3 October 2011: Market opening of rail transport sector

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The *Autorité de la concurrence* publishes two opinions concerning new entrants accessing passenger railway stations.

It invites public authorities to prepare for the next stage of the opening up to competition but also, henceforth, to establish minimum safeguards in view of the 2011-2012 season.

> Version française

The *Autorité de la concurrence* today issues two opinions concerning rail transport:

- An opinion on a draft decree relating to passenger stations and other service infrastructures of the rail network (Opinion Nr 11-A-15), that the government has submitted for consultation after having sought the opinion[1] – also public – from the *Autorité de regulation des activités ferroviaires* (ARAF, Regulatory authority of rail activities);

- **An opinion relating to the project to separate accounts from the passenger station activity within the SNCF (French national railway)** (Opinion Nr 11-A-16), made at the request of the ARAF.

In line with previous opinions it issued regarding rail transport[2], the *Autorité* formulates, in both these opinions, recommendations with regard to public authorities, the railway regulator and the SNCF, in order to allow a smooth opening up to competition.

Context

Last stage of the transposition into French law of the directives, law no. 2009-1503 of 8 December 2009 *relating to the organisation and the regulation of rail transport (called "ORTF law")* opened up international passenger rail transport to the competition. This law also created a sectoral regulator, the Regulatory authority of rail activities (ARAF).

Passenger stations present the characteristics of an **essential[3] facilities for rail carriers in competition with the SNCF**. The issue concerning access to stations by competitors is clearly raised today in concrete terms with **the forthcoming opening of the first train services operated by rival carriers of the SNCF at the end of the year** ("winter service" 2011-2012).

The autonomy of the department in charge of managing railway stations within the SNCF must be reinforced by real functional separation guarantees at the least and accompanied by a noticeable reinforcement of the powers of the railway regulator (ARAF)

To comply with the new legislation, the SNCF has created a specific internal entity, ***Gares et Connections***, which on 1 January 2010 took over managing all passenger stations of the national rail network (3,026 passenger stations and stops).

However, the organisation set up by the SNCF since 2009 and taken up by the draft decree, which leaves the incumbent operator too much leeway, **does not address the issues regarding opening the rail sector up to the competition[4]**.

The *Autorité* issues the following recommendations:

1- ENSURING AS OF NOW A REAL FUNCTIONAL SEPARATION OF THE RAILWAY STATIONS OPERATOR (*GARES ET CONNECTIONS*)

Appointment and revocation of the director of the railway stations operator

The appointment and revocation of the Gares et Connections director remains subject to an assessment by the SNCF board of directors and its chairman, which cannot qualify as a genuine autonomy. The director can thus be revoked at any time by the chairman of the SNCF.

>> The *Autorité* recommends **drawing inspiration from the appointment procedure of the director of rail traffic**, appointed for five years by decree of the Prime minister at the proposal of the transport minister and after opinion by the ARAF, in view of guaranteeing a greater autonomy to the Gares et Connections director. (*cf. page 11 of opinion 11-A-15*)

Managerial power over property holdings

The Gares et Connections director has a delegation of authority limited to 15 million Euros for acquisition or transfer transactions, while the competence of the chairman of SNCF was 40 to 160 million Euros according to transactions. **The managerial autonomy of Gares et Connections cannot be applied therefore to major investment transactions**, like for example in railway stations in Paris.

>> The *Autorité* recommends **giving a larger managerial authority over railway stations holdings to Gares et Connections directors**, to prevent the risk of orienting investments more towards the SNCF than towards its competitors. (*cf. pages 12-13 of opinion 11-A-15 and pages 17-18 of opinion 11-A-16*)

>> The *Autorité* also recommends allowing the Gares et Connections director to **determine the investment policy** to implement. Investment decisions of Gares et Connections could go via the filter of a **specific committee on commitments within the branch**, which would herald in a way a future board of directors. (*cf. page 13 of opinion 11-A-15*)

Confidential business information

Concerning the protection of business information communicated by the new entrants to the incumbent operator (for example when an operator announces to

the railway stations operator that it wishes to open a line serving such and such a station), it is necessary to **guarantee imperviousness between the sales activities of the SNCF and its service infrastructure management missions** (Gares et Connections). In fact, possessing information concerning competitors could give the incumbent operator a key advantage in the competition.

>> The *Autorité* consequently recommends **making provisions regarding confidential business information more restrictive**, by adding possible sanctions in the code of ethics, which could be implemented by the employer with regard to employees, but also by the regulator with regard to the SNCF. (*cf. pages 13-14 of opinion 11-A-15*)

Commercial relationship with rail operators

Likewise, the *Autorité* pointed out that rival carriers asking for services to access stations must apply to a general management department of the SNCF. This provision, presented by the SNCF as a possibility for rival carriers to have a "one-stop service" for their relationships with the different entities of the SNCF, includes the **risk of allowing the SNCF to be acquainted with the projects of rival carriers well before they are set up**.

