The Autorité de la concurrence publishes the opinion it provided to the French government concerning a bill on railway reform

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The Autorité issues several recommendations that are designed to reconcile the logic of industrial integration that underlies the creation of a public railway body with the necessary preservation of a level playing field.

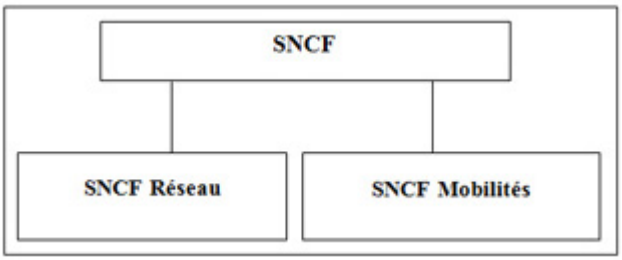
On 4 October 2013 the Autorité de la concurrence provided the French government with an opinion concerning a bill on railway reform that had been submitted to it for opinion. The bill, which at this stage incorporates a small number of recommendations made by the Autorité de la concurrence, was adopted by the Council of Ministers on 16 October 2013.

In a very detailed opinion that it is making public today, the Autorité de la concurrence formulated a dozen recommendations to ensure that the reform, while permitting the industrial integration of the public group, is accompanied by a number of guarantees, especially those concerning the independence of the management of the rail network and equal access thereto.

In-depth reform of the French railway system

In practice, the new architecture of the railway sector is based on the creation of a public railway group *(Groupe Public Ferroviaire, GPF).* The structure introduced in 1997 consisted of two autonomous entities, Réseau Ferré de France (RFF) which was responsible for the infrastructure and the SNCF which operated rail transport services. Henceforth, the GPF will incorporate, under the umbrella of a public industrial and commercial enterprise (EPIC) known as “SNCF”, an EPIC

named “SNCF Réseau” that will take over the management of the infrastructure and a second EPIC named “SNCF Mobilités” that will be responsible for operating rail transport services. The following is a diagram of the GPF structure:



This new organisation, similar to that of a vertically integrated group of companies, is the subject of several observations by the Autorité de la concurrence which wishes to ensure that the reform will make it possible to reconcile the hoped-for economic efficiency with the necessary preservation of a level playing field. It considers that this challenge can be met if three principles are upheld.

1- SNCF Réseau, that plays a pivotal role, must have wider terms of reference for intervention and have its independence reinforced

The objectives of industrial consolidation and competition are not mutually exclusive and could be fully effective if the reinforcement of SNCF Réseau, the infrastructure manager, is fully implemented and if its independence is preserved.

The bill assigns the tasks of infrastructure management of the national rail network to a single entity, SNCF Réseau. This terminates the current situation whereby management of the national rail network is performed via an infrastructure management body, the RFF, and a delegated entity also in charge of infrastructure management, the SNCF. The new organisation will reinforce transparency in the organisation of the rail sector. This is a welcome development with respect to the current allocation of areas of responsibility between the SNCF and the RFF, something that currently lacks definition.

• *Stations and service infrastructure to be transferred to SNCF Réseau*

The areas of responsibility of the infrastructure manager, SNCF Réseau, will be limited to the national rail network. The incumbent operator will thus remain in charge of most of the railway stations in France and of the service infrastructure. *The Autorité de la concurrence* deplores this *status quo*.

In fact, as it had already pointed out in 2009[1], passenger stations have all the characteristics of an essential facility to which access must be guaranteed for the railway operating companies in a non-discriminatory and transparent manner. Without access to the stations and service infrastructure, or if such access is only available under discriminatory conditions, the development of competition will be impaired[2].

▶ The Autorité de la concurrence would therefore prefer the service infrastructure (freight yards, marshalling yards, electrical traction power supply, etc.) used for rail freight, which is already open to competition, to be transferred immediately to SNCF Réseau. The stations should be managed in the same way. The Autorité is not averse to a certain amount of gradual progression but emphasises that the transfer should occur by 2019 at the latest, the date on which rail passenger transport is opened up to competition (recommendations 1a and 1b).

