Rail Transport 2022

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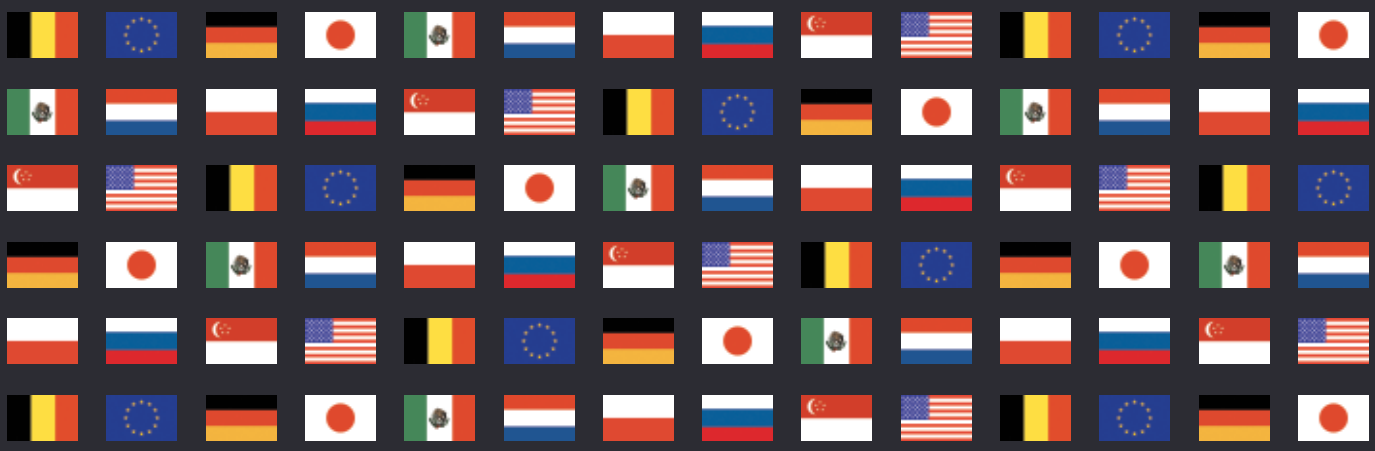

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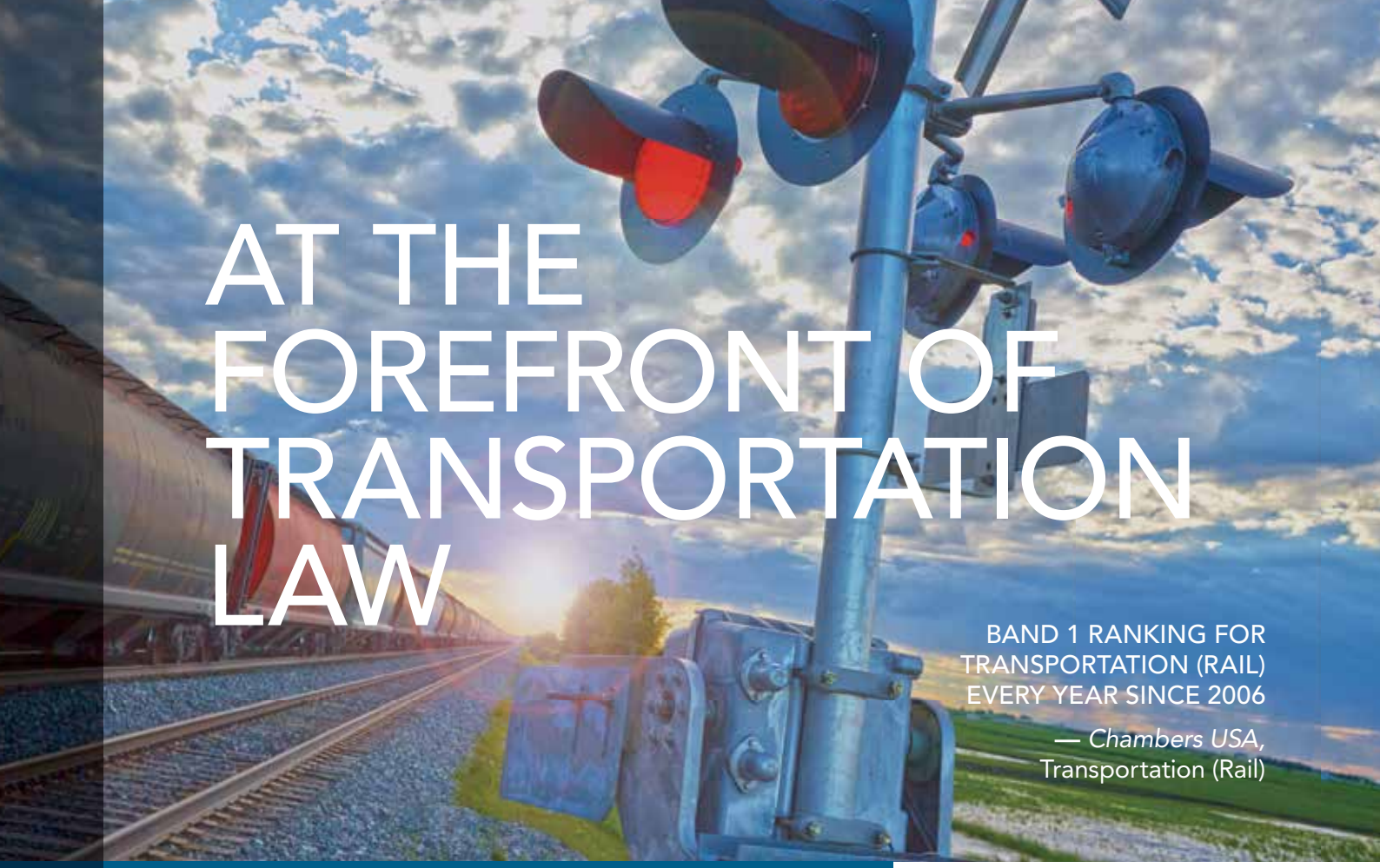

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Lexology Getting The Deal Through provides international expert analysis in key areas of law, practice and regulation for corporate counsel, cross-border legal practitioners, and company directors and officers.

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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.

LEXOLOGY®
Getting The Deal Through

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Global overview

Matthew J Warren, Marc A Korman and Morgan Lindsay

Sidley Austin LLP

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 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 (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. Further, the regulatory system has rejected 'open access' regimes requiring railways to grant network access to other operators in all circumstances. In part, this may be because of arguments that open access could drive railway rates below a level that would railways them to adequately support their infrastructure without public subsidy. Indeed, both major Canadian railways, Canadian National Railway and Canadian Pacific Railway, have extensive operations in the United States, and operate successfully in both companies.

In 2021 Canadian National and Canadian Pacific each 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). As of this writing Kansas City Southern has signed a merger agreement with Canadian National, although Canadian Pacific continues to contest the merger. The regulatory approval process for such a merger will extend well into 2022.

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 2021, both freight and passenger railways across the world continue to be affected by the covid-19 pandemic. Many freight railways saw significantly reduced volumes in 2020. While volumes began to recover in 2021 in many jurisdictions, that recovery has come with significant supply chain disruptions. Many passenger railways have seen reduced passenger demand due to travel restrictions and contagion concerns. This year's edition includes updates from authors on covid-19-related developments in their jurisdictions, including emergency legislation, relief programmes and other initiatives relevant to railways.

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.

Belgium

Michael Jürgen Werner and Julia Kampouridi

Norton Rose Fulbright

GENERAL

Industry structure

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

As a European Union member state, Belgium has implemented the EU legislative package liberalising the rail market sector, through Directive 2012/34/EU establishing a single European rail area and the other EU directives and regulations. In this regard, one of the key legislative acts transposing EU legislation is the Law of 30 August 2013 on the Railway Code (the Railway Code). In accordance with the EU rules, the rail transport market has been fully liberalised for domestic and international freight transport by rail, as well as for the international transport of passengers by rail. Unlike some other EU member states, Belgium has not yet liberalised the market for the domestic transport of passengers, which remains the exclusive competence of the National Railway Company of Belgium (SNCB). The market for freight has seen new market entrants over the years and currently has 12 operators in this segment. Three rail undertakings operate in the international passenger transport segment. Nevertheless, the market continues to be dominated by the SNCB, which provides 86 per cent of all train kilometres circulated on the entire Belgian rail infrastructure (including passenger and freight).

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

Ownership and control

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

The state directly owns several important rail stakeholders, including the SNCB, which continues to be the main market actor in the Belgian rail sector, enjoying a legal monopoly to provide domestic transport at least until 2023. In addition, the state also owns Infrabel. Finally, the state controls HR Rail, which handles recruitment of Infrabel's and SNCB's employees.

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

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

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

Regulatory bodies

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

Rail transport is mainly regulated by the European Commission, the Council of the EU, the European Parliament, the European Union Agency for Railways (ERA), the Belgian parliament and the Federal Public Service Mobility and Transport (FPSMT), Directorate General Sustainable Mobility and Rail Policy.

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

Following the entry into force of Regulation (EU) No. 2016/796 on the European Union Agency for Railways (part of the technical pillar of the fourth EU railway package) on 15 June 2016, the ERA replaced and succeeded the European Railway Agency. The ERA is mandated to issue single safety certificates and vehicle (type) authorisations valid in multiple European countries and to ensure an interoperable European Rail Traffic Management System (ERTMS), in the development and implementation of the Single European Railway Area. Its tasks are to (1) promote a harmonised approach to railway safety; (2) devise the technical and legal framework in order to enable removing technical barriers, and acting as the system authority for ERTMS and telematics applications; (3) improve accessibility and use of railway system information; and (4) act as the European Authority under the fourth Railway Package issuing the aforementioned authorisations and certificates, while improving the competitive position of the railway sector.

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

The FPSMT is a public administrative body whose main objective is preparing and implementing Belgium's transport policy. The sector regulator is the Regulatory Service for Railway Transport and for Brussels Airport Operations (the Regulator), which has the following objectives: undertake sector investigations; monitor compliance of

Infrabel's network statement with the legislation; levy user charges and competition on the market for railway transport services; and determine the genuinely international character of international passenger transport. The National Safety Agency is the Department for Railway Safety and Interoperability.

MARKET ENTRY

Regulatory approval

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

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

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

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

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

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

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

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

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

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

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

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

Infrabel builds and develops the Belgian rail network. Private companies can also build private tracks and then ask for their connection to the rail network. In all cases, an urbanism permit is required before any works may commence. The issuance of an urbanism permit is governed by legislation in the regions (Flemish, Walloon and Brussels-Capital) and the procedure usually involves a public investigation.

MARKET EXIT

Discontinuing a service

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

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

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

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

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

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

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

Insolvency

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

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

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

COMPETITION LAW

Competition rules

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

There are no sector-specific competition rules governing the rail sector. General Belgian competition law mirrors EU competition legislation and is contained in Book IV of insolvency of undertakings of the Code of Economic Law (CEL), introduced by the Competition Act of 2013 and amended in 2019, the Royal Decrees of 30 August 2013 on the procedures for the protection of competition, and on the notification of concentration of undertakings referred to in article IV.10 respectively. These Royal Decrees will remain in effect until new ones promulgated later in 2021 or in 2022 enter into force. The CEL covers typical competition areas, such as mergers, cartels (article IV.1, section 1, the national equivalent to article 101 Treaty on the Functioning of the European Union (TFEU)) and abuse of dominance (article IV.2, the national equivalent to article 102 TFEU).

Regulator competition responsibilities

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

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

Competition assessments

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

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

PRICE REGULATION

Types of regulation

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

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

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

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

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

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

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

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

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

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

NETWORK ACCESS

Sharing access with other companies

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

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

Access pricing

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

The prices for granting network access are regulated at EU level through the Commission Implementing Regulation (EU) 2015/909 of 12 June 2015 on the modalities for the calculation of the cost that is directly incurred as a result of operating the train service. In addition, national legislation governs network access pricing such as: the Royal Decree of 19 July 2019 on the allocation of the capacity of the railway infrastructure and the railway infrastructure utilisation fee, the Ministry Decree of 9 December 2004 as amended adjusting the calculation rules, the value of the coefficients and the unit prices involved in the calculation of the railway infrastructure charge, the Royal Decree of 16 January 2007 on the rail undertaking licence, and the Royal Decree of 16 January 2007 on the annual fee for holding a railway undertaking licence as amended. These are reflected in Infrabel's network statement, which has a breakdown of how charges are calculated and for which services.

Competitor access

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

There is no declared policy in this respect. However, the list of priority sectors of the Belgian competition authority for 2021 includes logistics.

SERVICE STANDARDS

Service delivery

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

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

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

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

Challenging service

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

Regulation (EC) No. 1371/2007 of the European Parliament and of the Council of 23 October 2007 on rail passengers' rights and obligations stipulates certain rules in favour of rail passengers. This Regulation has applied in full in Belgium since 3 December 2014. To comply with its EU obligations, Belgium has implemented national legislation on complaint handling, enforcement and sanctions through the Law of 30 December 2009, the Anti-Discrimination law of 10 May 2007 as amended, and the Law of 15 May 2014 on the rights and obligations of rail passengers. These set out the general framework relating to administrative sanctions, the rights of the defendants and the right to undertake inspections. Belgium designated the FPSMT as the National Enforcement Body (NEB). Passengers can submit a complaint to the NEB if they feel that their rights have not been respected.

SAFETY REGULATION

Types of regulation

25 | How is rail safety regulated and what body has responsibility for regulating rail safety?

