

An Alternative Route of Legal Integration: The Community's Railways Policy(*)

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1. Introduction

The process of European integration and policy-making is sometimes rather puzzling. On the one hand, it is well known and documented that member states are no "star pupils" when it comes to the implementation of European legislation. In many instances, the transposition and enforcement of supranational policies at the national level is deficient, with European requirements being either neglected, resisted, wrongly interpreted or incompletely applied(1). In short, member states tend to do less than they are supposed to do(2). It therefore comes as no surprise that ineffective implementation has been identified as one of the most urgent problems which, if not properly addressed, could call into question the legitimacy and credibility of the integration process(3).

On the other hand, this overall picture is in sharp contrast to a recent "success story" concerning the implementation of the Council Directive on the development of the Community's railways(4). What is striking in this context, is not that the Directive was properly complied with at the national level; the requirements set out in the European legislation were rather modest and therefore could easily be integrated into national arrangements without significant efforts. The actual surprise lies in the fact that many member states went far beyond the minimum required by the European legislation, in fact doing much more than they were legally obliged to do.

How can we explain this result against the overall background of European implementation deficits? In the following, we argue that these differing evaluations of implementation success can be traced to different implementation approaches, which may be termed the compliance approach and the support-building approach. The compliance approach is characterised by a "top-down" perspective on implementation. The underlying assumption is that compliance leads to desired outcomes and therefore should be the indicator for successful implementation. While this conception holds true for the most part of European legislation, we suggest that the Railways Directive is shaped by a "bottom-up" logic of support-building. The primary objective of the Directive was not in its immediate effects emerging from national compliance, but in affecting the political climate at the national level in order to win support for a European "reform project". Hence, successful implementation implies to a lesser extent legal and practical compliance with European rules. Rather successful implementation refers to the extent to which European legislation triggers domestic changes by stimulating and strengthening support for European reform ideas at the national level.

It is the intention of this paper to point out the specific factors explaining the success of the support-building approach in the case of the railways. How did European legislation impact upon the domestic policy-making context? Which mechanisms account for the fact that the member states did more than they were legally required to do? We argue that the European Directive influenced the domestic arenas in basically three ways: namely by providing (1) legitimisation for political leadership, (2) concepts for the solution of national problems, and (3) strategic constraints for domestic actors opposing domestic reforms.

The plan of the paper is as follows. Section Two contrasts the two alternative approaches to European integration and places the 1991 Railways Directive into this broader context. Section Three analyses the role of the Directive in supporting railway reforms in Britain, the Netherlands, and Germany; pointing out the different mechanisms of national support-building by European law. Section Four draws general conclusions, contrasting the findings for Britain, the Netherlands, and Germany with the cases of Italy and France, where the Directive so far has had a less far-reaching impact.

2. The Community's Railways Policy: Integration by Support-Building

Viewed from a mere compliance perspective, the 1991 Directive on the development of the Community's railways is a "tiger without teeth"; that is to say, its legal requirements pose hardly any challenges to the well-established railways policies at the national level. This initial picture, however, looks quite different when taking a look behind the scenes. Thus, it is not the primary objective of the Directive to promote integration from a "top-down" perspective, but by stimulating and influencing domestic reform discussions. In short, the legal mechanism underlying this Directive is quite different from a traditional approach to legal compliance.

2.1 Compliance versus Support-Building

European legislation, which may emanate from both the policy-making in the Council and the decisions of the European Court of Justice, traditionally promotes integration in the sense of a "top-down" perspective. Member states are legally required to refrain from certain activities or to carry out specific tasks, regardless of domestic peculiarities and conditions. This implies that the

implementation of European policies at the national level is viewed "from above".

According to this conception, domestic implementors should have limited discretion to add values, and instead are supposed to reproduce faithfully statutory designs decided at the supranational level. In its ideal form, this approach is characterised by policies which are based on a comprehensive logic, clear objectives and detailed operational specifications in order to avoid misunderstandings and false interpretations(5). The crucial assumption underlying the "top-down" approach is that compliance leads to desired outcomes. Hence, compliance is the measure of "successful integration" and the primary role of European legislation is to produce effective and consistent compliance across member states.

The compliance approach of European legislation and policy-making can be observed in areas of both positive and negative integration. In areas of positive integration, European policies define positive requirements member states have to fulfil. In the environmental field, for example, European directives may require member states to abolish their approaches to pollution control or certain policy instruments in favour of corresponding arrangements defined in European legislation. In areas of negative integration, European policies are to a lesser extent directed at positive changes at the national level, but require member states to abolish or refrain from domestic activities which could distort the functioning of the internal market(6). In short, both positive and negative integration traditionally operate from a "top-down" perspective, either demanding or prohibiting member states to carry out certain activities.

This approach is in clear contrast to alternative implementation concepts which emphasise a "bottom-up" perspective and, more specifically, the building of support for certain projects or ideas. The support-building approach, which so far played a limited role in the European context, places greater emphasis on statutes that influence values and participation patterns and how various groups reconcile their interests(7). From a support-building perspective, European integration is to a lesser extent related to the national compliance with legal and administrative requirements of supranational policies. Rather, successful implementation refers to the extent to which European policies contribute towards creating and improving domestic support for European reform projects and hence trigger changes at the national level.

Of course, European legislation may in fact hardly reflect an ideal type version of either a compliance or support-building approach. In many instances, supranational policies will contain elements of both concepts. Thus, it is perfectly conceivable that measures following a "top-down" logic, besides their specific legal impact, will considerably affect the domestic decision-making context, and hence the overall support for EU legislation. However, we submit that in general one of the two approaches is dominant. While the greater part of EU policy-making is characterised by the dominance of the compliance perspective, the Railways Directive serves as a good example for illustrating the support-building approach.

2.2 European Legislation as Support Building: The Case of the Railways

In 1991, the Council of Transport Ministers agreed on a Directive on the development of the Community's railways. Although proposals to liberalise the European railways had been on the agenda of the Commission since the mid-1970s, it was not before the early 1990s, that supranational reform efforts were accepted by the member states(8). As we will see, this sudden take-off in European railways policy can be understood in terms of a changing approach to integration. While the Commission initially based its reform proposals on a legally demanding compliance approach, the 1991 Directive emphasises the building of domestic support for railway liberalisation rather than forcing member states by law to reform their railways.