SNCF Réseau will thus become a "one-stop shop" for rail capacity requests from train operating companies, the allocation of train paths up to and including services provided in stations, and it shall do so for both passenger and freight transport. This will increase the general efficiency of the railway network.

• *Reinforcement of measures designed to provide a concrete guarantee of the impartiality and independence of SNCF Réseau and its board of directors*.

The Autorité de la concurrence considers that the planned governance contains certain gaps, especially with respect to the composition of the board of directors of SNCF Réseau and the appointment of its members.

The chairman of the board of directors will have a key role to play in the governance of SNCF Réseau. In its present state, the bill provides for the regulator, the ARAF, being able to object to the appointment of a particular individual only if, at the time this person accepts the office of chairman of SNCF Réseau, he/she has interests in a rail company or any of the subsidiaries thereof.

This absence of a conflict of interest would appear to be necessary but it is inadequate to guarantee the independence of the chairman of SNCF Réseau.

- The Autorité de la concurrence recommends reinforcing the conditions for ensuring the independence of the chairman of SNCF Réseau by granting the ARAF the power to issue a substantiated, public opinion concerning the person or persons proposed for this post (recommendation 2).

With respect to the other members of the board of directors, there appears to be no reference to a ban on having certain interests. Yet it is indispensable for the whole board of directors to be neutral.

- Clarification is necessary so that this ban on the acquisition of interests in a rail company or any of the subsidiaries thereof, as well as in a company controlling a rail business, can be extended to all the members of the board of directors of SNCF Réseau (recommendation 3a).

- The Autorité de la concurrence further recommends that the same people may not sit on both the board of directors of SNCF Réseau and SNCF Mobilités (recommendation 3b).

• *Safeguarding measures should be extended to all of the terms of reference of SNCF Réseau*

Finally, there should be an allowance for internal organisational measures in order to guarantee materially the independence and impartiality of SNCF Réseau with respect to the railway companies (restrictions on the mobility of the senior management of rail companies to SNCF Réseau through a rail ethics commission which would have to be notified, the material requirement of independence in terms of separation of the premises occupied, their information systems, etc.).
The Autorité observes that most of the measures under consideration are restricted to the allocation and pricing of train paths while all of the infrastructure management tasks are largely interdependent and require close contact between each other. For example, the allocation of train paths[3] is not unconnected with network maintenance activity, the same organisation being responsible for performing the work that would render certain train paths unavailable in practice.

▶The Autorité de la concurrence considers that the safeguarding measures should be extended to all of the tasks that SNCF Réseau is required to perform (recommendation 4).

2- Clarifying the terms of reference and the tasks of the controlling epic

• *Preserving the independence of SNCF Réseau*

The tasks assigned to the controlling EPIC (SNCF) have been defined in a particularly wide sense and their exact scope is subject to interpretation. It would appear that the controlling EPIC does not have the sole function of exercising the traditional prerogatives of a holding company (fiscal and economic integration tasks) but is also required to perform functions of an operational nature.

This rather vague definition of its tasks runs the major risk that certain prerogatives relating to the management of railway infrastructure in France

could be exercised de facto by the leading EPIC, resulting in a major loss of decision-making independence for SNCF Réseau.

▶To clarify this situation, the Autorité de la concurrence recommends including in the law an explicit ban on the controlling EPIC performing the operational functions of infrastructure management in order to guarantee the independence of SNCF Réseau (recommendation 6a).

• *Specifying the tasks of the controlling EPIC and adapting governance regarding the tasks performed for the benefit of the whole sector*

The bill does not specify in any way the allocation of the so-called "internal" tasks (i.e. those performed solely for the benefit of the EPICs constituting the GPF) and "external" tasks (i.e. those performed for the benefit of the whole railway industry). Under such conditions, there is a risk that the controlling EPIC would endorse the responsibilities for the industrial integration of the railway system as a whole without any guarantee of independence and objectivity.

This situation raises the issue of the opacity of the system concerning, on the one hand, the role of the controlling EPIC in the tasks it will be performing for the benefit of all and, on the other hand, the ability of the incumbent rail operator to exert an influence on the decision-making process of the controlling EPIC regarding decisions that have an impact on the whole railway industry.