>> The *Autorité* recommends that **Gares et Connections become in charge of the commercial relationship with rail operators**, once the winter service 2011-2012 has started. (*cf. pages 18-19 of opinion 11-A-16*)

2- INCREASING THE FINANCIAL INDEPENDENCE OF *GARES ET CONNECTIONS*

The establishment of separate accounts for the passenger station activity of the SNCF has represented an obligation since 1 January 2011: accounting separation rules must be approved by the ARAF, after opinion from the *Autorité de la concurrence*.

The *Autorité* points out that, while the balance sheet and the income statement drawn up meet legal obligations well, they highlight however the **very fragile**

financial structure of the Gares et Connections entity, which makes it very dependent on the rest of the SNCF.

With regard to competition, this might have as a consequence an increase in prices for accessing stations, which would be harmful to new carriers entering the market.

The *Autorité* notably recommends (*cf. opinion 11-A-16*):

>> that in the absence of a genuine financial autonomy of Gares et Connections, financing terms are the subject of a **multi-year agreement between Gares et Connections and the SNCF**, to improve the foreseeability of its financing.

>> and that the regulator (ARAF) has regular recourse to **external audits to validate these separate accounts**.

3- REINFORCING THE POWER OF INTERVENTION OF THE ARAF

Armed with its practice in other sectors and network industries, the *Autorité* considers that the weaker the degree of separation between the incumbent operator and the facilities operator the stronger the power of intervention of the sectoral regulator as far as service infrastructures must be.

>> Concerning the **price setting of the use of infrastructures and services**, the *Autorité* recommends **setting up an *ex ante* regulation of prices of services in stations and costs passed on to rail companies**. This regulation would guarantee, under the control of the ARAF that the price setting is transparent and foreseeable on the one hand, and does not introduce any elements of unjustified price discrimination on the other. (*cf. pages 15 to 26 of opinion 11-A-15*)

In the medium term, the *Autorité* recommends a legal unbundling of the Gares et Connections entity

The *Autorité* understands the government's desire to proceed by stages in a learning stage occurring itself in a sector characterised by various rigidities. For all this, **it would not approve the separation – barely completed – provided by**

the draft decree as far as passenger stations are concerned, if it is not accompanied by an outlook on medium term perspectives and a significant reinforcement of minimal short term safeguards.

The functional unbundling within the incumbent operator, between carrier and railway stations operator activities **immediately requires a strict distribution of competences on a functional, financial, operational and human level. However, the organisation set up by SNCF since 2009 and taken up by the draft decree does not provide enough safeguards**: it leaves too much leeway to the incumbent operator, too little to the stations operator and far too little to the railway regulator.

The success of the railway market opening depends, beyond issues concerning right of access, making services available to rail companies and fair, unsurprising and transparent price setting, **on defining a balance between managing the network's essential infrastructures and sectoral regulation.**

A credible framework must be built now, in the context of the opening up to competition which will actually take place as of December 2011. This framework presupposes:

- that the regulatory power clearly announces its desire **to advance by stages: functional unbundling for the coming two to three years**, according to a model suggested hereto (Opinion Nr 11-A-15), which would take up the same guarantees as those set up for the traffic and circulation managerial service, **then legal unbundling** that could be permitted by modifying decree Nr 83-817 of 13 September 1983 concerning approval of SNCF specifications;

- **that the powers of the sectoral regulator are reinforced significantly** according to the terms evoked above, notably regarding *ex ante* and *ex post* control of prices for service infrastructures.

[1] *ARAF opinion n° 2011-014 of 15 June 2011 on the draft decree relating to passenger stations and other service infrastructures of the rail network, made public the same day.*

[2]Opinion of the Conseil de la concurrence no. 08-A-17 of 3 September 2008 on the project relating to the organisation and regulation of rail and public transport as well as transport safety, Opinion no. 08-A-18 of 13 October 2008 relating to a draft decree on user charges of the rail network, Opinion of the Autorité de la concurrence no. 09-A-55 of 4 November 2009 on the sector of passenger public land transport.

[3]In fact, these facilities represent an essential element "to ensure a link with the clients and allow competitors to exercise their activities and that it would be impossible to reproduce by reasonable means", according to the definition given by the decision-making practice of the Autorité.

[4]The Autorité de la concurrence had previously indicated in its opinion no. 09-A-55 of 4 November 2009 that the governance system considered by the SNCF for the station management mission was not satisfactory, and it had recommended that station management be the subject of a more successfully completed separation.

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