

**COMMENTS OF THE COMPETITION AUTHORITY ON
DEPARTMENT OF PUBLIC ENTERPRISE CONSULTATION PAPER
TRANSPORT (RAILWAY INFRASTRUCTURE) BILL**

Final

19/1/01

1. Introduction

This document gives the comments of the Competition Authority on the Department of Public Enterprise consultation paper on the Transport (Railway Infrastructure) Bill, which was published on 3 January 2001 with a request for views by 19 January 2001. The paper contains an outline of the Department's proposals and the general scheme of the Bill (i.e. the titles of the heads).

The Bill proposes the creation of an independent commercial statutory public body, the "Railway Procurement Agency" (RPA). The main function of the RPA will be to provide, or to secure the provision of, railway infrastructure through the Public-Private Partnership (PPP) process. The Minister for Public Enterprise will determine the projects to be procured by the RPA. The Bill will allow the RPA to negotiate, sign and manage PPPs for the design, construction, operation, financing and maintenance of rail-based infrastructure. It is also intended that the Agency itself may be an operator in certain circumstances. Subject to the safeguards of Ministerial Orders and the Statutory Public Inquiry Process, it is also proposed to give the RPA the function of promoting the development of commercial opportunities along the route of public transport projects where the promotion of such opportunities will contribute to the economic viability of the project.

The Bill contains proposed financial provisions relating to the charging of fees for services provided by the RPA, borrowings by the RPA, preparation of accounts, submission of annual reports and information to the Minister for Public Enterprise, and accountability to a committee of one or both Houses of the Oireachtas. Provisions for the organisational structure of the RPA include the appointment by the Minister for Public Enterprise of the Board of the Railway Procurement Agency, including the Chairperson. It appears that the Chairperson and members of the Agency will be part-time appointments. Staff are to be transferred from the Light Rail Project Office in CIÉ to the Agency, as are certain property, rights and liabilities.

The Bill provides for a statutory process for private-sector participation in infrastructure procurement by extending the right to apply for a Railway Order (currently reserved to CIÉ only) to the RPA or any person having the consent of the RPA. The current Light Railway Order Process will be extended to all railway infrastructure projects. A Public Inquiry will be required prior to the making of a Railway Order (at present, the Minister has discretion in relation to holding of a Public Inquiry). Compulsory purchase powers

for the development of a railway will be extended to the RPA. Land acquired by the RPA under this provision may then be leased on to the PPP partner as part of a concession. Such land will revert to State ownership at the end of the PPP concession period. An undertaking which has been granted a Railway Order will be given power to enter land, including land or premises in private ownership, and to implement the works authorised under the Order. The undertaking must give notice of the intent to enter and of the work to be done. The owner may challenge the notice in the District Court.

The Bill also contains provisions in relation to rail safety, to specific legal aspects of the on-street operation of light rail, and to penalties for various offences, including trespass on railways, unlawful use of railways and obstruction of railways. A provision which gives the Minister for Public Enterprise power to make by-laws in relation to railways is also proposed.

2. Independence of the Agency

The Competition Authority considers that the independence, both actual and perceived, of the proposed agency is essential to its successful operation. In particular, its independence both from political influence and from CIÉ must be assured. The consultation paper correctly states that “Statutory independence from CIÉ is crucial to establishing transparency and credibility with potential private sector partners and to maximise the level of competition for PPP projects.” However, in the view of the Authority, the proposals do not live up to this ideal. Possible private sector partners will undoubtedly be concerned that the agency is to be staffed initially by CIÉ personnel. It is difficult to see how a level playing field for other possible bidders for infrastructure projects is to be created, since these staff will have an in-depth knowledge of CIÉ’s operations and capabilities, but not of those of the other parties.

It appears that the provisions relating to establishment of the Agency are based on those in legislation creating agencies such as the Food Safety Authority of Ireland, the Irish Horseracing Authority, the National Safety Authority etc. It is not at all clear that these are appropriate models for the Railway Procurement Agency. A network industry where a single company has to date had a statutory monopoly on procurement is different to a fragmented industry where a number of different, competing entities already operate but where an overarching regulatory agency is needed to ensure, for example, consumer protection. The former situation is more analogous to the telecommunications and electricity industries where competition has gradually been introduced. The Authority considers, therefore, that the establishment of the Agency should be based on the same principles as those applied to sectoral regulators. In particular, the principles outlined in the Department’s own document, “Governance and Accountability in the Regulatory Process: Policy Proposals, March 2000”, should be applied to the Chairman and Members of the RPA insofar as they address the selection, appointment and removal of regulators, their terms of appointment, period of office and re-appointment, and control of personal interests.