Despite the widespread acknowledgement that the European railways faced a profound financial crisis, the railways policy of the EU for a long time made little progress. Throughout the 1980s, corresponding legislative attempts of the Commission never surpassed their initial stage. What is more, the main objectives of the railways policy at that stage - namely to improve the railways' competitive situation in intermodal competition, and to reduce social service obligations and state aids for the railways - had not been achieved. Rather, the overall situation of the railways in Europe had in fact worsened(9).

The reasons for this deadlock in the European railways policy were twofold. On the one hand, there was a strong resistance at the member state level towards any Community attempt to intervene into domestic railway policies. Especially in the larger member states, the railways were not seen as purely economic actors, but as public service which had to be maintained for political reasons. On the other hand, the Commission disposed of only limited legal and institutional powers in order to overcome the resistance of the member states. Thus, in contrast to sectors like energy and telecommunications, the railways, as a result of their strong dependence on national subsidies, could not easily be made subject to the application of European competition law (article 90 of the Treaty) which formally empowers the Commission to break up national monopolies without the agreement of the Council. However, even if the Commission was able to rely on these formal legal powers, the practice of European policy-making in telecommunications and energy reveals that the *de facto* application of article 90 is dependent on the consent of the member states(10).

From the end 1980s onwards, the Commission started a new initiative in order to address the problems of the railways, given the increasing problems concerning the railways' financial situation and economic position in intermodal competition with road haulage. Rather than explicitly demanding that the railways be "trimmed down" into a profitable industry, the Commission emphasised organisational and regulatory reforms, including managerial autonomy for the railways from state interference, contracts regulating the financial relationship between the state administration and the railways, the separation of infrastructure provision and network operation, and rules governing market access and operation(11).

Given the above mentioned difficulties for the development of a supranational railways policy, one could hardly expect that the new concept of the Commission would easily be accepted by the Council. Indeed, a corresponding proposal by the Commission was watered down by the Council and the European Parliament(12). An agreement was only possible if the requirements for domestic compliance were further reduced.

Consequently, the 1991 Directive contains hardly any serious challenges to the well-established railway policies of the member states at the domestic level. The Directive is endowed with a non-compulsory nature and a sufficiently ambiguous texture in order to give domestic implementors far-reaching flexibility and discretion in the way in which they comply with its modest requirements. Thus, the most "demanding" requirement of the Directive is that member states shall take the necessary measures to ensure that the accounts for business relating to the provision of infrastructure and those for business relating to the provision of transport activities are kept separate. In other words, the Directive requires only a change in national accounting systems rather than organisational or institutional adaptations. Moreover, the Directive's provisions for third party track access were restricted to international joint ventures in freight transport rather than being granted to individual companies, such as national railways.

In this light, one could hardly expect any progress towards the Commission's reform objectives of a liberalised European railways market from the mere legal compliance with the Directive's

requirements at the national level. The Commission was well aware of the limited impact of a compliance approach in this area. Contrary to its initial ambitious objective to reform the domestic railways system by relying on a "top-down" approach, its intention was to alter the national policy-making context by increasing the support for its reform programme. As a Commission official pointed out, "if the Directive was to be a success, it wasn't so much a success with what it did directly, but what it did indirectly. And that is to create a new thought process to be applied to the railways, to think again about what railways were supposed to be doing, and how they were supposed to be run"(13). To this extent, the Commission made a virtue of necessity. Since the political context provided limited opportunities for the successful application of a compliance approach, the Commission changed its concept in favour of a "bottom-up" approach to European integration(14).

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In fact, the impact of this support-building version of European integration at the domestic level seems to be considerable, as is demonstrated by fundamental railway reforms which have taken place or are still under way in Britain, the Netherlands, and Germany. While these countries went far beyond the legal requirements set out in the Directive, reform attempts, albeit more moderate, are also to be observed in other countries, including those with a classical "statist" tradition like France and Italy. In the following, we will have a closer look at the particular mechanisms underlying the support-building approach of the Railways Directive. For this purpose, we will investigate the impact of the Directive in the three countries which are most advanced with their railway reforms: Britain, the Netherlands, and Germany.

3. Three Mechanisms of Support-Building

As our analysis of the railway reforms in Britain, the Netherlands, and Germany reveals, there are three basic ways in which European legislation may increase domestic support for supranational reform projects. In its "lightest" version, European legislation can provide legitimacy for domestic political leaders in situations of high uncertainty about outcomes. Domestic leaders hesitate to enact national reforms, although they potentially possess both concepts of reform and the political power to push these ideas into practice within the national context. However, support-building role of European legislation is not restricted to the provision of legitimacy for decisions in situations of uncertainty, but may also mean that national policy-makers rely on European concepts to solve their national problems. A final mechanism of European support-building refers to the way European legislation may strengthen the domestic capacity for reform. In limiting strategic opportunities for domestic opponents of reform, EU policy may provide support to overcome any institutional veto at the national level.

3.1 Britain: European Legitimation for a Domestic "Revolution"

The privatisation of British Rail (BR), which was introduced with the *Railways Act 1993*, can be classified without exaggeration as the most radical and far-reaching railway reform anywhere in the EU. The changes in the formerly publicly-owned railways go beyond European requirements in several ways.

First, the separation of infrastructure and network operation is not only restricted to accounting, but is found in a far-reaching organisational fragmentation. Operational services, including passenger and freight transport, were split up into over thirty companies. Moreover, they were institutionally separated from infrastructure provision and maintenance for which a particular company (Railtrack) was established. Second, the organisational break-up of BR into separate businesses was followed by

the transformation of these services into the private sector. Most of the business units (rolling stock, freight transport, services) were sold off to the private sector, and the passenger services were franchised to private companies. In contrast to all other European countries, the provision and maintenance of infrastructure was also privatised by stock market flotation. Third, privatisation was accompanied by the establishment of a liberalised market regime. Whereas for freight operations access to the market was completely liberalised, a more restricted form of competition was introduced for the passenger sector. Market access is restricted by a competitive bidding process for franchises which grant the successful bidder a regional monopoly for a limited period of time. Both the yearly subsidy payments and the detailed service obligations to be fulfilled by the franchisee are specified in formal contracts, so-called franchise agreements. Finally, liberalisation coincided with the establishment of a regulatory framework relying on two independent regulatory agencies. The Office of the Rail Regulator deals mainly with aspects of competition and monopoly control, i.e. the classical regulatory functions in order to control privatised industries. The establishment of the Office of Passenger Rail Franchising (OPRAF) on the other hand results from the franchising provisions which reflect a peculiarity of the railway privatisation: that not all passenger operations are economically profitable and therefore require subsidy payments. OPRAF has the responsibility to allocate these subsidies(15).