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

- the national safety rules relating to the principles applicable to the safe operation of railway infrastructure, relating to the

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

The government determines:
1 the following national security rules: (a) the principles applicable to the safe operation of the railway infrastructure; (b) the requirements applicable to safety staff and staff of entities in charge of maintenance; (c) the requirements applicable to rolling stock; and (d) requirements applicable to railway infrastructure;
2 rules for the investigation of accidents and incidents; and
3 requirements relating to the circulation of heritage vehicles on the network.

In the absence of interoperability technical specifications (TSIs) or as a complement to the TSIs, the infrastructure manager shall identify and adopt, on the basis of the principles defined under (1)a) and d) above, the technical specifications for the use of the network and the operational procedures relating to the operational safety of operation of its railway infrastructure, with regard to the operational interface between itself and the railway undertakings or tourist associations. Railway undertakings and tourist associations shall comply with these specifications and procedures in their relations with the infrastructure manager and shall integrate these specifications and procedures into their internal safety rules and apply them to the staff concerned. These specifications and procedures, and their modifications, shall be submitted for the assent of Belgium's safety authority, in accordance with a procedure determined in law.

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

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

Competent body

26 | What body has responsibility for regulating rail safety?

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

Manufacturing regulations

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

Directive (EU) 2016/797 of the European Parliament and of the Council of 11 May 2016 on the interoperability of the rail system within the European Union lays forth that each part and subpart of the European rail system must comply with certain TSI. These TSI must also be taken into account by manufacturers to establish the EC declaration of conformity or suitability for use of an interoperability constituent.

Maintenance rules

28 | What rules regulate the maintenance of rail equipment?

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

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

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

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

Accident investigations

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

The organisation competent within this area is the Investigation Body for Railway Accidents and Incidents (IB) within the Federal Public Service Mobility and Transport. The IB investigates serious operational accidents that result in the following: the death of at least one person; serious injury to five or more persons; or extensive damage to the rolling stock, the infrastructure or the environment (ie, more than €2 million), occurring on the Belgian rail network. It may also investigate accidents and incidents with consequences for railway safety. The safety investigations carried out aim to determine the circumstances and causes of the event, and are not intended to apportion blame.

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

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

Accident liability

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

Regulation (EC) No. 1371/2007 on rail passengers' rights and obligations establishes special rules for the liability of railway undertakings for passengers in article 11 and title IV of Annex I. The payment of damages in the case of death is provided for in articles 27 and 28 of Annex I of Regulation 1371/2007. In other cases of bodily harm, national law shall determine whether and to what extent the rail undertaking must pay damages in accordance with article 29 of Annex I of Regulation 1371/2007.

FINANCIAL SUPPORT

Government support

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

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

Requesting support

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

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

In addition, there are financial schemes open to rail undertakings that allow them to benefit from state funding, including the following:

- combined transport aid: commenced in 2005, this measure provides aid for operators that contract to transport intermodal transport units (by rail); and
- single wagon market aid: commenced in 2013, this measure provides aid to rail undertakings providing rail transport by single wagon in Belgium.

To benefit from this aid, eligible candidates must submit their application form to the Federal Public Service Mobility and Transport at the latest one month after the end of the trimester that gives right to the subsidy, pursuant to the Royal Decree of 15 July 2009 regarding the promotion of combined rail transport of intermodal transport units as amended. Article 1 of the Law of 5 May 2017 regarding aid for combined transport and for single wagonload traffic 2017–2020 defines 'trimester' as the period that runs from 1 January until 31 March, 1 April until 30 June, 1 July until 30 September or 1 October until 30 December. These schemes are due to expire at the end of 2021.

LABOUR REGULATION

Applicable labour and employment laws

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

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

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

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

ENVIRONMENTAL REGULATION

Applicable environmental laws

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

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

Special rules in the case of damage or imminent threat of damage to the environment apply as stipulated by the Royal Decree of 8

November 2007 on the prevention and reparation of environmental damage caused by transport by road, rail, waterway or air.

UPDATE AND TRENDS

Key developments of the past year

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

On 11 January 2019, Belgium adopted a law modifying the Rail Code to transpose Directive 2016/2370/EU – the Market Pillar Directive. This law allows other providers, not just the National Railway Company of Belgium (SNCB), to access the domestic rail transport market, and allows for the possibility to bid for public contracts on access to routes already served by rail undertakings. Furthermore, it strengthens the independence of the infrastructure manager. The expected date for the liberalisation of the domestic market is 2023. In preparation, it is expected that more legislative changes will be enacted to prepare the SNCB commercially for competition in the rail transport market.

The general competition rules were amended in the early part of 2019 and implementing legislation, including in relation to procedures and notified concentrations, is still pending at the time of writing. Such implementing legislation may also include further amendments in order to give effect to the ECN+ Directive (ie, Directive 2019/1 to empower the competition authorities of the member states to be more effective enforcers and to ensure the proper functioning of the internal market).

On 22 January 2021, the Belgian government announced new public support for rail. Starting in January 2021 and running through June 2021, high-speed trains and night trains were exempt from reservation and network usage charges in Belgium and received state subsidies. The operators concerned by the aid included the companies offering high-speed trains, such as Eurostar, Thalys, ICE and TGV, as well as the operators offering night trains, such as Nightjet. The government granted a 70 per cent wage subsidy on a capped salary cost, which was granted to 30 percent of the staff.

The Belgian government also adopted in March 2021 two measures to support rail freight operators for the temporary period of 1 January to 30 June 2021. A linear reduction of €0.75 per train/km was applied to the track access charges for actually performed commercial rail freight traffic. Furthermore, the cancellation costs and reservation costs for train paths were annulled for this period.

The EU has adopted a new Regulation for rail passenger rights, which will replace the current Regulation 1371/2007, and will apply from 7 June 2023. The new Regulation will strengthen passengers' protection in case of disruptions, include a strengthened complaint-handling mechanism, and reinforce the obligation for the national enforcement bodies to cooperate. Passengers with reduced mobility will also have more flexibility when making travel arrangements, as they will only be obliged to notify the operator of their travel plans 24 hours in advance instead of currently 48 hours, and any required accompanying person will travel free of charge. Passengers with reduced mobility using an assistance dog will also be given assurances that the animal can travel with them.

In April 2021, the European Commission fined Dutch, German and Belgian railway companies (ie, Österreichische Bundesbahnen (ÖBB), Deutsche Bahn (DB) and SNCB respectively) a total of €48 million for breaching EU antitrust rules. The infringement concerned cross-border rail cargo transport services in the EU provided by ÖBB, DB and SNCB under the freight sharing model and carried out in 'block-trains'. Blocktrains are cargo trains shipping goods from one site (such as the production site of the vendor of the transported goods) to another site (such as a warehouse) without being split up or stopped on the way. Under the freight sharing model, which is a contract model foreseen in international railway law, railway companies performing cross-border rail services provide customers with a single overall price for the service required under a single multilateral contract. The Commission's investigation revealed that the three railway companies coordinated by exchanging collusive information on customer requests for competitive offers and provided each other with higher quotes to protect their respective business. The companies thus participated in a customer allocation scheme, which is prohibited under EU competition rules. The anticompetitive conduct lasted from 8 December 2008 to 30 April 2014, with SNCB participating only since 15 November 2011 and only for transports by ÖBB, DB and SNCB. The cartel concerned conventional cargo transport sectors (except automotive transports).

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Coronavirus

37 What emergency legislation, relief programmes and other initiatives specific to your practice area has your state implemented to address the pandemic? Have any existing government programmes, laws or regulations been amended to address these concerns? What best practices are advisable for clients?

At EU level, member states have adopted measures imposing restrictions primarily on passenger transport, with freight flows being less affected in accordance with the relevant guidance issued by the European Commission (ie, European Commission, COVID-19: Guidelines for border management measures to protect health and ensure the availability of goods and essential services). These measures are applicable in all EU member states, thus including Belgium. In light of the improvement of the epidemic situation, further EU guidelines were issued enabling the coordinated, progressive restoration of transport services as well as ensuring that appropriate safety measures are in place (ie, European Commission, COVID-19: Guidelines on the progressive restoration of transport services and connectivity). With respect to the EU rail transport-specific regulatory developments due to the pandemic, the deadline by which some member states must transpose EU law on rail safety and interoperability was extended until 31 October 2020, which has now passed. Belgium took advantage of this extension in relation to Directive (EU) 2016/797 on the interoperability of the rail system within the European Union and Directive (EU) 2016/798 on railway safety.

In addition, the Implementing Regulation (EU) 2018/763, which is directly applicable in all member states and thus in Belgium too, has been recently amended as regards the dates of application and certain transitional provisions. In this respect, if it is foreseeable that a positive decision on already submitted applications for safety certificates would not be possible by 15 June 2020, further processing is possible until 30 October 2020 upon the applicant's request. Furthermore, the validity of safety certificates that expire between 1 March 2020 and 31 August 2020 has been extended by six months.

In light of the disruptions caused by the covid-19 pandemic, the state-owned Belgian railway company SNCB introduced a free rail pass for Belgian residents, valid for 12 journeys during the period between October 2020 and March 2021, with two journeys per month allowed.

European Union

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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.

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 anti-competitive 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).

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 and what body has responsibility for regulating rail safety?

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 rail equipment?

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?

The year 2021 is the European Year of Rail, a European Commission initiative intended to highlight the benefits of rail transport, with a particular focus on safety and sustainability. More broadly, the EU intends to double rail freight and triple high speed rail activity by 2050 as part of a push towards a 90 per cent reduction in transport emissions by 2050.

Coronavirus

37 What emergency legislation, relief programmes and other initiatives specific to your practice area has your state implemented to address the pandemic? Have any existing government programmes, laws or regulations been amended to address these concerns? What best practices are advisable for clients?

The European Commission adopted a Temporary Framework in relation to state aid rules to address issues arising out of the covid-19 pandemic in March 2020, which has now been extended to 31 December 2021. The Temporary Framework sets out how the Commission will apply state aid rules in relation to certain types of liquidity support granted by member states to businesses during the pandemic and sets out certain types of liquidity support measures that the Commission will consider as compatible with the internal market and would be able to approve very rapidly upon notification. It does not, however, provide an exemption from the requirement for member states to notify and obtain Commission approval. This applies to the railway industry as well as to other industries; since March 2020, support schemes for the railway sector in Austria, Denmark and Italy have been notified to and approved by the European Commission under the Temporary Framework.

Regulation (EU) 2019/779 was amended in the context of the covid-19 pandemic by Regulation (EU) 2020/780 to: (1) postpone the requirement to comply with article 4 concerning safety-critical components until 16 June 2021; (2) extend the validity of entity in charge of maintenance certificates and certificates relating to outsourced maintenance functions due to expire between 1 March 2020 and 31 August 2020 by six months; and (3) provide longer (until 16 June 2022) for most vehicles to comply with the new requirements.

In addition, Regulation (EU) 2020/698 and Regulation (EU) 2021/267 extended a number of certificates, licences and authorisations across EU transport legislation, including in relation to existing and temporary operator licences, Part A and Part B safety certificates, safety authorisations and train driver operator licences.

Under Regulation (EU) 2020/1429 (as most recently extended by Commission Delegated Regulation (EU) 2021/1061, member states were permitted to authorise infrastructure managers to reduce, waive or defer infrastructure access charges until 31 December 2021.

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GENERAL

Industry structure

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

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

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

Ownership and control

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

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

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

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

Regulatory bodies

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

Rail transport is mainly regulated by the European Commission, Council and Parliament, the European Union Agency for Railways (ERA), the Federal Railway Authority (EBA), the Eisenbahn-CERT (EBC), and the Federal Network Agency for Electricity, Gas, Telecommunication, Post and Railway (BNetzA).

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

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

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

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

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

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

MARKET ENTRY

Regulatory approval

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

A licence is necessary to enter the market as a rail transport provider. Article 6-6e of the General Railway Law of 27 December 1993, last amended on 9 June 2021 (AEG), sets out the relevant requirements. Article 6(3) of the AEG provides that the applicant has to have its seat in Germany or a registered office in Germany. The company must have a management structure as well as reliability, financial standing and professional aptitude (article 6a ff. AEG). Reliability means that the company should not have been subject to fines of more than €100,000 for violations of labour law, customs law or traffic law and no person in charge of management should have received sentences of at least one year for violations of labour law or social obligations, customs law or traffic law. Proof of the professional expertise can be provided with an assignment of a certified rail operations manager – in other words, a person who is trained as an engineer, has three years of experience as an engineer in the rail sector and has passed a special exam (article 6d (2) AEG).

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

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

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

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

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

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

On the basis of article 55 of the Foreign Trade and Payments Ordinance of 2 August 2013, last amended on 23 June 2021 (AWV), the Federal Ministry for Economic Affairs and Energy (the Ministry) may review the acquisition of domestic companies by foreign buyers in individual cases. Any acquisition of at least 25 per cent of the voting rights of a company resident in Germany by investors located outside the European Union or the European Free Trade Association region can be investigated. In principle, the rules on foreign investment apply to any industry sector. To obtain legal certainty undertakings can submit a voluntary notification. The Ministry can prohibit the transaction or impose conditions if it considers that public order or security in Germany is threatened.

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

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

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

MARKET EXIT

Discontinuing a service

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

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

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

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

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

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

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

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

Insolvency

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

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

COMPETITION LAW

Competition rules

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

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

Regulator competition responsibilities

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

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

Competition assessments

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

A transaction involving rail transport companies may be caught by the German merger control provisions, which are enforced by the Federal Cartel Office (BKartA). The current legislation can be found in Chapter VII of the Act against Restraints of Competition of 1958, version of 26 June 2013, last amended on 23 June 2021 (GWB). The GWB sets out a comprehensive list of events constituting a concentration, which includes not only the acquisition of control and the creation of joint ventures, but also the acquisition of minority shareholdings or of a material competitive influence below the level of control. A merger must be prohibited by the BKartA if it would significantly impede effective competition, in particular if it leads to the creation or strengthening of a dominant market position.

