

On Different Tracks: Institutions and Railway Regulation in Britain and Germany

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Abstract

'On Different Tracks: Institutions and Railway Regulation in Britain and Germany'

This study analyses how institutional factors impact on processes of isomorphism in the design of regulatory regimes. It does so through a comparative examination of regulatory reform in the railway domain in Britain and Germany in three time periods, the post-First World War and the post-Second World War periods as well as the 1990s.

It is argued that pressures for isomorphism, defined as the increasing homogenisation of a unit with other units in its policy environment, are exerted by several policy environments. These pressures can be distinguished in their degree of domain- and paradigm-orientation. Domain-orientation consists of regulatory change which is based on sector-specific sources, whereas paradigm-orientation involves the application of supposedly universal 'policy recipes' across policy domains. The study questions whether three institutional factors – the insulation of the regulatory space from coercive pressures, the insulation of the political-administrative nexus in the regulatory space and the insulation of the regulatory space from societal forces – can explain why in some cases reforms are domain-oriented, but, in other cases, reforms are paradigm-oriented.

The comparative analysis of reform in British and German railway regulation provides three conclusions. First, in all cases, pressures for isomorphism emerging from different policy environments provided competing 'templates' for regulatory design ideas. Second, among the institutional factors, the insulation of the political-administrative nexus in the regulatory space was identified as the most important factor for explaining the orientation of the selected regulatory instruments. Third, in the light of the study's historical and institutional perspective, this thesis critically evaluates arguments proclaiming the emergence of a 'regulatory state' in contemporary Europe.

Table of Contents

Abstract	p. II
Table of Contents	p. III
Acknowledgements	p. IV
Abbreviations	p. V
Section I	
Chapter One: Introduction	p. 1
Chapter Two: Isomorphism in Regulatory Choice	p. 20
Section II: Regulatory Change after the First World War	
Chapter Three: Institutional Weakness and Domain Orientation in Britain	p. 48
Chapter Four: Minimum Insulation and Persistence in Germany	p. 51
Section III: The Age of Public Ownership	
Chapter Five: The 'Socialisation of Transport' and the search for efficiency in Britain	p. 89
Chapter Six: Choosing between domestic 'paths' in Germany	p. 127
Section IV: Regulatory Reform and Forms of Privatisation	
Chapter Seven: 'Regulation by Competition' as switchman for the traffic of regulatory design ideas in Britain	p. 206
Chapter Eight: Domain-oriented Isomorphism and Institutional Compromise in Germany	p. 211
Section V: Conclusion	
Chapter Nine: Conclusion	p. 261
Appendix 1: Interviews	p. 314
Appendix 2	p. 338
Bibliography	p. 339
	p. 358

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Abbreviations

ABCC	Association of the British Chambers of Commerce
ASLEF	The Associated Society of Locomotive Engineers & Firemen
BDI	Bundesverband der Deutschen Industrie
BR	British Rail
BTC	British Transport Commission
CDU	Christlich Demokratische Union
CSU	Christlich Soziale Union
DB	Deutsche Bundesbahn
DNVP	Deutsche National Volkspartei
DR	Deutsche Reichsbahn
DRG	Deutsche Reichsbahn Gesellschaft
DTI	Department of Trade and Industry
FDP	Freie Demokratische Partei
FBI	Federation of British Industry
GdED	Gewerkschaft der Eisenbahner Deutschlands
GNER	Great North Eastern Railways
GWR	Great Western Railways
ICI	Imperial Chemical Industries plc
LMS	London, Midland and Scottish railways
MP	Member of Parliament
NRW	North Rhine Westphalia
NSDAP	Nationalsozialistische Deutsche Arbeiterpartei
NTA	National Transport Authority

NTC	National Transport Commission
NUR	National Union of Railwaymen
ÖTV	Gewerkschaft Öffentlicher Dienst, Transport und Verkehr
RDI	Reichsverband der Deutschen Industrie
SPD	Sozialdemokratische Partei Deutschlands
SR	Southern Railways
TUC	Trades Union Congress
UIC	Union International des Chemins de fer

Introduction

The Problematic of this Study

The study of regulation and the 'regulatory state' has enjoyed increased attention in contemporary public policy. The perceived failure of previous systems of control over economic activities and policy delivery is said to have led to a shift from the 'positive' or 'welfare' state towards the 'regulatory state' (Majone 1997). This shift has been characterised by an increased emphasis on competition and indirect market-correcting measures, free-standing regulatory bodies, changes in service delivery and an increased formality of regulatory relationships (Loughlin and Scott 1997: 205-7). At the same time, the public policy literature has shown a growing interest in institutional approaches towards regulation; for example, Leigh Hancher and Michael Moran (1989) have coined the term 'regulatory space' to emphasise the importance of inter-organisational relationships as well as formal and informal rules for the exercise of regulatory activities. The present study shares this institutional approach. It builds on concerns in the institutional literature with questions of institutional design. Most prominently, Max Weber (1972: 825-37) proposed a tendency towards convergent forms of bureaucracy on a legal-rational basis. DiMaggio and Powell (1991a) similarly stressed the phenomenon of increasing homogenisation of organisational forms within an organisational field. This study argues that regulatory reform can be conceptualised as a process of isomorphism. Isomorphism is defined as the constraining process which forces

one unit to become increasingly homogeneous with other units in its policy environment.

The thesis argues that social life is diverse and therefore does not offer one single dominant policy environment but numerous ones which provide different sources of isomorphism. These can be distinguished in the extent of their paradigm- or domain-orientation. Paradigm-orientation is defined by the application of supposedly universal 'policy recipes' across policy domains, while domain-orientation specifies regulatory change which is oriented at sector-specific sources. To explain why regulatory reforms vary in their source of isomorphism, three institutional factors are considered which open the regulatory space to various policy environments and which provide templates for the formulation of regulatory instruments. The institutional factors define the extent to which the regulatory space is insulated from other policy environments. First, the insulation of the regulatory space from coercive pressures defines the degree of integration of the regulatory space with a higher legal, political or economic framework which exerts pressure for homogenisation. Second, the insulation of the political-administrative nexus in the regulatory space is concerned with the internal organisation of the state. The third factor, the insulation of the regulatory space from societal actors, considers the membership of societal actors in the regulatory space.

The empirical cases of this study investigate the impact of these institutional factors on the extent to which isomorphic processes are domain- or paradigm-oriented. Contemporary and historical cases of regulatory reform in the railway domain in Britain and Germany provide the empirical basis for this analysis. The

railways offer an appropriate case for the study of institutional approaches, in particular as they represent, similar to telecommunications, energy and health, a 'sector close to the state' (*'staatsnaher Sektor'*, Mayntz and Scharpf 1995a: 13-14). Such sectors are defined as state activities, which, while not being directly part of 'national sovereignty', involve a substantial amount of state involvement and control for political, economic and electoral reasons.

The railways have been at the forefront of regulatory development since the mid-1830s (Dobbin 1994: 22). The study of regulation, especially with regard to railways, is therefore far from a suddenly emerging policy fad, but looks back on a long history of debates concerning the control of economic activities (Ogus 1994: 6-10; Craig 1994: 41-63). At the same time, the domain was exposed to the more contemporary themes of public sector reform in the late 1980s and 1990s. By examining historical and more contemporary examples of regulatory reforms, this study follows the recent 'historical turn' in the social sciences (McDonald 1996). Just as old steam trains are an interesting field of study for the engineer, historical cases of regulatory debates and policies provide an indication of recurring debates in regulation and allow for an assessment of 'progress' in the understanding of policy instruments for the control of economic activities. At the same time, a comparative and historical perspective minimises the risk of overemphasising the extent, significance and 'newness' of contemporary debates. Instead it is possible to consider the potential persistence of policy patterns and the possibility of convergence across sectors and states.

This study aims to contribute to the institutional literature by investigating issues of institutional design in terms of the origins and legitimisation of

regulatory design ideas. Moreover, it is concerned with the impact of institutional factors on the selection of regulatory design ideas and their implementation. Finally, the study offers an analysis of the selection of regulatory instruments in both Britain and Germany and thus aims to contribute to the current academic debates concerning regulation and privatisation of industries with network characteristics and railways in particular.

The rest of this introductory chapter explores three issues. It first considers the background of the research. It highlights the considerable interest in the literature given to railway regulation and institutions. It then discusses the underlining methodology of this study. Finally, it presents an overview of the whole argument.

Background of the Research

As a 'sector close to the state', the railways have been a prime political and academic concern since the 19th century. Max Weber described the railways, together with the telegraph and the postal system, as an essential part of the occidental state. This view reflects the railways' crucial importance in the 19th century in terms of industrial, regional and even nationhood development. In Germany and India, the railways were crucial for military purposes, allowing rapid troop movements across large geographical distances. The railways were essential in evolving with and shaping 19th century industrial policies across states. For example, the 1844 Regulation of Railways Act is said to have set the pattern for natural monopoly regulation not only in the UK, but also in the US with the 1867 Interstate Commerce Act (McLean and Foster 1992: 315). The analysis of railway regulation has been used to highlight the dysfunctional

nature of different types of past regulatory regimes (Foster 1992) as well as to test various theories of regulation in order to explain the 1844 Railway Regulation Act (McLean and Foster 1992). The critical role of the 'railway interest' in shaping railway regulation, often regarded as the most powerful interest represented in the British Houses of Parliament until, at least, the beginning of the 20th century has been assessed (Alderman 1973, also Bagwell 1965, Gourvish 1980). Furthermore, the role of railway regulation as a 'spearhead' for the increased role of the British government in economic activities has been part of the 'growth of government' debate among historians of the 19th and early 20th century (Parris 1960, 1965; MacDonagh 1958, 1961; Cromwell 1966; Taylor 1972).

As has already been noted, the study of regulation has been burgeoning with attention increasingly paid by policy-makers to regulation as an attractive policy-tool. The literature on regulation has provided various explanations for regulatory origins and developments (see Hood 1994: 19-36). These focus on the impact of powerful ideas, socio-economic changes, self-stimulated institutional growth and possible destruction as well as interest accounts. However, notwithstanding the wide-ranging usage of the notion of 'regulation', the term itself is not an uncontested concept. For example, Baldwin, Scott and Hood (1998: 3) have defined regulation as the 'promulgation of an authoritative set of rules, accompanied by some mechanism, typically a public agency, for monitoring and promoting compliance' - thereby broadly following Selznick's definition of regulation as a 'sustained and focused control exercised by a public agency over activities that are valued by the community' (Selznick 1985: 363). Other approaches offer more wide-ranging definitions, broadening the

definition of regulation to all forms of deliberate state influence and, in some cases, even to all forms of social control (Baldwin and Cave 1999: 1-2). The following analysis draws on the first definition. It also utilises the term 'regulatory regime'. The term 'regime' refers to the configuration of rules and their application governing the 'regulatory space' (Hancher and Moran 1989). Three particular issues - regarded as crucial in the regulatory literature - have been selected and are being examined on the extent of their domain- or paradigm-orientation. First, the *organisational structure* is said to be more influential in shaping the behaviour of the regulated actor than ex post regulatory activity; second, the *allocation of regulatory authority*, its objectives, distribution and instruments; and, third, so-called *non-commercial objectives*, often also labelled as 'public services'.

Defining the railway domain as a 'sector close to the state' emphasises the importance of understanding regulation as being formulated and exercised inside a 'regulatory space' which unavoidably involves relations of interdependence and (continuous) interaction between public and private actors (Hall, Scott and Hood 2000: 83). Regulation represents institutional processes which involve complex and shifting relationships between and within organisations, both public and private. Widening the study of regulatory relationships to the 'regulatory space' reflects the difficulty of applying established US-approaches, in particular Stigler's well-known 'capture' argument, to European cases (Stigler 1971), while not disputing the view of regulation as a political process rather than as a functional response to perceived market failures. In contrast to the increasing interest in the transaction cost and principal-agent literature on institutional mechanisms of control, this analysis

focuses on the importance of institutional 'appropriateness' of regulatory instruments and, in particular, the impact of institutional factors on the selection of regulatory design ideas.

Despite the wide-ranging literature on the *mortmain* of institutions and the shared institutionalist assumptions of the importance of the impact of structures, the focus of this study, namely the institutional factors which facilitate the 'transfer' of particular regulatory design ideas while hindering the diffusion of others, has received less attention. This study does not offer a comprehensive test of institutional approaches, for example, it does not 'test' the impact of broad distinctions at the macro-political level such as 'Westminster' or 'consensus' democracy (Lijphardt 1984; 1999), the number of veto points (Tsebelis 1995) or more general deductive game-theoretic actor constellations (Scharpf 1997). Instead, it seeks to contribute to the institutional literature by exploring the impact of three inductively generalised institutional factors on the selection of regulatory design ideas. Assessing the impact of institutional factors as explanations for processes of isomorphism highlights the importance of legitimate and persuasive policy templates rather than the mere exercise of economic interests. Furthermore, it stresses the importance of 'copying' and 'imitation' in the formulation of public policies and administrative reform (Hood 1983: 128-30; Hood 1986: 157). It therefore emphasises the importance of established 'symbols' in analysing how selected actors perceive situations within their structures.

Finally, why study historical cases of 'nationalisation' in a proclaimed period of privatisation? Giandomenico Majone has argued (1996a: 17-23) that failure

occurs in the regulation of both public as well as private enterprises in fairly similar ways, thus making them comparable. Both are open to 'capture': whereas in the case of regulation of private industry, regulators might be captured by politicians or by private industries, in the case of public ownership, enterprises might be captured by politicians for electoral purposes or may themselves 'capture' ministers, departments or agencies by exploiting their informational advantages (Tivey 1982). Thus, similar causes for problems with public and private enterprises have been diagnosed concerning 'ad hoc' decision-making, confusion of objectives, political manipulation, lack of co-operation between administrators, ministries and industries as well as ineffective performance measures. Furthermore, given this similarity of regulatory problems, it can be expected that similar solutions and/or similar justifications in accordance with fads and fashions will be adopted in regulatory design over time.

Methodology

The nature of this study on the impact of institutional factors on forms of isomorphism in railway regulation in two countries is comparative and qualitative. It represents a case-oriented approach in aiming to explain particular outcomes: why reforms in some cases are domain-oriented, in other cases paradigm-oriented (Ragin 1987). It compares cross-nationally as well as over time. The goal is not only to highlight differences and explain these, but also to contribute to the analytical debates concerning the impact of institutional factors on processes of isomorphism.

Given the debated limitations of the case study, the aim is not to offer law-like generalisations. It is questionable whether predictive generalisations, based on

the assumption that political life operates in a clocklike manner, are feasible at all, given the likely variations in observed behaviour across space and over time (Almond and Genco 1977). Thus, the most likely (or, at least, desired) achievement is the creation of 'sometimes true stories' - explanations that hold under specific institutional conditions (Coleman 1964: 516-9), which are nevertheless important for the examination of the power of the institutional approach as an explanatory device.

A case-oriented, qualitative approach faces the 'many variables, small N' problem (Lijphart 1971: 685, Coppedge 1999). This describes the inability of comparative policy research to isolate and systematically vary a single variable and the problem of having to face a multiplicity of possible explanatory variables with only a limited set of evidence, leading to the problem of 'overdetermination'. One traditional means of overcoming this problem has been the application of John Stuart Mill's methods of 'agreement' and 'difference'. However, their usefulness has been questioned on grounds of the perceived unreasonableness of Mill's assumptions such as

'a deterministic set of forces, the existence of only one cause, the absence of interaction effects, confidence that all possible causes are measured, the absence of measurement errors, and the assumption that the same clean pattern would occur if data were obtained for all relevant cases' (Liebersohn 1991: 315-6; also *ibid.* 1994; Little 1991: 35-7; but Savolainen 1994).

Following Mill's proposals (which Mill himself regarded as inapplicable to the social sciences), Przeworski and Teune (1970) proposed designing analysis along

the lines of 'most similar systems' or 'most different systems' (reversing Mill's notions). According to this line of argument, if the cases differ or agree in one variable or in a small set of variables only, then causal interferences can be derived. However, the effectiveness of such a quasi-experimental analysis depends on the level of detail the analysis aims to provide. Most cases encounter problems with the complexity facing comparative research designs, leading to the effect that 'most similar' or 'most different' systems designs fail to reduce variance sufficiently to facilitate quasi-experimental solutions (i.e. face the problem of control via matching in order to achieve so-called 'unit homogeneity') (Scharpf 1997: 23-4; King, Keohane and Verba 1994: 199-206). Furthermore, the difficulty in establishing laboratory-type conditions for empirical research is enhanced by the researcher's position as part of the research design and its execution which is likely to shape interviews and document analysis.

Given the lack of mono-causality, the recognition that combinations of factors explain policy outcomes and that similar outcomes are brought about by different circumstances, Renate Mayntz declared that qualitative research is primarily concerned with the 'development and elaboration of descriptive categories in an interactive process with the research object and the formulation of hypothetical explanations' (Mayntz 1985: 70 *own translation*). Following Lijphart (1971: 685) and Ragin, Berg-Schlosser and de Meur (1996: 753; see also Keohane, King and Verba 1994: 120; Scharpf 1997: 24-5), one device to overcome the 'small N' problem is to concentrate on key variables, test 'single conjunctural perspectives', or use 'theoretical reduction'. The device of 'theoretical reduction' aims to decrease the number of variables by drawing on one distinct analytical

approach only. This study utilises an institutional framework and develops a set of three different, though not necessarily fully exhaustive or mutually exclusive institutional factors for the analysis of forms of isomorphism.

This approach towards complexity allows for clarification, on an admittedly limited scale, of the appropriateness of particular approaches to a specific policy outcome. In the present study, the independent variables – the three selected institutional factors – are examined on their impact on the dependent variable – the domain- or paradigm-oriented isomorphism of regulatory reform. It therefore aims to clarify which 'institutions matter' – the insulation of the regulatory space from coercive pressures, the insulation of the political-administrative nexus and the insulation of the regulatory space from societal forces. If the impact of these factors is negligible, then it raises questions as to whether institutional factors are as crucial for understanding political life as advocates of institutional approaches seem to suggest (Peters 1999: 78). Similarly, Scharpf suggests that 'for many purposes institution-based information will be sufficient to derive satisfactory explanations' (Scharpf 1997: 42). Following the analogy of a 'ladder of abstraction' (Scharpf 1997: 42, citing Lindenberg 1991), one should begin with institutional explanations and search for information on more idiosyncratic factors only when institutional accounts fail.

