survival of the licensee, or the whole or part of its undertaking as a going concern; and
- for the transfer to another person or two or more different persons, as a going concern, of so much of the licensee's undertaking as it is necessary to transfer to ensure that the functions that have been vested in the licensee may be properly carried out.

COMPETITION LAW

Competition rules

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

The Competition Act 2004 (Chapter 50B) (the Competition Act) expressly excludes the application of the following prohibitions to the supply of rail services by any person licensed and regulated under the Rapid Transit Systems (the RTS Act):

- agreements, decisions or concerted practices having the object or effect of preventing, restricting or distorting competition within Singapore;
- conduct that amounts to the abuse of a dominant position in any market in Singapore; and
- mergers that have resulted or may result in a substantial lessening of competition within any market in Singapore.

Regulator competition responsibilities

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

There are no specific duties relating to competition law imposed on the Land Transport Authority.

Competition assessments

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

We are not aware of any specific applicable standards for assessing the competitive effect of a transaction involving rail transport companies. The general principles set out in the Competition Act will apply, subject to specific exclusions stipulated in respect of persons licensed and regulated under the RTS Act.

PRICE REGULATION

Types of regulation

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

Even though there are currently no rail carriers for freight transport in Singapore, the Railways Act provides for the ability of a railway administration (subject to the approval of the Minister) to make general rules to fix the charges for the conveyance of, among other things, goods, animals and vehicles.

For the purposes of the Railways Act, railway administration means the person appointed by the governments of Singapore or Malaysia to manage the railway and in the case of a railway administered by a railway company, the railway company.

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

In respect of the Rapid Transit Systems, a rail operator may submit an application for train fare review for the approval of the Public Transport Council (PTC) (the Council) established under the PTC Act. In assessing the application, the Council will consider, inter alia:

- the need for the applicant to remain financially viable;
- the applicable fare adjustment formula under the PTC Act;
- the elderly and students;
- facilitating integrated and seamless travel by passengers using more than one transport service;
- facilitating the integration of bus fares and train fares;
- the need to optimise the bus and rapid transit system network capacity to ensure economic, financial and technical viability of the public bus system and the rapid transit system;
- whether increases in bus fares or train fares could cause financial hardship to commuters; and
- the need for public interest to be safeguarded.

The Council may, on its own initiative, call for a review of the fares at any time (PTC Act S 48(1)(a)(iii)).

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

There are no procedures under law for passengers or freight shippers to challenge price levels.

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

There is no express requirement that rail transport companies must charge similar prices to all passengers who are requesting similar services. In fact, a pricing policy that applies different pricing to different categories of passengers requesting a similar service is adopted in practice (eg, concessions are given to certain passengers such as the elderly and students).

Applications are made to the Council for approval of the price of or the pricing policy for train fares to be charged. In considering any application for approval, the Council is required to take into account the need for fare concessions to address the interests of certain passengers, such as the elderly and students.

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 right to operate any railway within the Rapid Transit Systems will require an operator licence issued by the Land Transport Authority at its discretion.

Access pricing

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

The proposed licensee will have to pay a cash bid (which it will propose in its application for the operator licence), a licence fee (as prescribed under the Rapid Transit Systems (Fees) Regulations) and a licence charge (which is determined by the LTA depending on certain factors) for a licence to operate a rapid transit system.

Competitor access

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

We are not aware of any such policy. Currently, each of the railway lines within the Rapid Transit Systems is run by a single licensed operator.

SERVICE STANDARDS

Service delivery

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

Generally, in relation to the Rapid Transit Systems, the operator license is likely to contain conditions setting out the extent, hours and general level of services to be provided by a licensee. The Land Transport Authority (LTA) is also entitled (from time to time) to give directions to be observed by licensees in respect of these matters.

The Rapid Transit Systems Regulations (the RTS Regulations), however, provide a general discretion that allows the LTA and any licensee to refuse to admit any person onto the railway premises at any time, including opening or closing any entrance to or exit from any station or platform or any other part of the railway premises at such times as it considers expedient without incurring any liability to any person.

Additionally, the RTS Regulations provide that no person can enter or remain on the railway premises if such person:

- is in an intoxicated or drugged state;
- is in an unfit or improper condition to travel by passenger train; or
- is dressed or clothed in a condition liable to soil or damage the railway premises or the dress or clothing of any passenger, or to injure any passenger.