If one considers the history of utility reforms in Britain which both preceded and went beyond corresponding reform activities at the supranational level, one might hardly expect that supranational policy-making made any difference with respect to the privatisation of British Rail. However, although the railways had already been on the "selling list" of the Conservative government since the early 1980s, railway privatisation was especially problematic in comparison to the other public utilities, such as gas, telecommunications, electricity and water. Given Britain's rich experience of the privatisation of public utilities and public sector reforms, there was never likely to be a shortage of reform concepts. Moreover, the generally strong position of executive leaders in Britain provided significant capacity to push through a radical reform despite considerable opposition. Rather, given the high level of political and economic uncertainty associated with the specific case of the railways, European legislation provided an important extra legitimisation for the British government to finally enact a rather radical reform programme.

British Rail: A Difficult Case for Privatisation

In common with the railways of other European countries, BR was highly dependent on public subsidies and faced an ever increasing loss of market share in freight transport. Despite several reform attempts during the 1970s, the railways' reputation as an inefficient and inflexible industry gained increasing political attention in the context of the far-reaching privatisation programme launched by the Conservative government from 1979 onwards.

However, although the Conservative government maintained a strong commitment to the idea of privatising BR, the specific problem of the railway industry inhibited the "easy" application of the standard British solution to the reform of public utilities. In contrast to other public utilities on the governments "selling list" BR was a loss-making undertaking and dependent on public funding. On the other hand, the option of making BR more attractive for privatisation by closing unprofitable lines was never politically feasible, due, in part, to the particular affection of the British public with respect to their railways(16).

It was only at the beginning of the 1990s, when potential solutions to tackle the perceived problem of the railways became available. Policy-makers were able to draw on various experiences stemming

from two sources: previous privatisations and public sector reforms. Evidence stemming from the privatisation of other public-sector industries pointed to the need to liberalise public monopolies before privatisation and to separate the ownership of infrastructure and network operations(17). Moreover, in order to cope with the problem of loss-making services, government relied on experience with franchising, contracting-out and performance regimes introduced in bus deregulation and general administrative reforms. Indeed, these experiences had a profound impact on the reform concept finally applied(18).

Once the concept of how to apply a standard solution to the specific case of the railways had been formulated, there seemed to be nothing to stop British government enacting these reforms. The Westminster-model generally favours the emergence of strong single-party governments which face hardly any formal or actual institutional veto when pursuing their objectives. "Britain has the fastest law in the West, with the fewest formal or codified restrictions on government action of any liberal democracy"(19). However, things were not as easy as the above seems to suggest, the main reason for this being the high degree of political uncertainty associated with the railways reform. Given the mixture of several recipes applied to the privatisation of BR, the reform had a rather experimental character, and hence presented considerable political risks for British policy-makers.

European Legislation: Legitimation for a Radical Decision under Uncertainty

The political uncertainties associated with railway reform became apparent in several aspects. First, it was highly questionable whether the franchise system would work as intended. Many commentators presumed that franchisees would strive to cut costs by reductions in services. Given the fact that the franchisees would be able to influence only 20% of their costs with the other 80% being determined by charges for rolling stock and track access, there might be only limited room for the efficiency gains the government hoped for. Second, there was high uncertainty as to whether the regulatory regime would be appropriate in order to secure sufficient investment by the private infrastructure monopoly (Railtrack). Third, it was argued that there were important economies of scope stemming from a vertically-integrated structure which would facilitate investment. These advantages would be lost within a fragmented industry structure. Important transaction costs originate from the allocation of economic risks related to infrastructure investment between different actors involved. Thus, in every single case it would be necessary to clarify who should pay for track upgrading; i.e. Railtrack, or the operator who wants new tracks to be built(20).

Against this background of high political uncertainty about the outcomes of a radical and experimental reform programme, the 1991 Railways Directive played an important role in providing domestic political leaders with extra legitimisation for their reform plans. In contrast to many other European countries, problems of railway reform were neither related to a lacking problem-solving philosophy nor to limited capacity for putting this philosophy into practice, given the strong role for integrated leadership within the British political system. Rather the difficulty of the railway reform was its radical and experimental character, which created considerable uncertainty and risk for political leaders. Thus, the 1991 Directive provided an important resource for the government to legitimate its risky undertaking: "The directive was preparing the way for what we would like to do anyway"(21). To conclude, although the British reforms went far beyond the legal requirements set out in the Directive, the latter served as added legitimisation for implementing a radical reform which had the blessing from Brussels.

3.2 The Netherlands: An European Model for Domestic Problems

Although the 1996 reform of the Dutch railways did not follow the path of liberalisation and commercialisation taken in Britain, it went beyond the requirements of the Railway Directive, and, moreover, assumed elements characteristic of the Netherlands. At the heart of the railway reform in the Netherlands lies the disentanglement of public and private functions and responsibilities. In institutional terms, this means a vertical and horizontal separation of functions with each segment embedded within a regulatory framework appropriate to its politically-assigned function. On the one hand, all infrastructure-related tasks including licensing, access regulation and infrastructure building are assigned to a government-commissioned sector to reinforce their public character and to ensure governmental influence for reasons of co-ordination. On the other hand, the horizontal separation of operations has been regarded as a precondition to set the agenda for competition. Provided with increased managerial autonomy and financially put on an even keel, the main services of the *Nederlandse Spoorwegen* (NS) passenger and freight transport are now, though to a different degree, subject to competition. In the freight sector, there has been an uncompromised market approach which provided NS Cargo with the greatest possible freedom. In this respect, rail freight is on the same private footing as any road freight company. Due to the sector's high political saliency, competition in the rail passenger market was not introduced immediately, but took place in a typically Dutch way, i.e. limited and guided.⁽²²⁾ Nevertheless, the relation between the government and the NS was transformed in such a way as to increase significantly the independence of the company and to cut back drastically on the opportunities for government intervention in its management. Whereas in government has for a long time instrumentalised the NS for certain redistributive objectives, the NS now requires remuneration for all such benefits from the Ministry of Transport or any other public entity.