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

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

PRICE REGULATION

Types of regulation

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

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

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

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

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

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

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

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

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

This obligation does not apply to freight transport.

NETWORK ACCESS

Sharing access with other companies

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

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

Access pricing

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

The prices for granting network access are regulated at EU level through the Commission Implementing Regulation (EU) 2015/909 of 12 June 2015 on the modalities for the calculation of the cost that is directly incurred as a result of operating the train service. Charges payable by passenger and freight transport undertakings for access to tracks, stations and other facilities are regulated in the ERegG, which came into force on 2 September 2016. It contains specific requirements based on the principles of non-discrimination. The access charges for train movements on the rail network and associated services are set out in the infrastructure managers' list of track access charges, which also provides details of the charges for any supplementary and ancillary services available in connection with the use of the tracks. The most recent version of the list is contained in the DB Netz AG Network Statement for 2021 (SNB 2021), which entered into force on 13 December 2020.

Both passenger and freight companies must negotiate with DB subsidiary for infrastructure DB Netz AG to obtain access to DB tracks. In Germany, open access rules apply to all companies that possess infrastructure, pursuant to the symmetric approach to the network access regulation. The full cost of track access is apportioned to the train operating companies. The charges for track access comprise three elements: (1) base charges dependent upon the type of track and the company's utilisation; (2) charges linked to prioritisation in scheduling; and (3) surcharges for particular circumstances such as for heavier weights, special trains, etc.

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

Competitor access

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

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

SERVICE STANDARDS

Service delivery

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

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

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

Article 28 of Regulation (EC) No. 1371/2007 states that railway undertakings shall define service quality standards and implement a quality management system to maintain service quality. Annex III of this Regulation lists the following minimum quality service standards: information and tickets; punctuality of services and general principles to cope with disruptions to services; cancellations of services; cleanliness of rolling stock and station facilities (air quality in carriages, hygiene of sanitary facilities, etc); customer satisfaction survey; complaint handling, refunds and compensation for non-compliance with service quality standards; and assistance provided to disabled persons and persons with reduced mobility. These rules are directly applicable in Germany.

Challenging service

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

Pursuant to article 27(1) of Regulation (EC) No. 1371/2007, railway companies are obliged to set up a complaints handling mechanism, and to make their contact details and working languages widely known to passengers. In accordance with article 27(2) of Regulation 1371/2007, passengers may submit a complaint to any railway undertaking involved. Within one month, the addressee of the complaint shall either give a reasoned reply or, in justified cases, inform the passenger by what date within a period of less than three months from the date of the complaint a reply can be expected.

Passengers who are not satisfied with the response from the railway undertaking may also complain to the Federal Railway Authority (EBA) pursuant to article 30 of Regulation (EC) No. 1371/2007. First, the EBA examines the facts. If the complaint is legitimate, it will conduct an administrative procedure to persuade the company to comply with its obligations to safeguard the passenger's rights (eg, to pay compensation or reimbursement). Germany has notified a national exemption, and therefore, Regulation 1371/2007 is not applicable for certain urban, suburban and regional services, and in particular for services run mainly on account of their historical significance or for the purposes of tourism. On 29 April 2021, Regulation (EU) 2021/782 of the European Parliament and of the Council on rail passengers' rights and obligations was adopted. It will apply from 7 June 2023 and will replace Regulation (EC) No. 1371/2007.

SAFETY REGULATION

Types of regulation

25 | How is rail safety regulated and what body has responsibility for regulating rail safety?

Directive (EU) No. 2016/798 on railway safety, which is part of the fourth EU railway package, repealed Directive 2004/449/EC. To transpose the Directive, on 16 March 2020, the German legislator adopted the Law on the implementation of the technical pillar of the fourth EU railway package. The relevant national safety rules for the rail system in Germany were first notified to the European Commission in 2006. The current notification of German national safety rules under Directive (EU) No. 2016/798 is still under evaluation by the European Union Agency for Railways (ERA). A list of national safety rules as of August 2020 is available on the EBA website. The European Commission has issued Implementing Regulation (EU) No. 2018/763 of 9 April 2018, establishing practical arrangements for issuing single safety certificates to railway undertakings. The Ordinance on Railway Safety of 17 June 2020 complements this Commission Implementing Regulation.

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

Competent body

26 | What body has responsibility for regulating rail safety?

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

Manufacturing regulations

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

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

Maintenance rules

28 | What rules regulate the maintenance of rail equipment?

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

This agreement provides the railway infrastructure companies with funds for the infrastructure to use at their discretion and increases

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

29 What specific rules regulate the maintenance of rail equipment?

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

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

Accident investigations

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

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

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

Accident liability

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

Regulation (EU) No. 1371/2007 of 23 October 2007 on rail passengers' rights and obligations in article 26 renders rail transport companies liable for the loss or damage resulting from the death of, personal injuries, or any other physical or mental harm, to a passenger, caused by an accident arising out of the operation of the railway and happening while the passenger is in, entering or alighting from railway vehicles regardless of the railway infrastructure used. The Regulation also stipulates the circumstances in which it is relieved from liability in this context.

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

FINANCIAL SUPPORT

Government support

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

Cargo transport and long-distance passenger transport are not supported by government subsidies. Federal states are, however, responsible for procuring subsidised regional passenger rail services from rail companies, and for financing them within franchise contracts. The franchising system is, therefore, based on the transfer of financial resources, the *Regionalisierungsmittel*, from the federal budget to the federal states at an annual level of approximately €8.2 billion with an agreed annual increase of 1.8 per cent from 2017 to 2031. The federal government also gives grants annually for noise abatement measures.

Requesting support

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

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

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

The competent authority, defined in article 15 of the General Railway Law, grants compensation for the net financial impact occasioned by compliance with the contractually defined public service obligations or pricing obligations established in the general rules. Public service contracts are awarded according to the rules laid down in this Regulation. Subject to certain reservations detailed in article 5 of the Regulation, competent local authorities may provide public transport services themselves or assign them to an internal operator over which they have control comparable to that over their own services. Any competent authority who uses a third party other than an internal operator must award public service contracts by means of transparent and non-discriminatory competitive procedures that may be subject to negotiation. In the exceptional cases set out in article 5 (4) to (6) of Regulation (EU) No. 1370/2007 the obligation to instigate competitive procedures does not apply to rail transport.

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

companies are also set out in the Commission notice on the application of articles 87 and 88 of the EC Treaty.

A €500 million package of state aid from the federal government, which is part of a scheme running from 2018 to 2022 approved by the European Commission on 1 August 2018, is available to railway companies. It aims to promote the adoption of new energy-efficient technologies in the sector.

LABOUR REGULATION

Applicable labour and employment laws

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

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

ENVIRONMENTAL REGULATION

Applicable environmental laws

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

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

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

UPDATE AND TRENDS

Key developments of the past year

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

In regard to legislative developments, on 9 June 2021, Germany adopted the Act on the further development of the railway regulation . It forms the legal basis for the *Deutschlandtakt*, a new Germany-wide coordinated railway timetable. Investments into rail infrastructure are to be accelerated following the adoption of the Investment Acceleration Act in November 2020. It will simplify the planning procedures for certain construction projects (eg, the electrification of routes or noise reduction measures).

The Federal Budget adopted in December 2020 foresees investments in the rail sector of €8.5 billion. In the course of the past year, the German Federal Ministry of Transport and Digital Infrastructure (BMVI) has announced further funding measures, such as a programme for the refurbishment of 167 stations, which the government will support with €40 million. In addition, several rail-related projects in Germany will receive funding through the EU's Connecting Europe Facility.

In September 2020, the BMVI presented the 'TransEuropExpress 2.0' strategy, which aims to establish cross-border regular interval services for Europe, including high-speed and overnight train services. At the same time, the German EU Council Presidency adopted the Berlin Declaration to strengthen rail freight through increased digitalisation and better interoperability.

The German Supreme Court delivered an important judgment in February 2021 on the liability of infrastructure managers towards railway undertakings for delays and train cancellations. It rejected the argument that infrastructure managers were not obliged to provide timely access to tracks and clarified the contractual nature of the parties' relationship (Case XII ZR 29/20). The delineation between competition law and regulatory law continues to be a contentious issue after the Supreme Court ruled in October 2019 that track access charges can be assessed in civil private enforcement cases where plaintiffs bring claims for damages following alleged abuse of dominance. This judgment conflicts with a previous European Court of Justice (ECJ) ruling from November 2017 finding that there is no room for separate control by the civil courts of the fairness of track charges and that the regulatory authorities (such as the Federal Network Agency for Electricity, Gas, Telecommunication, Post and Railway) should have exclusive competence in this regard. The Kammergericht Berlin lodged a request for a preliminary ruling on 30 December 2020 asking the ECJ to rule on whether civil courts have the power to review user charges (Case C-721/20).

Coronavirus

37 | What emergency legislation, relief programmes and other initiatives specific to your practice area has your state implemented to address the pandemic? Have any existing government programmes, laws or regulations been amended to address these concerns? What best practices are advisable for clients?

The German government has adopted various support measures to compensate for the financial losses incurred during the pandemic. Private competitors have, however, reportedly complained to the European Commission about the support measures for German railways Deutsche Bahn (DB AG).

To alleviate the impact of the covid-19 crisis, the European Commission had permitted the reduction, waiver or deferral of charges for access to infrastructure with the adoption of Regulation (EU) 2020/1429 in October 2020. On 28 June 2021, the applicability of this Regulation was prolonged until 31 December 2021.

On 2 August 2021, the European Commission approved, as state aid-compliant, two German schemes supporting the rail freight sector and the long-distance rail passenger sector in the context of the coronavirus outbreak. Charges paid by railway companies to access rail infrastructure will be reduced by 98 per cent. First, long-distance rail passenger operators will be relieved of infrastructure charges paid during the period of 1 March 2020 to 31 May 2022. Second, infrastructure charges paid by rail freight operators will be reduced retrospectively for the period from 1 March 2020 to 31 May 2021, thereby amending a previous decision from December 2018 in which the European Commission had approved €350 million per year in public funding to promote a shift of freight transport from road to rail in Germany. On 21 May 2021, the European Commission had already approved a reduction of track access charges due by rail freight operators during the period between 1 June 2021 and 31 December 2021. The compromise reached with the European Commission was preceded by intensive discussions with the German government that had initially intended to support DB AG with an equity capital increase of €5 billion. The European Commission did eventually approve a €550 million equity injection in favour of DB AG on 10 August 2021. The measure will compensate for losses caused by covid-19 between 16 March 2020 and 7 June 2020 in domestic travel and between 16 March 2020 and 30 June 2020 in international travel.

On 24 June 2021, the German government adopted an amendment of the Law on Regionalisation, increasing by €1 billion the funds provided by the federal government to the regions for local public transport (ÖPNV-Rettungsschirm). On 7 August 2020, the European Commission had already approved a €6 billion German scheme to compensate companies providing regional and local public passenger transport services in Germany for the damage suffered due to covid-19.

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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.

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 company. 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, and the train speeds were limited to 120 to 130km per hour. On the contrary, 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 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.

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 Shinkansens. 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 to 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.

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 for passenger services. The central government provides

adjustment monies 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 any 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 in 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.

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 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.

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 and what body has responsibility for regulating rail safety?

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 provider's 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 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
- the Notification on Special Railway Technology Standard (MLIT Notification No. 1785 of 2001).

In addition to the above, many de facto standards for construction, manufacturing and maintenance were historically developed by the JNR and other railway companies, which are now succeeded and accepted, with updates and revisions, by the JR companies and others. Some of them are published and available in the market. Details may differ widely depending on the systems and infrastructures the rail transport companies currently operate and maintain.

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
- the Notification on Special Railway Technology Standard (MLIT Notification No. 1785 of 2001).

In addition to the above, many de facto standards for construction, manufacturing and maintenance were historically developed by the JNR and other railway companies, which are now succeeded and accepted, with updates and revisions, by the JR companies and others. Some of them are published and available in the market. Details may differ widely depending on the systems and infrastructures the rail transport companies currently operate and maintain.

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 Japan Railway (JR) companies, the government set up a fund to stabilise the operation of these two companies and JR Kyushu. Since JR Kyushu successfully privatised and exited from this support scheme, JR Hokkaido and JR Shikoku may give loans to the JRTT by using this fund and received interest. There has been enough interest offset the deficit from rail transport operation. These schemes are established by the JRTT Act.

In addition to JR Hokkaido and JR Shikoku, 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 environment impact assessment.

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

UPDATE AND TRENDS

Key developments of the past year

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

In 2020, steep decreases in the volume of passengers was the most critical topic in rail transport businesses.

As for the maglev line construction project between Tokyo and Nagoya, the Japan Railway (JR) company JR Central commenced construction work. However, underground water management problems raised by Shizuoka-prefecture have been stuck for years. It is now anticipated that the planned completion and commencement of commercial operation may be seriously delayed.

Furthermore, JR Hokkaido, which had been struggling with a steep population decrease in its covered rural area, is dealing with management difficulties. The covid-19 pandemic tremendously deteriorated its business, shutting down its businesses for inbound passengers. JR Hokkaido discontinued its operations on certain routes in 2020 and early 2021.

Coronavirus

37 What emergency legislation, relief programmes and other initiatives specific to your practice area has your state implemented to address the pandemic? Have any existing government programmes, laws or regulations been amended to address these concerns? What best practices are advisable for clients?