▶The Autorité recommends that for its "external" tasks, the terms of reference of the controlling EPIC should be limited to the task of acting as strategic decision-maker (recommendation 6b)

▶A decree should be issued to define the list of such tasks (recommendation 7a).

Furthermore, the board of directors of the controlling EPIC consists of two members, the chairman of SNCF Réseau and the chairman of SNCF Mobilités. The possibility cannot thus be excluded that decisions might be made solely for the benefit of the incumbent operator, without taking account of the point of

view of the other rail operators or the interests of the rail industry.

The controlling EPIC should not be entitled to take on “external” tasks and restricted governance without this adversely affecting the neutrality of the decisions taken.

- In the case of decisions taken as part of its “external” remit, the Autorité de la concurrence recommends that the opinions of all those involved be solicited before any decision is taken. Such a consultation could take the form of a substantiated opinion from the Haut comité du ferroviaire (the Higher Railway Committee), a joint body covering all those involved in the sector which will have a consultative duty and will also commission the major changes to the rail industry (recommendation 8a).

- The ARAF should be given the power of self–referral in order to issue a substantiated opinion before any decision is taken concerning “external” tasks (recommendation 8b).

3- Reinforcing sector-specific regulation

•Awarding greater powers to the ARAF

The Autorité de la concurrence recalls that sector-specific regulation is a key element for the purpose of supporting the various phases in the opening up to competition of an economic sector previously run by a monopoly.

It welcomes the fact that the provisions of the bill reinforce the independence of the ARAF (professionalisation of the Board) but is disappointed by the fact that the bill deprives the regulator of its right to give assent with respect to fixing the fees for using the national rail network infrastructure (“railway tolls”).
This change deprives the ARAF of one of the most important powers it currently possesses.

- The Autorité de la concurrence recommends maintaining the power of the ARAF with respect to assenting to the pricing structure for access to the national rail network (recommendation 11a) and providing a requirement for assent with respect to the fees for access and services provided at passenger train stations and for the service infrastructure (recommendation 11b).

- *The Haut comité du ferroviaire*

The Haut comité du ferroviaire is the consultative body for all rail industry stakeholders. It has a consultative role and will also commission the major changes to the rail sector. Consultation between the stakeholders on major questions of strategy could be a good indication of transparency for the benefit of all concerned.

The task of conciliation assigned to it, however, could result in the industry's stakeholders resolving their disputes among themselves, non-transparently and without any guarantee of impartiality. Furthermore, this would weaken the ARAF's powers of dispute resolution.

- The Autorité recommends that the conciliation powers assigned to the Haut comité du ferroviaire be removed from the bill (recommendation 9)

The bill that has been submitted to the Autorité for examination also provides for the Haut comité ferroviaire to approve a network code (Code du réseau) that specifies the manner in which relationships are conducted between infrastructure managers, managers of service infrastructures, railway companies and the organising bodies. This "Code of Conduct" explains in which way the network reference document (***Document de référence du réseau, DRR***), which describes the principles and procedures for access to rail infrastructure, must be implemented.

The bill does not specify either the nature or content of this code. There is however a serious risk that, in practice, its content would overlap or reinterpret

the content of the DRR, thus depriving the infrastructure manager of the authority which it alone must have to guarantee non-discriminatory access to the network.

- The Autorité recommends clarifying the legal scope of the network code, which could take the form of a charter to which the stakeholders would commit voluntarily, without it having the status of a standard or norm, in order to preserve the independence of SNCF Réseau and the general transparency of regulation in the sector (recommendation 10).

[1]See opinion no. 09-A-55 dated 4 November 2009 concerning the terrestrial passenger public transport sector and the press release.
[2]The risk of discrimination in access to infrastructure is not hypothetical. In late 2012, in the freight sector, the Autorité de la concurrence fined the SNCF for having prevented competitors accessing rail capacity that was indispensable for their operations (decision 12-D-25 dated 18 December 2012.
[3]Train path allocation consists in tracing traffic graphs and drawing up train timetables.

> Full text of Opinion 13-A-14 of 4 October 2013 concerning a bill on railway reform

> Annex: list of recommendations issued by the Autorité de la concurrence