The reform of the railways fits in well with the recent history of successful reform programmes in the Netherlands. Without doubt, the reform of the welfare state reform Netherlands provides the most significant example of the Dutch style of policy-making. Macro-economic concertation of socio-economic actors as well as concertation at the sectoral level generated a climate of consensual decision-making. Institutionalised forms of public-private interactions guaranteed a high capacity to adjust politically to economic change.⁽²³⁾ However, it has frequently been shown that to initiate and guide reform processes requires the 'shadow of hierarchy', i.e. government acted as *primus inter pares* and had to claim public authority.⁽²⁴⁾ An additional strengthening of public authority frequently occurs by referring to the process of European integration and requirements to adapt (pro-actively) to European policies. Both the provision of legitimation for public actors and the orientation function of European policies could be observed during the reform of the railways. Faced with a failure of existing regulation, Dutch government adopted a reform model that was proposed by European legislation. This model not only increased the governments legitimacy to act, but also provided a concept which contributed to solve existing problems at the domestic level by corporatist negotiations between public and private action.

Domestic problems...

In the Netherlands, the NS, a state-owned public limited liability company, operated as a kind of nation-wide undertaking for passenger transport by rail. Subject to a number of public service obligations, the NS relied strongly on public subsidies. In contrast to passenger transport, freight transport was considered to be a 'by-product' which had to operate on a strictly commercial basis.⁽²⁵⁾ However, from the mid 1980s onwards the existing regulation was challenged by several factors. First, to maintain or even to improve passenger transport services required ever-increasing financial support. Apart from fiscal considerations related to passenger transport, efforts to revitalise freight transport by rail were to a large extent due to pressure that stemmed from economic and social actors. On the one hand, road transport, which had developed as the backbone of the Dutch transport industry, was faced with increasing problems of congestion and bottlenecks. These limitations of the existing infrastructure were perceived as a threat to the competitive position of the Dutch economy.⁽²⁶⁾ On the other hand, in a general atmosphere of growing environmental consciousness,

public awareness of the negative effects of freight transport by road increased and exerted pressure on political actors.

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Given this set of problems, a broad consensus towards a strengthening of the railways emerged between political, societal and economic actors. In 1989, the report 'Strategy for Freight Transport by Rail' of the so-called 'van der Plas Commission' marked a crucial point in Dutch railway policy. The report made a gloomy forecast concerning the competitive position of the Port of Rotterdam and the development of the railways in future. The lack of a high quality railway system to provide an alternative to road transport would be 'disastrous' and a 'serious handicap for the Netherlands as a gateway to Europe'. While the NS made the most of the pro-rail support and offered bold re-organisation plans which would have left the NS as an integrative unit, the government followed the recommendations of a second committee which laid the foundation for a general restructuring of the Dutch railways. In 1992, the report submitted by the 'Wijffels Committee' made concrete recommendations for a future organisation of the railways. Referring to European legislation (91/440) the report recommended a vertical and horizontal splitting up of different railway units and, furthermore, asked for a clear and coherent transport policy.

... meet an European solution

The history of the reform underlines the broad consensus among political, economic and societal actors in favour of a strengthening of the railways. Given these pressures and the awareness that road transport alone would not be able to cope with an ever-increasing volume of freight transport, the government started to revise its policies from the mid-1980s. The major feature of the new policy-making approach was the strife to take the interdependence and interaction of different modes of transport, i.e. road, rail, inland waterways, more into account.⁽²⁷⁾ This approach rested on two pillars. On the one hand, co-ordination became a major theme of an approach striving for an integration of different sub-systems views. On the other hand, deregulation and the introduction of the market principle wherever possible was seen as an important means of increasing the competitiveness of Dutch industry. From the mid 1980s onwards, government had already proved its capacity to realise its policy visions in road freight transport. According to the generally institutionalised *modus operandi* of consensual and negotiated problem-solving, government, together with the road hauliers interest organisation, had succeeded in developing a scheme which contained elements of industrial policies within a liberal and deregulated market regime.

The development of a comprehensive solution for the railways was hampered by the integration of passenger and freight transport into the same organisation and their dependence on the same infrastructure. However, with the added legitimacy of the European legislation, the government was able to draw strength from the European policy. Most importantly, the model proposed by EC Directive 91/440 entailed the splitting up of the railways complex and problematic structure, and thereby allowed policy-makers to deal with specific problems sequentially. Thus, the European legislation fitted well with the emerging Dutch approach of integrated transport policy-making as the provisions enshrined in the regulation left sufficient room for the government to incorporate its own policy views whilst transforming the provisions into national legislation.

While in the past, the government, receptive to the high level of public support for a pro-rail transport policy, had been willing to accept the NS's own proposals for reform, in 1992 the government rejected proposals which involved a cautious step towards organisation separation without destroying the structural integrity of the railways in favour of the more radical scheme proposed by the Wijffels Committee. The Wijffels' recommendations did not only incorporate the European

legislation but also were more in line with the new regulatory approach of the government towards transport markets, i.e. to establish the market principle wherever possible while maintaining governments prerogative to intervene where necessary. The advent of a Common European Railway Policy, which will be built on the pillars of the separation of infrastructure and operations on the one hand and the introduction of market-conform means on the other, legitimised the governments position. In a nutshell, European legislation served not only as a concept to solve domestic problems, but also provided political executives with additional legitimacy to enact its policy ideas.

3.3 The Reform of the German Railways: Restricting Opposition

At first glance, the reform of the German railways of 1994 seems to be nothing more than a formal privatisation, as a public monopoly was transformed into a private one. Nevertheless, the reform not only implemented European legislation but went beyond its minimum requirements: by transforming the railways into a joint-stock company (*Deutsche Bahn Aktiengesellschaft DB AG*); by separating infrastructure and operations in organisational terms and providing a schedule for the institutional separation of the exploitation of infrastructure and freight and passenger operations within a ten years period; and, finally, by opening up the rail infrastructure to any national and foreign railway undertaking on the basis of the principle of mutual reciprocity, i.e. provided that the network of the foreign company is also accessible to German operators.⁽²⁸⁾ Further important elements of the reform were: a distinction between sovereign authority, exercised by newly formed administrations responsible for licensing and control, and commercial operations; the merger of *Deutsche Bundesbahn* and *Deutsche Reichsbahn*; regionalisation, i.e. the shift of responsibility for regional public transport to the *Länder* as of January 1996; and a fundamental release from the debts of DB AG.