The covid-19 pandemic has had significant impact on the rail transport industry in Japan.

For commuter rail transport in urban areas, the volume of passengers steeply decreased due to the remote work or 'work from home' campaign under the government's announcement of the state of emergency three times in 2020 and twice in early 2021. Furthermore, the government strongly recommended not to make any long-distance trips. The JR companies for passenger services recorded a tremendous deficit for the financial year 2020.

Equally, major private railway group companies were also affected. Their businesses, covering the hotels, shopping and entertainment industries, among others, suffered losses due to sudden absence of inbound travellers.

As for local rail transport providers, although the net decrease of passengers was not as large compared with urban commuter rail transport providers, most of their business deteriorated significantly. The government continued to support local rail transport providers by using existing legal and financial schemes.

In autumn 2020, when the covid-19 pandemic plateaued to some extent, the government launched a 'Go To Travel' campaign, giving subsidies to encourage the use of public transportation, restaurants and hotel accommodation. As Japan's borders were tightly restricted, the campaign targeted domestic trips. While it boosted the number of the travellers at the beginning, the government suspended it at year-end, due to the steep rise of positive covid-19 cases.

The stock prices of the rail transport providers did not drop even after their financial status was reported. It may be an indication that people still have strong confidence in the rail transport providers' roles and see them as resilient, at least in the short term. It has been reported that the major rail transport providers are now implementing new goals for the post-covid-19 era.

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Mexico

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GENERAL

Industry structure

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

The Mexican Constitution establishes that railways are a priority area for national development. The federal government is the main authority in this industry as it plans and establishes policies, as well as coordinates, regulates and supervises the rail sector. The rail transport industry is being developed mainly through concessions granted to private parties for the latter to render cargo and passenger transport public services, although passenger trains are still undeveloped. Ferrocarril del Istmo de Tehuantepec (FIT) is the only rail cargo line that is still owned and operated by the government through an entitlement that is granted to a state-owned commercial entity.

Considering elements such as national security and sovereignty, the government maintains full domain over the general communication networks and key infrastructure such as, for instance, railways and associated buildings and workshops, as well as right of way (ROW) and signalling. Private parties acting as concessionaires are obligated to exploit, increase, operate and maintain the network as well as to render transport public services. However, the concessionaires are the owners of the rolling stock and related equipment. At the end of the concession, concessionaires shall hand over to the government the network and the associated key infrastructure, including any improvements. The government has the right of first refusal and preferential right to acquire the rolling stock and associated equipment owned by the concessionaire.

The rail transport industry has been structured under basic principles such as free competition, operative efficiency, reduced costs, and access and interconnection between lines and systems.

Under the applicable legal framework, there are three types of regulatory approvals:

- concessions to private parties to render the cargo or passenger transport public service;
- permits to private parties to render ancillary services such as cargo terminals and maintenance workshops, as well as to conduct other activities, such as constructing crossings or bridges over the railways; and
- entitlements to local or municipal governments, as well as to government-owned entities, such as FIT.

The Ministry of Communications and Transport (SCT) is in charge of granting the concessions, permits and entitlements, and supervising compliance with their terms. However, the Railway Transport Regulatory Agency (ARTF) is the agency expressly created by the government to, among other things, regulate the railway transport in general, including technical, operative and safety features and standards; supervise the services rendered by concessionaires; secure interconnection; and establish guidelines to implement tariffs when there is a lack of competition.

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?

Yes. For example, the government owns FIT, which holds an entitlement because it is a state-owned entity. Although the rail sector is open to private participation through the granting of concessions, the government decided it was vital to hold ownership of FIT for many reasons, including national sovereignty and security. FIT connects the Port of Coatzacoalcos (Gulf of Mexico) with the Port of Salina Cruz (Pacific Ocean) over a distance of approximately 300km, through the region known as the Isthmus of Tehuantepec. Geographically and conceptually, the Isthmus of Tehuantepec divides the country into northern Mexico and southern Mexico, and for decades many foreign governments and companies have tried to obtain access to the Gulf of Mexico and Pacific Ocean through it. Originally, FIT's entitlement contemplated maintaining the railway as a key activity as well as granting and receiving pass-through rights with other companies. However, the entitlement was amended this year to include exclusivity for the rendering of cargo transport public service, among other things.

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

Not necessarily. Freight and passenger operations can be controlled by separate companies depending on the terms and conditions of the concession granted to each concession holder. For instance, the most relevant concessions in Mexico are solely dedicated to rendering cargo transport public service; this includes companies such as Kansas City Southern de México, Ferrocarril y Terminal del Valle de México, Ferromex and Ferrosur. However, by law, rail transport is contemplated for both passengers and freight. For instance, Grupo México, which owns Ferromex and Ferrosur, also owns Chepe, a passenger train dedicated to the tourism industry. However, the Ojinaga-Topolobampo line carries freight and passengers, and both operations are controlled by the same company under one concession.

Regulatory bodies

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

Rail transport and related rail services are mainly regulated by the Rail Service Law and by the Regulations of the Rail Service. Other laws and regulations that apply include the following:

- the General Communications Networks Law;
- the General Law of National Assets;
- the Federal Law of Administrative Procedure; and
- the Federal Commercial Code, the Federal Civil Code and the Federal Code of Civil Procedure.

The SCT and ARTF are the main regulatory authorities.

MARKET ENTRY

Regulatory approval

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

Yes, for purposes of being awarded a concession, bidders participating in a public tender process must obtain clearance from the antitrust agency, the Federal Economic Competition Commission (COFECE). The procedure and time frame to obtain clearance will be expressly laid down in the tender rules and must be strictly followed by each interested bidder.

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

In principle, it is not necessary to obtain regulatory approval to acquire control of an existing rail transport provider. Any concession holder must notify the Ministry of Communications and Transport (SCT) about any change in the shareholding structure, whether direct or indirect, of the capital of the concessionaire, when such participation is equal to or greater than 5 per cent. Depending on various factors, including the size of the transaction and monetary value or the end result regarding the combination of market sales and assets, the parties wishing to acquire control may have to obtain clearance from COFECE.

However, any assignment of rights and obligations by concession and permit holders to any third parties will require prior authorisation from the SCT.

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

Foreign entities cannot wholly own or control a rail transport concessionaire in Mexico, or a company engaged in constructing, operating and maintaining railways. The Rail Service Law and the Foreign Investment Law provide that the participation of foreign shareholders cannot exceed 49 per cent of the total capital stock of the relevant company, unless the Foreign Investments Commission approves a higher percentage. Only Mexican commercial companies organised under Mexican law may act as concessionaires or permit holders.

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

When participating in a tender process to obtain a concession for a new rail line, construction will typically form part of the concession itself, and therefore it will not be necessary to obtain a permit separately. However, concession holders may contract construction with third parties. In that case, those third parties must obtain a permit from the SCT, although the sole party liable before the SCT will always be the concession holder.

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 Rail Service Law foresees the scenarios in which concessions and permits are revoked. If a rail transport company voluntarily refuses to perform or discontinues service, the concession may be revoked. In addition, the rail transport companies do not have the ability to remove rail infrastructure over a particular route either because they do not own that infrastructure, such as the tracks, or because even if they own equipment such as rolling stock and associated equipment, that equipment can only be used under the terms of the concession or permit. Failure to comply will also result in revocation of the concession or permit. The Ministry of Communications and Transport (SCT)'s and Railway Transport Regulatory Agency (ARTF)'s supervising and sanctioning faculties are set forth in the Rail Service Law.

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 Rail Service Law contemplates various scenarios under which a concession or permit can be revoked, including if the concessionaire or permit holder (1) fails to exercise its rights and duties; (2) transfers the concession or permit, or assigns rights and obligations without prior consent; (3) changes nationality; (4) interrupts the operation of the railway or the transport service, unless expressly permitted; or (5) applies higher tariffs than those registered with the ARTF. In scenarios (1), (2) and (3) the SCT will immediately revoke the concessions or permits. In other cases, such as (4) and (5), it may revoke the concessions or permits prior to receiving the ARTF's opinion, if the holder has breached or defaulted three times within five years.

If a controversy arises between a concession holder and a third party, the ARTF is empowered to investigate and resolve it.

The initial measure available to a concession or permit holder in the case of revocation is to initiate an administrative procedure against the resolution adopted by the SCT, under the provisions of the Federal Law of Administrative Procedure. Legal remedies can result in a constitutional trial or amparo proceeding.

The government may also force a rail transport service provider to temporarily discontinue service over a particular route or cease to operate in the case of a natural disaster, war, disturbance of public order or an event that may threaten national security, internal peace or the economy of the country. If this occurs, the government may be able to take control of the concession. This condition will be enforced for as long as the element that motivated it exists. With the exception of an international war, the government will indemnify the rail transport provider for any damage and financial loss caused.

The government can also suspend services but the concession holder is entitled to challenge the suspension through an administrative appeal under the Federal Law of Administrative Procedure.

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 laws apply. The Rail Service Law provides that in case of liquidation or insolvency the concession or permit will be terminated. However, the termination of the concession or permit for this reason does not remove the obligations of the holder, acquired during the term of the concession or permit.

COMPETITION LAW

Competition rules

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

Under the current competition legal framework, the Federal Law of Economic Competition and its Regulatory Provisions are the only competition provisions that apply and regulate rail transport in Mexico (ie, there are no sector-specific competition rules). Consequently, the Federal Economic Competition Commission (COFECE) is the agency that enforces this legal framework.

Regulator competition responsibilities

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

The sector-specific regulatory agency is the Railway Transport Regulatory Agency (ARTF) and it is not empowered to enforce any competition provisions. In accordance with the Rail Transport Law, the ARTF can request COFECE to intervene in the rail transport industry, to issue an opinion on the lack of effective competition conditions on a particular market.

In addition, COFECE and the ARTF are working on the development of an official methodology to enhance competition in the rail industry, by establishing the basis of tariff regulation and the consideration of pass-through rights, towing rights, interconnection and terminal services when providing the public service of freight and passenger rail transport in Mexico. At present, only a draft version of the above-mentioned methodology is available and has been published for public consultation.

Competition assessments

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

As in any other transaction, at the outset, COFECE analyses the levels of concentration in the market (both before and after the intended transaction takes place) to determine whether the transaction could negatively impact the market and, therefore, if it requires a thorough analysis before being cleared.

Additionally, in line with COFECE's legal precedents in cases related to the rail industry, it conducts its analysis of the possible competition effects resulting from an intended transaction on a route-by-route basis considering the relevant railway networks available and involved in each case.

Ultimately, COFECE will approve the transaction if it concludes that the transaction will not produce anticompetitive effects, for example if the involved routes are not affected, or the resulting entity would have enough competitive constraints and would not attempt to manipulate the price of its services to increase the costs for the clients in the relevant market under analysis.

PRICE REGULATION

Types of regulation

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

The Rail Service Law provides two schemes for fixing the prices and tariffs regulation. The first scheme is under the principle of freedom of tariffs regulation in which concession and permit holders can freely fix the tariffs. The second scheme is through agreed tariffs between the concession holders and final users.

Regarding the first scheme, to become effective, the concession and permit holders will register before the Railway Transport Regulatory Agency (ARTF) the maximum tariffs applicable to the provision of the rail transport service and rail-related services. In that sense, according to the specific characteristics of each service, the concession and permit holders shall publish the prices and tariffs in electronic media. Any modification to the maximum tariffs of rail-related services and charges must be registered before the ARTF before being applied, in which case the concession or permit holders must submit a justification of such modifications. Regarding the second scheme of agreed tariffs, figures should be available at any time so that the ARTF may review them when it chooses to do so.

The tariffs must contemplate the general principles of quality, efficiency, competitiveness, security and permanence to foster a competitive environment. If the ARTF determines that there is no effective competition, then it can set forth the guidelines to establish said tariffs.

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

The same regulations and principles apply for both passenger and freight transport.

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

Freight shippers or passengers can challenge price levels before the ARTF. Charging tariffs above those registered with the ARTF can result in revocation of the concession or permit.

In the event a concessionaire or permit holder wants to modify the maximum registered tariffs, the ARTF may issue recommendations regarding any increases and, if it deems convenient, may request an opinion from the Federal Economic Competition Commission.

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

Following the principles of tariff freedoms, effective competition, quality, efficiency, competitiveness, security and permanence, rail transport companies must charge similar prices to all freight shippers and passengers who are requesting similar service. That is to say, the rail transport companies should not discriminate between freight shippers and passengers who, under the same circumstances, request a 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?

According to the Rail Service Law, network access must be granted. The concession holders, in exchange for a consideration, must grant to other concession holders pass-through rights and towing rights. In that sense, the Railway Transport Regulatory Agency (ARTF) must supervise the network access, and should design and set forth the conditions and considerations when the pass-through rights and towing rights are not being granted.

The concession holders must allow network access when it is established in the terms and conditions of the concession titles, or mutually agreed or demanded by the ARTF if the Federal Economic Competition Commission (COFECE) has determined that there is an absence of effective competition.

The only restriction for granting network access is in terms of total length. Access right to a network cannot exceed the length of the concession and pass-through rights acquired by the concessionaire.

Access pricing

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

The concession holders granting network access must negotiate and agree the consideration to be paid. If the parties do not reach an agreement within 60 calendar days of starting negotiations, they must appear before the ARTF, which may commence a negotiation procedure to set forth the consideration for granting network access. If the parties fail to reach an agreement, the ARTF is entitled to request an opinion from COFECE that it will use to determine the applicable conditions and considerations.