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

In relation to the Rapid Transit Systems, under their existing operator licences, all operators are required to meet a set of mandatory operating performance standards issued by the LTA that establishes the performance required relating to service quality, safety and key equipment reliability, including the following:

- frequency of occurrence of train disruptions and severe service degradation incidents;
- reliability standards for key station equipment; and
- security standards.

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?

This is not applicable with respect to freight shippers.

There is no formal procedure (under legislation) for passengers to challenge the quality of rail services they receive. However, in relation to the Rapid Transit Systems, members of the public are entitled to provide feedback to the LTA (via the LTA website) about issues of concern.

SAFETY REGULATION

Types of regulation

25 | How is rail safety regulated?

Generally, the safety of the Rapid Transit Systems is regulated through the following:

- the Rapid Transit Systems Act (the RTS Act);
- various subsidiary legislation under the RTS Act (namely the Rapid Transit Systems (Railway Protection, Restricted Activities)) Regulations and the Rapid Transit Systems (Development and Building Works in Railway Corridor and Railway Protection Zone) Regulations); and
- various codes of practice issued by the Land Transport Authority (LTA).

Competent body

26 | What body has responsibility for regulating rail safety?

The main body responsible for regulating rail safety for the Rapid Transit Systems is the LTA.

The Railways Act contains certain provisions relating to rail safety but these do not apply to the Rapid Transit Systems.

In relation to railways that are not subject to the RTS Act, under the Railways Act, it is generally the Minister that has powers in relation to safety.

Manufacturing regulations

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

We are not aware of any specific safety regulations under law that relate to the manufacture of rail equipment.

Maintenance rules

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

In relation to the Rapid Transit Systems, the RTS Act provides that the LTA may do the following:

- impose conditions on the operator of a rapid transit system relating to the maintenance of the rapid transit system and the relevant railway;
- issue codes of practice in connection with the maintenance of rapid transit systems and any equipment relating thereto; and
- from time to time, issue directions to be observed in respect of the maintenance of rapid transit systems.

Some codes of practice and information issued by the LTA that may relate to maintenance of track and other rail infrastructure include the following:

- Code of Practice for Railway Protection (October 2004 edition);
- Handbook on Development & Building Works in Railway Protection Zone (January 2005 edition);
- Guide to Carrying Out Restricted Activities within Railway Protection and Safety Zones (May 2009 edition);
- Guidebook for the Carrying Out Modification Work to Rapid Transit Systems (RTS) Stations or Private Developer Revision 1; and
- LTA Circulars for Building Works and Restricted Activities in Railway Zones.

Further, the RTS Act also grants broad discretion to the Minister in respect of defects. If, in the opinion of the Minister, the condition of any part of any railway (or any machinery, plant or equipment) is such as to cause (or to be likely to cause) a risk of injury to any person, the Minister may give directions to the LTA or the relevant licensee to take steps to ensure that the condition of the railway (or machinery, plant or equipment) in question will cease to constitute a risk.

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

In relation to the Rapid Transit Systems, the RTS Act provides that the LTA may do the following:

- impose conditions on the operator of a rapid transit system relating to the maintenance of the rapid transit system and the relevant railway;
- issue codes of practice in connection with the maintenance of rapid transit systems and any equipment relating thereto; and
- from time to time, issue directions to be observed in respect of the maintenance of rapid transit systems.

Accident investigations

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

In relation to the Rapid Transit Systems, under the RTS Act, the Minister may appoint an inspector to, among other things, investigate an accident on any part of any railway when an inspector is directed to do so pursuant to any regulations made under the RTS Act.

The general powers of the inspector include, among other things, the following:

- entering into the relevant premises at all reasonable times;
- carrying out on the premises, or on any machinery, plant or equipment, such tests and inspections as the inspector considers expedient; and
- requiring any person to provide the inspector with such information relating to any railway or any machinery, plant or equipment connected with the railway as the inspector may specify, and to answer any question or produce for inspection any document that is necessary for that purpose.

In relation to accidents on railways that are not covered by the RTS Act, generally, the Railways Act requires that:

- notice of the accident shall be given (to the police and to the Minister);
- a joint inquiry of the causes of the accident shall be made by a committee of railway officials; and
- the result of the inquiry shall then be reported to the Minister (which shall be accompanied by proposed actions to be taken with regard to responsible parties or for the revision of the rules or system of working).