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The extent of the reform comes as a surprise when one takes into account that 'semi-sovereign' policy-making and a tendency towards administrative conservatism made Germany the backwater of administrative modernisation, privatisation and reform during the 1970s and 1980s.⁽²⁹⁾ Generally, policy-making in Germany is characterised by the fragmentation of power and the existence of formal or *de facto* powers of veto. However, German re-unification and European integration contributed to a significant change. On the one hand, problems related to the re-unification prevented incremental policy-making. On the other hand, European policies provided government not only with additional legitimacy, but also with the conceptual framework which can be enacted at the national level. Thus, European provisions limit the scope for potential opponents at the national level.

Internal and external pressure

The *Deutsche Bundesbahn* (DB) was constituted as a national railway but was required to act as 'an economic enterprise' which fulfils 'public service obligations' (Art 28 I of the Federal Railway Act). To impose such seemingly contradictory obligations on the railways was the result of what one might call a 'national embrace' involving Federal government, parliament, *Länder*, trade unions and industry which all took part in railway policy-making.⁽³⁰⁾ The legal-budgetary regime, whereby the railway constituted a special Federal fund without independent legal personality (*nicht-rechtsfähiges Sondervermögen*), helped to act as a buffer for the inherent conflict of objectives in the railway's constitution. Thus, the costs resulting from efforts to fulfil conflicting goals built up as deficits in the special Federal fund outside the main Federal budget.

From the mid 1980s onwards, the negative consequences of the existing regulations were becoming increasingly apparent. The continuous decline of the railways was forcing the Federal government to

provide steadily increasing subsidies; the *Länder* and local authorities also were having to bear greater costs as a result of the unsatisfactory state of public transport by road and rail at regional and local level; the railway unions could not prevent the steady decline in jobs; and, finally, transport exports and leading business associations questioned the basic justification for the existing regulation of transport markets in Germany and argued for deregulation and liberalisation policies. These factors combined to stimulate the emergence of a basic parliamentary consensus between the governing Centre-Liberal coalition and the opposition Social Democrats.

In 1989, a commission (*Regierungskommission Bahn*) was launched with the brief to develop proposals for establishing a sustainable basis for the railways. In its work, the commission was substantially affected by two developments: the German unification, coupled with the opening up of Eastern Europe; and the obligations imposed by the European legislation. As a result of the first, the commission had not only to take into account the calamitous financial situation of the Deutsche Bundesbahn and the Deutsche Reichsbahn, but also the latter's specific problems and the fact that Germany was supposed to become a transit country in the centre of Europe. Against this background, the commission's final report, published in December 1991, recommended a fundamental structural reform which, at that time, represented the most radical approach to the reorganisation of the railways. On the basis of these recommendations, the Federal Government decided to institute a structural reform of the German railways to come into effect on 1 January 1994.

Constraining veto players

There is good evidence to state that only the combination of internal and external factors can satisfactorily explain both the speed and substance of the reform. On the one hand, in the late 1980s, a broad consensus between political and economic actors emerged demanding a substantial reform of the regulations in the transport sector. German re-unification and the need to implement relevant European legislation urged the demand for finding a solution. Given the nature of the problem, the relatively modest demands of European provisions fell on fertile ground and could develop its potential in a threefold manner.

First, the advisory commission working on the future development of the German railways incorporated the concept inherent in the provisions of the EC-Directive 91/440 into recommendations which proposed the most far-reaching reform in the history of the German railways. To separate vertical and horizontal respect not only allows for increasing the internal transparency of different functions, tasks and services an aspect which was especially important with respect to regional and local passenger transport but also includes the introduction of intra-modal competition as a market-based means of increasing efficiency. Second, the 'aura' of future European requirements increased the legitimacy of the Federal Government to implement its neo-liberal inspired ideas of restructuring the regulation of transport markets.

Third, a final important effect of the European legislation on the situation at the nation level was its impact on potential opponents of the reform. As the reform included an amendment of Article 87 of the Basic Law, the Federal Government needed not only the agreement of the opposition SPD MPs in the *Bundestag*, but also the confirmation of the *Länder* in the *Bundesrat*. While all former efforts to reform the railways had substantially been opposed, either by the *Länder* which did not want to accept regionalisation or by the railwaymen's union which successfully mobilised Social Democrats in Parliament, the new European legislation decisively changed the situation. The European provisions and even more so the original proposals of the European Commission clearly indicated the direction in which the future railway policy was supposed to develop. Hence, the fact that the reform

model of the Federal Government was given the 'aura' of the future European railway policies significantly constrained the ability of potential opponents to resist the reform. Given the foreseeable developments, the question for potential veto players, especially the *Länder*, the opposition in parliament and the railway union, was not how to block the general developments but how best to influence the shape of the reform which almost inevitably would develop into a new direction. Hence, although several actors at the national level forced the Ministry of Transport into extensive concessions,⁽³¹⁾ the reform of the German railways constitutes a third case illustrating the impact of the European legislation on the national constellation. It not only provided government with additional legitimisation and a conceptual framework for solving domestic problems, but also restricted the resources of potential opposition.

4. Conclusion: The Scope of Support-Building

We have seen that the railway reforms in Britain, the Netherlands, and Germany went well beyond the legal compliance requirements of the 1991 Railways Directive. This finding is in sharp contrast to the overall picture of European implementation deficits. In our analysis, we have tried to explain these differences in implementation success by emphasising that the 1991 Railways Directive follows an alternative route of legal integration. Contrary to the classical and dominant "top-down" approach to integration, where compliance at the national level indicates successful implementation, the Railways Directive follows the logic of support-building.

It is a crucial characteristic of the support-building approach that its success is highly dependent on the specific conditions which shape policy-making at the national level. Domestic conditions define the need for European support. As demonstrated by our three "success stories", this need varies strongly between countries. Hence, in each country different mechanisms of support-building were of importance. Despite this variance of domestic needs for external support, European legislation still provided sufficient support to trigger domestic reforms. However, this cannot be taken for granted, as suggested by the limited impact of EU legislation in France and Italy. In these countries the demand for external support exceeded what could be provided by European legislation. Its dependence upon national conditions therefore implies considerable limits for the success of the support-building approach. Notwithstanding these domestic constraints, however, the support-building approach also in these countries may pave the way for a more liberal regime, especially when it is supplemented with subsequent "top-down" legislation at the supranational level.