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. However, the Rail System Law and the rail transport industry aim to foster railway development in a competitive environment with a strong emphasis on cost efficiency, tariffs and service quality.

SERVICE STANDARDS

Service delivery

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

Rail transport providers must serve all customers who request the service. Freight or passenger services shall be rendered to all users in a uniform manner, and in equitable conditions regarding opportunity, quality and price. Restrictions include, for instance, the right of a transport provider to deny service to passengers who are inebriated or under the influence of drugs, who are carrying any weapons, explosives or dangerous merchandise, or who otherwise pose a risk to the other passengers on board. With regard to freight services, shippers must refuse to transport any goods that are illegal or prohibited under Mexican laws.

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

The service standards that rail transport companies are required to meet are set forth in each concession title and also through the provisions of Mexican Official Standards. The Ministry of Communications and Transport will add a document to the concessions or permits describing the service standards that must be fulfilled. Generally, the service standards regulate efficiency and safety, including for crossings and towing equipment.

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 or passengers can challenge the quality of the service received from the rail transport companies before the Railway Transport Regulatory Agency. The agency will resolve the controversy, considering the technical specifications and quality of service with which the rail transport company must comply, and may impose monetary sanctions upon the concessionaire or permit holder.

SAFETY REGULATION

Types of regulation

25 How is rail safety regulated and what body has responsibility for regulating rail safety?

Rail safety is mainly regulated in the Rail Service Law and the Regulations on Rail Service; it is also regulated through other rules and regulations (NOMs). For instance, NOM-025-SCT2-2016 issued by the Ministry of Communications and Transport (SCT) deals with safety measures for towing equipment involved in cargo service.

The Rail Service Law foresees two types of liabilities if the concession holder fails to keep the passengers or freight safe. For instance, the measures adopted by the concession holders for passengers must guarantee the safety and integrity of passengers during the journey, from boarding the train to disembarking. The concession holder will be liable for any damage suffered during the journey. In any case, the concession holder must possess insurance that covers passengers as well as any damage to their belongings.

From the moment that freight concession holders receive the goods to be transported to the moment they conclude the delivery, they are liable for the losses and damage suffered, with the exception of the following cases:

- defects of the freight or inadequate packaging;
- when the freight, because of its nature, suffers deterioration or damage, provided that the concession holder meets the delivery time;
- when, upon written request from the customer, the goods are transported in unsuitable vehicles; and
- when the statements or instructions of the shipper or consignee are incorrect.

Competent body

26 What body has responsibility for regulating rail safety?

The SCT and Railway Transport Regulatory Agency (ARTF) are the responsible entities for establishing and regulating rail safety. For instance, the SCT publishes NOMs that rule on diverse matters such as railway crossings and signalling. The ARTF is responsible for determining technical specifications of railways and cargo or passenger service, and for applying NOMs, among others.

Permit and concession holders are also obligated to implement their own safety programmes and submit them before the ARTF, prior to initiating operations.

In addition, the ARTF may issue recommendations to federal, local and municipal administrative entities and concessionaries to collectively promote public safety measures and actions, in large part because theft and vandalism are causes of significant concern.

Manufacturing regulations

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

This is not applicable in Mexico because concessionaries rent or acquire rail equipment primarily from the United States. Therefore, rail equipment must conform with US standards, which are familiar and accepted in Mexico.

Maintenance rules

28 | What rules regulate the maintenance of rail equipment?

There are various NOMs that regulate the maintenance of track and other rail infrastructure. For example, NOM-055-SCT2-2016 provides rules on how to assure quality related to welding railway tracks, while NOM-064-SCT2-2001 regulates how to conduct inspections of locomotive equipment (this NOM adopts the US Railroad Locomotive Safety Standards). The SCT approved the Conservation of Roads and Infrastructure for Mexican Railways Regulations, which provides specific regulation regarding maintenance of track and other rail infrastructure. Concession holders are also obligated to implement their own investment, maintenance and upgrading programmes.

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

NOMs regulating the maintenance of rail equipment include NOM-044/1-SCT2-1997 and NOM-044/2-SCT2-1995. These NOMs establish the procedure to conduct inspections and scheduled repairs for rail equipment, which can take place daily, or for every journey at every quarter or intervals of 48,000km. Concessionaires are required to implement their own investment, maintenance and upgrading programmes as a condition of their concession titles.

Accident investigations

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

If a rail accident occurs, the ARTF will form a specific commission to determine the causes and factors of the accident. The commission must compile information, and investigate and analyse the physical, technical and administrative evidence, including photographs and testimonials. The ARTF must cooperate with the authorities that participate in the administrative and judicial procedures. The ARTF will designate specialised personnel to travel to the place of the accident to assess the condition of the tracks and the rail infrastructure, for which it can request the services of third-party experts. Moreover, the concession holder must submit a technical report to the authorities, which establishes, among other aspects, the causes and circumstances of the rail accident. The ARTF will issue a final report on the accident and will determine the responsible parties.

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 Rail Service Law makes reference to certain types of liabilities for rail transport companies in case of rail accidents, which are provided for in the ordinary liability regime regulated in the Civil Code, and in the Federal Law of Environmental Responsibility, in the case of an accident involving damages to the environment.

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 rail sector mainly operates by granting concessions through third parties by means of a public tender process. This arrangement does not contemplate any monetary investment by the government. However, as part of the concession, the government contributes assets such as ROW, and tracks and buildings. The government will be entitled to receive a consideration for awarding the concession, as well as on an annual basis for the exploitation of the concession. The concessionaire is obligated to provide all funding required to construct, operate and maintain the line, and provide the cargo or passenger service.

There are other cases in which the government has provided support for rail projects. For instance, there is an urban railway project known as Tren Suburbano that was structured under a concession in different phases. To make the Cuautitlán-Buenavista phase viable and bankable, the federal government, together with the local governments of the state of Mexico and Mexico City, contributed non-recoverable grants. The tariff collected from users covers operations and maintenance. Currently, the federal government owns 49 per cent of Tren Suburbano. Other projects include the Guadalajara Light Train System and the Monterrey Metro Line 3.

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?

Until 2008, there were no sector-specific rules governing financial support to rail transport companies; in the event that a rail company needed support, it had to resort to traditional or standard loan or project finance structures. However, in 2008, the National Infrastructure Fund (Fonadin) was established, which provides financial support to public or private entities that want to develop infrastructure projects or conduct research for these projects. This financial support can be loans, guarantees or recoverable and non-recoverable support in the form of grants.

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 is a specific chapter in the Federal Labour Law that refers to the public service work in areas or zones under federal regulation. This

chapter applies to work involving loading, unloading, stacking, handling, inspection, docking, berthing, hauling, storage and transfer of cargo and baggage performed on board ships or on shore, at ports, navigation waterways, railway stations and all other areas falling under federal jurisdiction, including activities performed with tow boats and additional or related activities.

ENVIRONMENTAL REGULATION

Applicable environmental laws

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

The general environmental laws that apply are the following:

- General Law of Environmental Protection;
- General Waste Law;
- Federal Law of Environmental Responsibility; and
- General Law of Climate Change.

The only specific framework that applies are the Regulations for Terrestrial Transport of Hazardous Materials and Waste. Certain rules (NOMs) also apply to environmental matters related to this sector; for instance, NOM-021-SCT2/2017 deals with the compatibility and segregation of towing units transporting hazardous material and waste.

UPDATE AND TRENDS

Key developments of the past year

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

Mexico has recently formalised the launch of the special economic zones (SEZs), which are intended to attract investment into the less-developed southern regions of Mexico, and, at the same time, provide many incentives to investors, such as tax exemptions and preferential treatment. There are currently seven SEZs and the rail transport industry is expecting substantial amounts of investment in those zones that will connect the southern regions with the rest of Mexico and abroad.

The recent energy reforms have created opportunities to expand the rail transport industry and its infrastructure. Trains are considered to be a crucial part of the transport system that provide more flexibility for the energy market, as well as faster and more secure deliveries. For instance, according to the Railway Transport Regulatory Agency, in 2017 the rail transport industry transported 13.9 per cent more oil and by-products than in 2016. From a cost perspective, and considering Mexico's lack of pipeline infrastructure and security issues with pipelines, trains are probably the best option for transporting oil products. Strategic distribution lines, storage facilities and terminals are currently under construction, and rail cargo companies should benefit from this expansion. These opportunities, coupled with growing imports and exports including those related to key industries such as automotive, agriculture and mining, will undoubtedly encourage further development of Mexico's railway infrastructure.

Another hot topic is the construction of the Mexico City-Toluca high-speed passenger train. This project is the first of its kind in Mexico but progress has been slow owing to numerous delays and corruption scandals. President Andrés Manuel López Obrador took office on 1 December 2018. It is yet to be determined how Mr López Obrador will receive this project and how it will be completed and commissioned. He has stated that his team will very carefully audit each and all contracts related to the project.

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Finally, since 1 July 2018, Mr López Obrador has been unveiling the list of top infrastructure projects for the new administration. The top project consists of redesigning and revamping roads and railways in the Isthmus of Tehuantepec corridor that connects the Port of Coatzacoalcos with the Port of Salina Cruz. FIT holds an entitlement to render rail cargo transport service on its route through the Isthmus of Tehuantepec. This will be a great opportunity to revamp FIT and its rail infrastructure. In addition, Mr López Obrador has proposed resuming the Mexico City-Queretaro high-speed passenger train as one of his top priorities. He has also proposed building a passenger rail line to cover the Cancún-Palenque route (recently expanded to cover Yucatán and Campeche states), which will be used solely in the tourism sector. The administration may also be responsible for creating a new national rail network.

Coronavirus

37 What emergency legislation, relief programmes and other initiatives specific to your practice area has your state implemented to address the pandemic? Have any existing government programmes, laws or regulations been amended to address these concerns? What best practices are advisable for clients?

In connection with environmental practice, the government basically suspended all kinds of legal terms exceptions made to specific areas (priorietary areas such as chemical, transport, health, etc) and some government-driven specific projects. However, no relief programmes were implemented.

Each state government issued its own guidelines to resume activities, requiring employers to comply with health and safety actions to continue to operate.

It is advisable for clients needing to keep their facilities operating to comply with specific health requirements in the specific jurisdiction and, in the case of any doubt, to contact the competent authorities.

* *The information in this chapter was verified between July and August 2020. This chapter was co-authored by Eduardo Bravo Senderos and Jorge Guadarrama Yañez, who have since left the firm.*

Netherlands

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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, 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.

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 2034. 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.

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.

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 will have to reduce their costs. Most companies have expressed their intention to reduce their timetables and with that, thousands of jobs will be lost.

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 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 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 so 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 that 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.

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 jeopardize 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 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 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 2023–2025.

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 seems to stimulate 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 of 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. This means that, if requested by the authority that awarded the concession, the rail infrastructure manager or the railway undertaking performing the concession, the ACM has to decide whether or not the economic equilibrium of the public service contract will be compromised by the new proposed 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.

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.

In addition, passengers or passenger organisations can 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 and what body has responsibility for regulating rail safety?

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 methods on safety management system).

Railway infrastructure and all rail vehicles must also meet certain safety standards. These are set out in Directives 2016/797/EU and 2016/798/EU 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).

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 51 of the 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 rail equipment?

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).

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, no.

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.

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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.

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 counsel 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 now processing the responses.

Coronavirus

37 What emergency legislation, relief programmes and other initiatives specific to your practice area has your state implemented to address the pandemic? Have any existing government programmes, laws or regulations been amended to address these concerns? What best practices are advisable for clients?

Emergency programmes were implemented in 2020. For months, rail passenger transporters were allowed to reduce their time schedules. Passengers were allowed to travel only if their journey was essential (eg, no tourism was permitted). By government request, since 1 June 2020, rail passenger transporters have resumed their regular timetables, although the number of passengers is still substantially

decreased. The government introduced an availability payment of €1.5 billion to compensate rail passenger concessionaires, on the conditions that no dividends, bonuses or dismissal payments are paid to directors.

Public transport will continue to receive financial support from the central government to keep trains, buses, trams and metros running during the covid-19 crisis. This support has been extended for the whole of 2021.

Passengers still have to wear surgical masks in all forms of public transport.

The validity of train drivers' licences is limited to 10 years. It is also subject to periodic checks. Owing to the difficulties in renewing licences as a consequence of the extraordinary circumstances caused by the covid-19 outbreak, Regulation (EU) 2020/698 offered the possibility to extend the validity of licences expiring between 1 March 2020 and 31 August 2020 for a period of six months from their date of expiry. Similarly, train drivers should be granted an additional period of six months to complete the periodic checks. As the covid-19 crisis is ongoing, Regulation (EU) 2021/267 extends the validity of these licences for a period of 10 months. The Transport Inspectorate applies these extensions to engine drivers.

For the same reason, the renewal or extension of other certificates, licences and authorisations could be extended (Regulation (EU) 2021/267). Among other things, these extensions consider the validity of safety certificates of railway undertakings. The Netherlands has chosen not to apply most of these extensions.

Poland

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GENERAL

Industry structure

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

There are 14 railway infrastructure managers in Poland that manage the railway infrastructure and make the tracks available to rail operators. The largest manager is the state-controlled company PKP Polskie Linie Kolejowe SA, which is responsible for the maintenance of rail tracks, managing the rail traffic across the country, scheduling train timetables and managing the railway land. More than 95 per cent of the infrastructure is managed by this company and the remaining part of the infrastructure is managed by local railway operators (eg, metropolitan railways, power plants, mines). A separate entity, PKP Energetyka SA, which was privatised in 2015, provides nationwide maintenance and emergency response services to the railway network.