In terms of *case selection*, the railways offer a good case for theoretical and pragmatic reasons for utilising this analytical framework based on institutional isomorphism. In contrast, for example, to telecommunications, the railways have not been exposed to rapid technological change and convergence of industries,

thus being less exposed to competitive forces in the policy domain. As already stated, the railways, as a 'sector close to the state', were crucial for the overall approach of governments towards the control of economic activities. The railways have been of key political and economic importance not only as direct employer, but also as employer in the up- and downstream industries. Furthermore, in particular in the UK, they provided a powerful trade union base, especially in the early 1920s as part of the Triple Alliance of transport workers, miners and railwaymen. Moreover, the railways have been and remain a major economic contractor for multiple industries both up- and downstream, often (in the past) in close relationship with the operator. After a period of decline which set in after the First World War due to increased inter-modal competition and changing industrial production away from heavy goods (thus reducing the 'natural' freight market for railway transport), the railways have re-emerged since the late 1970s as a 'political attraction' mainly for environmental as well as traffic congestion reasons. High-speed train developments, for example, were one expression of this renewed interest. Furthermore, despite the marginal importance of the railways to the 'average voter' in the late 20th century in terms of passenger market share, the railways have maintained a high salience in terms of popular attachment, commuter interest, media attention and political rhetoric. During much of the post-war period, the 'political' interest in the railways was reinforced by the financial decline of the railway industry and the consequent need to deal with large subsidy and investment requirement demands on budgets as well as the trade-off between 'economic' reasoning and 'constituency pleasing' in the case of line closures.

Six cases of regulatory change are analysed in terms of policy formulation and deliberation; the study is therefore not concerned with assessing outcomes in terms of, for example, performance standards or subsidy levels. The cases draw on three distinct time periods, the post-First World War and the post-Second World War periods as well as the 1990s. The cases selected offer examples of regulatory debates from the past which were directed at the very same issues as contemporary regulatory debates. They multiply the number of observations, thus providing a further means of reducing the 'small N' problem. The cases under examination can be counted as 'major' acts in that they substantially shaped the consequent development of the railways and of railway regulation. Besides representing the major changes to regulatory regimes in the course of the 20th century, these cases also provide potential examples for major, paradigm-oriented changes, whether via imposition after war-time defeat as in the case of Germany, party-political change after the Second World War as in the case of Britain or via Europeanisation in both countries as part of membership to the European Union.

The comparability of the different cases is enhanced by the fact that Britain and Germany are Western European states, whose railway systems have been exposed to similar problems at similar time periods (see Stykow 1999). In the selected time periods, the railways had moved beyond the peak of their power and sustainable viability. All cases involved choices between and within domain or paradigm-oriented alternatives. In all three time periods under investigation, academic writers have diagnosed isomorphism, a move towards a 'regulatory state' since the 1980s (Majone 1994), a move towards a 'public corporation model' following the Second World War (Robson 1960) and a move towards a similar

regulatory distance between state and railways in the 1920s following the First World War (Witte 1932). Furthermore, the time periods chosen are claimed to represent periods of major policy shifts. The public policy literature has identified 'war effects' as crucial for the evolution of policies in terms of levels of public expenditure and taxation (Peacock and Wiseman 1961) as well as in terms of 'institutional sclerosis', with the absence of war-time defeat not eliminating the accumulation of special interest participation in public policies (Olson 1982). Similarly, policy shifts during the 1980s and 1990s are often claimed to represent a period of major policy reversals and changes to established modes of governance (see Hood 1994).

The *empirical evidence* is drawn from archival sources, publications and elite interviews. The historical chapters are based on public records, contemporary newspaper reports and on academic and semi-academic writing on these issues. The public archives in the UK and, to a lesser extent, in Germany, offered substantial material both on various reform proposals and the reform processes, viewed from different departmental and rail operator perspectives. In particular the German post-Second World War sources were difficult to uncover not only due to a lack of cataloguing but also by the systematic 'tidying up' by civil servants before the transfer of the files to the archives.¹ While newspaper sources – such as the *Railway Gazette* or the *Times* and press cuttings in the German *Bundesarchiv* offered good accounts of the evolution of the policy debate, they did not offer by far the same amount of substantial information obtainable from current newspaper reports (in particular with 'FT Profile' as a

¹ Communication with transport expert at Bundesarchiv Koblenz.

research resource). While it is necessary to expect a certain bias in the reporting of these issues, by using various sources and adding these to the evidence gathered from historical documents, it is possible to minimise the natural selection bias of historical records. This limits the inherent risk of tautology that the conclusions drawn are based on the conclusions of those sources from which this study's conclusions are derived (Lustik 1996).

Contemporary research is faced with similar problems. Newspapers (primarily *Financial Times*, *Independent*, *Guardian*, *Times* and *Daily Telegraph* (and their Sunday equivalents) and the *Frankfurter Allgemeine Zeitung*, *Süddeutsche Zeitung* and *Handelsblatt*) as well as specialist publications (such as *Modern Railways* and *Internationales Verkehrswesen*) and 'grey' literature were used. While they offered substantially more 'background' information than the historical sources, it was necessary, in particular in the case of the British press, to examine the potential strategic or even misleading 'leaking' of stories to newspapers. The most important source of information on the 'privatisation' stories of the 1990s were interviews with leading politicians, officials, railway managers, academics and journalists. A total of 35 interviews was conducted, interview partners were identified and selected, on the one hand, by analysing published sources and, on the other hand, by relying on the so-called 'snowball' system.

Number of interviews according to country case and organisational background

	<i>Germany</i>	<i>UK</i>
politicians	1	5
officials	7	11
railway managers	3 (5 persons)	4 (5 persons)
academics	1	1
journalists	0	2
<i>total</i>	<i>12</i>	<i>23</i>

The interviews, usually lasting for approximately one hour, were semi-structured in order to allow for a systematic comparison across sources as well as adjustment to the individual perspective of the interviewees. Most interviews were recorded and transcribed.² Following academic custom, interviews were conducted with the understanding that all information used in the text should be completely non-attributable. Within the text, sources therefore appear only under their interview number. The table in the appendix provides an indication of the background of the interview sources and the time period of fieldwork research. Similar to historical documents, single interviews can be relatively unreliable sources of information. The information offered in interviews is

² In some cases, interview partners refused to be recorded. One interview was conducted by telephone. In these cases, a transcript of the interview notes was produced. Originally, a similar number of potential interviewees was approached in both countries. In the German case, retired officials as well as former transport politicians transferred interview requests to still active officials, who had already been approached and interviewed. However, the evidence collected during these interviews was to a large extent not conflicting. In the British case, the statement by IUK11 'Have you seen [IUK1], [IUK2], and [IUK12]? [...] These three people will cover the ground' suggests that the interview sample includes key actors. In general, access to British politicians and officials was less difficult than in the German case.

potentially selective. Interviewees' responses might be shaped by the 'benefit of hindsight', pure memory loss, as well as by organisational or individual positions and opinions. Again, by drawing on a number of interviews, including actors from various organisational backgrounds and by comparing it with the information gained from newspapers and other contemporary literature, it is possible via 'quasi-triangulation' to minimise the risk of bias.

Overview

This study aims to contribute to the established literatures on regulation and institutionalism. It provides an account of six cases of regulatory reform in the railway sector in Britain and Germany. While in both countries, the historical cases have received academic attention - mainly in economic history, railway studies and, especially in the German cases, law - the material presented here is based on full access to archival evidence. The 1990s cases offer a wealth of unpublished and interview material which also provide a critical perspective on established accounts on the policy process of railway privatisation and 'Europeanisation'. The analysis of the privatisation cases ends in 1997, with only occasional reference, where necessary, to developments following the election of 'new' governments in Britain and Germany in 1997 and 1998 respectively.

The following chapter introduces the institutional approach and in particular the distinction between paradigm- and domain-orientation as descriptive categories. This distinction aims to highlight the different motivations and orientations which guide policy formulation and which provide policy-makers with choices in their selection of regulatory policy instruments. Furthermore, three institutional factors are explored in order to assess their impact on domain- and

paradigm- oriented isomorphism. In the conclusion (chapter nine), it is argued that while none of these factors can, on their own, offer a comprehensive explanation for change, the degree of insulation of the political-administrative nexus is crucial for explaining the selection of regulatory design ideas, while the impact of 'coercive pressures' and 'societal actors' was less important as mechanisms for isomorphism.

Chapter *three* begins the empirical case studies. The British 1920s case highlights the conflict between domain- and paradigm-oriented ideas and the success of domain-oriented proposals due, at first, in the case of the 1919 Ministry of Transport Act, to political resistance and, later, in the case of the 1921 Railways Act, to a reliance on corporatist decision-making patterns. Chapter *four* offers an account of regulatory change in the early 1920s in Germany. Here particular attention is paid to the exposure of the German regime to the interests of the Allied powers in maximising reparation payments and 'commercialising' the German railways. It assesses why despite the full exposure of domestic actors to international demands, the reforms were mainly domestic and domain-oriented.

Chapter *five* discusses the British case of creating a public corporation for its railways. It is argued that regulation was very much at the centre of discussion of nationalisation policy, especially given the commercial rather than 'welfare-oriented' nature of socialisation policy. Chapter *six* considers the German post-Second World War reforms. In contrast to the 1920s, the Allied occupation powers did not play a prominent role in reform discussions. The regulatory debate was conducted between two competing domestic domain-oriented reform options based on federal lines of conflict. Chapters *seven* and *eight*

consider the two railway privatisations during the 1990s, in particular with regard to themes of 'Europeanisation'. It considers the extent to which the national regulatory debates were purely domestic and whether experiences from non-domestic sources were drawn upon.

Chapter *nine* draws the findings of the empirical chapters together and assesses the strength and weaknesses of the proposed institutional framework. It also attempts to broaden the lessons of the case studies to wider debates concerning institutions. Finally, it critically assesses the contemporary debate about the 'emergence' of the regulatory state in the light of the historical cases by highlighting the importance attached to regulation in the past and the similarity of regulatory debates.

Chapter 2:

Isomorphism in Regulatory Choice

Introduction

The central purpose of the study is to examine the impact of institutional factors on the nature of the design of regulatory regimes. Institutions, and institutional approaches, have been an area of burgeoning academic concern across the social sciences and have been identified as an appropriate way to understand and explain regulatory regimes given their mutual interest in control and order (see also Hancher and Moran 1989). Anthropological studies, for example, emphasise the importance of rules and norms for individual and tribal survival (Rehberg 1994). Economists have found 'institutions' increasingly attractive as a means to criticise approaches which focus on individual rationality on the micro-level and aggregated demand and supply on the macro-level without paying much attention to market structures and transaction costs (North 1990). Institutions are said to provide the key to solving instability problems as identified in the literature following Arrow's Impossibility Theorem (Shepsle 1995), offering possibilities for both co-operation as well as coercion (Moe 1990). Nevertheless, the claim that 'institutions matter' in itself has little explanatory power, it is virtually impossible to search for an outcome which has not been affected by some form of 'institution'. This study aims to 'add value' to the study of institutions by analysing the impact of three institutional factors in the design of regulatory regimes, therefore seeking to specify which institutions matter for what kind of outcomes.

The following proposes that institutional reform - such as regulatory regime change - can be understood as a process of isomorphism. Isomorphism is defined as a constraining process that forces one unit in a population to resemble other units in its policy environment that face the same set of conditions (DiMaggio and Powell 1991a: 66). This study claims that the nature of isomorphism can be differentiated in terms of domain- or paradigm orientation. Furthermore, the study analyses in its empirical chapters whether particular institutional factors can explain the extent to which reforms are either domain- or paradigm-oriented. Using an institutional framework allows for a better comparison between the two countries analysed in this study. Furthermore, it avoids the traditional debates in the literature on regulatory origins and developments which have focused on the question whether 'public' or 'private' interests dominate the regulatory process. By utilising institutional variables to explain the nature of processes of 'institutional transfer', this study takes an historical and sociological institutionalist approach. Such a perspective is similar to Stephen Vogel's study of regulatory reform in telecommunications and financial markets in the UK and Japan and Hancher and Moran's concept of 'regulatory space' (S. Vogel 1996; Hancher and Moran 1989).

The next section reviews the traditional debates with regard to the 'public interestedness' of regulation in order to highlight and discuss the utility of applying an institutional approach. Then the key themes in the institutional literature are discussed in order to develop the notion of 'isomorphism' and the distinction between domain- and paradigm-oriented isomorphism. Finally, three institutional factors, whose impact on processes of isomorphism is assessed in the empirical chapters, are discussed.

Choosing regulatory instruments: 'Capture' and its limitations

The traditional literature on regulation has been concerned with either showing how regulation is shaped by special, in contrast to 'public' interests, or, alternatively, by arguing that such 'private interest' accounts do not offer convincing explanatory accounts (see Hood 1994: 19-36). However, neither of these perspectives can make a persuasive case for explaining the particular attractiveness of certain regulatory design ideas. This section sketches the 'traditional' debate between the public and private interest approaches in regulation and points to its limitations in not considering the origins and transmission mechanisms of regulatory design ideas.

The literature on 'capture' stressed the implausibility of regarding regulation as a 'benevolent' act. The traditional welfare economics literature argued that the purpose of regulation was to offset perceived market failures, relying on 'a litany of ways in which the conditions for competitive equilibrium may fail to be satisfied' (Noll 1989: 1255, also Ogus 1994: 1-71; Baldwin and Cave 1999: 9-21; Breyer 1982: 15-35). These include diagnosed natural monopoly characteristics in a given industry, anti-competitive practices, the need to safeguard public goods, the necessity to counter information asymmetries and to internalise costs from negative externalities such as pollution. Given substantial evidence that regulatory policies did not respond to 'benevolent' views (for example, see Mueller 1989: 235-8; Doron 1979), the dominant perspective on regulation stressed the dominance of 'special' interests rather than 'public spirited' ideas as

the main explanation for regulatory instruments.¹ Regulatory regimes, therefore, reflect the interests of a dominant coalition rather than a response to market problems and represent 'private' rather than 'public' interests. Such 'conspiracy' approaches originated in accounts of regulation which regarded market control as a result of an industry seeking market stabilisation (Kolko 1965) and 'life-cycle theories' (Bernstein 1955). According to Bernstein, regulators, after initial enthusiasm, grow tired of continuous regulatory adversity and lack of political support and consent to a 'friendly arrangement' with the regulated industry. As a consequence, regulatory agencies, seemingly inevitably, become 'captured' by the industry.

Stigler's claim that 'as a rule, regulation is acquired by the industry and is designed and operated for its benefit' (Stigler 1971: 3) highlighted the importance of collective action for explaining regulatory 'failure' - due to asymmetrical costs and benefits of organising and sustaining collective action, business groups would be advantaged in offering politicians electoral resources.² However, substantial electoral resources can be obtained from dispersed constituencies: given the desire of politician-regulators to preserve politically-optimal distributions of rents in terms of electoral as well as financial resources, regulatory regimes, while being mainly in the interest of the regulated industry, are arguably rather a result of coalitions than of single interests

¹ Intellectual challenges represented by 'contestable markets' (Baumol 1977) or 'competition for the market' (Demsetz 1968 - although Chadwick suggested such a scheme for the control of railway monopolies in the 19th century) further undermined the 'benevolence' view of regulation.

(Peltzman 1976, 1989).³ 'Capture' by a single interest thus represents a unique actor constellation in which the costs are highly concentrated and benefits widely dispersed (J.Q. Wilson 1980). Most state activities are characterised by a more even distribution of costs and benefits leading to different dynamics than predicted by Stigler (Williams 1976).⁴ In contrast to these societal accounts, Barke and Riker (1982) pointed to the record of railway abandonments which was inconsistent with the predictions of 'industry capture' and argued that regulation had to be understood as a political and not as a market 'product'. Regulation should be regarded as the outcome of politicians' 'platform plank' building exercises across different constituencies or as a 'bureau-shaping'

² If all groups in society faced equal transaction costs in organising collective action, efficient outcome would occur as inefficiencies would be competed away (Becker 1983).

³ Despite the parsimonious elegance of these models, the assumption of a utility-maximising regulator-politician in itself is open to criticism. Regulators should be regarded as bureaucratic actors in their own right and not as politicians (see Hirshleifer 1976). The difficulty of reconciling 'capture' views with the empirical reality of regulation in favour of dispersed constituents was also stressed by Posner (1974). Furthermore, Stigler's and Peltzman's models assume constant returns to scale with no externalities. From the outset, it is therefore assumed that any intervention in the market is inefficient. Evidence suggests that certain agencies in the United States were established with the goal of preventing capture, but then dismantled as a result of political choices rather than industry pressure (G. Wilson 1984).