Specific deficiencies in the general scheme of the Bill as currently drafted are:

- no specific Head of Bill guaranteeing the independence of the Agency, as is included, for instance, in the current Draft General Scheme of the Communications (Regulation) Bill;
- no provision for a “cooling-off period”, as is recommended in *Governance and Accountability* at item 3(i):

“It is proposed that a regulator be constrained by statute from accepting employment within the regulated industry during a specific period – twelve months – following his or her term as a regulator.”

The importance of such a provision in a situation where multi-million pound projects are involved should need no further elaboration.

- no positive duty on members of the Agency to desist from pursuing an interest that they know to be in conflict with the work of the Agency (*Governance and Accountability*, item 3(g)). Instead, it appears that the chief executive and each member of the Board must simply declare his or her interests to the Minister, thus placing all the onus on the Minister to decide whether a conflict of interest exists;
- no apparent provision for an independent selection process, as was proposed in *Governance and Accountability* at Item 3(d) (although responsibility for the appointment of regulators would remain with the Minister).

3. Ring-fencing of the Agency

The Competition Authority considers it vitally important that the operations of the Railway Procurement Agency should be separated, both physically and electronically, from those of CIÉ as soon as possible. In the electricity industry, Eirgrid, the transmission system operator, while constrained to remain in the same building as ESB because the national transmission control centre is there, has instituted sophisticated electronic access systems and “Chinese walls” between its computer systems and those of ESB.

A separate element of the electricity industry provides an example of the type of measures which may be needed to ensure a “level playing-field” among different industry participants. Following an investigation by the electricity regulator into the operations of ESB Independent Energy (ESBIE), a wholly-owned subsidiary of ESB operating in the liberalised sector of the electricity market, ESBIE has been ordered to refrain from making offers or entering supply contracts without satisfying the regulator in each case that information for the supply terms was acquired directly from the customer and not from other sources. In addition, all unaccepted offers to ESB Independent Energy customers - where information was not secured directly from the customers - should be

withdrawn. ESB Independent Energy was directed by the regulator to refrain from using any customer information obtained from ESB and its information systems to target clients or make offers of contracts to them. ESB Independent Energy should not use its parent firm's telephone switch system. Subsidiary staff should not use fixed line and mobile telephones when working for the parent company. ESB offices and premises should no longer be used by ESB Independent Energy and their staff should not have access to or use ESB's IT systems and software. Its e-mail, Internet and intranet systems should not be accessed by staff of the subsidiary. The subsidiary's IT server should not be linked to that of its parent and there should be no hyperlink between the Internet sites operated by the two¹.

In the instance of the Railway Procurement Agency, it is clear that information flows either from it to CIÉ, or from CIÉ to the RPA, could have a detrimental effect on the development of competition for PPP projects, which is an objective of the proposals. As the paper points out, CIÉ or one of its subsidiary companies (possibly in partnership with private sector companies) might wish to bid for a PPP project. If so, and if proper ring-fencing arrangements are not put in place, with appropriate penalties for their breach, either of the following situations might arise:

- (a) Information flowing from CIÉ towards the RPA might unduly influence the project design so as to favour CIÉ; or
- (b) Information flowing from the RPA towards CIÉ might give it an unfair advantage in the bidding process.

The Authority recognises that the general scheme of the bill includes a provision on the disclosure of confidential information and a prohibition of certain communications. However, prevention is better than cure. In our view, these provisions should be supplemented by a statutory requirement for the ring-fencing of the RPA, along the lines indicated for ESBIE, above.

4. Essential information.

Clearly, the people who know most about the rail infrastructure in Ireland at the moment work in CIÉ. This gives CIÉ a clear informational advantage over possible other bidders for railway infrastructure projects. CIÉ may be aware of bottlenecks or technical constraints within the system, which are not public knowledge. Lack of this knowledge may affect the ability of other parties to bid successfully for projects. The Department might consider including a statutory requirement on CIÉ to make available all relevant information, either to the RPA or directly to potential bidders, in the context of the procurement of a rail infrastructure project. Again, recent events in the electricity industry may illustrate the problems which may arise. Access to the high-tension transmission network in the Dublin area is limited, a fact which apparently was only made explicit in a paper published by ESB National Grid (now Eirgrid) in August 2000.

¹ Source: Irish Times, 11/01/01. The regulator's direction has been appealed by ESBIE.

ESB National Grid had, however, given a grid connection to its own 70%-owned subsidiary, Synergen, the previous year. This grid connection meant that only one possible competitor could be connected to the national grid in the Dublin area. This case is now under investigation by the Competition Directorate General of the European Commission.