Ownership and control

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

The government owns 100 per cent of shares in PKP SA, which controls leading nationwide rail passenger carrier, PKP Intercity SA. A second nationwide rail passenger carrier, Polregio, is controlled (50 per cent and one share) by the Industrial Development Agency (a state-controlled company responsible for implementing restructuring processes) and by regional self-government units (voivodeships). Regional self-government units and cities are owners or the majority shareholders of regional or metropolitan rail passenger carriers (currently there are 10 such regional and municipal carriers). The government also indirectly controls approximately 30 per cent of shares in PKP Cargo SA, a freight carrier listed on the Warsaw Stock Exchange.

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

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

Regulatory bodies

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

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

MARKET ENTRY

Regulatory approval

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

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

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

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

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

No, there is no such requirement.

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

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

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

MARKET EXIT

Discontinuing a service

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

The procedure of closing a railway is set out in the Railway Transport Act. The manager of a particular route may apply to the Minister of Infrastructure to approve closure of a railway route (and, as a consequence, removal of infrastructure) if the revenue from operations carried out on this route does not cover the costs incurred by the manager for maintenance of that route, and if no financing from the state treasury or the local government unit's budget was provided to cover the manager's loss.

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

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

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

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

Insolvency

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

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

COMPETITION LAW

Competition rules

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

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

Regulator competition responsibilities

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

The president of the Office of Rail Transport (ORT) supervises non-discriminatory treatment of all applicants in the field of access to infrastructure. The president also monitors the state of competition in the rail transport market, cooperates with competent authorities in counteracting the use of monopolistic practices, coordinates the operation of the rail transport market and respects passengers' rights.

Competition assessments

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

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

PRICE REGULATION

Types of regulation

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

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

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

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

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

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

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

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

NETWORK ACCESS

Sharing access with other companies

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

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

Access pricing

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

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

Competitor access

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

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

SERVICE STANDARDS

Service delivery

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

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

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

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

Challenging service

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

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

SAFETY REGULATION

Types of regulation

25 | How is rail safety regulated and what body has responsibility for regulating rail safety?

Pursuant to the Act on Railway Transport, the president of the Office of Rail Transport (ORT) supervises safety management systems in accordance with the principles set out in Commission Regulations (EU) Nos. 1158/2010 of 9 December 2010 on a common safety method for assessing conformity with the requirements obtaining railway safety certificates and 1169/2010 of 10 December 2010 on a common safety method for assessing conformity with the requirements for obtaining a railway safety authorisation.

Competent body

26 | What body has responsibility for regulating rail safety?

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

Manufacturing regulations

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

There are both national and EU rules regulating the manufacturing of rail equipment. A regulation of the Minister for Infrastructure and Development lays out the grounds for authorisation for placing in service certain types of structures, equipment and railway vehicles. At EU level many pieces of legislation have been issued, the most relevant being Regulation No. 2016/919 on the technical specification for interoperability relating to the 'control-command and signalling' subsystems of the rail system in the European Union.

Maintenance rules

28 | What rules regulate the maintenance of rail equipment?

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

29 What specific rules regulate the maintenance of rail equipment?

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

Accident investigations

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

If an accident occurs, the railway employee must notify the supervisor and the dispatcher of the infrastructure administrator, whose tracks the siding is connected to. If necessary, the employee should notify the emergency services, including the police. The president of the ORT (either directly or through a competent local branch) and the chair of the State Commission for Investigation of Railway Accidents should be notified of the accident. If the accident is a threat to the environment, the voivodeship inspector for environmental protection must be notified. If there are dangerous goods on the railway siding, the voivode should be notified. Depending on the size of the siding, the employee should check whether the other tracks are trafficable. Victims should be assisted and material should be secured to help determine the cause of the accident. The State Commission for Investigation of Railway Accidents will investigate the accident or incident and attempt to determine the cause and circumstances of the accident or incident, estimate losses and draw preventive conclusions; however, it will not establish fault or liability. Members of the Commission include, inter alia, a railway siding user and a railway carrier who operates the siding.

Accident liability

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

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

FINANCIAL SUPPORT

Government support

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

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

Requesting support

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

The sector-specific rules governing financial support to rail transport companies are regulated at EU level. Generally, all public aid should be prohibited unless it qualifies as an exception. Sectoral aid, granted to companies acting in a given sector, is characterised by some specific rules. As regards transport, public aid may be granted only for passenger transport. EU legislation sets forth that certain actions made by the governments of EU member states with the aim to support passenger transport companies will not constitute the prohibited state aid. For instance, Regulation No. 1370/2007 concerning the opening of the market for domestic passenger transport services by rail lays down that competent authorities may decide to take appropriate measures to ensure effective and non-discriminatory access to suitable rolling stock.

LABOUR REGULATION

Applicable labour and employment laws

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

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

ENVIRONMENTAL REGULATION

Applicable environmental laws

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

There are no special environmental laws that apply to the rail transport industry (including rail transport companies). Standard environmental regulations apply. According to these regulations, building and rebuilding railway lines constitutes an investment that is deemed to have a potentially significant effect on the environment and should, therefore, be preceded by an environmental assessment report.

UPDATE AND TRENDS

Key developments of the past year

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

The Solidarity Transport Hub (STH) is an emerging infrastructure mega project, which includes two major components: a new international

airport constructed from scratch approximately 40km from Warsaw and a new nationwide railway system consisting of 10 major corridors radiating from the STH Airport towards all regions of Poland. As currently envisaged, the STH railway system will be based on approximately 1,800 km of new high-speed-rail (HSR) lines and 2,400km of modernised railway lines. Completion of the STH railway programme is one of the biggest ongoing engineering projects in central Europe. It involves the adoption of the highest HSR design standards, technical parameters and planning procedures, many of which will be implemented for the first time in the region. The railway infrastructure is planned to be developed by a special purpose vehicle (SPV) set up to carry out the project, which means that the SPV will become a new state-controlled infrastructure manager in Poland. Thus far, the STH has chosen a strategic adviser (Incheon International Airport) and selected contractors who will conduct development studies.

Coronavirus

37 What emergency legislation, relief programmes and other initiatives specific to your practice area has your state implemented to address the pandemic? Have any existing government programmes, laws or regulations been amended to address these concerns? What best practices are advisable for clients?

The covid-19 outbreak has brought a sharp drop in demand for rail transport services since March 2020. This has had a serious impact on railway undertakings. In order to mitigate the negative economic circumstances, the European Parliament and the Council of the European Union adopted Regulation 2020/1429 which allows member states to authorise infrastructure managers to reduce, waive or defer the payment of charges for access to the railway infrastructure. Based on Polish regulations, companies could apply for benefits to subsidise the remuneration of employees covered by stoppages or reduced working hours. The support was granted to entities that recorded a drop in economic turnover, did not meet the conditions for declaring bankruptcy and were not in arrears in the payment of public law debts. Another type of support for transport companies were products offered by the Industrial Development Agency. The first of these was an operating lease with a grace period and an oversized repayment period. It was intended to refinance the leases held in commercial companies and leasing companies, and could be applied for by small and medium-sized enterprises with a turnover over 4 million zlotys and with positive results for 2019. Railway operators applied for subsidies for regional, inter-regional and international rail passenger transport operators from the state budget to cover lost revenues from statutory reliefs (eg, applicable for the students or the elderly). In addition, operators were provided with funds to honour statutory entitlement to concessionary public transport services up to the amount cleared for the same monthly periods in the previous year. The support also included subsidies paid to cover unrealised sales revenues and operating costs planned but not realised for the reduction of operational work. Moreover, the merger control restrictions that were introduced in 2020 also apply to the railway sector. Under these covid-19-related regulations, acquisition of a significant number of shares (ie, at least 20 per cent) in companies whose income in Poland exceeded the equivalent of €10 million in any of the two financial years preceding the acquisition will be controlled by the president of the Office of Competition and Consumer Protection.

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Russia

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GENERAL

Industry structure

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

The rail transport industry in Russia is divided into three groups:

- rail transport for public use, which is the rail infrastructure, rolling stock and other property serving the rail transport needs of individuals, legal entities and the state based on a public (standard form) contract, as well as for other related works (services) in connection with such transport;
- rail transport for non-public use, which is railways for non-public use, buildings, rolling stock (in certain cases) and other property serving the needs of individuals and legal entities for works or services in non-public places based on contracts or for their own purposes; and
- technological rail transport of organisations, which is the rail transport of organisations that transport goods within the territories of the organisations, and carry out initial and tail-end operations with railway rolling stock for the organisations' purposes.

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?

Almost all rail infrastructure related to publicuse rail transport is owned by the Russian Railways Joint Stock Company (RZD). Rail operations over that infrastructure are typically performed by RZD and its subsidiaries, while the market share of other rail operators is relatively low (except the freight containers operators market).

The Russian Federation owns 100 per cent of the shares in RZD, which was established by the Russian Government Regulation 'on the establishment of Russian Railways Joint Stock Company'. In addition, RZD has a number of affiliated companies in the different sections of the railway services market.

Non-public-use rail transport and technological rail transport are typically privately owned and operated by the owners.

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

RZD controls a huge part of all rail operations. It has a strong monopoly on passenger operations on the public-use railways, while the presence of the private rail service providers on the freight operations market is relatively high. In addition, RZD has a small presence on the non-public-use railway freight market (the industrial rail transport enterprise section).

Regulatory bodies

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

The following governmental bodies regulate rail transport:

- Ministry of Transport of the Russian Federation: the federal executive body for transport, including rail transport. The Ministry of Transport develops governmental policy and regulates, inter alia, rail transport.
- Federal Agency of Rail Transport (FART): a federal executive body under the authority of the Ministry of Transport, which renders state services and manages state property in the area of rail transport. Among other things, FART adopts decisions on the commissioning of railway stations and public-use railways, and keeps track of railway rolling stock and containers by number.
- Federal Service for Supervision in the Sphere of Transport (FSSST): a federal executive body under the authority of the Ministry of Transport performing control and supervisory functions in the transport sector, including rail transport.
- RZD is given certain regulatory functions, for instance, issuance of technical conditions and approval of design documentation for the construction of a new railway which connects with RZD railway infrastructure.

The key Russian regulatory acts relating to rail transport are:

- the Federal Law 'On railway transport in the Russian Federation' (the Federal Law on Rail Transport);
- the Federal Law 'Rail Transport Charter of the Russian Federation'; and
- by-laws, including Russian government regulations.

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 general requirements to start operations as a rail transport provider are stipulated in the Federal Law on railway transport and include the following:

- obtaining a licence, if the operations must be licensed;
- owning or being otherwise entitled to possess rolling stock;
- having qualified employees; and
- having an executed agreement for railway infrastructure use (if applicable).

The following operations must be licensed:

- passenger rail transport;
- hazardous materials and goods transport; and
- handling of hazardous materials and goods.

The rail transport provider must obtain the respective licence from the FSSST or its local offices. The list of documents required for the licences is stipulated by the Government Regulation on the licensing of certain operations on rail transport. The licence fee stipulated by the Tax Code is relatively low. Licences are issued for unlimited terms.

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

In general, there is no specific regulatory approval necessary to acquire control of an existing rail transport provider. However, there are some general competition regulation requirements. In some circumstances (listed below) the rail transport provider or buyer (accordingly) must submit an application for consent to the transaction or deliver a notification to the Federal Antimonopoly Service (FAS) in accordance with the FAS Order on approval of the rules for the Federal Antimonopoly Service and its territorial bodies to examine applications and notifications submitted in accordance with the requirements of article 7 of the Federal Law on natural monopolies.

If the rail transport provider is the subject of a natural monopoly, submitting the application for consent or delivery of notification (as applicable) are required, inter alia, in the following circumstances:

- the sale as a result of which the buyer acquires the right to own, possess or use part of the fixed assets of the rail transport provider intended for the production (sale) of goods and the price of these assets exceeds 10 per cent of the provider's equity capital; or
- if stocks (shares) of the provider valued at more than 10 per cent of the authorised capital are being acquired.

In addition, if the aggregate value of assets of the person (group of persons) or aggregate revenue from goods sales in the past calendar year exceeds a specific amount, then acquisition of the stocks (shares), rights or property of the rail transport provider (which meet the requirements stipulated by the Federal Law on Competition Protection) may be subject to preliminary approval by the FAS.

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

The Federal Law on Procedures for Foreign Investments in Business Entities of Strategic Importance for Russian National Defence and State Security provides that rail services, which are treated as a natural monopoly, have strategic importance for national defence and state security. The law requires that prior authorisation be obtained from a special Government Commission on Monitoring Foreign Investment for foreign investors to acquire control over companies of strategic importance. Furthermore, any investor may be required by a decision of the chair of the Commission to request preliminary approval for the transaction (even if it is not a strategic industry). Detailed grounds for the aforementioned decision other than 'national defence and state security' are not stated.

Transactions that result in a foreign investor obtaining control over rail transport companies, and that are made in violation of the abovementioned Federal Law, are void.

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

There are general and specific rules regarding new rail line construction.

The general rules are stipulated, inter alia, by the Town Planning Code and the Land Code. Such rules include obtaining title to the land, construction permits, etc.

Specific rules are stated in the Federal Law on Rail Transport. Non-public-use railway construction must be approved by the government of the Russian constituent entity in which the railway is located. A special commission handles commissioning of the non-public-use railway in accordance with the Federal Law on Rail Transport.

There are also different procedures for situations when and if the constructed railway connects with non-public-use railways or public-use railways. In the first case, construction must be approved by the owner of the existing railway (Order of the Ministry of Transport on approval of the procedure connecting non-public-use railways under construction with non-public-use railways). In the second case, construction must be approved by the Federal Agency of Rail Transport (Government Regulation on the rules for connecting new or renovated non-public and public-use railways to public-use railways).