⁴ This debate has received increasing attention given the growing importance of social and environmental regulation, in particular with regard to regulation inside the European Union. Instead of observing a 'Delaware' effect, with regulation 'racing to the bottom' as part of locational competition, in some areas, notably product regulation, there has been a so-called 'California effect', a trend towards higher regulatory standards. These have been explained by the 'battle of the sexes' actor constellation in these fields (Scharpf 1999, Lütz 1995) and by coalitions between 'baptists' (high regulation crusaders) and 'bootleggers' (highly regulated industries) to impose regulation on low regulated industries (D. Vogel 1995).

activity by bureaucrats desiring to maximise their influence over policy content in times of fiscal constraint (Dunleavy 1991, Majone 1994).⁵

These 'conspiracy' views of regulation were challenged by attempts to 'bring the public interest back into regulation'. These attempts reflected a response to a perceived trend of 'deregulation' since the late 1970s which seemed to fly in the face of interest-based accounts of regulation as well as an increasing interest in designing institutions resilient to any form of subversion. On the one hand, the role of 'ideas' has been stressed (Derthick and Quirk 1985, Hood 1994: 28-9). These emphasise the importance of experts and policy entrepreneurs such as US consumer activist Ralph Nader and William Gladstone (in the 1844 Railway Regulation Act, according to McLean and Foster (1992)). Keeler (1984), in a rational choice account, also highlighted the role of 'political entrepreneurs' who, as vote-seekers in an environment of dissipated rents, increase public awareness of regulatory failure. Apparent successes of dispersed interests, such as environmentalists, against business interests seem to offer further evidence against established 'private interest' approaches. On the other hand, the transaction cost literature has highlighted various methods with which both 'bureaucratic drift' and 'coalitional drift' can be inhibited. These include

⁵ In a different argument, Fiorina (1982) has highlighted the importance of legislators' trade off between the desire to delegate blame and the desire to claim credit for 'successful' outcomes (ibid.: 47). Horn has extended this search calculus by highlighting overall legislators' decision-making and participation costs, policy commitment costs and agency costs (Horn 1995: 7-39, 46-7). The choice depends on the specific interest constellation, although it is questionable whether politicians, despite delegation, are able to evade blame after policy fiascos.

procedural as well as structural devices (McCubbins, Noll and Weingast 1987),⁶ with which informational 'slack' can be minimised by making regulatory processes more transparent and thus less prone to regulatory discretion or private interests (Levine and Forrence 1990).⁷

The choice of regulatory instruments and, as a consequence, the character of regulatory policy has therefore been a key concern across the literature on regulation. The shared emphasis of these contrasting approaches to regulation is mainly on the (im)possibility of control. They have, however, difficulty in accounting for the diversity of choices across domains, states or time which are observable empirically. Nor can they explain the extent to which the solutions adopted in various time periods reflected contemporary doctrines, ideas or 'recipes'. Furthermore, the attention paid to control implies a view of the world which distinguishes between 'private' and 'public' interest. This assumes a clear-

⁶ Structural solutions involve incentives, monitoring and the allocation of resources and decisional authority within a regulatory agency, whereas procedural control solutions rely on administrative procedures which set the rules and standards applying to the agencies' policy decisions.

⁷ Horn extends this argument by introducing 'uncertainty' into the calculus of the legislators and constituents - certain institutional forms will be selected to increase commitment costs so that particular pay-offs remain secure beyond the tenure of the enacting 'winning coalition' (Horn 1995: 7-39), the choice is influenced by four functions: costs of legislative decision-making and private participation, commitment problems (the risk incurred to constituents that benefit flows might be altered or reversed by future legislators), agency costs regarding monitoring, enforcement, incentive-setting and compliance costs and uncertainty and risk costs due to the unknown impact of the particular measure.

cut public-private dichotomy which does not reflect the role of many private organisations which fulfil public regulatory functions.⁸

The importance of existing political institutions which enable and disable action by societal, political and administrative actors is not sufficiently considered: individual and corporate actors are influenced by rules, organisational and social settings. Preferences are shaped by institutional procedures and norms. Finally, and most importantly, actors desiring policy change require a 'justification' as well as a 'legitimate' model to argue their case. While the traditional approaches on regulatory origins are able to make claims about *why* regulatory reform occurred, they cannot explain *why a particular regime* was chosen and *how* different design ideas were taken up or neglected. This interest in the political selection of reform options in an institutionally shaped regulatory space is central to the historical and sociological institutionalist approach (Black 1997, Hall and Taylor 1996, Hancher and Moran 1989). The choice of regulatory instruments is inevitably a process of emulation and 'lesson searching' for 'appropriate' policy instruments: when actors choose, they 'seek guidance from the experiences of others in comparable situations and by reference to standards of obligation' (DiMaggio and Powell 1991b: 10). Arguably, the successful diffusion of particular design ideas on regulatory and other organisational arrangements depends more on the persuasiveness of these proposals or other

⁸ Hancher and Moran criticise that 'the very idea of "capture" betrays an assumption that there is a sphere of public regulatory authority which ought to be inviolate from private interest' (Hancher and Moran 1989: 274). This criticism seems to address mainly a Bernstein-type capture; the normative claim of Stiglerian approaches would be that there should be a wide-ranging private sphere which should be inviolate from the public sphere.

'attractive' assets than their functional necessity (Hood and Jackson 1991). As Hancher and Moran note:

'the most casual acquaintance with any important substantive area of regulation soon reveals that institutions and rules are widely imitated. Copying is obviously an economic way of solving the problem of regulatory design. [...] [M]odels emanating from countries exercising great economic and political power are most likely to be the object of emulation' (1989: 285).

The following aims to establish an institutional framework for the analysis of regulatory regime orientation. It does not discuss whether policy imitation is possible or desirable but asks instead 'why a particular model becomes influential at a given time' (Majone 1991: 104). Rather than searching for 'efficiency', 'optimal solutions' or relying on 'competitive selection', the design of regulatory regimes is shaped by the search for legitimate and 'appropriate' policy options which fulfill some form of 'goodness of fit' (March and Olsen 1989). Thus, while established approaches towards regulation have provided an extensive discussion on the original causes of regulatory change, there has been an insufficient interest in the conceptual origins of regulatory design ideas. In the following sections, an institutional approach towards explaining the different orientations of regulatory reforms is proposed.

Institutional Isomorphism and the Selection of Regulatory Design Ideas

As noted in the introduction to this chapter, isomorphism defines a process in which the characteristics of a regulatory regime are modified in the direction of increasing compatibility with characteristics of units in a shared policy

environment (DiMaggio and Powell 1991a: 65-6). The notion of *institutional* isomorphism emphasises that this increasing homogenisation is not caused by competitive market pressures (for such an approach, see Hannan and Freeman 1977; 1984). As a consequence, regulation is not merely characterised by a conflict between actors and coalitions; it also requires an understanding of the decision-maker's assumptions regarding their instrument choice (Linder and Peters 1989: 37). The following analysis asserts that while isomorphism may lead to uniformity across policies, social life is diverse and numerous 'fields' might be drawn (or forced) upon as a 'legitimate' source for regulatory design (Powell 1991: 195; Fligstein 1997). It is argued that, despite the potential variety of sources for regulatory design ideas, these sources of isomorphism can be placed on a continuum between their domain- and paradigm-orientation.

Before expanding on this line of argument, the next section discusses the wider public policy literature from which this account draws. On the one hand, the notion of isomorphism, while originating in mathematics, has been developed in the (sociological and organisational) institutionalist literature. On the other hand, central themes of this study also relate to the increasingly popular notions of 'policy learning' and 'policy transfer'. The examination of the impact of institutional factors on processes of isomorphism builds on these literatures, while also drawing on an established framework with clear institutional assumptions and expectations.

Institutionalism and Policy Transfers

Across disciplines, institutional explanations have emphasised the importance of institutions for imposing order, for defining actors' resources and (inter-)

dependencies. A key institutionalist aim is to 'expose and analyze the discrepancy between "potential" interests and those that come to be expressed in political behaviour' (Immergut 1998: 7). An institutional perspective regards the state as a fragmented entity in which policies are produced only after the interaction by and co-operation among numerous individuals acting within policy domains in which 'inheritance' in terms of legal traditions and policy commitments dominate. Approaches stressing the impact of political institutions on public policy have focused on the effect of constitutional and decision-making rules on tax policy (Steinmo 1993), the importance of institutional veto-points (Tsebelis 1995, Immergut 1992), the position of courts vis-à-vis legislatures in shaping the strategies of trade unions (Hattam 1993) and administrative capacities (see Rothstein 1996: 142, John 1998: 57-65). The existence of order and stability, inertia and the persistence of increasingly inefficient policies are a common theme in the institutionalist literature. The range of policy options is said to be a product of institutional opportunities which are themselves an inheritance from the past. Policy change is said to be path dependent, allowing for both incremental and rapid change following the overturn of 'punctuated equilibria' (Krasner 1984).

Despite these shared claims, the various schools of institutionalism offer contested starting assumptions and definitions of 'institutions' (Goodin 1996: 20-4; Hall and Taylor 1996, Peters 1999). Thus, for March and Olsen (1989: 22), institutions are 'routines, procedures, conventions, roles, strategies, organisational forms and technologies, [...], beliefs, paradigms, codes, cultures and knowledge', whereas for North they are 'the rules of the game in a society or, more formally, are the humanly devised constraints that shape human

interaction', consisting of both formal and informal constraints (North 1990: 1). This study utilises Peter Hall's definition as institutions as 'formal rules, compliance procedures and standard operating procedures that structure the relationship between individuals in various units of policy and economy' (Hall 1986: 19). Similarly, Thelen and Steinmo argue that institutions show 'how [factors] relate to one another by drawing attention to the way political situations are structured' (Thelen and Steinmo 1992: 12-3).⁹

Persistence, stability and path dependent change are among the key claims of institutional approaches, leading to the persistence of national institutions, difficulties in inducing institutional change and institutionally moderated responses to external challenges (Thatcher 1999). Path dependency, based on self-reinforcing mechanisms, such as high fixed costs, learning and co-ordination effects as well as adaptive expectations (North 1990: 94), can be understood as a persistence ('lock-in effect') of certain, often suboptimal structures, the primary

⁹ Similarly, the debate concerning 'human rationality' has attracted great debate, mainly on the notion of 'self interest', offering a debate between 'calculus' and 'cultural' approaches towards explaining human agency (see Hall and Taylor 1996; Hay and Wincott 1998; March and Olsen 1996; North 1990; Thelen and Steinmo 1992; Norgaard 1996; DiMaggio and Powell 1991b). It is assumed here that self-interested behaviour can be associated with a (reasonable) interest in one's own survival or existence, in resources as well as in organisational autonomy in contrast to self-destructive or idiosyncratic action (see Mayntz and Scharpf 1995b: 54). In general, different institutional theories should be regarded as complimentary rather than as competing as they each provide distinct explanatory and conceptual tools for particular areas of academic interest. The decisive choice for policy research seems rather the focus of the analysis rather than different philosophical positions (see also Kato 1996).

example being the QWERTY keyboard (David 1985, Arthur 1988).¹⁰ Numerous causes for 'path dependency' have been identified. For example, 'path dependency' has been defined in terms of a persistent regulatory configuration or, alternatively in terms of a continuous re-generation of dominant actor constellations and decision-making patterns due to constitutional incentives (Steinmo 1993). Similarly, 'unintended consequences' and 'feedback' effects are stressed which lead to a self-stimulating growth of regulatory bureaucracy (MacDonagh 1961, Pierson 1995). In addition, ideational 'path dependency' has been identified, constraining the scope of legitimate reform options (Döhler 1995). At an 'ideational' macro-level, Dobbin (1994) has discussed 'industrial cultures' which shape the perception of problems and proposed solutions. Most prominently, Silberman (1993) claims that instead of witnessing an unifying march of bureaucratisation according to Weberian ideals of legal-rationality, bureaucratic development across countries has been path dependent, set by the way critical institutional design dilemmas were handled at major historical turning points. In the regulatory literature, Hancher and Moran (1989) discuss various path dependencies which shape the 'regulatory space', ranging from state and legal traditions, policy-making patterns to historical timing.

However, while policy inheritance is crucial for explaining policy developments, it remains necessary to account for the multiplicity of possible paths from which decision-makers can choose and, as a consequence, explain why particular paths become dominant. A further problem with the notion of 'path dependency' is its reliance on the existence of a 'formative constellation' (see Stinchcombe 1965)

¹⁰ The current British mainland railway gauge draws on the 1825 Stockton & Darlington

where small differences in the initial condition may lead to great differences in the future. As in the case of the dispute among zoologists regarding the status of the tortoise as a 'primitive' or 'ordinary' reptile following the examination of fossil headbone structures, the nature of initial policy conditions might in itself be open to dispute and interpretation.

As a consequence, this study addresses four key institutionalist concerns. First, it is interested in questions of the 'logic of appropriateness' in the selection of regulatory instruments (March and Olsen 1984, 1996). Second, by investigating the impact of political institutional factors, this account considers the distribution of resources and the access to the regulatory space, which facilitate pressures for isomorphism and linkages to particular policy environments. Third, an analysis of key events over time is likely to reveal whether continuities and recurring patterns. This also includes the analysis of choices between different 'paths'. Finally, by analysing how regulatory spaces are linked with and adapt to policy environments, it shares the sociological-institutional interest in the embeddedness of institutions.

At the same time, the interest in the selection of regulatory instruments follows an increasing interest in the notions of 'policy learning' and 'policy transfer'. In their original contribution, DiMaggio and Powell (1991a: 69) include among their pressures for isomorphism 'mimetic sources': imitation as a product of uncertainty and poor understanding of policy instruments and their consequences. Emulation and institutional transfer have been discussed in the

railway line where passenger services were provided by horse-drawn carriages.

field of 'policy learning' (Heclo 1974), 'policy convergence' (Bennett 1991) 'policy transfer' (Dolowitz and March 1996), 'lesson drawing' (Rose 1993) and 'policy diffusion' (Berry and Berry 1999) in public policy. Most of the literature on 'policy learning' has been concerned with evaluating the extent to which policy-makers are aware and knowledgeable about potential policy lessons and the extent to which these experiences were utilised in policy reforms (Bennett 1997). Attention has also been paid to the 'moments of crisis' in which 'lesson drawing' occurs, on identifying the 'learners' and on the sources of policy transfer (Dolowitz 1997). The main focus of analysis has rested on 'convergence' (Bennett 1991) and on the force of ideas proposed by 'advocacy coalitions' (Sabatier 1988; Sabatier and Jenkins 1993), the spread of professional norms by 'epistemic communities' (Haas 1992, Hoberg 1986) as well as developing different types of 'transfer' and learning (Haas 1990, May 1992, Hall 1993).

The present study's concern shares many of the interests of the 'policy transfer' literature which seems more actor-centred in its perspective than institutional approaches. The concerns of the 'policy transfer' literature in identifying causes and sources for transfer have also been reflected in DiMaggio and Powell's work on isomorphism where three mechanisms inducing increasing homogenisation are identified: coercive forces, mimetic sources or normative pressures. This study treats the nature of isomorphism as dependent variable. It stresses the importance of institutional factors and capabilities which to a considerable extent determine 'whose learning matters': 'what is learned and remembered must always be seen in the context of political interests and political power' (Bennett and Howlett 1992: 291).

The next section extends the discussion of isomorphism and introduces the distinction between domain- and paradigm-orientation. While organisational structures both enable and constrain actors, the motives and orientation of these actors dealing with uncertainty are of crucial importance (Ziegler 1995: 344). Regulatory instruments 'incorporate implicit theories about how to achieve their objectives' (Sabatier 1993: 17; Majone 1989: 150). The study further focuses on the impact of political institutional factors on the contestation between institutional templates and 'implicit theories' (Hofmann 1993).

Domain- and Paradigm-oriented Isomorphism

DiMaggio and Powell's original account of isomorphism stressed increasing homogenisation of institutional forms in a so-called organisational field. It is argued here that the regulatory space of any policy domain is potentially connected with numerous policy environments which provide distinct institutional forms for emulation, therefore offering different sources for isomorphism. This section sets out the distinction between paradigm- and domain-oriented isomorphism and claims that they offer one way to establish descriptive categories for the analysis of regulatory change.

Domain-oriented isomorphism defines change in the regulatory regime as an increasing similarity with regulatory regimes in the same sector, either in other countries or in previous periods of time. Thus, reforms draw on examples in the specific policy domain both in the national and in the international context, often with the justification of enhancing the performance of the domain. Domain-oriented isomorphism at the national level leads to cumulative policy change in which inherited regulatory regimes are used in the selection of regulatory

instruments. In the case of international domain-orientation, experiences in the same sector in other countries are used to formulate policy proposals. Other domain-specific models may be imported by external actors via supranational processes. However, as the case of Meiji Japan shows (Westney 1987, Lehmbruch 1995), 'lesson-drawing' (Rose 1993) does not necessarily lead to either the complete transfer of policy models or their emulation; nor do they prohibit the existence of 'non-lessons', where it is decided that certain practices should not be imported.

Paradigm-oriented isomorphism, in contrast, involves a transformation of existing policies to achieve congruence with an existing policy 'recipe' or concept across domains. These policy ideas are often granted the status of universal applicability, allowing actors to 'privatise', 'nationalise', 'public managementise' along lines used in other sub-systems. Similarly, Peter Hall (1993: 279) has defined the term 'policy paradigm changes' as 'radical changes in the overarching terms of policy discourse'. While the term 'paradigm-oriented' operates at a lower level of policy analysis than Hall's discussion of macro-economic policy discourse, it defines a similar change: the application of an overarching framework to particular policy practice. Again, national and international sources of paradigm-oriented reforms are feasible (Rose 1993: 95-117), often leading to both national in addition to international 'policy bandwagoning' (Ikenberry 1990). Internationally, paradigm-oriented reforms may occur either by governments of similar persuasions, or directly or indirectly by countries exercising economic or political power, or by international organisations. Moreover, an international orientation may reflect interdependence by requiring adaptation of national regulatory regime. At the

domestic level, experiences in other sectors are drawn upon in the design stages of later regulatory reforms.

Isomorphism-type Domain	Source	Expected Phenomenon
	Domestic International	Policy Cumulation Sectoral Isomorphism
Paradigm	Domestic International	Cross-Domain Policy Alike-ness International Policy Bandwagoning

The distinction between domain- and paradigm-oriented isomorphism can be operationalised by assessing dominant regulatory ideas and various properties of 'hardwired' regulatory instruments (Macey 1992). In the following empirical studies, regulatory regimes are analysed in the context of their origins, justification as well as their motivation. Of further crucial importance is why other regulatory ideas are rejected. 'Hardwiring' describes the attempt to impose commitment into the regulatory regime. Commitment provides stability and is perceived as key aspect of regulatory choice to prevent so-called coalitional and bureaucratic drift (Horn 1995: 16-9). Coalitional drift occurs in cases of a change in preferences of the government which leads to policy preferences and objectives other than those of the 'enacting' coalition and is therefore likely to harm the latter's constituencies' interests. Various means have been discussed in the literature to prevent such 'drift' problems. Attempts to solve these problems are analysed in the empirical chapters with regard to questions concerning the *organisational structure* of the regulated industry, the distribution and objectives of *regulatory authority* and, finally, the definition and accommodation of *non-commercial objectives*, or 'public services'. Across all these issues, policy-makers can choose between various possibilities and options, either emphasising to some extent the 'domain-specificity' of the regulatory regime or, alternatively,

the need to apply broad policy recipes drawn from reform experiences in other policy domains. The advantage of utilising such a differentiated approach towards a regulatory regime is that it offers an analytical categorisation of regulatory instruments for the discussion of the empirical cases which is grounded in the regulatory literature itself. Furthermore, it increases the number of observations at various levels of analysis.

