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**THE REGULATION IN THE TRANSPORT RAILWAY SECTOR  
AND THE NEW AUTHORITY:  
THE ENGLISH EXPERIENCE AND FOOD FOR THOUGHT  
(ABSTRACT)**

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ABSTRACT

The aim of the present research is to analyze regulatory aspects and problems from an antitrust point of view concerning railway sector.

First of all, the research describes the sector specific characteristics and the ones common to the other public utilities, such as natural monopoly, essential facility, service of general economic interest and its public service obligations.

The analysis opens with a EU perspective because - in the case of the railway sector - it represents the foundation of both legislation and main economic dynamics. More precisely, it describes the evolution of the industry - characterized by a dialectic public powers-market- and the process of liberalization, with the introduction of the principles of economic freedom and competition, de-monopolization and privatization through the analysis of the sectoral legislation (from the first measures of '60s and '70s, to the directives of '90s that have liberalized the sector, to the "railways packages" until the directive establishing a single European railway area) and the relevant case law.

The analysis revealed the persistence of some limits on the reforming scope of the industry regulation, such as the special attention devoted to compliance with state prerogatives - which has sometimes hindered a real market opening - and the creation of a more efficient and interconnected European railway sector.

The research was also conducted in a comparative perspective, analyzing the UK railway regulation system. Together with Sweden, it was one of the first countries to have liberalized the sector and to have experienced, at the same time, the privatization of the infrastructure manager, despite advancing it again in the public perimeter and transforming, thus, a failure into a successful story. In particular, the British experience - which began with the Railways Act of 1993 - was outlined as “the most radical restructuring” among all European railway systems and it has provided a complex process of “vertical disintegration” of the incumbent *British Rail* (BR), which was conducted through a complex and contextual process of separation: the infrastructure ownership (assigned first to *Railtrack*, then to *Network Rail*); the operators of transport companies (*Train operating companies* - *TOCs* for passenger and *Freight operating companies* - *FOCS* for freight transport) and the ownership of rolling stock (assigned to privatized companies, *Rolling stock leasing companies* - *Roscops*). The reforms have included, therefore, the privatization of the main elements of the system together with the introduction of the competition in the field of passenger services using the franchising system as well the independent regulation.

Despite its controversial aspect due to the failure of the privatization of the nowadays “re-nationalized” infrastructure manager and to some questions concerning the costs and safety (especially in the aftermath of major accidents behind the years ‘2000s), the British experience seems to have shown, on the whole, some definite advantages of the vertical separation system: the highest rate of railway growth; the increase in the number of passengers; the development of more and new trains - which appear to be on time and promote higher levels of passenger satisfaction; the higher security level for which the British railways appear to be, according to recent

studies, the safest in Europe; the positive impact of the introduction of competition through the franchising system, which has encouraged the development of the rail market and has supported some companies to improve performance and reliability of the services and eventually, to introduce new services and innovation in timetable patterns, in customer service and in ticketing.

As shown below, we proceeded to the description of the discipline and the activity of the new sector regulatory body, the Transport Regulatory Authority (ART), which fits into the system of independent authorities and, more specifically, in the regulation of public utilities. After a description of the former regulator and the attempts of setting up an Authority industry, the research examined in particular the structure and the independence of the new Authority characters, its powers, with specific reference to the railway sector, the collaboration reports and tools with other independent administrative authorities and institutions. Subsequently, the attention was focused on the first regulatory measures adopted by ART in the rail sector with a particular reference to the adjustment measures on fair and non-discriminatory access to infrastructure, on regulation of infrastructure manager, protection of passengers and public procurement. The introduction of an independent regulator like the ART could undoubtedly be considered as a significant step forward to achieve the objective of defining a clear and pro-competitive regulatory framework.

Subsequently, due the existence of a close relationship and a complementarity between competition and regulation, the issues and the unresolved problems that characterize the rail sector have been analyzed with a further investigation to the application of the antitrust provisions and actions of the sectoral regulation. In particular, the obstacles to the establishment of competition in the industry have been

examined in the double meaning of “competition in the market” - developed in the high-speed sector with the entry of the competitor (NTV), which holds moreover a greater number of passengers - and “competition for the market” - developed at the regional level even with the persistence of some advantages for the incumbent and of some obstacles to the establishment of public bids. Specifically barriers to access to infrastructure or to essential goods to perform the service have been described, since they appear to be substantiated in exclusionary abuses of a dominant position. Furthermore, this research aims to show the limits of the system of “competition for the market”, such as an unclear distinction between the services provided by the free market and those dependent to public service obligations, with the risk of the emergence of the cross-subsidies, in an inadequate regional public transport financing, in the difficulty in finding the rolling stock and the problem the size of public bids.

The research devoted particular attention to the strategic role played by the infrastructure manager, going over the fundamentals and the doctrinaire debate on the model of vertical integration on one hand and on the separation between ownership and management of the network and performance of rail services on the other. This lot has been investigated in order to the specific analysis of the Italian case: the Italian State Railways Group (FSI) holds both the infrastructure manager (RFI) and the incumbent operator (Trenitalia) in the same holding company, which is wholly owned by the Ministry of Economy and Finance.

Finally, the thesis was completed, prospectively, starting with the very latest developments in European legislation, for adoption of the so-called “fourth railway package” - currently under discussion - which proposes an integrated policy approach aimed at revitalizing EU rail transport and at encouraging the creation of a single European

railway area. It consists of six acts that can be classified in two pillars: a “technical pillar”, which includes a set of initiatives to remove remaining administrative and technical barriers, pushing for a common approach to safety and interoperability and “market pillar”, which aims to open the domestic rail passengers market to competition, to enhance the governance of infrastructure management and to establish fair and non-discriminatory access conditions for new entrants. In this regard, it should be reported according to a particularly incisive and ambitious proposal made by the European Commission - following the first reading by the European Parliament - which was, in fact, severely limited and weakened by the reluctance of Member States and lobbies of the sector.

Secondly, some hints were provided on the privatization project of the Italian State Railways Group, started up by the government act n. 251/ December 2015, which could provide a valuable opportunity to carry out a separation of the network from the FSI holding company, to be entrusted to a third party and the public, only condition to eliminate the root of the persistence of anti-competitive practices and the incumbent advantages. Vice versa, privatization without liberalization would do little to tackle the dominance of Trenitalia in many parts of the market for freight and passenger train services or to contain all the barriers to competition. In fact, it would reduce the likelihood that the railway will develop to satisfy the needs of the passengers, freight users and the communities it serves.