The Ministry of Transport is authorised to regulate project design and construction of public-use railways and of non-public-use railways; however, currently, specific regulation does not exist.

In addition, there are special Russian Railways Joint Stock Company (RZD) local acts that regulate the procedure of development and approval of the design and working documentation for the construction and reconstruction of RZD railway infrastructure (for instance, RZD Order on approval of the procedure for the development, coordination and approval of design and working documentation for construction and reconstruction of facilities of JSC RZD).

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?

While there is no requirement to obtain special approval for nonpublic-use railways, there is a voluntary closure procedure for public-use railways stipulated by the Ministry of Transport Order on approval of the order for closure of public-use railways, including lines and plots of low intensity. This order sets forth quite a complicated procedure that includes Ministry of Transport approval that is based upon the Federal Agency of Rail Transport's or its local office's reports. The rail transport company must submit a set of documents, including a railway closure feasibility study and the offer from the respective constituent entity of Russia regarding the closure.

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 general grounds for licence withdrawal are material breaches of the licence conditions. A licence can only be withdrawn by a court on the basis of a Federal Service for Supervision in the Sphere of Transport (FSSST) claim that the transport company failed to remedy material breaches after receiving a preliminary order from that body. Prior to withdrawal, the FSSST may suspend the licence on the same grounds or suspend the provider's operations in accordance with the Code of Administrative Offences.

The FSSST and the courts consider a breach to be material when it (1) results in the death of or injury to a person, (2) results in harm to animals, the environment or cultural heritage sites, or (3) poses a risk of (1) and (2). The following are considered breaches:

- violation of rules of passenger transport, rules of freight transport and the respective technical conditions;
- not having the required number of employees with the appropriate qualifications and experience; and
- the required equipment (containers, rolling stock, etc) being of poor quality.

Insolvency

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

The general rules of the Federal Law on Insolvency (Bankruptcy) apply to the insolvency of rail transport providers. In general, legal entities must continue operations during insolvency. Whether services can be provided during insolvency depends on the insolvency phase and amount of assets needed to pay debts. A rail transport provider must stop operations if a court decides that it must be liquidated.

COMPETITION LAW

Competition rules

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

The general legislative acts relating to competition are the Federal Law on Protection of Competition and the Federal Law on Natural Monopolies. In addition to these two laws, rail transport is regulated by specific by-laws relating to fees and charges, among other things. The Federal Antimonopoly Service (FAS) is the government body authorised to regulate competition.

Regulator competition responsibilities

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

Despite the fact that the Ministry of Transport is authorised to take measures to develop competition in relevant spheres, including special-purpose government programmes, it does not have the power of direct competition law enforcement.

Competition assessments

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

To the extent that public-use rail transport services are part of a natural monopoly they have specific features in competition regulation. For example, there are two main methods for regulating natural monopolies:

- price regulation (fixing prices or the maximum price level); and
- stating a list of consumers who must be provided with services or the minimal level of service provision.

The following competition standards, which may indicate a violation of competition rules, apply to other railway services (which are not part of a natural monopoly):

- reduction of the number of players in the relevant market;
- price manipulation;
- restricting certain market players from acting independently;
- determination of joint conditions for the circulation of goods; and
- other circumstances allowing some of the market players to influence the conditions for the circulation of goods.

PRICE REGULATION

Types of regulation

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

Prices for freight services on public-use rail transport are regulated by the government in accordance with the Federal Law on Natural Monopolies, because they are considered natural monopolies. The main piece of legislation is the Government Regulation on state regulation of charges, fees and payments relating to works (services) of natural monopolies in rail transport.

Previously, prices (tariffs) were regulated by the Federal Tariff Service (FTS), but this right was subsequently transferred to the Federal Antimonopoly Service (FAS). For example, the limits within which service providers are entitled to determine prices are stipulated by the FTS Order on the approval of the method for rail transport companies to state price limits (maximum and minimum levels) for freight transport. In addition to the FAS, executive government bodies of the constituent entities of Russia regulate prices, including setting tariffs for carriage on local transport services.

Prices for non-natural monopoly services emerge on a free basis, but they must comply with competition rules.

International transport service prices are regulated by international treaties.

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

Price regulation of passenger rail transport services is relatively similar to that of freight services, if they are natural monopolies. The Government Regulation on state regulation of charges, fees and payment for works (services) of natural monopolies in rail transport also applies to passenger transport tariffs.

An important feature of tariff regulation is that service providers must meet breakeven criteria.

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

The general rule is that freight shippers or passengers are entitled to challenge acts that set prices with the FAS, if these acts violate the competition rules. The resulting FAS decisions may be challenged in the state courts.

Furthermore, there are specific ways to reduce prices for freight shippers or passengers within the limits stated by the FAS or FTS. For example, the procedure for reducing prices for freight shippers on the RZD rail infrastructure is stipulated by RZD Order No. 2314p dated 15 November 2016.

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

Rail transport providers are required to charge similar prices for similar services if they provide public-use rail transport services in accordance with article 789 of the Civil Code, the Rail Transport Charter, the Federal Law on Rail Transport and other by-laws. However, this obligation does not apply to non-public-use railway services.

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?

A public-use railway owner is not allowed to deny conclusion of an agreement for network access to such railways and other public-use rail infrastructure in accordance with the Government Regulation on approval of the rules for rail transport of public-use infrastructure usage services.

The only reason for denying conclusion of an agreement for network access is when it is not possible to execute an agreement granting network access. This would need to be assessed case by case.

In addition, in cases when there is a signed agreement for network access, the public-use railway owner can deny network access for the requested period due to:

- lack of technical and technological capacity for transportation;
- cessation or limitation of freight transportation via requested railways due to acts of God, military operations, blockades and epidemics; and
- in other circumstances, stipulated by the law.

Access pricing

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

Prices for granting network access to public-use railways and other public-use rail infrastructure services also relate to the natural monopoly sphere and are regulated by the government in accordance with the Federal Law on Natural Monopolies.

In addition to the price for granting network access, the regulator is entitled to establish additional special-purpose costs related to prescribed financing needs (eg, rail transport infrastructure major repairs).

Competitor access

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

Russia has announced the process of rail transport market demonopolisation. The main objective is to switch from regulating all natural monopolies in all rail transport services to regulating public-use transport services only.

There are plans to reduce market sections within which state price regulation is applied and improve the mechanisms of price self-regulation. These plans are outlined in the Rail Transport Improvement Strategy for the period until 2030 (approved by a government regulation).

SERVICE STANDARDS

Service delivery

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

Service providers are required to serve anyone who requests service on public-use transport in accordance with article 789 of the Civil Code, the Rail Transport Charter, the Federal Law on Rail Transport and other by-laws. However, a service provider is entitled to deny service if it does not have the capacity to provide it.

This rule does not apply to non-public-use transport services.

Regarding restrictions, there are a number of items that are not allowed on rail transport, including those that are flammable, poisonous, explosive or otherwise dangerous.

In addition, in 2020, amendments were made to Rail Transport Charter according to which in the situation of emergency or high alert regime implementation government of the constituent entities of Russia can state special conditions of transport service agreements execution. For instance, rail transport service providers can be given the right to unilaterally change such agreements or to terminate them with compensation of the price paid.

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

General regulation for service standards is stipulated by the Rail Transport Charter, which states, for instance, that railway stations and other buildings must comply with construction and sanitary regulations. Passengers must be provided with free use of waiting areas and toilets, special equipment must be provided for people with disabilities, etc.

The Government Regulation 'on the provision of rail transport services for carriage of passengers and cargo, baggage and freight baggage for personal, family, household and other needs not connected with the approval of commercial operation rules' is the specific act regulating service standards, which are primarily established for passenger transport services and for private freight.

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 who are individuals and passengers (consumers) are entitled to challenge the quality of service under the Federal Law on the protection of consumer rights.

If shortcomings are discovered in the service received, consumers have the right, inter alia, to demand:

- to remedy the shortcomings in the service at no charge;
- a commensurate reduction in the price of the service; or
- reimbursement of the consumer's or a third party's costs to remedy the shortcomings in the service.

The Rail Transport Charter establishes specific liability for rail transport providers (primarily in the form of fines), including the following:

- damage to or the loss of cargo or baggage;
- delay of freight or passenger transport; and
- use of a freight shipper's equipment without approval.

Freight shippers (companies and individuals) and passengers may challenge the service quality on the grounds listed above without taking legal action. However, they can also challenge service quality in court, pursuant to the general rules stipulated by Russian civil and procedural legislation.

SAFETY REGULATION

Types of regulation

25 | How is rail safety regulated and what body has responsibility for regulating rail safety?

There is a wide range of transport safety regulations in Russia, including technical, criminal and fire safety regulations.

One of the general acts for transport safety is the Federal Law on Transport Safety. It prescribes the following different types of safety requirements:

- transport safety requirements;
- transport safety requirements regarding transport infrastructure safety during project design;
- transport safety requirements regarding non-transport infrastructure facilities that are located near transport infrastructure; and
- requirements for the transport safety of individuals.

The Government Regulation on federal transport supervision regulates rail transport supervision, including safety supervision. The Regulation sets forth a timetable for planned inspections of providers: depending on the risk category of the facility, an inspection takes place every year, or every three, five or 10 years.

The Federal Law on Fire Safety and the Federal Law on Technical Regulation also apply to transport safety.

For convenience of researching transport safety regulation, the most important acts on rail transport regulation can be found in the Federal Service for Supervision in the Sphere of Transport (FSSST) Order 'on approval of the FSSST list of legal acts that contain obligatory requirements for commercial operations based on a notification procedure'.

Competent body

26 | What body has responsibility for regulating rail safety?

The Ministry of Transport regulates the safety of transport and maintenance of rail infrastructure and prepares the state transport safety policy.

The FSSST performs control and supervisory functions in the transport sector, including rail transport.

Manufacturing regulations

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

Primarily, the manufacture of rail equipment must comply with provisions of the Technical Regulation on the Safety of Rail Equipment (approved by a decision of the Customs Union Commission). It includes, inter alia, requirements for mechanical, chemical, biological and radiation safety.

A safety compliance assessment may be in the form of certification or in the form of a declaration of conformity. The Technical Regulation contains lists that state the form of assessment for particular equipment.

Maintenance rules

28 | What rules regulate the maintenance of rail equipment?

The general rules of the Town Planning Code apply to the operation, construction and commissioning of buildings that are part of rail infrastructure. Rail transport and other rail infrastructure are also regulated by the Federal Law on Rail Transport and other specific by-laws. This includes the Technical Regulation on the Safety of Rail Infrastructure.

Rules for the maintenance of track and other rail infrastructure are stipulated by the Ministry of Transport Order on the approval of railway technical maintenance rules, which regulates, inter alia, the following:

- rail transport employees' obligations regarding transport safety;
- the maintenance of buildings and track equipment;
- the maintenance of electrical equipment; and
- train traffic management.

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

The Ministry of Transport Order on the approval of railway technical maintenance rules also regulates the maintenance of rail equipment. It prescribes requirements for planned repairs. An access permit can be obtained following equipment repair provided the relevant notes were made in the technical passport, which each locomotive, carriage or other part of the rolling stock must have.

The rules also require certain signs and titles to be made on rolling stock (eg, owner's name, dates of repair, identification numbers).

Moreover, the rules contain separate regulation for the maintenance of rail infrastructure, including rolling stock, on tracks where high-speed trains (140 to 250km/h) are operated.

Accident investigations

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

The procedure for the investigation of rail accidents is prescribed by the Ministry of Transport Order on the approval of provisions for classification, investigation and recording of rail accidents and other events related to violations of rail safety regulation procedure.

This procedure requires the rail infrastructure owner to inform a range of government bodies (including the FSSST and the relevant public prosecutor's office) about accidents such as train crashes, accidents involving hazardous cargo spills, etc.

A commission of FSSST representatives must be formed to investigate these accidents. The commission's decisions are binding on the rail infrastructure owner.

The Russian Railways Joint Stock Company (RZD) Order 'on the approval of provisions for the classification, investigation and recording of rail accidents and other events related to violations of rail safety regulation procedure on RZD infrastructure' corresponds to the abovementioned Ministry of Transport order.

Investigation of accidents involving a transport company's employees is regulated by the Labour Code, which also requires the employer to immediately report accidents to the relevant government bodies. In this case, the investigation is conducted by a commission formed by the employer. The commission must include a state labour inspector if the accident caused death or injury.

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 Rail Transport Charter states that a transport company is liable for the death of and injury to passengers, or for damage to baggage in accordance with international treaties or Russian civil law. The Rail Transport Charter or the respective transport contract may set a higher amount of compensation than is determined by civil law.

According to the Rail Transport Charter, the compensation for a passenger's death is 2 million roubles and for injury up to 2 million roubles. However, if the amount of compensation for harm which is determined in accordance with civil law is higher than that stipulated by the Rail Transport Charter, payment of the compensation in accordance with the Rail Transport Charter does not exempt the payer from the payment of compensation for harm in the amount exceeding compensation stipulated by the Rail Transport Charter.

Liability for safety rule breaches is also regulated by the Criminal Code (liability of individuals) and Code of Administrative Offences.

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 financial support to rail transport companies, and especially to Russian Railways Joint Stock Company (RZD) as the exclusive public-use rail infrastructure owner, is primarily provided in the form of reimbursement of expenses.

Generally, loss of income of rail infrastructure owners and service providers resulting from government tariffs or consumer benefits below an economically feasible level must be subsidised by the state budget.