An analysis utilising the notion of isomorphism allows for a clear and established conceptual framework. The differentiation of paradigm- and domain-oriented isomorphism builds on the notion of increasing uniformity within a policy environment, but also draws attention to the existing variety across policy environments. It allows for the comparison of recurrent or non-recurrent 'convergence' between the regulatory regime in question and the 'desired' policy template. By differentiating between domain- and paradigm-orientation, different 'legitimizing sources' which offer competing sources of design ideas can be distinguished.¹¹ Furthermore, institutional isomorphism stresses the importance of 'appropriateness' of regulatory instruments, thus

¹¹ DiMaggio (1991) provides the example of the 'structuration' by professionals of the art museum 'policy field' emerging from a competition between 'art-as-such' and 'art-for-use' approaches. Stone (1989) has stressed the importance of 'causal stories' for policy argumentation. The distinction between domain- and paradigm-oriented isomorphism differs from the typology established by Feigenbaum, Henig and Hamnet (1998: 28-58). They argue that privatisation experiences can be differentiated in pragmatic (adaptation to a changing policy environment of fiscal crisis), tactical (achievement of short-term political goals) and systemic reforms (reshaping of an entire society). Their analysis emphasises political imperatives and relies on interpretations of the importance of key motives of political actors. Arguably, the differentiation in domain- and paradigm-oriented isomorphism also provides a more precise analytical tool than Rose's (1993) 'lesson-drawing' across space and time.

emphasising the need to study regulatory instruments not merely in terms of their technical efficiency or effectiveness in preventing 'market failures'. Finally, it highlights the importance of policy environments which shape regulatory regime design. These environments operate as reference points for formulating reforms inside the regulatory space. The linkages between the policy environment and regulatory space are affected and constructed by political institutions. Political institutions are therefore crucial for the understanding of isomorphism; they provide the access and resources to set the agenda or deny the emergence of 'inappropriate' proposals (see also DiMaggio and Powell 1991a: 80).

The next section suggests three political institutional factors drawn from the historical institutional literature which are said to shape the extent of policy reform. Applying these to the cases of regulatory regime change in comparative and historical perspective will provide some insights into whether and how 'institutions matter' in isomorphic processes of regulatory change.

Institutional Factors and Regulatory Choice

DiMaggio and Powell (1991a: 67-74) argue that the state and professional sources have been crucial for inducing tendencies towards homogenisation across organisational forms. They propose three mechanisms through which isomorphism occurs - 'coercive' (via legal or other power), 'mimetic' (imitating what is considered 'best practice' in uncertainty) and 'normative' (the growth of a common professional culture). This study builds on these three mechanisms, but adapts the notion of isomorphism to accommodate diversity in policy environments. This section sets out three institutional factors which link a

regulatory space to its policy environments and thereby enable the dissemination of certain regulatory design ideas instead of others and therefore facilitate the implementation of particular models into the regulatory space instead of others.

In order to come to a better understanding how 'institutions matter', the three institutional factors have been selected on grounds of their key role in forming relationships within the regulatory space, facilitating and hindering access and membership of actors representing different policy environments. These factors do not claim to be mutually exclusive and fully exhaustive, but they represent a set of approaches developed in the (historical) institutionalist literature on policy-making. To emphasise the importance of access to and relationships within the regulatory space, the institutional factors are evaluated with regard to their impact on the 'insulation' of the regulatory space: 'insulation' describes the degree to which these institutional factors open the regulatory space to a particular policy environment. Insulation of the regulatory space highlights the absence of institutional linkages to policy environments; put differently, the lack of insulation and institutional penetration into a regulatory space facilitates the spread of regulatory design ideas from other policy environments, whether from international or from other domestic domains.

These three institutional factors are

- a) the insulation of the regulatory space from 'coercive pressures';
- b) the insulation of the political-administrative nexus in the regulatory space;
- c) the insulation of the regulatory space from societal actors.

Insulation of the regulatory space from coercive pressures

According to DiMaggio and Powell (1991a: 67), coercive isomorphism is caused by informal and formal pressures by other organisations upon which organisations are dependent. In the context of regulatory regimes, such coercive pressures are exerted by militarily victorious powers (for instance, the imposition of regulations by the US on Japan after the Second World War) or by international organisations, such as the World Bank or the International Monetary Fund as agents of their principal donor states. Membership in international agreements or organisations further restricts domestic policy choice - for example through international trade law under the WTO and GATT agreements and the increasing importance attributed to human rights against the formerly perceived sovereign authority of national states (Hood 1998: 202).

Membership in the European Union has arguably led to a 'Europeanisation' of domestic public policies, given the supremacy of Community law over national laws. In addition to this 'top-down' view of EU influence, highlighting the role of the European Commission and the European Court of Justice, more informal 'coercive' institutional mechanisms have been explored within the context of EU public policy. For example, market-making legislation, which merely asserts the principle of a common market, may not directly challenge national institutional arrangements, but may crucially alter market relationships, necessitating an institutional response. Moreover, support-building devices, which offer vague framework legislation without detailed policy prescriptions, advantage particular domestic coalitions over others and provide sources of legitimacy (Knill and Lehmkuhl 1998, 1999). Participation at the supranational level might, at the same time, enable national policy-makers to obtain policies which are

unobtainable in the domestic arena and thereby can enable successful imposition of policies on domestic opponents.

As cited above, Hancher and Moran argue that regulatory regimes are often emulated from countries which are economically or politically superior. Hoberg's analysis is similarly concerned with the extent of the 'sleeping with the elephant' effect (applied to the impact of US policies and markets on Canadian public policy). The range of possible causes for increasing similarity vary in their degree of coerciveness (Hoberg 1991). Thus, emulation may, on the one hand, be a result of functional adaptation to perceived negative externalities (such as pollution, labour traffic and the like) stemming from a neighbouring country (or membership in a common market). On the other hand, such 'emulation by followship' may be a result of market dominance by others and pressure to create similar market conditions, an argument advanced by Hills (1986) in the case of telecommunication liberalisation, pointing to the crucial role of US telecommunication and information technology firms.

In terms of predicting either domain- or paradigm-oriented isomorphism, this institutional factor is ambivalent. The nature of the coercive pressures and their source as well as how these are 'transported' into the national regulatory space is likely to vary across cases.

Insulation of the political-administrative nexus in the regulatory space

One of the basic tenets of the statist and historical institutional literature has been its emphasis on the internal organisation of the state (Egeberg 1999, Hall 1983). Administrative capacities, in particular, are said to influence the scope of

'bounded innovation' in policy reform (Weir 1989). This literature builds on Hugh Heclo's work on the development of social policies in Sweden and Britain, which argued that governments not only 'power', but also 'puzzle'. He found that the 'puzzling' by the civil service was more important for explaining policy evolution than political parties or interest groups (Heclo 1974: 284-322).¹² Weir (1989), similarly, highlights the significance of the administrative structure - in terms of patterns of recruitment, career promotion and administrative standard operating procedures - in order to explain the receptiveness to Keynesian ideas. Comparing 'Keynesian' responses to the economic depression of the late 1920s in Sweden, Britain and the United States, Weir and Skocpol (1985) note the crucial importance of the 'openness' of the administrative system to external advice and the institutional division of ministerial responsibilities and bureaucratic capacities. A further crucial variable is concerned with the recruitment of so-called 'in- and outers' in the US, whose primary identification and prospects for career advancement lie in their professional expertise. Such a pattern provides a hospitable setting for introducing new approaches towards problem-solving (Weir 1992: 193). This contrasts with the strong *Ressort*-particularism and identification in Germany and the career-bound, open structure in the UK.

In terms of policy learning, Hood (1996) stresses the importance of the 'lateral transfer' of civil servants in the UK across departments for the spreading of public sector reform models and learning over time. This contrasts with the

¹² Peter Hall, in contrast, stresses the importance of political parties in policy innovation in economic policy (Hall 1986: 273-6). Hayward (1976) emphasises the importance of cultural values in order to explain the difference between French and British civil servants when engaging in major policy innovation.

administratively-educated French elite civil servant with the influence of the system of 'pantouflage'. In the German case, domain-expertise dominates among civil servants, which leads, in particular at the non-political levels of the civil service hierarchy, to long-term orientation in the domain and also the occurrence of 'pantouflage'. Therefore, the type of 'on the job learning' (defined by Weber as '*Dienstwissen*' in contrast to the educational background of civil servants) allows for different degrees of specialisation and establishes different forms of institutional memory (Page 1992: 48).¹³ The same factors affect political actors. The German legislative committee system and the, on average, long duration of ministerial office encourage ministerial specialists in contrast to the UK parliamentary system with its, on average, short-term ministerial appointments. A further crucial factor for comparison involves the pattern of policy-making across departments. Thus, in contrast to the overarching role of the Treasury in the UK, the German Finance or Economics ministries are said to have not assumed similar importance on issues such as regulatory policy design in particular policy domains.

With regard to the extent of domain- or paradigm-oriented isomorphism, a regulatory space whose political-administrative nexus is insulated, thus allowing for the development of long-term relationships and possibly even interchange of personnel between 'private' and 'public' organisations, is likely to lead to the formulation of domain-oriented regulatory design ideas. In contrast, a lack of insulation, either because of 'lateral transfer' or dominance of other

¹³ Sisson (1959: 37) highlights the principle that the British civil service relied on training from the 'actual work on the tasks', relying on 'intelligent amateurs' whose judgement was formed by experience and not by formal training.

ministerial departments, is likely to open the regulatory space to paradigm-oriented 'policy recipes' drawn from other policy domains.

Insulation of the regulatory space from societal actors

Societal actors have been traditionally regarded as the key source for the origin of regulation (Stigler 1971). While discounting traditional 'capture' approaches, Hancher and Moran (1989) similarly stress the importance of membership in the regulatory space for comprehending regulatory policy-making: understanding

'economic regulation (...) means understanding a process of intermediation and bargaining between large and powerful organizations spanning what are conventionally termed the public and private domains of decision-making' (Hancher and Moran 1989: 272).

The way in which interests organise and represent their demands is shaped by their organisational status. While the role of interest constellations is crucial (see J.Q. Wilson 1989: 72-89), political institutions allocate the roles and responsibilities of the various interests - institutions shape their access and veto power, but they also affect the direction with which societal actors exercise their societal demands (Hall 1986: 233).

The study of institutionalised access of societal actors to the regulatory space not only includes the regulated industry, in this case, the railway operator(s). As with all network industries, the study of railway regulation reveals the crucial role played by industries dependent on and affecting the financial performance of the regulated industry, both up- and downstream, in the case of railways, especially road haulage in both Britain and Germany since the 1920s.

Furthermore, while railway regulation is mostly concerned with the control of railway operator(s), the regulation and competitive position vis-à-vis other modes of transport and their lobbying power play an important role in shaping the isomorphic orientation of the regulatory regime.

Finally, the organisation of 'experts' who offer solutions to perceived policy problems provides a further factor for analysis (Braun 1998). 'Advocacy coalitions', unified by their core beliefs, compete to obtain and maintain favourable institutional access to impose their favoured institutional or regulatory order (Sabatier 1988). At the same time, established organisational arrangements, such as the academic advisory councils attached to the federal ministries in Germany, might represent an institutionalised 'advocacy coalition'. In addition, the spread of a privatisation and 'deregulation' agenda is said to have been facilitated by an international network of management consultants - both 'public', such as the OECD and World Bank with 'benchmarks' and other comparative exercises in 'good governance' practice, and 'private', such as international service providers (see Dunleavy 1994).¹⁴

In terms of the impact of societal actors on the extent of domain- or paradigm-oriented isomorphism, a high degree of insulation of sector-specific societal actors inside the regulatory space, for example the railway operator, transport academics, rolling stock manufacturers and the like, is likely to lead to domain-orientation. In contrast, an 'open' regulatory space, allowing for access to

¹⁴ As the case studies show, international consultancy is not just a recent phenomenon. A similar point has been made by Saint-Martin (1998).

international or domestic non-domain actors, is likely to provide either for international and/or paradigm-oriented reforms.

Conclusion

The empirical case studies which follow are used to investigate the usefulness of these institutional factors for explaining the adoption and rejection (whether actively or not) of design ideas in regulatory reforms, in particular concerning their paradigm- or domain-orientation. The three institutional factors are unlikely to offer a fully exhaustive explanation on their own, but it is likely that they will provide some indication whether and, if so how, 'institutions matter'. Moreover, the application of these institutional factors, should their value in explaining outcomes be found lacking, allows for consideration of other institutional factors - such as returning to 'veto points' - or other, more circumstantial explanations.

Finally, a framework for the evaluation of regulatory regimes has been developed which is based not on *ad hoc* convenience, but rather on problems - in terms of organisational structure, regulatory authority and non-commercial services - identified in the literature on regulation and regulatory design. The consideration of these distinct regulatory areas which have been at the forefront of debates concerning regulatory design, provides the basis for distinguishing domain- and paradigm-orientated isomorphism. This distinction of two sources of isomorphic change develops the original argument by DiMaggio and Powell (1991a) further, while accepting that any process of regulatory reform is not merely defined by a struggle of interests but also one of rival concepts of the 'appropriateness' and 'legitimacy' of regulatory arrangements.

Section II: Regulatory Change after the First World War

'Nationalisation' became one of the key demands of politicians, trade unionists and business interests after the end of the First World War. 'Nationalisation' was regarded as an economic necessity, given diagnosed economies of scale and natural monopoly characteristics in the industry. Following years of private and/or fragmented modes of service provision of utilities, a 'publicly owned' or 'nationalised' actor was said to offer higher 'efficiency' and 'economies'. 'Nationalisation' policies were, however, not limited to the purchase of an industry by the state. Looking at various examples in a cross-country as well as cross-sectoral perspective, the policy of 'nationalisation' was pursued in the form of various organisational arrangements:

- (1) organisational unification - numerous private operators merge into a single or a small number of operator(s), which, however, remain private;
- (2) financial subsidies - the government provides subsidies and other financial guarantees to a private industry within a regulatory framework;
- (3) a unified state-owned operator, but granting some extent of organisational autonomy;
- (4) a unified state-owned operator integrated into the state's public administration.

In Britain in the 1920s, regulatory reform followed types (1) and (2), whereas in Germany there was a shift towards (3). The following analysis is not merely an account of the different regulatory regimes established in the post-war period in Britain and Germany, but also considers the sources of isomorphism and how

institutional factors shaped and facilitated the spread of particular regulatory design ideas and undermined others. In terms of the overall argument of this study, the British case offers an example of a contest between domestic paradigm and domain-oriented sources, whereas the German example discusses a case of national and international domain-oriented sources of isomorphism.

In both Britain as well as Germany a 'nationalisation' of the railway system was part of the immediate post-war legislative agenda after the First World War. Whereas the British railway sector was characterised by numerous private railway companies in a nevertheless oligopolistic market, the Germany industry was characterised by numerous state-administered and a few private railways at the state level. Whereas in the UK nationalisation was associated with bringing the railways 'closer' to the state and within a tighter regulatory framework, in Germany the discussion soon turned into how to make the railway operator more 'autonomous' from politics. According to Witte (1932), there was a convergence in terms of the 'organisational distance' between the state and the operator not only in Britain and Germany, but also across Europe. However, this observation does not consider why such a convergence took place and whether regulatory reform took place for the same reasons.

The broad challenges to the railway systems in both countries were fairly similar. In the UK and Germany the war experience had raised expectations that the railways were bound to be 'nationalised'. On the one hand, both railways systems had suffered during the war due to lack of investment and intensive use. On the other hand, both countries had made positive experiences with the relatively unified and national control and management of the railways during

the war. In both countries, railway unions were among the most powerful unions and considerable pressure was brought upon the governments to introduce measures such as the eight-hour working day. In both countries, strike action (or the prevention thereof) was among the incentives for governments to bring about organisational change.

Moreover, both countries were headed by 'weak governments'. In the UK, Lloyd George's coalition government was divided between those who demanded a 'reconstruction' of the UK with state-interventionist means and those who regarded a return to the pre-war pattern of (non-) economic policy-making as the best way to return to post-war 'normality'. In Germany, the early years of the Weimar Republic were dominated by political and economic turmoil, frequent changes in government and international demands for reparation payments.

The following two chapters provide a discussion of the national changes to the regulatory regime. In Britain, there was substantial continuity despite considerable organisational change, while in Germany, the traditional role of the railways as a 'servant' to business was under challenge from international sources.

Chapter Three

Institutional weakness and domain orientation in Britain

*Politics corrupts the railway
management and the railway
management corrupts politics*

E. Geddes¹

Conflicting ideas about future economic policy influenced the extent of change in the regulatory regimes of the UK railway domain after the First World War. Although UK railway policy became truly 'national' because of the establishment of a Ministry of Transport in 1919, this form of 'nationalisation' neither affected ownership or the previous commercial orientation of the railway companies. In fact, railway policy became 'national' in order to reinforce and ensure commercial viability.

The following discusses the 1919 Ministry of Transport Act and the 1921 Railways Act. It assesses the domain- and paradigm-orientation of the various proposals and examines why the selected regulatory instruments were domestic domain-oriented, representing little else than policy cumulation. The 1919 Ministry of Transport Act represents an example of the reassertion of deflationary policies in British post-war economic policy, emerging from an initial 'policy soup' consisting of policies of deflation and war compensation, reconstruction and protectionist policies. The 1921 Act represents a case of domain-orientation, caused in particular by an insulated, corporatist decision-

¹ HoL RO F/18/4/10 – 9 February 1920.

making structure led by the Ministry of Transport with the Railway Companies' Association (RCA), the Federation of British Industry (FBI) and, although not in direct negotiations with the government, the trade unions. The 1919 Act, in contrast, provides an example of a failure of a departmental paradigm-oriented reform agenda, which failed due to political resistance. Instead of providing a complete account of changes in railway policy, this chapter mainly addresses regulatory issues. As a consequence, labour relations and the railway strike of 1919 (which did not mention nationalisation as an issue) do not receive detailed attention as they did not significantly impact on the shape of regulatory reform.