5. Commercial nature of the agency

The commercial rationale for the agency is not clear from the general scheme of the Bill. The proposed financial provisions allow the agency to charge for its services, but it is not clear whom they would charge. It is also not clear whether the agency is intended to make a profit, break even or make a loss. It is possible that the procurement of certain rail infrastructure projects may conflict with the commercial aspects of the Agency's nature. It is, of course, a matter for Government to decide what the financial basis of the agency should be, but, whatever it is, there should be incentives for the agency to operate in the most efficient way possible and to give value for money.

The proposals give the RPA the function of promoting the development of commercial opportunities along the route of the Metro, light railways etc., where the promotion of such opportunities will contribute to the economic viability of the public transport project in question. Peripheral development revenues are, of course, a valid way to boost future revenue streams or to reduce capital investment. Again, however, it is not clear on whose behalf the Agency is to exploit such opportunities, and there is no clear profit maximisation objective assigned to the Agency. In other words, the Agency's role in commercial development is not clear – is it to act as landlord? As property developer? As an operator of retail outlets? What is the agency to do with the revenue from these commercial developments?

Moreover, some competition concerns may arise from the possession by a single agency of dual *quasi*-regulatory and commercial functions in the sector. Such an outcome would be further aggravated by the procurement and compulsory powers it is contemplated will be enjoyed by the Agency. In effect, the Agency will be in a position to regulate access to the market, via its powers to select private partners with which it intends to bid for projects, as well as via its powers to award concessions. This could not only have an adverse impact on competition in the market for the provision of railway infrastructure, it could indeed restrain competition in the tendering process.

6. Criteria for the selection of projects

Determination of the criteria that will apply in deciding how to select a PPP project is also of vital importance. This is particularly the case if the currently contemplated approach -- whereby the Minister for Public Enterprise, the key shareholder in CIÉ -- is the person responsible for determining the projects to be procured by the RPA. Such an approach could be viewed as placing the Minister in a position of conflict. Put simply, under the currently planned scenario, if the RPA/Minister for Public Enterprise are faced

with two competing projects for the same routes, one from CIÉ and one from a private partnership, how is the appearance of bias to be ruled out if the CIÉ project is chosen? One approach might be to set out very clearly and explicitly, in the planned legislation, the criteria on which such a choice is to be made. This would provide some safeguards towards ensuring a level playing field on selection particularly vis-à-vis CIÉ. It would also ensure that prospective investors knew the criteria they would have to meet in order to be selected, thus increasing investor confidence.

7. Views of the Competition Authority on other issues.

(i) Right of CIÉ to apply for a Railway Order

At present CIÉ has exclusive rights to apply for a Light Railway Order to construct and operate light railways in Dublin. The proposed Bill extends the right to apply for a Railway Order, for any part of the country, to CIÉ, the RPA, or any person having the consent of the RPA. It is not clear why CIÉ is treated differently from other potential railway operators, since presumably the RPA could give its consent for CIÉ to apply for an order, in the same way as it would for other operators. Giving special rights to CIÉ which are not accorded to other operators may make it difficult for independent undertakings involved in a PPP project to compete on a level footing with CIÉ, given that they will only have the powers conferred by a Railway Order, presumably including that of compulsory purchase (see Head 40), by virtue of their association with the RPA.

It may be that it is intended that CIÉ's powers will pertain chiefly, if not solely, to the existing mainline network outside the Greater Dublin Area. In any event, it would seem to follow that there will be, if the proposed Bill proceeds to adoption as it stands, two State-owned agencies in Ireland responsible for securing the provision of, and/or providing, railway infrastructure in Ireland – CIÉ and the Agency. However, no clear demarcation is made between the future activities of the Agency and those of CIÉ. This would appear to be an unnecessary duplication of responsibilities.

(ii) Rôle of the RPA in rail operations.

According to the consultation document, it is intended that the Agency itself may be an operator in certain circumstances. It is not clear what circumstances are envisaged. Obviously, however, this provision could give rise to competition problems if the same agency is active in the rail market at the same time as it is organising competitions for PPP partnership projects. At the very least, it could damage the Agency's reputation for transparency and credibility with the private sector.

8. Conclusions

The Authority considers that the setting up of the Railway Procurement Agency is a timely and welcome step in the development of a modern, effective and competitive

transportation system in Ireland. Our reason for making the above comments is that, at this stage, the State has accumulated a body of experience, both good and bad, in the total or partial introduction of competition into network industries. We are anxious that the lessons to be drawn from other sectors should not be lost and that a “best practice” can evolve which maximises the consumer benefits, and minimises the risks, of such developments. We would be very willing to meet with officials of the Department of Public Enterprise, at your convenience, to discuss the matter.

Yours sincerely,

For the Competition Authority,
Isolde Goggin,
Member.