4.1 The Domestic Need for European Support: Three Mechanisms

As our three country studies demonstrate, the effects of support-building played a crucial role in facilitating domestic railway reforms that come closer to the general project of an internal railways market as one could have expected from the modest requirements set out in the Directive. Given the far-reaching reforms in Britain, the Netherlands, and Germany, it was our intention to identify the specific mechanisms by which European legislation affected the domestic decision-making context. Our cases allow for three general conclusions in this respect.

1. There are basically three mechanisms, by which European policies may stimulate and facilitate domestic reforms. First, European policies may provide additional legitimisation for domestic political leaders to justify the content and implementation of national reform policies. Second, European policies can support domestic changes by providing the conceptual basis for reform to solve specific domestic problems. Third, European legislation can strengthen the potential of

national reforms by reducing the relevance of institutional veto points in the national decision-making process. In doing so, EU legislation formally or factually restricts the strategic opportunities for domestic reform opponents.

2. We have seen that the extent to which these mechanisms are of relevance in order to bring about domestic reforms depends on the specific political and institutional conditions at the national level. Thus, from the three countries under study, the need for European support was lowest in the British case. British reformers neither lacked an adequate conceptual basis for their reforms nor the institutional and political capacity to put through the radical reform programme. However, given the experimental character of the reform, EU legislation played an important role in legitimising the final decision in a situation of high political uncertainty. In the Dutch case, by contrast, European legitimisation would not have been sufficient to stimulate successfully the railway reform. Notwithstanding the institutionalised system of corporate conflict resolution, which accounts for a generally high level of national reform capacity, the Dutch for a long time had not been able to develop an appropriate solution for the well-acknowledged problems of their railways. In this situation, the concept of reform embodied in the 1991 Directive played an important role in providing the basis for the development of an appropriate solution to the problems of the Dutch railways. The need for European support was even higher in the German case, where policy-makers the Directive did not only provide them with additional European legitimisation and a conceptual framework to solve problems. Domestic reforms were also facilitated by the fact that European policy restricted the strategic opportunities of domestic reform opponents, and hence reduced the difficulties to reach an agreement in the context the numerous veto points provided by the fragmented German polity.

Table 1: Mechanisms of Support-Building in Three Countries

Mechanism / Country	Britain	Netherlands	Germany
Legitimisation	X	X	X
Conceptual Basis		X	X
Restricting Strategic Opportunities for Reform Opponents			X

3. Although the railway reforms in the three countries under study are well in line with the Commission's project of railway liberalisation, they reveal far-reaching differences with respect to their concrete regulatory and organisational arrangements. These differences are to be understood against the background of differing national conditions, problem perceptions and regulatory traditions. The particular success of the "bottom-up" logic embodied in the Railways Directive therefore may be seen in its role in stimulating domestic reforms which are sufficiently similar to correspond to European reform ideas, but leave sufficient room for taking account of national diversity.

4.2 Domestic Limits to Successful Support-Building: Evidence from France and Italy

Notwithstanding the far-reaching impact on European legislation in Britain, the Netherlands, and Germany, it should not be overlooked, however, that the support-building approach may not be universally successful in every member state. This qualification refers to the fact that the national context not only defines the need for European support but also implies important limits for the success of the support-building approach. The impact of this qualification becomes obvious when this need is too high to be sufficiently compensated by European support, as demonstrated by the cases of France and Italy.

Relating the mechanisms of the support-building approach to their impact on the national level in

several countries, we can think of a continuum on which from left to right the countries are located as follows: United Kingdom, the Netherlands, Germany, France and Italy. While, in the German case, support by legitimisation, conceptualisation and constraint of opposition proved still sufficient to generate a significant reform, this has obviously not been the case in France and Italy. The question is: what are the limits of the support-building approach?

Turning to the French case first, it seems as if European provisions may have supplied some support. In 1997, a new organisation was created which is in charge of the infrastructure (*Réseau ferré de France*, RFF). This may support the impression that European legislation provided political leadership with legitimisation and conceptual back-up, and contributes to influencing actors at the national level in favour of a reform in line with the European ideas. However, the fact that the SNCF still manages infrastructure on behalf of RFF and that the monopoly of SNCF for all operational services is maintained contradicts this impression. Rather, we encounter a catch-22 situation that the administration is faced with. On the one hand, French administration is quite responsive to European policies which offer the conceptual means of solving some of the problems of the railways. On the other hand, the possibilities of the administration to act according to its convictions and to apply the European concept of reform is limited by two factors; hence restricting the scope of the support-approach in the case of the French railways.

First, given the general "rationality" of a "strong state", the opportunities to legitimate political changes by reference to European requirements are fairly restricted. Especially in politically rather sensitive areas, such as agriculture or transport characterised by strong and influential societal actors, the legitimisation of domestic reforms by European legislation is likely to have the paradoxical effect of even increasing political opposition. Opposing actors, in many instances, can mobilise additional support by emphasising the political weakness of the "strong French state" when voluntarily accepting European requirements. Thus, as demonstrated by French railways policy, any reliance on a legitimacy based on European provisions further increased the resistance of societal actors especially the railway unions against the reform. As a consequence, the impact of legitimisation mechanism of European support-building is limited in France. Second, and closely related to this aspect, European provisions do not sufficiently constrain the opponents of reform. Contrary to the situation in Germany, where potential veto players interpreted European developments in a way that favoured their cooperation rather than resistance to the railway reform, opposing actors in France even gain new opportunities to mobilise political resistance when pointing to the European dimension underlying domestic reform attempts. European support-building in the French case was therefore restricted to the provision of reform concepts which were generally accepted within the French administration. However, European legislation so far did not provide sufficient support, in terms of both political legitimisation and the reduction of strategic opportunities for reform opponents, to allow the administration to fully enact these reforms in the context of strong political and societal opposition. Rather, the French railway reform so far can be characterised as a "tightrope walk" between officially opposing European activities and cautiously introducing domestic reforms which are in line with European policy objectives⁽³²⁾.