The 1919 Ministry of Transport Act, the deliberation of regulatory ideas and the policy-making processes, and the 1921 Railway Act, in terms of regulatory ideas, organisational structure, regulatory authority and non-commercial public services, are described in detail and analysed according to their extent of domain- and paradigm-orientation. Finally, the impact of institutional factors is assessed.

THE 1919 MINISTRY OF TRANSPORT ACT

The Emergence of Regulatory Ideas

The debate concerning the organisational status and the extent of increased regulatory control over the railways did not suddenly emerge as a side-effect of the First World War and the impact of the war economy. Prior to the war, there had been growing support for a close control of the railways from the labour movement, business and politicians. The railway economist William Acworth, one of the most prominent opponents of state-owned railways, concluded that state ownership had become inevitable as no other form of regulatory control

seemed feasible or viable (Foster 1992: 58; Wettenhall 1970: 36). Nationalisation ideas were promoted by the Railway Nationalisation Society, which was founded in 1908 and was supported by trade unions and various politicians.² Various parliamentary committees also supported the notion of further concentration and standardisation³, while business tacitly supported state ownership, hoping that this would lead to a reduction in freight rates as part of an activist economic policy (Armitage 1969: 46).

A change of regulatory structure was, on the one hand, encouraged by the financial decline and the market concentration of the railway operators.⁴ Furthermore, competition on price was virtually non-existent due to pooling agreements, while outright mergers had been successfully opposed by so-called trading interests. On the other hand, the war-time experience, with railway operations managed jointly by co-opted railway managers in the Railway Executive Committee under the overall control of the government, made stronger control and centralisation of railway activities increasingly politically

² The Railway Nationalisation Society called for a state purchase of the railway undertakings, which should then be managed by a railway board and a large Railway Council which would include representatives from the Chambers of Commerce, Agriculture, trade unions and from counties and boroughs served by railway operations (Barry 1963: 103).

³ For example, the 1911 Railway Companies (Accounts & Returns) Act provided the basis for a standardisation of the railway companies' accounts.

⁴ Derek Aldcroft (1968) points to the deterioration in the railway companies' financial position with average returns on capital falling from a peak of 4.4 per cent to around 3.5 per cent since 1900. This decline was caused by overcapitalisation, duplication of services and facilities, extensive service compensation and a rigid freight charge structure. Aldcroft (1969: 11-8) claims that this market behaviour was caused by a general confusion between net and gross revenue.

acceptable.⁵ While productivity gains and operational improvements were achieved during the war, the financial position of the railway companies declined further because of the intensive usage of the network, the need to run government traffic free of charge, the inability to change rates and by continuous increases in wages (Foreman-Peck and Millward 1994: 24). During the war the government paid a 'war bonus', negotiated by the Railway Executive Committee and the two railway unions, NUR and ASLEF, which compensated railway employees for increases in the cost of living caused by the war. In 1916, the railway companies threatened not to accept any further wage increases without seeking arbitration as they realised that 'war bonuses' would have to be continued after the war. They demanded a financial guarantee from the government for five years after the war as compensation.⁶ The President of the Board of Trade, Walter Runciman, fearing economic, and more importantly, social upheaval, promised the companies to guarantee the companies' revenues at the 1913 level for two years after the official cease-fire, thereby establishing government involvement in railway policy after the war.⁷

⁵ This war-time organisation followed provisions from the 1871 Regulation of the Forces Act. It represented a direct response to the successful use of the railways by the German military in the war against France. The ability to rely on co-opted managers in a 'self-regulated' arrangement was greatly facilitated by the oligopolistic structure of the industry: while 130 companies fell under government authority in total, 12 companies controlled 75 per cent of the network.

⁶ House of Lords Records Office (HoL RO) F 18/3/9 - 14.1.19 (also Armitage 1969: 54).

⁷ In a similarly motivated move to avert industrial trouble, the government promised ASLEF 'sympathetic consideration' after the war of their demand in 1917 for the introduction of the eight-hour day. This was granted by the Cabinet shortly before the general election of 1918. The government's general fear of social unrest following industrial disputes led to the establishment of a special cabinet committee, the Industrial Unrest Committee in February 1919. Following the 1914 agreement of the railways, docks

Because of the positive wartime experience of greater operational centralisation and the companies' financial difficulties, there was a relatively universal agreement that more state involvement in the railway industry was needed. There was, nevertheless, less consensus on how 'activist' such a policy was to be and what role a ministerial department should play. The proposals can be distinguished according to their degree of domain- and paradigm-orientation, the former mainly addressing railway-specific issues, to a large extent relying on lessons from the past, while the latter aimed to place the railways in an overall policy concept integrated with policies in other policy domains.

Domain-oriented proposals were expressed by the Board of Trade, the House of Commons Select Committee on Future Railway Policy and railway representatives. In December 1918, Sir Sam Fay, from the perspective of the railway industry, called for the creation of a Transport Authority which would consist of representatives of labour, trade and commerce, shipping, agriculture, mining, textile, chemical and iron masters. The railways, the railway-owned docks and the canals were to be controlled and managed by a 'corporatist' committee of elected members of these trade associations. This committee would act independently of direct political control, despite formal links to the Board of Trade.⁸ In contrast, the 'free-trading' Board of Trade under Albert Stanley argued that while the railway problem required an 'entirely new department through

and mining union to form a 'Triple Alliance', the government feared that any strike might lead to an economic standstill, or to social and revolutionary unrest as in Germany and Russia (see Dangerfield 1961).

⁸ Public Records Office (PRO) MT 45/226, Sir Sam Fay memorandum, December 1918.

which will be exercised the state control over a unified railway system', this new ministry should only be concerned with the railways. Other competencies should remain with the Board of Trade.⁹ The Select Committee shied away from detailed policy proposals or voicing an opinion on 'the' ownership question, while advocating that single ownership and management would be desirable (House of Commons 1918).

More paradigm-oriented proposals were put forward by Lloyd George and the Ministry of Reconstruction, which was set up as a research department to prepare programmes and present them to the relevant department for implementation (Abrams 1963: 50). Lloyd George expressed his interest in an activist railway policy in a meeting with trade unions.¹⁰ These ideas appealed to Lloyd George's vision of 'garden cities' which would offer solutions to the housing and health problems of urban squalor once a well-integrated transport system had been established. Furthermore, an active railway policy would support the demobilisation of the army and respond to the need for a better co-ordination of the railways which would lead to a long-term improvement and cheapening of transport services.¹¹ A Ministry of Ways and Communications was to initiate these policies while the railways remained in governmental control, with a future public ownership of the railways remaining a possibility.¹²

⁹ HoL RO F/2/6/12 - 31 December 1918.

¹⁰ Promising that 'the problem must be taken in hand under the direct inspiration and control of the state' (*Railway Gazette*, 16 November 1918).

¹¹ HoL RO F/45/9/21 - 9 November 1918.

¹² In a draft for the 1918 election manifesto, Lloyd George incorporated a commitment to a 'nationalisation' of the railways. This clause was redrafted by his coalition partner Bonar Law into a demand for the state development of a unified system. The agreed

Thus, the railways were to contribute actively to 'reconstruction', which meant 'nothing less than an effort to correct the weakness in the British social and economic fabric which had been revealed by the war' (Armitage 1969: 6).

Forms of regulatory control and state ownership were also examined at the Ministry of Reconstruction, despite obstruction by the Board of Trade and the Railway Executive.¹³ Great urgency was attached to solving the railway 'problem' as it was regarded as crucial for the overall development of industry and also for accommodating the increasing pressure from trade unions, in particular the NUR, on the issue of ownership, but also on so-called 'Joint Industrial Councils'.¹⁴ Benefits of nationalisation on the lines of government ownership and, possibly, management were seen in preventing the emergence of a private monopoly. Furthermore, the ability to take a 'large view' of the development of national resources, the establishment of a simplified organisation and the pooling of rolling stock were regarded as advantageous. Nationalisation was to be achieved by issuing government stock to shareholders with a Ministry of Transport taking possession of all railway undertakings. An Advisory Council, including worker representatives, was to assist the minister.¹⁵

policy stance for the 1918 election was that while the pre-war 'state of freedom from government control' would no longer be acceptable, the exact form of government control remained a matter of consideration (HoL RO F/2/6/8 - 9 December 1918).

¹³ PRO BT 67/1/6 - Ministry of Reconstruction 1917-19; Railway Nationalisation Proposals: minutes and memoranda; 21 November 1919.

¹⁴ Armitage (1969: 64) claims that NUR leader J.H. Thomas seems to have believed that government ownership of the railways was not realisable in the British context and therefore concentrated on other issues.

The initial policy proposals took such a paradigm-oriented perspective. Lloyd George asked Sir Eric Geddes, a former railway company manager, to establish and lead a Ministry of Ways and Communications, which would deal with the 'immense questions of transportation and its development' which would 'vitally affect the welfare and prosperity of the nation'.¹⁶ Geddes, whose agenda was, at the time, to a large extent set in agreement with Lloyd George, emphasised the importance of utilising the time immediately after the cease-fire for major initiatives and relief work in railway and canal construction as well as road development in order to respond to the pressures of rapid demobilisation. If action was not taken immediately, he feared that initiatives could be frustrated by opposition from traders. Railway rates could be set to protect and promote domestic industry and agriculture. Furthermore, the railways had a vital role to play in other policy schemes in terms of agricultural development and housing.¹⁷ These policies were also included in the King's Speech which emphasised the importance of transport for the development of industrial and agricultural resources (*Railway Gazette*, 14 February 1919: 279).¹⁸

¹⁵ PRO BT 67/1/6 - 20 February 1919.

¹⁶ PRO ADM 116/1809 - 16 November 1918. Sir Eric Geddes was one of Lloyd George's 'businessmen in government'. Before the war, he had been deputy general manager of the North Eastern Railway. During the war, he was Deputy Director-General of Munitions Supply from June 1915, Director-General of Movements from September 1916 and finally First Lord of the Admiralty from May 1917. 'Businessmen in government' was one of the, arguably unsuccessful, innovations made by Lloyd George during the war (see Turner 1988: 212, Grievs 1992: 24)

¹⁷ PRO ADM 116/1809 - 18 November 1918.

¹⁸ Geddes pointed out the role of Lloyd George in shaping the agenda - 'if we are to proceed with this policy which you have outlined to me' (PRO ADM 116/1809 - 18 November 1918; Geddes to Lloyd George) and letter to the parliamentary draughtsman:

Despite this official emphasis on an active policy which was paradigm-oriented as part of an overall reconstruction policy, there was also a 'countervailing' tendency that stressed non-interventionist, 'deflationary' policies. These were represented in the Balfour Committee report (Committee of the Committee on Commercial and Industrial Policy 1918) which argued that in order to encourage an expansion of production and efficiency, the government should pursue a policy of decontrol and some protective legislation.¹⁹ The Cunliffe report similarly called for deflationary policies in order to resume the old gold standard parity (Committee on Currency and Foreign Exchanges after the War 1918; also Cline 1970).

Thus, the initial proposals drew on paradigm-oriented sources. However, alternative sources for regulatory models were also available and were promoted by other government departments. The following section considers the successful challenges, drawing on more domain-oriented proposals, which led to a veto of the initial suggestions of an activist reconstruction policy.

The Ministry of Ways and Communications Bill

The Bill proposing the establishment of a Ministry of Ways and Communications was drafted in January 1919 by a small group of officials with a military transport background similar to Geddes. Neither the Railway Executive

'This is a very rough outline of what I understand to be the Prime Minister's wishes' (PRO MT 45/234 - 15 January 1919).

nor the Board of Trade participated in the process of policy formulation (Armitage 1969: 66). The Bill provided for the mechanism for transferring all responsibilities of other departments regarding existing modes of transport, railways, light railways, roads, canals, docks and harbours, shipping, tramways and road vehicles as well as the supply of electricity to the new ministry. Competencies concerning aviation were added later. Clause four of the Bill enabled the ministry to take possession of these modes of transport.

The leading officials envisaged a strategic, activist role for the new ministry along the lines of the Haldane Report. A Cabinet memorandum on the general outline of the Ministry of Ways and Communications Bill strongly emphasised the positive role the railways could play in the reconstruction efforts of the post-war period. It was argued that after the war, the conception of the duties of government had changed. The intensity of industrial development required a more 'scientific handling' via close co-ordination.²⁰ Now 'war' had to be waged against obsolete and inefficient industrial and social conditions. The country, it was argued, no longer expected mere regulation and restriction from the state, but positive action in the form of 'initiation' and 'inspiration'.²¹ Electricity was included in the Bill so that the electricity grid could be extended into remote areas of the country. Geddes noted that

'[t]he theory underlying the institution of a Ministry of Ways and Communications is surely owing to the development of a highly

¹⁹ The report considered methods to regain economic leadership; among those were anti-dumping measures, incentives to increase production and a policy towards 'combinations'.

²⁰ PRO 45/226 - 4 February 1919 (also Bagwell 1982: 242).

civilised and industrial state, it is now necessary to provide in the governmental machinery a Department not charged, as in the past, with functions of criticism, regulation, conciliation and arbitration, but with the inspiration and control of the development of a public service comprised in all methods of commercial movement of men, animals and materials in the Realm: that inspiration and control to be exercised not purely from a narrow point of view as to whether a particular development of a system of transport or of a service will per se and immediately yield a commercial return upon the capital invested and upon the expenses incurred, but whether it will in the end [...] be of commensurate service to the community'.²²

The financial position of the railway companies increased the urgency attached to the need for legislative action. The companies claimed that no investment would be forthcoming as long as government policy was not clarified: without financial responsibility being taken by the state, private enterprise would not be willing to improve and extend the railway network.²³ During the two 'Runciman years' of government-guaranteed revenue levels, the new ministry was to ensure

²¹ PRO MT 45/225 - 19 February 1919.

²² PRO MT 45/226 - 5 March 1919. However, Armitage (1969: 67) observes that Geddes was afraid of the 'extended', even 'autocratic' powers of the minister as provided in the draft legislation.

²³ PRO MT 45/234 - 22 January 1919; Comment by Nash on draft law. Officials stated that the relation of expenditures to earnings was such 'that state assistance and state control in some form or another is inevitable'. Furthermore, it was argued that costs had increased by £90 million since 1913, consisting of £50 million in increased wages, £5 million to 'shopmen', £15 million due to the introduction of the eight-hour working day and £20 million in increased prices.

that the companies improved efficiency and achieved closer co-operation. Furthermore, the pre-war structure of the industry had to be abandoned as it had only caused 'waste' and 'profligate movement'.²⁴ Powers were envisaged to allow for 'emergency acquisitions' of the railways in case of financial failure. In the course of the following two years the railway companies were required to produce amalgamation schemes of their own and to suggest a modification of the classification of freight rates.²⁵ The ministry was to be equipped with powers to continue the present guarantees, to enter into working agreements, to construct, manage and maintain railways as well as to acquire land. Furthermore, the ministry was also enabled to authorise rates and charges and to determine the rates of pay and conditions of employment. A Tribunal was to decide in cases of financial disagreements between the government and the railways, while changes in ownership status were to be effected by the Orders in Council procedure.²⁶ It was left undecided whether the government should then 'work' (i.e. manage) the railways directly or lease them to private undertakings.²⁷ Nevertheless, despite this power of 'nationalisation', Geddes stressed that if public ownership should occur (which he hoped would not), this would not involve direct governmental management as it was 'unthinkable that any government department run with a minister in charge should be directly

²⁴ PRO MT 49/4 - 22 July 1920.

²⁵ Armitage (1969: 66) suggests that this deliberate postponement of more far-reaching legislation indicates that Geddes had no precise plan for the future organisation of the railways.

²⁶ The Order in Council procedure allows measures to be passed without a special vote in parliament.

²⁷ Geddes claimed to be opposed to nationalisation in terms of ownership, but feared that the companies' financial position would necessitate such a policy.

responsible [...] I cannot conceive anything more disastrous', emphasising that some form of board would be essential for exercising managerial control.²⁸

The scope of the proposals attracted great controversy. It was argued that the proposals gave such 'autocratic powers that it would be difficult to get it through Parliament'.²⁹ Due to the numerous election pledges which had to be fulfilled and the volatile support for Lloyd George's coalition government in the House of Commons, the Ministry of Transport reckoned that 'in the present Parliamentary situation the utmost we can expect is an Enabling Bill of the nature of the Bill to establish a Ministry of Ways and Communications already drafted [...] the shorter and less contentious a measure is, the better its prospect of being introduced in the House'.³⁰ This would enable a ministry to be formed and to achieve some improvements by drawing together competencies from various departments, although not giving direct power to take the railways into government ownership. It was feared that the resistance to the nationalisation issue and also the increased complexity caused by an inclusion of nationalisation measures in the Bill would lead to the failure of the whole Bill. As a consequence, the relevant clause four was considerably weakened in the course of the various drafting stages.³¹

²⁸ PRO MT 45/ 235 - 10 March 1919.

²⁹ PRO MT 45/226 - 12 February 1919.

³⁰ PRO MT 45/226 - 3 February 1919. Furthermore, Lloyd George was in Paris for most of the time conducting the 'peace conference' negotiations.

³¹ For example, from 'for the consideration and formulation of policy as to the acquisition of undertakings' in the second draft to a 'consideration and formulation of the policy to be pursued as to the future position of undertakings' in the fifth draft.

