RAIL LIBERALISATION AND CABOTAGE IN THE EU.
A CONTRIBUTION BY THE ICA

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1. INTRODUCTORY REMARKS

With opinion issued on 20 October 2013, the Italian Competition Authority (‘ICA’), on the ground of its advocacy powers, expressed criticisms against the denial opposed by the Italian Rail Regulator to a French owned/Italian based company to supply cabotage services within international services between Italy and France.

This article outlines the reasoning behind the ICA’s decision and its legal background, as well as the final outcome in the market. In particular, following an interim order by the administrative judge, URSF finally authorized the exercise of the service at stake.

2. THE RAIL REGULATOR’S DECISION AND THE ICA’S CRITICISMS

The issue arose when, on 20 February 2013, Società Viaggiatori Italia S.r.l. (‘SVI’) asked the Rail Regulator (Ufficio di regolazione dei servizi ferroviari – ‘URSF’) an authorization to market new rail connections between Italian cities Milan, Novara, and Vercelli with Oulx and Bardonecchia, within the already existing high speed trains between Milan and Paris.

In the perspective of the demanding company, the services had to be qualified as cabotage services, i.e. domestic services offered within an international connection, allowed by the European and national laws, provided that all requirements are met.

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1 Italian Competition Authority.
2 The legal basis of the decision is article 21 of the Italian antitrust Law (No. 287/90), giving the ICA the possibility to issue an “opinion on any measures needed to remove or prevent distortions” in order to contribute to a more effective protection of competition and the market.
3 SVI is an Italian rail company controlled by the French incumbent SNCF. It owns a license for international rail services.
4 URSF, a branch of the Italian Ministry of Transport and Infrastructure, was at the time of the decision the office in charge of dealing with the requests of authorization for cabotage services. For the current rail regulator, see infra par. 4.
5 SVI intended to launch new services by serving on the same link Milan-Paris two destinations based in the national territory, namely Oux and Bardonecchia, in the Piedmont Region, in the northwest part of Italy. Such destinations are famous as touristic sites, especially for skiing activity, being surrounded by mountains, e.g. Bardonecchia hosted the snowboarding events of the 2006 Winter Olympics.
In its original configuration, the service envisages travelers getting on at any stop within the Italian territory and getting off, as the first possible destination, in Modane, France, and beyond. With decision adopted on 31 August 2013, following a procedure governed by national laws but applying principles of EU origin, URSF rejected SVI's request as it considered the intended services outside the scope of application of cabotage rules.

During the proceedings, other rail companies were heard, as provided for by the applicable law, among which the Italian incumbent, state owned Trenitalia. This company requested URSF to assess the international nature of the service offered by SVI, as envisaged by the relevant procedure, and alleged, among others, that the economic equilibrium of its public service contracts was compromised, insofar as the planned services overlapped its services.

However, this was not the reason of the denial. Indeed, URSF did not even touch upon the point of the economic equilibrium of Trenitalia’s contracts and rather qualified the services as domestic, notably as “parallel” to and “autonomous” from the international connection between Milan-Paris, inasmuch as they spot “seasonal” features. As a consequence, in the URSF’s assessment, their exercise would require a license for domestic services by the perspective supplier.

In substance, notwithstanding the launching of the proceedings under the rules addressed to cabotage, implying a qualification of the requested service as international or otherwise, URSF avoided such assessment and reached its conclusion on the basis of a different perspective, on the basis of ad hoc justifications.

The ICA’s critical remarks focused exactly on this issue. Pointing at the relevant European and national provisions on cabotage, the ICA highlighted that URSF could not justify the refusal by placing the case outside their scope of application, and that the case had to be tested against cabotage standards, including by assessing the main service as international or otherwise. Had URSF correctly applied such standards, it would have had to consider that the length of the domestic link was minimal compared to the length of the international connection (237 km vs. 652 km), and so were the shares of domestic turnover and traffic.

The ICA considered URSF’s decision as implying the violation of competition and liberalization rules in the rail sector as provided for by Directive 2007/58/EC (and its recast in Directive 2012/34/UE)

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6 Italian stops are notably: Milan, Novara, Vercelli, Turin, Bardonecchia and Oulx; French stops are: Saint Jean de Maurienne, Chambery, Paris. There was, and based on the current information, there is no similar service offered by whomever on the intended connections.