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 provisions in the RTS Act and the Railways Act relating to safety and accidents (if any) do not apply to the exclusion of the ordinary liability regime under law. An aggrieved party to an accident may pursue a claim against the relevant rail operator under general contract (if applicable) or tort law, or both.

In respect of the Rapid Transit Systems, there are no specific provisions in the RTS Act that relate to the liability of rail transport companies for rail accidents. It is possible, however, that the licence to operate a rapid transit system may contain conditions relating to the security and safety of persons using or engaged in work on the rapid transit system. The occurrence of a rail accident may therefore result in a breach of a condition. The RTS Act does additionally provide for penal provisions relating to wilful acts or omissions that result in the safety of any person being endangered or the wilful removal, destruction or damage to any part of the railway.

In respect of railways that are not subject to the RTS Act, the Railways Act prescribes certain penal provisions with respect to the failure of any railway company to comply with notice requirements and submission of a return of accidents. The Railways Act also prescribes that the court or any person having authority to determine the claim may order that the relevant injured person be examined by a duly qualified medical practitioner and may make such order as to the costs of the examination.

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)?

We understand that the licence charge payable by private rail operator SMRT to the Land Transport Authority (LTA) for the right to use the operating assets and operate the lines is structured such that the risks (and rewards) associated with uncertainties in relation to revenue from fare collection and fluctuations in operating costs is shared with the LTA through the fare revenue shortfall sharing scheme (the FRSS scheme).

To share the revenue risk between SMRT and the LTA, a revenue collar mechanism was determined based on a set of projected revenue figures set by the LTA. SMRT and the LTA will then share in any shortfall or excess based on a tiered structure.

SMRT may apply to the LTA for a grant if it suffers a net reduction in operating revenue or a net increase in operating costs as a result of certain specified unanticipated events, such as enhancement of operating standards or regulatory changes. The amount of the grant is determined at the LTA's discretion.

A similar structure applies to SBS Transit (including the applicability of the FRSS scheme).

In addition to the FRSS scheme, the relevant rail operators may also submit applications for train fare review to the Council, which in assessing such review will consider the need for the applicant to remain financially viable.

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?

Not applicable.

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?

There are no special labour and employment laws that apply to workers in the rail transport industry and the general employment laws will apply. The First Schedule of the Employment Act 1968 (Chapter 91) provides that the definition of 'workmen' includes train drivers and train inspectors, and the definition of 'industrial undertaking' under the Employment Act includes private or public undertakings engaged in the transport of passengers or goods by rail.

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 specialised environmental laws that apply to rail transport companies and the general environmental laws apply, which include the Environmental Protection and Management Act 1999 (Chapter 94A) and its subsidiary legislation.

UPDATE AND TRENDS

Key developments of the past year

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

Kuala Lumpur-Singapore high-speed rail link:

- In 2013, the governments of Singapore and Malaysia announced plans for the development of an approximately 350km high-speed rail link (HSR) between the two countries. It was anticipated that the HSR would connect Jurong East in Singapore with Bandar Malaysia (Kuala Lumpur) in Malaysia with six stops along the way (Putrajaya, Seremban, Ayer Keroh, Muar, Batu Pahat and Iskandar Puteri).
- In October 2017, as part of the arrangements for the HSR, the Ministry of Transport introduced the Cross Border Railways Bill to provide for, among other things, the 'construction, maintenance, operation and regulation of cross-border railways between Singapore and Malaysia in accordance with bilateral railway agreements'.
- The Cross Border Railways Act 2018 was passed by Parliament on 19 March 2018 and assented to by the President on 11 April 2018.
- In May 2018, the newly elected Malaysian Prime Minister Mahathir Mohamad announced plans to cancel the HSR project. In September 2018, the governments of Malaysia and Singapore agreed to defer the development of the proposed Kuala Lumpur-Singapore HSR Project up to 31 May 2020. A final extension was agreed upon between the parties to defer the development of the HSR to 31 December 2020.
- The HSR project was discontinued after the governments of Malaysia and Singapore allowed the bilateral agreement to lapse on 31 December 2020.