Resistance to these proposals also emerged from within the Cabinet. In a key Cabinet meeting on 19 February 1919, opposition from the Board of Trade, the Ministries of Shipping and Air as well as the anticipation of determined opposition in the House of Commons led to the elimination from the Bill of clauses affecting merchant shipping, local tramways and aviation. The Chancellor of the Exchequer, Austen Chamberlain, questioned the reasoning behind the clauses specifying the terms for purchasing the railways, in particular the Order in Council procedure. While Geddes claimed that the nationalisation clauses provided effective 'sticks' for negotiations with the railway companies, Lloyd George emphasised the potential 'carrot' effect on labour and industrial peace. The President of the Board of Trade, Albert Stanley, repeated his opposition, suggesting that the scope of the new ministry should be limited to the railways and the canal system. General oversight over transport facilities should remain as a whole in the interest of trade and commerce and therefore with the Board of Trade. More importantly, he opposed the transfer of authority for electrical supply, claiming that the responsibility for electricity should not rest in the hands of the potentially largest customer.³²

Further opposition to the Bill emerged from well-organised interest representatives in Parliament.³³ The railway companies were opposed to the Order in Council procedure for the state purchase of railway companies and the setting up of an arbitrating Tribunal to deal with disagreements between

³² HoL RO F/23/4/15 - 8 February 1919.

³³ Geddes informed Lloyd George in Paris that 'roads were noisy, but not formidable', while the docks were 'formidable' and that he anticipated stronger hostility from the electricity interests (HoL RO F/18/3/10 - 13 March 1919).

government and companies. Geddes warned Lloyd George, who had insisted on the inclusion of the Order in Council procedure, on the potential risks of this procedure should a 'Socialistically inclined Labour government' determine railway policy.³⁴ Due to the widespread opposition among the railway companies and MPs, who regarded the clause as an infringement of their constitutional privileges, the Order in Council clause was withdrawn in the early committee stages of the Bill. Furthermore, the transfer of competence for electricity supply was rejected during the consideration of the Electricity Supply Bill.³⁵ The Shipping Committee convinced Bonar Law that docks and harbours should be exempted from the scope of the Bill. Finally, the 'nationalisation' clause four was withdrawn after vigorous campaigning by the opponents of the Bill. Thus, in the course of the process through parliament, the Ministry lost proposed competencies on harbours, docks and electricity, its ability to nationalise the railways was eliminated and the powers on road policy were reduced. The House of Lords renamed the proposed new ministerial department Ministry of Transport. Beyond the mere change in words, it reflected the new ministry's limited planning competencies in network development and communication systems. The Act reduced the Ministry to a railway department, defining the role of the new ministry as 'improving the means of, and the facilities for, locomotion and transport'. The financing of the companies in terms of capital was to remain as far as possible with the owners. Direct ministerial action was only to be taken after receiving advice from a special advisory

³⁴ HoL RO F/18/3/10 - 13 March 1919.

³⁵ HoL RO F18/3/18 - 14 August 1919; HoL RO F/18/3/33 - 13 November 1919.

committee consisting of railway company representatives.³⁶ Far from being a ministry of 'initiation' and 'inspiration', the Ministry of Transport's role was mainly supervisory, having to search for remedies for the causes of the railway companies' decline, such as the impact of the reduction of working hours, and to promote the pooling of rolling stock. A further task was to examine the methods of operation, to co-ordinate the systems and to 'cut out redundant services'.³⁷

In sum, the case of the 1919 Ministry of Transport Act represents a case of competition between two 'policy environments' which were used to legitimise policy programmes with regard to railways. On the one hand, there were demands to modify the pre-war structures, while, on the other hand, there were attempts to integrate transport into an overall policy of reconstruction. The establishment of the Ministry of Transport represents an example of the more general shift in emphasis in the UK policy on reconstruction after the First World War in which advocates of a return to pre-war policy principles succeeded in opposing the proposals of 'activist' policies (Lowe 1978). In the case of railways, this not only meant that instead of 'nationalisation' via 'inspiration', possibly ownership and, potentially, even management, there was 'nationalisation' via financial subsidies, granted under the 'Runciman' agreement. It also represented a defeat of the activist, reconstruction-oriented elements in post-war politics against the short-term political imperatives of economic downturn, limited credit facilities and long-term Treasury ideas

³⁶ Ministry of Transport Act 1919, clause 3.

³⁷ HoL RO F/18/3/17 - 13 August 1919.

concerning the need for decontrol and deflation.³⁸ Similarly, the ministry had no effective enforcement powers, but had to rely on persuasion (Grieves 1992: 32).

THE 1921 RAILWAYS ACT

In contrast to the 1919 Act, the 1921 Railways Act received only little interest from Lloyd George or the Cabinet (Grieves 1989: 76). Most policies were formulated between the Ministry of Transport, the Railway Companies' Association and the FBI. The main opposition expressed by the Treasury and the so-called 'anti-waste' campaign had less to do with the details of railway policy and regulation, but rather with the Ministry of Transport's overall existence.³⁹ The Act was partly motivated by the coming to an end of the 'Runciman' years for the railway companies and their continuing financial difficulties. Partly it was shaped by the preceding railway strike (see Armitage 1969: 73-5; Grieves 1989: 86-7), which led Lloyd George to insist on including a provision allowing workers' representatives on the management boards.⁴⁰

³⁸ Johnson (1968: 411) speculates on various reasons, such as a change in government preferences due to interest group pressure or MP revolts, an imprecise first draft whose controversial details were clarified over time, or an attempt to 'buy time' to overcome strike threats.

³⁹ PRO T1/12373/36905 - (no date); Memorandum to Chancellor of Exchequer; Chisholm and Davie (1993): 292.

⁴⁰ In broad terms, the White Paper (Cmd 787) suggested that employee representatives, elected from and by employees of the railway company, should participate on the boards of management, together with stockholder representatives. The employee representatives would represent the workers of the company and not be agents of trade unions. Benefits were seen in adding experience to board meetings as well as a 'moderating' and 'educating' effect on worker demands (PRO CAB 24/2824 - 12 April 1921; Railway Bill 1921). While business interests were ambivalent, the RCA opposed these suggestions arguing that this would lead to a 'constant struggle to prevent further concessions' (PRO MT 49/2 - 22 October 1920). The RCA offered as an alternative a committee composed of

The following analyses the limited debate concerning regulatory ideas and the hardwiring of the regulatory regime. The Act not only offers a good example of a dominant domain-orientation which drew its conceptions and legitimisation from existing railway regulation, but it also provides an example of corporatist decision-making between the Ministry, the railway association and main business association, the FBI.

The emergence of regulatory ideas

Two alternatives for the future organisation were presented by Geddes to the Cabinet: either nationalisation in terms of both ownership and management of the railways or the amalgamation of private companies under tighter regulatory and managerial control while also providing the companies with financial guarantees.⁴¹ Geddes argued that no state had pursued policies of nationalisation in terms of ownership for reasons of theoretical superiority, but only on grounds of financial necessity. Public ownership would only lead to stagnation and a situation where 'politics corrupt the railway management and

board and worker representatives to discuss matters of wages and operational issues (PRO MT 49/5 - 2 April 1921). While Geddes regarded these proposals as insufficient, the railway unions were increasingly hostile to the idea of worker representatives, fearing that this would weaken their own position in dealing with the companies (MT 49/3 - 29 March 1921; CP 2824). They therefore took up the offer of the RCA and reached a compromise without consulting Geddes (Bagwell 1963: 411). This ensured the continued existence of the National and Central Wages Boards, the setting up of Group Councils and some clauses on workplace discipline. Geddes had to ask the Cabinet to withdraw the initiative (Cmd 1292).

⁴¹ HoL RO F/18/4/10 - 9 February 1920.

the railway management corrupts politics'.⁴² In contrast, a 'regulatory arrangement' would allow the government to 'exercise all the powers we require without doing this [taking into ownership] and this is a favourable time for altering the relationship between the state and the companies, [...]'.⁴³ Geddes proposed to amalgamate the railway companies into seven groups which would form regional monopolies. This scheme was administratively convenient as it did not necessitate a separation of individual undertakings.⁴⁴ Rates were to be fixed at a level that would allow for the companies to earn the equivalent of the pre-war revenue of all companies absorbed into the group, while profits were to be regulated by a sliding scale mechanism where the government's share would be channelled into a transport development fund.

The justification for these proposals indicates the reduced ambitions and the reforms' domain-oriented isomorphic nature. It was argued that reforms were necessary because of the poor financial position of the railway companies which were due to be released from government control in August 1921 and the necessity for some comprehensive re-organisation of the country's railway system so as to 'give the best service to the shareholders and others concerned in Railway Transport'.⁴⁵ An efficiently functioning railway system, operating effectively and economically, was both in the public and in the shareholder interest. The central assumption was that the function of government was to

⁴² HoL RO F/18/4/10 - 9 February 1920.

⁴³ HoL RO F/18/4/10 - 9 February 1920; Future transport policy - memorandum for the cabinet by the Minister of Transport.

⁴⁴ These were Southern, Western, North Western, Eastern and North Eastern, London with a separate railway system for Scotland. Ireland was no longer considered.

assist the railway companies to attain a higher standard of efficiency and better co-ordination rather than 'attempting any direct management of a vast machinery of transport' (*The Times*, 4 May 1920: 4). These intentions were also reflected in the White Paper 'Outline of Proposals as to the Future Organisation of Transport Undertakings in Great Britain and their relation to the State' (Ministry of Transport 1920), which set out the basic structure of the future amalgamated railway companies.

The regulatory ideas considered were markedly different to those discussed during the formulation of the 1919 Act. There was a lack of debate on principles, with most ideas being agreed upon and only discussed at the level of detail. This reflected the domain-oriented nature of policy proposals, which was induced by the corporatist decision-making pattern. Therefore, the prime concern was to place the railway companies on a 'sound basis' rather than being subject to a distinct policy recipe.

Organisational Structure

The 1921 Railway Act aimed to establish - by means of amalgamation - a more 'efficient' system which would enable 'economical working'. Such domain-oriented and evolutionary changes would be more beneficial than a continuation of the 'illusory benefits' of 'wasteful competition'. It was further argued that although 'more logical' grouping schemes could be imagined, the proposed scheme kept the companies integrated and therefore minimised administrative

⁴⁵ PRO MT 49/10 - 2 May 1921.

transaction costs.⁴⁶ While competition could still emerge in terms of services and facilities, which would ensure further advances in operational efficiency among companies, the full benefit of the system could be obtained only by the way of a 'regulated monopoly'.

Despite the near universal agreement on the benefits of amalgamation which was domain-oriented and evolutionary, the exact nature of these new railway groups caused some debate. The White Paper proposed the full financial amalgamation of the railway companies into five regional monopolies in England and Wales (Southern, Western, North Western, Eastern, North Eastern, while keeping London separate) and a single operator for Scotland. The FBI agreed with the principle of the grouping scheme.⁴⁷ In contrast, the Association of the British Chambers of Commerce (ABCC) opposed the government's grouping scheme as it would lead to regional monopolies and higher charges for both passengers and freight. While amalgamation was not opposed in principle, the ABCC demanded that as much competition as possible should be maintained as otherwise the Ministry of Transport would have the incentive to stifle all other modes of transport to make the railway companies viable.⁴⁸

Very similar demands had been made by the *Railway Gazette* (5 November, revised version: 26 November 1920: 697-9). According to the *Gazette*, the

⁴⁶ The companies were to be set up by 1 January 1923. The larger companies - called constituent companies, were mutually to agree on and submit a scheme for amalgamation. These companies were then to absorb the smaller, so-called subsidiary companies.

⁴⁷ PRO MT 49/4 - 22 July 1920.

government's proposals had not met with a favourable reception. Alternatively, the formation of eight operators (or nine, if two Scottish companies were to be maintained) would not only maintain competition where it 'was desirable' but also secure the identity of as many companies as possible. It would also avoid 'some huge but very invertebrate systems for the sake of problematical operating systems'.⁴⁹

The main controversial organisational issue was the inclusion of the Scottish railway companies into English companies. The Scottish companies' demand to be included in English companies, was, at first, rejected by the latter.⁵⁰ Later, in their formal submission, the RCA suggested an alternative scheme which would consist of five regional monopolies which included Scottish companies in English groups. It was stressed that direct competition could not be fully eliminated and that therefore the fullest co-operation between the companies should be allowed for. Furthermore, expectations concerning the potential economies of amalgamation should not be set too high.⁵¹

⁴⁸ PRO MT 49/13 - 1 December 1920.

⁴⁹ The Ministry of Transport rejected these proposals as they offered 'no advantages over the Ministry's proposals which are not attended by even greater drawbacks, it is open to formidable objections and it fails to provide sufficiently for the enforcement of economy' (MT 49/9 - no date. 'Railway Gazette and Railway News - Alternative Proposals for Grouping').

⁵⁰ PRO MT 49/2 - 11/12 October 1920.

⁵¹ After internal consultation, the RCA stated that the Scottish companies would not be viable on their own and that the North Eastern Railway Company should be grouped with weaker companies, arguing that the grouping scheme would not pass the House of

A note from the Secretary of the RCA to Geddes suggested that with the exception of the North Eastern company, all the English companies unanimously desired the adoption of a grouping scheme which included the Scottish companies in the English groups.⁵² Geddes, in contrast, argued that such a 'longitudinal grouping' would be disadvantageous from an operating point of view.⁵³ In the Bill, the Scottish railways were divided into two groups, East and West (Ministry of Transport 1921).⁵⁴ The Scottish demands for integration into English groups were initially rejected by the Ministry because there was no justification 'in throwing the burden of a Scottish deficiency on to the shoulders of English traders' (Ministry of Transport 1921). Due to continuous lobbying by the (Scottish) companies as well as pressure from Scottish MPs, Geddes gave up his opposition and conceded to a longitudinal amalgamation of English and Scottish railway companies during the first committee meetings (*Railway Gazette*, 17 June 1921: 945-6).⁵⁵ As a consequence, the 'four' great railway companies, the Southern, Great Western, London, Midland and Scottish and the London North Eastern Railways were established.

Commons, if the North Eastern and the Hull & Barnsley were not amalgamated with the Eastern grouping.

⁵² PRO MT 49/13 - 14 December 1920.

⁵³ 'Longitudinal' grouping describes the grouping of the Scottish companies with English groups, leading to what are today known as the East and West Coast mainlines from London to either Edinburgh or Glasgow and beyond.

⁵⁴ Furthermore, the North Eastern and Hull & Barnsley lines, previously autonomous, were combined with the Eastern grouping. London traffic was excluded from the Bill.

⁵⁵ Geddes claimed that he conceded this clause because of the pressure from MPs and by the indicated support from the railway companies. He argued that he had wanted to

The change in organisational structure towards creating the four great regional monopolies was domain-oriented and evolutionary. Pooling, which might be regarded as a form of informal amalgamation, had been part of the development in the railway sector since at least the mid-1870s and was therefore not opposed in principle. It also illustrates the low value attached to 'wasteful' competition given at the time.⁵⁶ The evolutionary domain-oriented character of the proposals is also evident in the minimisation of administrative transaction costs by grouping companies according to existing organisational arrangements without attempting any major reform.

The allocation of regulatory authority

The analysis of the control mechanisms over the activities of the railway companies reveals the limited coercive powers of the Ministry and the emphasis on 'enabling' the railways to regain their 'equilibrium'. Thus the main aim of the rate-setting authority was to enable the railway companies with an efficient and economic management to obtain levels of revenues equivalent to an, at first, undefined pre-war basis. At the same time, the deliberation on the allocation of regulatory competencies also reveals a substantial amount of conflict which to some extent resembled the controversies concerning the 1919 Act.

The Act determined that both the Ministry of Transport as well as the Railway & Canal Commission should take on enhanced regulatory functions on the basis of the 1919 Act. Geddes rejected suggestions that the Railway & Canal Commission

preserve a 'Scottish' identity and that there had also been disagreement between the English and the Scottish railway owners.

⁵⁶ PRO MT 49/10 - 2 May 1921.

should be disbanded and its tasks merged with the Ministry, arguing that this would lead to too strong a dependence of the railways on political control. Both Commission and Ministry were entitled to request that the companies should offer reasonable facilities. The Commission was to secure and promote public safety and to respond to the interests of business. It was allowed to impose 'improvements' on railway companies, if these amounted to less than £100,000 and had no negative impact on shareholders. The Ministry's competencies rested in areas of standardisation of ways, plant and equipment and to enforce schemes for co-operative operation and usage of rolling stock (Railway Act: clause 16(2)). Nevertheless, the minister had to consult an expert committee, consisting mostly of railway managers, on his proposals before any action could be taken. The companies were granted the right to appeal to the Railway & Canal Commission when the capital expenditure involved could either not be provided or would affect the interests of existing shareholders. The continued existence of the Railway & Canal Commission highlights the critical importance given to regulatory bodies with political independence which were supposed to limit the possibility of political involvement.

In contrast to these final regulatory arrangement, original plans, as presented in the White Paper, had stressed that the Ministry of Transport should have new, stronger control functions over the railway industry. These competencies, nevertheless, in no way resembled those envisaged in the 1919 Act as they were justified as 'necessary for the most economical transport possible'. This could only be obtained by the exercise of central authority.⁵⁷ These competencies

⁵⁷ CAB 105/C.P. 1264 - 1 May 1920.

concerned the protection of the public, the maintenance of an 'economical working' of the railways and the safeguard of 'national interests'. The Ministry should have the right to require the provision of adequate services and facilities in order to secure the necessary returns to the companies while keeping rates at a low level. Regulatory authority extended to the right to impose 'reasonably high' standards to require closer co-operation and to prescribe the detail and amount of the accounts produced and published. The companies were to obtain approval for all plans involving capital expenditure and for the methods of raising the necessary capital.

These proposals met with resistance from both business and the railway companies. The FBI feared that the increased governmental control would be an impediment to effectiveness. The ABCC simply stated that the 'pre-war control exercised by Parliament through the Board of Trade amply protected the Public'.⁵⁸ Geddes dismissed these criticisms, pointing out that the government would not be an impediment to effectiveness. Moreover, powers would look more formidable in print than would be exercised in practice. Other suggestions, such as the establishment of a tribunal to replace the ministry, were also rejected.⁵⁹ The RCA opposed the government's proposals, claiming that the control functions would take away all powers from Directors and the Management, leading to a 'nationalisation without any guarantees of dividends'. It was claimed that the companies refused to improve their operations under

⁵⁸ PRO MT 49/13 - 1 December 1920.