7 The evidence used by the Rail Regulator for such conclusion consisted in press releases by SVI’s management alleging that the services were primarily addressed to potential tourists leaving from Milan and wanting to reach quickly the skiing sites concerned, as well as statistical data on possible forecasted traffic, split by days and potentially showing a concentration of passengers during the winter season.
and the corresponding national provisions, with the effect of impeding or making it difficult to exercise international and cabotage services in the national territory.

In doing so, the ICA also recalled the recent authorization given to Trenitalia by the French Rail Regulator ARAF in a symmetrical case (cabotage service between Nice and Marseille within the international link Milan - Marseille, operated by Trenitalia with the train Thello)\(^8\). It also highlighted that the application of the standards required by URSF (the holding of a license for national rail services), would not allow SVI to provide the proposed services\(^9\).

3. **European and Domestic Rules on Rail Cabotage**

Rail liberalization has been on the agenda of the European legislator since 1991\(^10\). In the past twenty years, three successive rail packages have aimed at creating the single rail market\(^11\). As a result, since 1\(^\text{st}\) February 2007 the rail freight traffic, both international and national, has been entirely liberalized, as well as the passengers rail traffic from 1\(^\text{st}\) January 2010, but only with respect to international services, including though cabotage. The complete liberalization of the passenger rail services (thus including the domestic one) is envisaged to be carried out by 2019\(^12\).

Passenger rail liberalization for international services, including cabotage, derives from Directive 2007/58/EC\(^13\). Such Directive and others within the three packages have been recast on Directive 2012/34/UE\(^14\), which is the current text of reference.

Notably, as from 1\(^\text{st}\) January 2010, art. 1.8 of Directive 2007/58/EC provides for railway undertakings with the right “of access to the infrastructure in all Member States for the purpose of operating an international passenger service”; moreover, “Railway undertakings shall, in the course of an international passenger service, have the right to pick up passengers at any station located on the

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\(^8\) See Decision by ARAF (Autorité de régulation des activités ferroviaire) No. 2013-004 of 27 February 2013, and Decision No. 2013-022 of 8 October 2013, at [http://www.regulation-ferroviaire.fr/](http://www.regulation-ferroviaire.fr/), whereby the former provides for the international qualification of the service and the latter assesses the lack of prejudice to the economic equilibrium of the public service contracts.

\(^9\) Under reciprocity rules provided for by Italian laws (Art. 58 of law No. 99/2009, legislative decree No. 188/2003, and Art. 131(1) of law No. 388/2000) a French owned company cannot get the needed license for domestic services, since France has not yet liberalized such services.


\(^12\) Discussions are ongoing on the fourth rail package, which, compared with the others, is essentially made by reports, impact analysis and communications assessing the opening of domestic passengers market.


international route and set them down at another, including stations located in the same Member State.” The same text is currently in art. 10.2 of Directive 2012/34/EU.

The same Directive defines the “international passenger service” as “the service where the train crosses at least one border of a Member State and where the principal purpose of the service is to carry passengers between stations located in different Member States” (art. 1.3).

As regards the principal purpose of the service, it shall be determined by the national regulatory body mandated by Directive 2001/14/EC, following a request from the relevant competent authorities and/or interested railway undertakings. Possible limits to the right of access are provided for where said exercise would compromise the economic equilibrium of a public service contract, whereby the equilibrium should be considered compromised when it can be demonstrated that the economic feasibility of operating these public services providing a reasonable level of quality would be jeopardised.

Recital 18 of Directive 2012/34/EU requires that the introduction of new, open-access, international passenger services with intermediate stops should not be used to open up the market for domestic passenger services (which in fact will be opened up by 2019) “but should merely focus on stops that are ancillary to the international route.” Again, it provides for the principal purpose of the new services to be that “to carry passengers travelling on an international journey.”

The same Recital referred to above, consistently with the Interpretative communication from the Commission on certain provisions of Directive 2007/58/EC\(^\text{15}\), suggests some (quantitative) criteria to take into account when assessing whether the principal purpose of the service is the international service\(^\text{16}\).