The reform of the Italian *Ferrovie dello Stato* illustrates the limits of the support-building mechanism in a different way. In contrast to the French case, Italian political leaders are generally quite willing to rely on European reform proposals and to legitimise domestic reforms by pointing to European requirements. In many instances, Europe is seen as the only means to overcome national deadlocks which emerge from the fragmented political decision-making structures in Italy, offering opposing actors numerous veto opportunities to block or weaken domestic changes. Although the conceptual basis of the European railways policy has been actively used by Italian leaders to promote and

legitimise corresponding reforms of the Italian railways, the support provided by European legislation was not sufficient to trigger substantial changes.

Thus, the 1992 privatisation of the Italian railways, which was itself preceded by other reform attempts from 1985 onwards, remained largely at a formal and symbolic stage. Despite the new structure, changes occurred neither with respect to the scope of governmental interference into the management of the railways, nor in subjecting passenger and freight operations to a more competitive framework. A similar failure was the so-called *Prodi Directive* of 1997 which suggested a far-reaching railway reform (by relying on European legitimisation and conceptualisation). Given the broad resistance to the proposals (especially from the railway unions), it was relegated into a long-term policy plan. In contrast to Germany, European support was not sufficient to overcome strong resistance of domestic veto players⁽³³⁾. The Italian case thus demonstrates the limits of support-building in cases where domestic opposition to European reform projects holds a strong position in the national decision-making context.

4.3 Support-Building and Compliance: Complementary Approaches

It is a basic characteristic of the support-building approach that it promotes European integration by accommodating national diversity. Rather than being directed at prescribing domestic reforms "from above", the provision of European support aims at triggering European integration within the existing political context at the national level. We have seen that this strategy has its strengths and weaknesses. On the one hand, as illustrated by the cases of Germany, the Netherlands, and Britain, the strong reliance on the domestic context can be rather successful, assuming that European support falls on a sufficiently fertile ground, and hence contributes to far-reaching domestic changes. On the other hand, its explicit reliance on the domestic context can significantly reduce the scope of the support-building approach in cases where the domestic conditions are not sufficiently responsive to European influence.

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However, this weakness of the support-building approach may be seen as less severe, when its effects are interpreted within a broader perspective. To be precise, support-building can be interpreted as a starting point which paves the way for further dynamics of European integration. In this respect, two aspects have to be distinguished:

First, support-building can prepare European market integration by setting in motion a self-dynamic of market mechanisms pushing towards liberalisation. Thus, it is conceivable that the liberalisation of the railways sector which took place so far in Germany, the Netherlands, and Britain will create spill-over effects increasing the pressure towards similar reforms in France and Italy. The French *Compagnie Générale d'Entreprise Automobile*, which operates local passenger transport by rail not only in France but also in the Netherlands, Britain, Germany and Portugal represents a clear signal for an Europeanisation of the supply-side of railway services even though the French railway reform up to now was only quite limited.

Second, support-building may prepare the ground for subsequent measures of "top-down" integration. In generating market dynamics in some countries, support-building contributes to the emergence of new actors, such as the privatised railway operators, which might serve as coalition partners for the European Commission not only at the domestic but also at the supranational level. Thus, privatised industries, in striving for network access in other, less liberalised countries, might address the Commission or the European Court of Justice to push through their demands. So doing, they contribute to an expansion of the up to then restricted scope for authoritarian mechanisms, e.g.

procedures according to Article 90. Put differently, support-building conceived as preparation for competition might contribute to the emergence of market mechanisms, which, in turn, prepare the ground for the application of the top-down approach to integration. This way, the compliance and the support-building approach are not in contradiction with each other, but - appropriately combined - can compensate their mutual weaknesses in order to promote European integration.

Endnotes

(*) The empirical results presented in this article are drawn from a research project on "The Transformation of the State. Transport Policy in Europe" carried out at Bielefeld University, Germany and the European University Institute, Florence between 1994 and 1998. The project is directed by Adrienne Héritier and financed within the Leibniz Programme of the German Science Foundation.

(1) These deficits are well documented by scientific observers as well as the Commission's own statistics. See, for example, C. D. Ehlermann, *Enforcement of Community Law: How to Improve the Existing Structures*. United Kingdom Association for European Law — Annual Address, London, 7 November 1996; C. Knill (ed), *The Impact of National Administrative Traditions on the Implementation of EU Environmental Policy* (Florence: European University Institute, 1997); European Commission, *Thirteenth Annual Report on Monitoring the Application of Community Law* (1995) (Luxembourg: Office for Official Publications of the EC, 1996); European Commission, *Implementing Community Environmental Law*. Communication to the Council of the European Union and the European Parliament (Brussels: Commission of the European Union, 1996).

(2) The reasons for these problems of compliance are seen in essentially two factors, namely, the restricted legal sanctions available to the Community in order to enforce EU legislation vis-à-vis the member states and the impact of national administrative traditions which may differ from country to country. See R. Dehousse et al., *Europe after 1992. New Regulatory Strategies* (Florence: European University Institute, EUI Working Paper No. 92/31); C. Knill, 'Appropriate Implementation. The Impact of National Administrative Traditions on European Policy-Making' (1998) 18 *Journal of Public Policy*.

(3) European Commission, *Implementing Community Environmental Law*, p. 6.

(4) Council Directive 91/440/EEC of 29 July 1991 on the development of the Community's railways (OJ No. L/237).

(5) H. Ingram and A. Schneider, 'Improving Implementation Through Framing Smarter Statutes' (1990) 10 *Journal of Public Policy* 67-88; B. G. Peters, 'Alternative Modelle des Policy-Prozesses: Die Sicht "von unten" und die Sicht "von oben"', in A. Héritier (ed), *Policy-Analyse. Kritik und Neuorientierung, PVS Sonderheft 24* (Opladen: Westdeutscher Verlag 1993), pp. 289-306; R. Mayntz, 'Implementation von regulativer Politik', in idem (ed), *Implementation politischer Programme II* (Opladen: Westdeutscher Verlag 1983), pp. 50-74

(6) P. Taylor, *The Limits of European Integration* (London: Croom Helm, 1983); F. W. Scharpf, *Mehrebenenpolitik im vollendeten Binnenmarkt* (Köln: Max-Planck Institut für Gesellschaftsforschung, Discussion Paper 93/9, 1993).

(7) Ingram and Schneider, 'Improving Implementation', p. 77; Peters, 'Alternative Modelle des Policy-Prozesses', p. 305.