⁵⁹ PRO MT 49/4 - 22 July 1920.

these conditions and would prefer nationalisation.⁶⁰ They claimed that the minister would be under continuous political pressure to demand and compel the companies to offer additional services. The RCA also told the Ministry officials that regulation to encourage standardisation was unnecessary as the groups would further standardisation by themselves. Furthermore, the RCA claimed it was too costly to produce statistics as required under the government's proposals. In order to find a compromise, the Ministry proposed the creation of an independent committee of experts which would be consulted before any ministerial decision in order to prevent abuse of ministerial power for political reasons.⁶¹ Moreover, the White Paper's suggestions that the companies should submit their capital expenditure and capital raising plans for approval were dropped.

A Railway Rates Tribunal was established as a further regulatory authority. Despite its authority as a court of law, the Tribunal also had many administrative functions with its power to fix standard rates and fares, to classify merchandise and decide on the conditions under which goods should be carried. The Tribunal was to consider whether rates were reasonable and the best available means to raise revenue (see also Foreman-Peck and Milward 1994: 246-7). It consisted of three permanent members who would be advised by two panels - one of a more general nature consisting of twenty-two Board of Trade nominated representatives, twelve representatives nominated by the Ministry of Labour and two representatives from the Ministry of Agriculture and Fisheries, the other consisting of twelve representatives nominated by the Ministry of

⁶⁰ PRO MT 49/2 - 22 October 1920.

Transport. The rates were to be set at a level which would allow the companies - given 'economic and efficient management' - to earn net revenues at the 1913 level. In the course of the formulation of the 1921 Act, the rate structure, their level and classification were elaborated by the so-called Rates Advisory Committee with the goal to secure a financial equilibrium for all railway companies (Rates Advisory Committee 1920).⁶²

The original intention was to make the whole process less judicial than under the previous procedures at the Railway & Canal Commission, while securing the companies a 'fair' rate of return. Rates were to remain outside any political influence. Exceptional rates were to cease unless they were more than five per cent below standard rates. The White Paper argued that a parliamentary act should fix rates and fares at a level where 'efficient and economic management' would allow revenue to reach pre-war levels. The exact level of fares and rates was to be determined by a Rates Advisory Committee (Rates Advisory Committee 1920). The Ministry argued that despite the indeterminate nature of the term 'pre-war basis', it would be ensured that the rates were set at such a level that allowed the companies a secure future.

The companies demanded a continued financial guarantee and a precise definition of the term 'pre-war level'. The RCA managers told the officials that no pre-war level would be sufficient in the present and foreseeable

⁶¹ PRO MT 49/2 26 October 1920.

⁶² Common carrier obligations were not abolished.

circumstances.⁶³ It was agreed that the provision of a ministerial veto for applications for increased rates might be dropped if railway companies would agree to supply detailed statistics.⁶⁴ The Ministry also offered provisions that would grant the companies short-term loans.⁶⁵ The RCA also opposed the sliding scale regulation on profit sharing, on the grounds that the state was not accepting any responsibility in respect of loss of revenue due to circumstances outside the companies' control. They demanded that until amalgamation had been effected - by 1 January 1924 - that the guarantee on 1913 levels should be continued. Geddes rejected any financial guarantees. The issue was resolved after the companies indicated that they would be unable to pay dividends should the financial guarantee be discontinued.⁶⁶ Linking this issue to the conclusions of the Colwyn Committee which had deliberated on government compensation for the railway companies' wartime services, it was agreed that the government would pay a compensation payment for the period of government war-control, amounting to a total of £60 million payable in two equal instalments.

The allocation of regulatory authority provides further evidence that the goals of post-war reconstruction policies had been abandoned due to a lack of political and societal support. Domain-oriented reforms, such as the establishment of the Rates Tribunal and the grouping scheme survived. The system of allocating regulatory authority was characterised by a lack of centralised control and the

⁶³ PRO MT 49/2 - 11/12 October 1920.

⁶⁴ PRO MT 49/2 - 22 October 1920.

⁶⁵ PRO MT 49/2 - 9 November 1920.

⁶⁶ PRO MT 49/13 - 2 February 1921; 3 February 1921.

absence of central financing mechanisms. The Ministry of Transport presented only a weak centre as the companies and interest groups were given considerable rights of participation both as advisors and as policy-makers in areas such as the various advisory councils at the Ministry, the Railway Rates Tribunal and the Railway & Canal Commission.

Non-commercial objectives

The proposal to establish a Development Fund was one last reminder of proposals that the railways were to play a key role in an active regional and reconstruction policy. The failure of this proposal shows in itself the lack of support for paradigm-oriented proposals during this period. The proposal built on the understanding that while rates and fares were to be fixed at a level which would allow revenue to reach pre-war levels, the state, given that it would grant monopoly status to the companies, should be entitled to a share of surpluses, which were to be distributed on a sliding scale. These funds were to be utilised for development work in order to connect remote regions to the railway network. Geddes argued that these services would not lead to a subsidisation of competition for the established operators, but would provide feeder services to the main network.

Both the FBI and the Chambers of Commerce criticised the idea of a development fund and the proposed profit-sharing mechanism, claiming that this would provide the government and the operators incentives to set rates and charges at a high level so as to obtain high profits.⁶⁷ In contrast, Geddes argued

⁶⁷ PRO MT 49/13 - 1 December 1920.

that the profit-sharing mechanism would provide the government with the incentive to enforce the most economical working of the railway companies.⁶⁸ Moreover, it represented the most practicable way to ensure investment in the development of backward regions.⁶⁹ Nevertheless, due to the objections raised by business and the railway companies to the idea of the development fund, the proposal was eliminated. The new provision allowed the companies to raise their rates, should average earnings fall below levels obtained in 1913. If they earned more, twenty per cent of the surplus would go to the rail operator and 80 per cent would be used to reduce charges.⁷⁰ The defeat of this proposal, which arguably can be regarded as a last reminder of the previous 'reconstruction' intentions, signalled the corporatist rejection of any non-domain initiative, thus signalling the dominance of domain-oriented ideas.

The impact of institutional factors

The examples of the 1919 and 1921 Acts provide cases of a dominance of domain-oriented isomorphic pressures. Policies were implemented which drew on and continued domestic railway regulation. In contrast, non-domain policy environments were not used to legitimise policy initiatives. Conventional explanations (Abrams 1963) of the 'failure' of the Lloyd George government in pursuing activist policies have pointed to 'hard-faced businessmen' in government and parliament, Treasury dominance and the quality of civil servants. Reforms followed domestic experience and therefore limited the possibilities for policy innovation. The application of the reconstruction 'policy

⁶⁸ PRO MT 49/4 - 22 July 1920.

⁶⁹ PRO MT 49/5 - 16 December 1920.

recipe' - however vaguely defined - was rejected. Instead, incremental change dominated, leading to policy cumulation. The assessment of the three institutional factors confirms the importance of institutional status and it highlights the importance of the political-administrative nexus in explaining the character of the selected regulatory instruments.

Insulation of the regulatory space from coercive pressures

The assessment of this institutional factor is limited in that there were no coercive pressures on policy-makers. As a victorious war power, Britain did not have to accept policy advice from other countries. No evidence was found that other policy provisions or experiences from other legal systems were drawn upon. This view is also shared by Susan Armitage who in her study of decontrol policies in the US and Britain found no evidence that 'either British or American government officials ever paid much attention to what was happening across the Atlantic' (Armitage 1969: 99).

The insulation of the political-administrative nexus in the regulatory space

The failure to translate the paradigm-oriented proposals into practice can be explained by the extent of the different actors' institutional power. In the case of the 1919 Ministry of Transport Act, paradigm-oriented reform proposals were promoted by a small circle of officials with merely war-time experience in government. The formation of the Ministry of Ways and Communications was to represent one of the preconditions for a more active government policy. The

⁷⁰ The railways never achieved the 1913 earning levels.

original dominance of paradigm-oriented reform plans, however, mainly originated in the interest of Lloyd George in a policy of active reconstruction.

This initial insulation of the political-administrative nexus meant that the original plans for the 1919 Act were produced by 'men whose experience in government was limited to these war-years, when grand schemes were possible, even necessary, and power and money for them comparatively easy to obtain' (Cline 1974: 91). The background of Geddes further encouraged this disposition as he had been exposed to the weaknesses of the pre-war railway industry and believed in transport as a key aspect for economic development. This was also visible in his strong interest in obtaining the competence for electricity supply. Against these aspirations, the immediate post-war period was characterised by the ascendancy of the Treasury as the most powerful department within British government. In 1919, for example, the Permanent Secretary of the Treasury was made head of the civil service. Moreover, Finance and Establishment Officers were established to standardise staffing and accounting arrangements (Lowe 1974: 428; also Roseveare 1969: 246-9). More importantly, in particular following the institution of the Ministry of Transport, the Treasury - in line with the overall 'anti-waste campaign' - ran a permanent cost-cutting policy, accusing the ministries of over-spending. Besides this increasing hegemony of deflationary policy arguments over economic policy-making, the proposed transfer of policy competencies from other departments, such as the Board of Trade, leading to battles over turf and authority represented a further cause inhibiting the adoption of paradigm-oriented proposals.

Finally, in terms of political actors, the progress of the initial transport proposals was further impeded by the absence of prime ministerial involvement and interest. Given the Unionist party's majority in Lloyd George's coalition government, the initial 'reconstruction' proposals faced the opposition of ministers and MPs with business interests. At the same time, prime ministerial attention was lacking. During the discussion of the 1919 Act, Lloyd George was occupied mainly with the international post-war settlement, and during the passing of the 1921 Act, he showed no involvement, especially after the end of the railway strike in 1919. The impact of the limited insulation of the political-administrative nexus seems crucial for explaining the outcome of the attempts in regulatory reform after the First World War. The lack of authority determined to a large extent that reforms did not reflect the initial desire to lead to paradigm-oriented isomorphic change, but led to policy cumulation.

Insulation of the regulatory space from societal actors

Although the importance of the threat of a general strike was one of the dominant themes in the immediate post-war period, the trade unions played only a small role with regard to the railway regulatory reforms; one single meeting, at the end of the legislative process, was recorded in the archives. The negotiations on worker representatives were conducted mainly between the RCA and the railway unions.⁷¹

⁷¹ The list of 'deputations' received by the minister in connection with the railways bill showed the following meetings (MT 49/3 - 29 March 1921; CP 2824): 2.2.20 RCA; 23.4.20 Chairman of Irish Railways; 19.7.20 Sir W. Nugent, Midland Great Railway, Ireland; 20.7.20 Central Council Railway Stockholders' Association; 22.7.20 FBI, 23.7.20 RCA; 5.8.20 Associated Chambers of Commerce; 29.3. 20 FBI; 19.10.20 Lord Bessborough and Southern Group; 9.11.20 Scottish Railway Companies; 10.11.20 Chambers of Commerce;

Nevertheless, the 1921 Act can be regarded as an outcome of interest group politics, given its corporatist decision-making patterns and the dominance of consensus. The main proposals, such as amalgamation, were in principle consented to by all societal actors as they reflected historical tendencies. Innovative policies, such as the proposal to establish worker representatives, a reform of the rate setting machinery or the development fund failed or were emasculated because of the resistance among coalitions of groups. However, despite the close involvement of the RCA, the internal organisation of the railway companies' representatives prevented them from 'capturing' the Ministry. Not only was their committee of representatives sent to ministerial discussions unable to bind members, but the railway companies were in themselves further divided in terms of size and wealth - as was evident in the initial rejection to amalgamate the Scottish companies with the wealthier English operators. Furthermore, Sir Frederick Banbury, an MP for the City of London and a railway director for the North Eastern railway, caused problems in the House of Commons as well as within the Association.

11.11.20 Hull & Barnsley; 19.11.21 Cumbrian railways; 2.12.20 North Eastern Directors; 5.1.21 RCA; 12.1.21 Association of Smaller Railway Companies; 13.1.21 FBI; 1.2.21 Goulding, Irish Railways; 2.2.21 Committee of Nine; 3.2.21 Rail Stockholder Association; 16.2.21 Scottish Chambers of Commerce; 2.3.21 Chairmen Scottish Railways; 3.3.21 Scottish Local Authorities; 23.3.21 Committee of Scottish members; 20.4.21 Thomas, Walkden, Bromley and about 60 members (railway unions). This meeting was set up following a note by Geddes from 25 January 1921: 'I think the NUR should be asked about their views as have all the large interests involved, prior meeting and suggest a meeting of not more than 25 from the three unions' (PRO MT 49/7 - 25.1.1920).

In contrast, during the deliberations over the 1919 Ministry of Transport Act, the railway companies played a minor role. Nevertheless, given his background, Geddes was accused by other departments and business interests of being a 'railway man', aiming to disadvantage the road in favour of the railway industry. However, Geddes himself criticised the railway interest for showing little self-initiative during the passage of the 1919 Act.⁷²

The nature of the relationship between minister and RCA was best revealed when during the passing of the 1921 Act, Viscount Churchill, the RCA's chairman, was forced to promise to secure a united RCA line and to offer full support for the Bill during the second reading stage in the House of Commons. Otherwise, he would, forced by Geddes, 'break from the Association'.⁷³ Furthermore, the FBI provided a 'countervailing force' to the railway interest. As the examples of the development fund and of worker representation on management boards show, policies were abandoned as a consequence of a mutual opposition to proposals rather than as a result of a hegemony of a single interest.

⁷² PRO MT 49/94 - 15 February 1920. Geddes noted that 'this seemed a most unfortunate position, that I could not go on defending the Railways unless there was a certain amount of mutual action, and that when there was an unreasonable attack upon the railways, it should not rest simply with the Ministry to defend them, but that the Railway Directors in the House ought, I thought, to take part in the debate'. Furthermore, he criticised the 'difficulty in which I was placed in having to negotiate with a body which was bound to repeat what passed to its constituents in the Council'.

⁷³ PRO MT 45/5 - 19 April 1921. Churchill succeeded - on 2 May 1921 the majority of the Association supported the Bill to pass the second reading stage with the exception of the

Thus, while during the formulation of the 1919 Act the regulatory space was largely insulated from societal forces, interest representatives in parliament were still successful in limiting the scope of the Act. In the course of the 1921 Act, the regulatory space was open to societal actors, mainly the RCA and the FBI, limiting and shaping the scope of policy proposals, albeit not too significantly as initial ambitions were already modest. Societal actors did not define the nature of regulatory reforms as the processes within the government dominated. Rather, governmental action provided the railway companies with a reorganisation which they themselves, due to internal as well as external resistance, could not perform themselves in the pre-First World War period.

Conclusion

The case of the 1919 Ministry of Ways and Communications Bill provides an example of a defeat of sources of paradigm-oriented isomorphism in contrast to proposals based on domain-oriented isomorphism. Although initiatives existed to forge homogeneity of railway policy with the 'policy fields' of active reconstruction policies in labour and housing policy, these proposals were defeated by a different type of policy orientation. Actors, referring to pre-war experience, proposed domain-oriented regulatory design ideas to tackle specific railway-related policy problems, and rejected the application of 'universal' policy recipes. This choice between regulatory design ideas can be explained by the lack of insulation of the political-administrative nexus, which, in course of the passing of the 1919 Act, led to the defeat of the Ministry's reconstruction plans. In the case of the 1921 Act, it was the insulated membership of societal

Scottish railway companies, who at that stage still demanded 'longitudinal grouping', the

actors, in particular the RCA and the FBI, which led to the rejection of any non-domain ideas.

North Eastern Railway Company and a Welsh operator.

Chapter Four

Minimum Insulation and Persistence in Germany

*'[The railways] have been,
according to the German
understanding, administered as a
transport agency and not as [a
case of] a cow doing the milking'*

Alfred von der Leyen¹

One key interest in the literature on policy transfer has been the 'reading across' from international sources. Due to the railways' role in the post-war settlement between Germany and the victorious First World War powers, the reforms of German railway regulation during the early 1920s offer an example of the presence of international actors in a national regulatory space. As in Britain, German railway policy became 'nationalised' after the First World War as the Reich took over responsibility for the railways from the Länder and established a Ministry of Transport. Domestic conflict soon emerged in the quest to combine the traditional role of the railways as a 'servant' to the perceived German 'economic interest' and the need to reduce operating deficits. The requirement to provide resources for reparation payments and the deliberation of an international reparation commission added a non-domestic policy environment to the selection of regulatory instruments.

The following discusses the various regulatory frameworks proposed between 1919 and the passing of the 1924 Act which established the Deutsche Reichsbahn

¹ R5 2047.

Gesellschaft (DRG). Particular attention is paid to the interaction between international demands and domestic actors as well as the impact of design ideas 'prescribed' by international actors. The analysis of the regulatory regime that emerged with the 1924 Act reveals a puzzle: a large extent of domestic domain-orientation persisted despite the openness of the regulatory space to an international agenda with the power to impose a more commercially-oriented regulatory regime. The analysis considers the regulatory design ideas that were debated and discusses whose proposals were influential given the rhetoric of an imposed *Diktat* at the time (Kolb 1999: 114-5). It describes the debate between two regulatory reference points within the German political establishment: one of operational autonomy and one of the railways as an 'economic tool'. The debate, however, was overshadowed by financial crises and reparation demands.

The case of the 1920s reforms has attracted considerable interest. Among contemporaries, various interpretations regarded the establishment of an autonomous railway company as an act of foreign imposition or as a conspiracy by global finance (Heiber 1981: 157). In the legal literature, the case of the 1924 Act has been used as an organisational example for a combination of state ownership and formal autonomy and has been heralded as a 'model' of autonomy, in particular in contrast to the 1951 Bundesbahngesetz. This chapter first discusses the regulatory ideas, both at the domestic and the international levels. Then the features of the regulatory regimes, which were established after 1923, are considered. Finally, the impact of the three institutional factors is examined.

The emergence of regulatory ideas

The regulation of a nationally unified railway operator attracted considerable debate. The following considers intergovernmental debates between the Reich and the Länder, then discusses the debates following the economic downturn in the early 1920s with business interests advocating a 'corporatisation' of the operator and, finally, the international regulatory design ideas brought into the regulatory space by the Reparation Commission.