Johor Bahru-Singapore rapid transit system:

- The governments of Singapore and Malaysia are also in the midst of developing a mass rapid transit (MRT) system connecting Singapore to Johor Bahru (the RTS).
- The RTS is currently envisioned as a two-station line with the Singapore terminus at Woodlands North and the Johor Bahru terminus at Bukit Chagar in Johor Bahru, Malaysia.
- It is anticipated that the two stations will each have combined customs, immigration and quarantine facilities so that passengers can clear both countries' border controls before boarding the RTS train, and not require further customs clearance procedures upon arrival at the other station.
- It is also intended that the KTM Line will cease operations within six months after the RTS commences operations.
- The signing ceremony for the RTS Link Project was held on 31 July 2020.
- Due to the impact of the covid-19 pandemic, the expected operation date of the RTS has been postponed from 2024 until the end of 2026.

Cross Island MRT Line:

- The government of Singapore, through the LTA, is currently developing the Cross Island Line (CRL), which will be the eighth line of Singapore's MRT system.
- The CRL is planned to be over 50km long and is expected to be the longest fully underground line in Singapore.
- The construction of the CRL is divided into three phases, with Phase 1 (CRL1) comprising of 12 stations.
- While the CRL1 is expected to be completed and operate for passenger service in 2030, the completion date may be subject to delays due to the impact of the covid-19 pandemic.
- Other existing rail expansion undertakings by the LTA include the Jurong Region Line (JRL), Circle Line 6 (CCL6) extension, Downtown Line 3 extension (DTLe) and North East Line Extension (NELe).

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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.

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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$943.9 million in annual revenues are 'Class I railways' that are subject to more rigorous regulation and reporting requirements. The seven Class I railways are BNSF Railway Co; CSX Transportation, Inc; Grand Trunk Western Railroad (the US affiliate of Canadian National Railway); Kansas City Southern Railway Co; Norfolk Southern Railway Co; Soo Line Railroad (the US affiliate of Canadian Pacific Railway); and Union Pacific Railroad Co. In addition, there are over 550 Class II (between US$42. 4 and US$943.9 million in annual revenues) and Class III railways (less than US$42.44 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 an extension of service north to Orlando is under construction. 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, most of whom purchased them from private railways in order 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 Department of Transportation (DOT), 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 Rail Safety Improvement 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 to 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 completed since the STB issued its 2001 rules governing major transactions, but Canadian Pacific Railway and Kansas City Southern have a currently pending application for approval of a major merger. That transaction, however, is being considered 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 energy and 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 offer 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, thus preventing 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 (URCS). 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 stand-alone 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 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. The STB has several active proceedings in which it is considering potential changes to its rate complaint processes and methodologies, as well as its arbitration programme.

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. One important exception is for Amtrak: freight railways are required to grant Amtrak access to their network at Amtrak's request. 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.

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 and establish reasonable through routes with 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. This emergency power has rarely been used. 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 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 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 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 train accidents. 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 programs. In addition, the DOT administers the Railroad Rehabilitation and Improvement Financing programme, through which low-interest, long-term loans can be obtained to finance freight or passenger projects. Shortline railroads can also take advantage of the 45G tax credit program 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. An emerging area of government support for passenger rail are 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. The nature of financial support for these commuter railways and short lines varies widely, and may include loans, tax benefits and direct financial subsidies.

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.

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 Interstate Commerce Commission Termination Act. Whether a particular state or local regulation is pre-empted by federal law must be analysed case by case.

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, ongoing supply chain challenges continue to be a major regulatory focus. The STB has held hearings on the challenges to the rail network, and STB members have argued publicly that recent railroad efficiency initiatives and labour force reductions are the cause of service issues. The STB has required the Class I railroads to submit detailed weekly reports on service metrics, and has ordered four Class I railroads to file Service Recovery Plans explaining their plans for improving service.

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 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. The STB held a lengthy evidentiary hearing on the dispute and it is still pending before the agency.

Third, the proposed acquisition of KCS remains pending before the STB. It is the first proposed Class I merger since the STB revised its major merger rules in 2001. In March 2021, Canadian Pacific and KCS announced plans to merge. Canadian National made a competing offer that was ultimately accepted by KCS, only to be cancelled after a STB decision to disapprove a voting trust for the merger. KCS accepted a new Canadian Pacific proposal in September 2021, and KCS and Canadian Pacific filed an application for merger approval in October 2021. The Board is expected to rule on the merger application and the accompanying requests for conditions and responsive applications in early 2023.

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Private Client
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Private M&A
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