- (8) J. Erdmenger, 'Verkehrspolitik', in Werner Weidenfeld and Wolfgang Wessels (eds), *Jahrbuch der europäischen Integration* (Bonn, Europa-Union Verlag, 1997), pp. 167-172.
- (9) J. Erdmenger, *The European Community Transport Policy. Towards a Common Transport Policy* (Aldershot, Gower, 1983).
- (10) S. K. Schmidt, *Die wettbewerbsrechtliche Handlungsfähigkeit der Europäischen Kommission in staatsnahen Sektoren* (PhD Thesis, University of Hamburg, 1997).
- (11) D. Kerwer and M. Teutsch, *The Dynamics of the EC's Common Transport Policy*. (Florence, European University Institute, 1997, ms.)
- (12) Communication on a Community Railway Policy. Proposal for a Council Directive on the Development of the Community Railways, Com (89) 564 final.
- (13) Commission official quoted in Kerwer and Teutsch, *The Dynamics of the EC's Common Transport Policy*.
- (14) It is important to emphasise that, from our empirical material, it is difficult to judge whether the Commission deliberately selected the support approach as a more effective means to push domestic reforms or whether this choice was the result of previous failures of the compliance approach. Since we are primarily interested in the *effects* of the support-building approach, this aspect is of minor importance in the context of this study.
- (15) See C. Knill, *Reforming Transport Policy in the United Kingdom: Concurrence with Europe but Separate Developments* (Florence, European University Institute, ms. 1997); C. Nash, 'Developments in Transport Policy. Rail Privatisation in Britain' (1993) 27 *Journal of Transport Economics and Policy*, pp. 317-322; R. Gibb, T. Lowndes and C. Charlton, 'The Privatisation of British Rail' (1996) 16 *Applied Geography*, pp. 35-51; D. Birginshaw, 'BR Break-up Begins' (1994) *International Railway Journal*, pp. 13-14.
- (16) N. Zahariadis, 'Selling British Rail. An Idea Whose Time Has Come?' (1996) 29 *Comparative Political Studies*, pp. 400-422.
- (17) J. Vickers and G. Yarrow, 'Telecommunications: Liberalisation and the Privatisation of British Telecom', in J. Kay, C. Mayer and D. Thompson (eds), *Privatisation and Regulation. The UK Experience* (Oxford: Clarendon Press, 1989), pp. 221-240.
- (18) Knill, *Reforming Transport Policy in the United Kingdom*.
- (19) P. Dunleavy, 'Introduction: Stability, Crisis or Decline?', in P. Dunleavy, A. Gamble, I. Holliday and G. Peele (eds) *Developments in British Politics* (London: Macmillan, 1993), pp. 1-18.
- (20) As recent developments reveal, many of these uncertainties actually turned out to pose severe problems for the operation of the privatised railways. See Knill, *Reforming Transport Policy in the United Kingdom*.
- (21) Official of the British Department of Transport, quoted in Knill, *Reforming Transport Policy in the United Kingdom*.
- (22) Ministerie van Verkeer en Waterstaat, *Beleidskader toelating tot het spoorvervoer*. (Brief aan de voorzitter van de Tweede Kamer der Staten-Generaal, 11 February 1997, kenmerk GDV/CPV/PVV-S/V 721483), p. 9.

(23) P. Katzenstein, *Small States in World Markets. Industrial Policy in Europe*, Ithaka: Cornell University Press. 1985. For the reform of the welfare state see J. Visser and A. Hemerijk, *The Dutch Miracle. Job Growth, Welfare Reform and Corporatism in the Netherlands*, Amsterdam: Amsterdam University Press, 1997.

(24) J. Visser, 'Two Cheers for Corporatism, One for the Market. Industrial Relations, Unions, and Labour Markets in the Netherlands', in: *British Journal of Industrial Relations* (1998, forthcoming).

(25) Zijderveld, A.C. (1989) 'Een spoor door de verzorgingsstaat. De sociale en culturele betekenis van de NS na de Tweede Wereldoorlog', in Nederlandse Spoorwegen (eds.), *Het Spoor—150 jaar spoorwegen in Nederland*, Utrecht and Amsterdam: Nederlandse Spoorwegen/Meulenhoff Informatief, p 271.

(26) The fact that the Port of Rotterdam had developed into the biggest port in the world had significantly contributed to making the transport industry an important branch in the Dutch economy.

(27) See for a general description D. Lehmkuhl, 'From Regulation to Stimulation: the reform of Dutch transport policy' (Florence, European University Institute, 1997, ms.).

(28) D. Lehmkuhl 'Privatizing to keep it Public? The Reorganization of the German Railways', in: Arthur Benz and Klaus H. Goetz (eds.), *A New German Public Sector? Reform, Adaptation and Stability*, Dartmouth: Aldershot, 71-92; Michael Teusch, 'Regulatory reforms in the German transport sector: how to overcome multiple veto points' (Florence, European University Institute, 1997, ms.).

(29) A. Benz and K.H. Goetz, 'The German Public Sector: National Priorities and the International Reform Agenda', Arthur Benz and Klaus H. Goetz (eds.), *A New German Public Sector? Reform, Adaptation and Stability*, Dartmouth: Aldershot, 1-26, p. 9; P. Katzenstein, *Politics and Policy in West Germany: The Growth of a Semi-sovereign State*, Philadelphia: Temple University Press, 1987.

(30) D. Lehmkuhl and C. Herr, 'Reform im Spannungsfeld von Dezentralisierung und Entstaatlichung: Die Neuordnung des Eisenbahnwesens in Deutschland', *Politische Vierteljahresschrift*, vol. 35, (1994) 631-657, p. 635.

(31) Indeed, the original plans of the Ministry had been even more radical, but both the concept and the method of transition, i.e. the creation of a holding company, was the result of "practical considerations" since, in view of the required broad consensus, a stage-by-stage restructuring process "would create considerably less friction and resistance" Bundesminister für Verkehr, *Kabinettsache*, Datenblatt-Nr. 12/12074-05, 6 June 1992, p. 31.).

(32) A.C. Douillet. 'France: A Slow Acceptance of European Orientations.' (Florence, European University Institute, 1997, ms.).

(33) D. Kerwer. 'Going through the motions. The modest European impact on Italian transport policy.' (Florence, European University Institute, 1997, ms.).