At this stage of the rail liberalization, it is worth noting that the reciprocity clause with respect to requests to access the rail infrastructure cannot be opposed by Member States but for the provision of domestic rail services, opened up to all operators in some Member States, such as in Italy, but not liberalized at EU level yet\(^\text{17}\).


\(^{16}\) These are (a) the proportion of turnover, and (b) of volume, derived from transport of domestic or international passengers, and (c) the length of the service. These criteria are mentioned only as examples. They are therefore not obligatory and other criteria could also be taken into account. For example, as provided for by the above mentioned Interpretative Communication, the way the service is marketed, its stopping pattern and the type of rolling stock used are qualitative factors that regulatory bodies might consider in order to determine the purpose of the service.

\(^{17}\) See Recital 29 of Directive 2012/34/EU.
As regards the domestic rules on *cabotage*, consistently with the European framework, art. 59(1) of Italian law No. 99, 23 July 2009, implementing Directive 2007/58/EC, grants rail companies, as from 1st January 2010, the right to access rail infrastructure with the purpose of international services, including ancillary domestic services with no need for international license, provided that the principal purpose of the services is international for vocation, i.e. connect stations located in different Member States. Similarly to the European limitation, such right might be limited whenever the proposed *cabotage* services would compromise existing public service contracts.

In this context, at the time of the decision at stake, the rail regulator URSF had the power to enforce *cabotage* rules and thus to establish, following a specific procedure and on the basis of economic analysis and objective criteria, whether (a) the service can be qualified as international, and (b) the economic equilibrium of existing public service contracts might be compromised. In this latter case, it can also provide for possible measures in order to make the exercise of *cabotage* services with said contracts consistent.

4. **The Rail Regulator’s Reformed Decision**

URSF’s decision, besides calling the ICA’s attention, was successfully appealed by SVI. With interim decision of 15 November 2013, the Regional Administrative Court of Lazio annulled the decision on the ground of lack of assessment of criteria provided for by art. 59 of law 99/2009, and ordered URSF to re-assess the case by issuing a new decision within 60 days from the judgment.

With decision of 14 January 2014, URSF delivered its authorization to SVI for the supply of the intended *cabotage* services, with no term of expiration. Namely, URSF first considered that the principal purpose – on annual basis – of the service between Milan and Paris is the transport between two different Member States, implying its international nature, and secondly it excluded that the proposed *cabotage* services would impact on the equilibrium of existing public service contracts.

A final comment regards an interpretative question implied by the reasoning used by URSF, beyond the specific case. The question is notably as to whether the regularity of the average traffic and load factor throughout the entire year could be considered as a relevant standard in order to assess the principal purpose of the service. At odd, this question is even more present in the reformed decision than in the old one.

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18 To this purpose, specific administrative acts, issued by the same URSF (Directorial decree No. 203/1/URSF of 6 May 2009, as amended by Directorial Decree No. 528/URSF of 11 July 2012), detail both the criteria to be applied, reflecting the national and European provisions, and the procedural rules governing the relevant proceedings.

19 Decision TAR Lazio No. 4457/2013.
To be noted that as from 15 January 2014 URSF has disappeared and its powers and functions, including the powers to assess *cabotage* cases, has been taken over by the newly established Italian Transport Authority\(^\text{20}\). Therefore, from now on any further evolution of the sector depends on this independent, specialized agency.

5. **Conclusion**

Despite rail liberalization has been at stake in the European arena in the past twenty years – whereby international passenger rail has been liberalized since 2007, and many countries, such as Italy, have autonomously anticipated the liberalization of domestic services – the level of competition throughout Europe is still extremely limited.

Regulatory and economic barriers, jointly with the position of national incumbents, generally state owned, are sufficiently dissuasive against any attempt to access by newcomers. The practice and case law is extremely rarified in all rail markets, including *cabotage*\(^\text{21}\). Therefore, against this drawback, the ICA’s decision represents an important contribution to the development of the internal rail market\(^\text{22}\).

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\(^{22}\) Rita Coco, *Rail liberalisation and cabotage in the EU. A contribution by the Italian Competition Authority*. DOI: 10.12870/iar-9937.