Requesting support

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

The government's obligation to reimburse expenses is stipulated by the Federal Law on Rail Transport. The government issues specific procedures for this reimbursement depending on the particular tariffs or grounds for consumer benefits. As a general rule, the transport company has to deliver a loss of income report to the Federal Agency of Rail Transport on a monthly basis to request reimbursement.

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?

In addition to the Labour Code, employment of workers in the rail transport industry is regulated by the Federal Law on Rail Transport. In accordance with this law, a large part of the specific regulation in this field falls under the authority of the Ministry of Transport. For example, the Ministry of Transport governs special aspects of working conditions and rail workers' working hours and breaks.

Moreover, there are special requirements for workplace discipline in rail transport stipulated by the Government Regulation on the approval of the discipline regulation for rail transport workers. In addition to the disciplinary liability stipulated by the Labour Code, this regulation, inter alia, prescribes rail transport workers' disqualification from driving trains or other rail vehicles and dismissal of rail transport workers on special grounds.

ENVIRONMENTAL REGULATION

Applicable environmental laws

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

There is no specific environmental regulation for rail transport, therefore the Federal Law on Environmental Protection applies.

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UPDATE AND TRENDS

Key developments of the past year

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

In the second half of 2019, there were remarkable deals on acquisition of rail market leaders' shares. For example, the Russian Railways Joint Stock Company (RZD) sold 50 per cent plus two shares in TransContainer (the country's largest freight container operator) in an auction to Delo Group for US$944.63 million.

In addition, Vnesheconombank (VEB.RF) and TransFin-M using LLC Atlant as a joint venture formed a single railway rolling stock operator. As a result, Atlant will become one of the market leaders in rolling stock, with 75,000 wagons under its control.

Regarding legal regulation – there were no revolutionary changes in specific railway legislation, but in 2019 some amendments were made regarding rail transport operators' liability. The Rail Transport Charter stated that liability for the delay of freight shipment is reduced from 9 to 6 per cent of shipment price for each day of delay and limitation of total liability reduced from 100 per cent of the shipment price to 50 per cent.

Finally, as in previous years, the hot topic in business is investment in transport infrastructure (including rail transport) on the basis of public-private partnerships (PPP). Currently, the largest rail infrastructure PPP projects are the following:

- Elegest-Kyzul-Kuragino railway. Beside construction of 410km of railway from coal deposit, this project also includes construction of mining and processing plant, coal port terminal and thermal power station; and
- the Northern Latitudinal railway (707km, along the Obskaya-Salekhard-Nadym-Novy Urengoy-Korotchaevo route). This project will link the western and eastern parts of the autonomous region, the Northern Railway with Sverdlovsk Oblast.

Coronavirus

37 What emergency legislation, relief programmes and other initiatives specific to your practice area has your state implemented to address the pandemic? Have any existing government programmes, laws or regulations been amended to address these concerns? What best practices are advisable for clients?

There were amendments to the Rail Transport Charter according to which, in an emergency situation or one of high alert, the government can declare special conditions for the execution of transport service agreements. These amendments were made for a more flexible and timely system of response to emergencies at regional government level.

Regarding financial support of RZD in accordance with the national step-plan for economic recovery, the plan was to postpone property tax payments and to grant 1 billion roubles to this company for the improvement of transit operations. It was also planned that regional passenger rail transport companies will get partial compensation of finance lease payments. The financial assets of Russia's Pension Fund might also be invested in long-term RZD bonds. However, these initiatives are not finalised because the national step-plan for economic recovery had not yet been approved at the time of writing.

In addition, RZD is going to reduce its investment programme from 820 to 620 billion roubles. However, this reduction mostly affects project works.

* *The information in this chapter was verified between July and August 2020.*

Singapore

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CMS Holborn Asia

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 (the KTM Line). Keretapi Tanah Melayu (KTM) owns and operates the KTM Line. KTM is owned by the government of Malaysia.

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 (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 (Chapter 263) (the Railways Act) and the Public Transport Council Act (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 under the RTS Act.

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 (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 the Insolvency, Restructuring and Dissolution Act (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 the Companies Act (section 210) or the Insolvency, Restructuring and Dissolution Act (section 71) 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 (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 Act (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.

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 (LTA) 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 licence 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 and what body has responsibility for regulating rail safety?

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 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.

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); 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 (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 (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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Coronavirus

37 What emergency legislation, relief programmes and other initiatives specific to your practice area has your state implemented to address the pandemic? Have any existing government programmes, laws or regulations been amended to address these concerns? What best practices are advisable for clients?

In terms of legislation and relief programmes to address the covid-19 pandemic, the government enacted the COVID-19 (Temporary Measures) Act 2020 (COTMA). Of greatest relevance to the rail industry is the temporary relief offered by the COTMA to businesses and individuals who are unable to perform a 'scheduled contract' due to covid-19. A 'scheduled contract' for the purposes of the COTMA includes:

- a contract for the grant of a loan facility to an enterprise, where the facility is secured against any commercial or industrial immovable property, plant, machinery or fixed asset located in Singapore;
- a construction contract or a supply contract; or
- a lease or licence of non-residential immovable property.

Under Part 2 of COTMA, an affected party that is unable to perform a 'scheduled contract' will be able to obtain temporary relief from its obligation to perform such obligation if the following requirements are met:

- the parties must have entered into or renewed a scheduled contract before 25 March 2020;
- a party to a scheduled contract is or will be unable to perform an obligation to be performed on or after 1 February 2020;
- the inability is caused to a material extent by a covid-19 event; and
- the party in default has served a notification for relief on the other party or parties to the contract and other specified persons in accordance with section 9(1) of the COTMA.

In November 2020, Parts 8A and 8B of the COTMA came into force to provide further specified reliefs for construction contracts, particularly in respect of the grant of extensions of time and cost-sharing.

United States

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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$900 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. In addition, there are over 550 Class II (between US$40.4 million and US$900 million in annual revenues) and Class III railways (less than US$40.4 million in annual revenues) in the United States, which include regional railways; short-line railways; and switching and terminal railways.

Passenger rail is largely government-owned or supported. The largest passenger 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 on 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 Virgin Trains 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 and regulations promulgated by the STB 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 (which partially deregulated the rail industry) and the ICC Termination Act (which further deregulated the industry and transferred the ICC's remaining functions to the STB).

The Department of Transportation, through several of its component agencies, is the safety regulator of the railway industry. Chief among these agencies is the Federal Railroad Administration (FRA). The primary laws governing rail safety are the Federal Railroad Safety Act (FRSA) and safety regulations promulgated by the FRA. 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 the FRA and in other areas by the Federal Transit Administration.

Amtrak was originally established by the Rail Passenger Service Act. 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 constructing a new line or by acquiring existing rail lines. The STB has authority to grant approval upon 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 the national transportation policy, and either the transaction or service is of limited scope or regulation is not needed to protect shippers from the abuse of market power. The STB can grant petitions for exemption in individual cases, and it has also established 'class exemptions' that allow parties to forgo the application process for certain types of transactions.

The type of regulatory process that is required varies based on the type of transaction and the identity of the new entrant (and particularly on whether or not it already controls a railway).

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 differs for acquisitions by a non-carrier and acquisitions by an existing rail carrier. A non-carrier (ie, an entity that does not own and is not affiliated with any rail carrier) may acquire control of an existing carrier through a stock purchase without approval or exemption by the STB. 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. 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 of time (usually 30 days) before consummating a proposed acquisition. If the reviewing agency believes that a proposed transaction may violate the antitrust laws, it may seek an injunction in federal court to prohibit consummation of the transaction.

A non-carrier acquiring control of an existing carrier through an asset purchase can obtain STB authorisation through a class exemption. Under these streamlined procedures, non-carriers may file a verified notice providing specified details about the transaction. 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. If the projected annual revenue of the rail lines to be acquired or operated, together with the acquirer's projected annual revenue, exceeds US$5 million, the applicant must post a notice of the proposed transaction at least 60 days in advance.

Transactions involving combinations of two or more rail carriers are subject to more stringent regulatory review. The STB classifies proposed transactions involving more than one rail carrier as major, significant, minor or exempt. 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 that 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 the national rail transportation policy, and thus has adopted a class exemption (eg, the acquisition of non-connecting carriers and trackage rights agreements). 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 must submit a pre-filing notification describing the proposed transaction for publication in the Federal Register. The STB's rules prescribe the information to be included in the notice and the application, which differs based on the type of transaction. The STB also will establish a procedural schedule allowing interested parties to comment and to 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 to be 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 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'. A 2001 STB policy statement on major transactions indicates 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 policy statement, but Canadian National Railway and Kansas City Southern have indicated that they intend to submit an application for approval of a major merger.

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 notice must specify which class exemption applies to the transaction, certify whether or not 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 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 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?

Construction of new rail lines that extend a railway into new territory require 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 needed 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 submit an application to the STB, including the information specified by the agency's rules (49 Code of Federal Regulations (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 before granting a construction application or petition for exemption, which typically will require an environmental impact statement.

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 Surface Transportation Board (STB) finds that the 'present or future public convenience and necessity require or permit the abandonment or discontinuance'.

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. Abandonment is generally accomplished through a class exemption that permits abandonment of any line that has been out of service for two years or more. Abandonment can also be sought through a petition for exemption.

After an abandonment application 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 one or more financially responsible persons have offered financial assistance for the operation of the rail line at issue, the abandonment or discontinuance shall be postponed until the parties have reached agreement on a transaction for subsidy or sale of the line, or 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). While the STB may impose a condition that the property be offered for sale for public purposes over a railway's objection, it cannot force such a sale, and such a 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 multi-carrier transaction approved by the Surface Transportation Board (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 the antitrust laws.

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 such cases are the preservation of competitive rail service where it exists and the enhancement of rail competition wherever possible. 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?

The Surface Transportation Board (STB) regulates some prices for freight transport, but it does not have jurisdiction to regulate (1) rates that are agreed to in rail transport contracts; (2) rates for transportation that is subject to 'effective competition' from another railway or mode of transportation; and (3) 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 Rail Costing System. In addition, the STB has granted commodity exemptions that preclude rate or other regulation of various commodities 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 that is within its jurisdiction, but it has never done so and has no rules governing such determinations. Amtrak is exempt from STB jurisdiction 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 the future. The STB has several active proceedings in which it is considering potential changes to its rate complaint processes and methodologies.

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 controlling 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 Surface Transportation Board (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 a 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, they 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, to accept traffic from other railways where necessary to complete rail service, to provide reasonable facilities for interchanging traffic with other railways, and to 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 (see 49 USC section 11123). These emergency service orders may be in place for a maximum of 270 days. This emergency authority has rarely been used.

SAFETY REGULATION

Types of regulation

25 How is rail safety regulated and what body has responsibility for regulating rail safety?

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 rail equipment?

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. In addition, the Department of Transportation administers the Railroad Rehabilitation and Improvement Financing programme, through which low-interest, long-term loans can be obtained to finance freight or passenger projects. On the passenger side, Amtrak is subsidised by the federal government, and state and local governments often own or financially subsidise commuter railways. Moreover, some short line railways are owned by state and local governments. The nature of financial support for these commuter railways and short lines varies widely, and may include loans, tax benefits and direct financial subsidies. An emerging area of government support for passenger rail 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.

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 inter-state 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?

The new administration in the White House has brought a renewed focus on passenger rail. Amtrak has released its 'Connect US' expansion vision of creating 30 new routes by 2035. However, because Amtrak primarily operates over host freight railroad lines (with the exception of its operations in the Northeast Corridor), its ambitious expansion plans raise the possibility of conflicts with host railroads. For example, Amtrak has expressed concerns about its freight railroad hosts for years, and the Federal Railroad Administration (FRA) recently adopted metrics to measure performance standards for Amtrak operations over freight rail lines. These new metrics could subject freight railroads to Surface Transportation Board (STB) investigations, as Congress previously authorised the STB to investigate any host railroad that fails to meet such performance standards. Amtrak has also initiated a legal process to operate a Gulf Coast passenger service on the rail lines of two freight railroads between New Orleans and Mobile. Given the current White House interest in passenger rail, other such actions could occur.

Another key development is the proposed acquisition of Kansas City Southern (KCS). In March 2020, Canadian Pacific and KCS announced plans to merge. Canadian National made a competing offer, which KCS

ultimately accepted over the Canadian Pacific proposal. The KCS acquisition is the first proposed Class I merger since the STB revised its major merger rules in 2001.

Coronavirus

37 What emergency legislation, relief programmes and other initiatives specific to your practice area has your state implemented to address the pandemic? Have any existing government programmes, laws or regulations been amended to address these concerns? What best practices are advisable for clients?

As a result of the pandemic, Congress passed the Coronavirus Aid, Relief, and Economic Security (CARES) Act in March 2020. The legislation did not provide any direct support for freight railroads but did provide US$1 billion to Amtrak, as ridership and ticket revenue fell as much as 95 per cent. US$25 billion was appropriated for transit agencies nationwide, a portion of which will go to commuter railroads. Two subsequent rounds of federal assistance were passed in December 2020 (US$1 billion for Amtrak; US$14 billion for transit agencies) and March 2021 (US$1.69 billion for Amtrak; US$30.5 billion for transit agencies).

In addition, the FRA declared an emergency situation in March 2020 and issued numerous waivers of testing, training and certification rules to accommodate social distancing and workforce shortages related to covid-19. The Surface Transportation Board (STB) also issued a statement regarding railway operations urging state and local authorities to account for the critical function of railways when developing and implementing stay-at-home orders, shutdowns or other covid-19-related protocols. The STB noted in particular that railway workers often must traverse state lines and must rely on other businesses such as hotels and taxi services to provide the legally mandated rest periods between railway worker shifts.

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