Establishing a national German railways

Before the First World War, the railways in Germany had been under the authority of the federal states. Prussia, due to the size of its territory and its responsibility for the railways in Hesse and in the annexed territory of Alsace-Lorraine dominated rate-setting and other railway policies.² Nevertheless, the other Länder, especially the larger ones such as Bavaria, guarded their individual authority over their railway systems as a means to promote the local economy and as a source of financial income given the substantial pre-war railway surpluses. While states such as Prussia and Bavaria operated the railways as part of their general administration, other states such as Baden and Hannover had separated the finances of the railway operations from their budgets (see also Appendix 2).

The perception that the previous system of Länder-administered railways would no longer provide financial resources as in the pre-war period and that an end to

² The share of the individual Länder on the overall railway network was: Prussia 64.38 per cent, Bavaria 15.94 per cent, Saxony 6.30 per cent, Württemberg 4.03 per cent, Hesse 2.45 per cent, Mecklenburg 2.20 per cent and Oldenburg 1.27 per cent.

the competition between various regional railway lines would be beneficial emerged towards the end of the First World War. Prussia, with the support of Baden and Württemberg, issued the so-called 'Heidelberg Programme' at a meeting of Länder transport ministers in June 1918 (Sarter and Kittel 1924: 11). It envisaged an intergovernmental unification of the German railways in the areas of finance and operations, while maintaining separate railway administrations. The aim was to achieve unification without transferring the authority for railways to the Reich. These plans were rejected by Bavaria. As a consequence, any further discussion was postponed until after the war.

After 1918, the idea that the railways should be brought under the authority of the Reich gained popularity. The trade unions called for immediate nationalisation.³ The federal cabinet hoped that a unified railway system would increase citizens' loyalty towards the Reich. Furthermore, the railways could be utilised as a job creation tool to prevent social tension after demobilisation. The smaller Länder were also interested in unification as this would weaken Prussia's hegemonic position. The bigger states, such as Prussia and Bavaria, showed less enthusiasm. The Bavarian government demanded in particular the establishment of powerful decentralised railway directorates. In the face of determined Bavarian resistance, the Transport Ministry suggested a possible unification without the Bavarian railways.⁴ The Bavarian government withdrew its opposition once it was realised that the railways could no longer be regarded as a source of income (Ruser 1981: 11-3).

³ BA R 3 I 1035 - 21 March 1919.

⁴ BA R 38 (old) 100 - 22 December 1919.

Articles 89 and 92 of the Weimar constitution called for Reich ownership of a fully unified railway system. The management of the railways was to be organised autonomously and separately from the ministry. The railways were to become an autonomous, commercial undertaking which was to finance its expenditures itself, including debt-repayments. The suggestion that the railways should be organised as a special property (*Sondervermögen*) was rejected in the constitution committee of the national assembly by the Reich Finance Minister who insisted that the operator's accounts should remain a part of the general budget (Sarter 1924: 201). According to Article 171 of the constitution, the unification of the railway systems was to be effected by 1 April 1921.

Given the deterioration of the economy, the discussion about a unification of the railway systems remained a political priority. The railway companies indicated that their financial situations had rapidly worsened. The poor condition of the track and rolling stock affected freight and the transport of foodstuffs. Even a stoppage of non-urban and non-commuter passenger services had to be declared for ten days in November 1919.⁵ As a consequence, the Cabinet decided that the Reich transport minister and the Länder should investigate whether a unification could be effected by 1 April 1920. The Länder, driven by their financial difficulties, consented to an accelerated process of organisational unification. The main discussions focused less on the regulation of the operator, but rather on the regulation of intergovernmental relations, with contested issues including the extent of Reich authority and administrative

⁵ BA R43 I 2111 - 23 November 1919.

decentralisation, the financial compensation of the Länder and other guarantees to the Länder and the need to integrate the various civil servant structures into a unified system. Bavaria, in particular, aimed to protect its policy autonomy and ability to promote the regional economy. It, again, proposed a decentralised structure which would split the railways into six to eight operating companies. These suggestions were rejected by the Reich government and by the smaller Länder which feared that an integration into a Munich-biased administration would be to their economic disadvantage and, more generally, could mean a substantial rationalisation of their railways. The Länder accepted the Act in the Reichsrat on 23 March 1920 after compensation payments and other commitments had been clarified in the Intergovernmental Treaty.⁶ Despite resistance among industrial interests in the Rhine-Ruhr area, the newly established Ministry of Transport finally took over control of a nationalised railway system on 5 May 1920. The Ministry of Transport was structured along the lines of its Prussian predecessors, the Ministry of Public Works, with the administration of the railways being integrated into the ministry.

Towards increased delegation

⁶ Among these commitments was the agreement that the Reich would only initiate major alterations to the Reichsbahn after the consent of the Reichsrat. The Reich Cabinet criticised the financial settlement as an immense financial burden for the Reich. However, it was argued that no other outcome would have obtained the support of the Länder. Reich transport minister Bell argued that the setting up of the new ministry had been 'messy' as the Länder, used to relying on the railways as a second source of income alongside direct taxation, had required rapid unification due to economic downturn, problems in financing the railway deficit, an unwillingness to invest and worker unrest. The Länder's lack of financial resources was further facilitated by the transfer of the competence for direct taxation to the Reich level (R 43 I 1044 - 4 March 1920).

During the economic, financial and political turmoil of the early years of the Weimar Republic (see Heiber 1981: 89-151), the regulatory regime of the railways remained contested. Societal actors in particular argued that more 'autonomy' on the lines of a 'corporatist' undertaking should be established to safeguard the traditional (and undisputed) 'commonweal' functions of the railways.

Due to the government's difficulties in raising sufficient resources for reparation payments, it asked industrial circles to provide the government with credit. The industrialist Hugo Stinnes responded in 1921 by offering the government monetary support in exchange for a sale of the state-railways to private industry, while the rights of civil servants and the supervisory authority of the ministry were to be preserved. A similar demand was made by a commission organised by the Association of German Industry, the Reichsverband der Deutschen Industrie (RDI).⁷ It proposed transferring the railway undertaking to a 'commonweal' joint stock company (*gemeinwirtschaftliches Unternehmen*) which would be owned jointly by agricultural, commercial and banking interests, industry and the craft sector as well as by trade unions and municipalities. The highest priority was to continue to serve the German economic interest before a profit-maximising motive. This would be guaranteed by the corporatist structure, while private ownership would eliminate public sector inefficiencies and 'red tape'. Furthermore, the difficulties inherent in regulating a franchised company would be avoided. The ministry was to remain responsible for the safety of the railways as well as for co-ordinating Germany's trade and transport policies.

⁷ BA R 43 I 1048 - 3 April 1922.

Similar proposals were made by trade unions. The 'christian-national' railway union, the '*Gewerkschaft deutscher Eisenbahner und Staatsbediensteter*' called for a separation of Reich ownership and a newly established company responsible for railway management and operations.⁸ The 'Deutsche Gewerkschaftsbund' trade union federation opposed any transfer to 'industrial capital', but suggested that the Reichsbahn would benefit from de-bureaucratisation, de-politicisation and autonomy by becoming a 'commonweal undertaking', including both capital and labour under the part ownership of the Reich (Roth 1921).⁹

While opposing 'privatisation', proponents of a continuation of Reich ownership called for increased commercialisation. Such views were presented in the majority report of the so-called 'Sozialisierungskommission' (socialisation committee), which had been specifically requested to discuss the future status of the Reichsbahn (Sozialisierungskommission 1921, *Berliner Tageblatt*, 19 December 1921).¹⁰ The majority report argued that the Reichsbahn was essential for trade, economic development and German unity. A privately owned

⁸ An undated ministerial document distinguishes between the 'Allgemeine Eisenbahnverband (democratic), the 'Gewerkschaft deutscher Eisenbahner und Staatsbediensteter' (christian-national), the 'Deutsche Eisenbahnverband' (split, with a radical left wing), the 'Eisenbahn Union' (operating mainly in the south-west and close to the left-wing 'independent social democrats', the USPD) and the 'Vereinigung Deutscher Verkehrsarbeiter' (communist) (R 43 I 1035).

⁹ BA R 43 I 1048 - 5 December 1921. Roth (1921).

¹⁰ The Commission was formed by the Economics ministry but consulted mainly officials from the Transport ministry, the railway industry, the civil service and from the railway unions.

Reichsbahn would not operate in the public interest, would reduce its construction efforts and would be open to exploitation by private interests, and would therefore not be 'de-politicised' at all. It was concluded that the Reichsbahn could be placed on a more viable basis by introducing more cost-consciousness, by establishing a commercial accounting system and by creating an independent managing directorate.¹¹

Various railway experts responded to these proposals, suggesting a similar range of positions. The former Prussian railway minister, von Breitenbach, argued that the RDI study ignored the advantages of an increased commercial orientation. Furthermore, cost-cutting measures could be implemented with the Reichsbahn remaining in state ownership. Furthermore, while 'de-politicisation' was laudable, in particular with regard to the Reichstag, too much independence would lead to capture by industry interests (von Breitenbach 1922). A more critical view was presented by the former Prussian railway official, Alfred von der Leyen, who stated that the RDI's proposals would do little else than immediately benefit 'big capital' (von der Leyen 1922). The main problems, von der Leyen claimed, were attributable to war damage, reparations and employment measures such as the eight-hour day and employment legislation following demobilisation.¹² In contrast, the railway economist Otto Blum argued that most German publications on railways showed a mistaken bias in favour of

¹¹ In a minority report, the representatives of the christian-national union repeated their demand for the creation of a 'commonweal' joint stock company. In contrast, the later chairman of the administrative board, von Siemens, called in another report for further studies before any organisational re-arrangement was undertaken.

state-owned railways. He maintained that the Transport Ministry underestimated the seriousness of the situation, suggesting that a joint stock company should be established in which a 30 per cent share should be owned by the Reich and up to 50 per cent by 'private capital'. Blum argued that evidence suggested that private companies would, while minimising bureaucratic slack, also act in the interest of the German nation, citing the examples of the German shipping companies 'Hamburg-Amerika Linie' and the 'Norddeutsche Lloyd' (Blum 1922).

The Reich transport ministry was fully opposed to the 'socialisation' proposals made by the RDI. It argued that the poor financial performance was due to war-time wear and tear, technical faults, urgent repair needs and, because of the political priority given to the avoidance of industrial unrest, a lag in rate increases.¹³ Nevertheless, the Ministry claimed that the Reichsbahn's position was improving: services had increased in quantity and quality, costs had been cut and staff numbers reduced. Rates had been increased since the autumn of 1921, once it had been realised that the government could no longer finance the railways' deficits.¹⁴ Privatisation would be an ineffective tool to improve performance: wage costs could not be brought down due to legal guarantees given to civil servants. Despite offering potential benefits in terms of increased flexibility, a privatised Reichsbahn would not be in a position to achieve

¹² The German railways had to deliver 5,000 locomotives, 150,000 freight wagons and 24,000 passenger carriages as reparation payments.

¹³ BA R 43 I 1049 - 23 November 1921.

'cheaper' deals with its suppliers. The solution was to establish the Reichsbahn as a special property. Costs could be cut by introducing private industry elements and by changing the civil service structure. The Ministry claimed that entrepreneurial spirit rather than the legal form would allow a company to be competitive. Furthermore, only as a state-owned railway would it be possible to accommodate the various interests of economic life and to 'make sacrifices'.¹⁵ The Ministry was opposed to a separation of operations and control, claiming that this would be rejected by the Länder (Fromm 1986: 196).

In sum, the debate concerning the selection of appropriate regulatory instruments, in particular with regard to the extent of operational autonomy, was less concerned with conceptual ideas in terms of either domain- or paradigm orientation, because there was a domain-oriented consensus that the railways had to remain a 'servant' and 'economic tool' of political and economic interests. Instead, the debate focused on the intergovernmental allocation of powers.

At the same time, the Transport Ministry was in the process of drafting versions of the new railway finance law, the *Reichsbahnfinanzgesetz*, in order to clarify and evolve the provisions of the constitution.¹⁶ The main aim was to avert any foreign influence on the Reichsbahn, while introducing some private company

¹⁴ BA R 43 I 1067 - 6 December 1922. Groener argued that the rate increases did not reflect the price increases for coal and iron. Much of the better financial position during 1922 was due to cost reduction and rationalisation.

¹⁵ BA R 43 I 1067 - November 1921.

¹⁶ BA R 43 I 1046 - December 1921.

law arrangements. A 'privatisation' or sale of the Reichsbahn was therefore rejected both by the ministry and the cabinet.¹⁷ The first draft of the railway finance law stated that the Reichsbahn was to be established as a special property of the Reich (*Sondervermögen des Reiches*) with the Minister of Transport both supervising the operations of the railways and also heading the administration of the undertaking. The minister's role was to be supported by an administrative council consisting of six members of the Reichstag, the Reichsrat, the Economic Council of the Reich and staff representatives respectively as well as twelve economic and transport experts.

During the period of hyper-inflation, the government imposed strict expenditure controls on all its departments and consequently also on the Reichsbahn. On 15 November 1923, the Finance Minister stopped all financial support to the Reichsbahn and declared it fully autonomous. The Transport Minister initially called for a 'radical' reform of the regulatory framework: the railways should be given a very strong commercial orientation, be debt-free and receive an initial lump-sum payment. The Reichsbahn was to become an independent undertaking with legal personality, independent of the administration of the Reich and was to receive no subsidies.¹⁸

There was a lack of debate on conceptual ideas with regard to railways with the main discussions concerning the extent of delegation either to the federal level (from the Länder perspective) or to the operational railway level (from the

¹⁷ BA R 43 I 1046 - 18 November 1921, 4 December 1921.

¹⁸ BA R 43 I 1048 - 9 November 1923.

government's view). While 'reading-across' took place, in particular with the proposals to form a 'special property' borrowing from the legal arrangements governing German limited companies, this was not used to legitimise reform proposals. Instead, the legitimate source for proposals of the future regulatory regime was domain-oriented - to search for a form which would facilitate a reduction of the financial burden and a continuation of the role of the railways as a promoter of economic interests.

The international dimension

A different policy environment was introduced by international actors. According to §248 of the Versailles Treaty all publicly owned property was liable for reparation payments. As the railways had been commercially successful in the pre-war period, they were regarded as a prime resource for providing payments. The possibility of utilising the railways for reparation payments was first raised by the German government under Chancellor Cuno in a memorandum to the French prime minister.¹⁹ It was suggested that the Reichsbahn's status should be changed into a 'special property', which would issue bonds amounting to 10 million Goldmarks, on which an interest rate of 5 per cent was to be paid from 1 July 1927, leading to an annual payment of 500 million Goldmarks. Later proposals to the Dawes Commission, set up to settle

¹⁹ Memorandum, 7 June 1923 (in Sarter and Kittel 1924: 16-7). The memorandum was addressed to the governments of the USA, the UK, Belgium, Italy and Japan. It received no response. The Reichsbahn's staff had previously consented to the proposal that the railways were to be used for the provision of reparation payments as long as it did not affect the Reich's role as owner and manager (BA R 43 I 1048 - 3 June 1923).

the reparation payment issue, proposed the creation of a joint stock company.²⁰ As the government anticipated opposition to such proposals from the Länder, it consequently moderated its offer, proposing the creation of a company which would obtain the concession to operate the Reich's railway property. Furthermore, it demanded that all major appointments had to be made by the Reich President and that the discretion for intervention of international actors should be minimised.²¹

The Dawes Commission's main initial demand was the payment of 11bn Goldmarks as war reparations to the victorious countries. It was argued that the Reichsbahn could be profitable with fewer staff and lower capital expenditure. The regulatory regime was to be altered by changing the organisational status of the railways into that of a commercial operator, establishing an administrative board consisting of 18 members and by controlling the undertaking by a non-German commissioner (Sarter and Kittel 1924: 18).²² A specialist committee for the railways was set up, consisting of two railway experts, William Acworth and Gaston Lerverve. Their report argued that the German government was to a large extent responsible for the poor state of the Reichsbahn's finances. By employing too many staff and by investing too extensively in infrastructure and stations,

²⁰ BA R 43 I 1036 (no date).

²¹ BA R 43 I 1049 - 20 May 1924.

²² The Dawes Commission's report argued that nine board members should be appointed by the German government and, if necessary, shareholders, and nine members by the countries receiving reparations, of whom, however, five should be of German nationality. Both the president of the administrative board as well as the Director General were also to be German.

the finances had been badly affected.²³ Given a status as a joint stock company, the Reichsbahn would, in contrast, be in a position to be profitable. If the railways were run as a commercial operation, 'therefore with the strong commitment, on the one hand, to set rates to obtain maximum income and, on the other hand, to reduce expenditures to a minimum', then the reparation payment obligations could be fulfilled.²⁴ However, Acworth and Leverage claimed that 'we do not believe that any German administration will have the necessary strength to battle successfully against the traditional predisposition, unless there is a permanent pressure exerted by an expert, established and maintained by the allies in their own interest in order to supervise the management with regard to rates and expenditures'.²⁵

There were therefore two competing policy environments which were used to propose alterations to the regulatory regime. Domestic-domain arguments aimed to maintain a continuation of the railways' original function in a time of economic and political adversity, despite disagreement on matters of administrative detail and the allocation of responsibilities. The proposals as

²³ Following demobilisation legislation, the Reichsbahn was required to take on demobilised soldiers to avoid unemployment and social unrest. As a consequence, staff figures at the Reichsbahn rose from 740,500 to 1,121,745 in 1919 despite territorial losses. Rates were not increased to the extent of inflation. In 1920, the railways reported a deficit of 15.6bn marks, while in 1921 this deficit was reduced to 10.8bn marks.

²⁴ BA R 5 2045 - 26 March 1924; 'Regelungen der Eisenbahnfrage im Bericht des ersten Sachverständigenkomitees'. The transport ministry criticised this accusation as unfounded, claiming that since the Reichsbahn had been made autonomous in November 1923 the operator had prioritised the promotion of its finances rather than the promotion of the German economy (BA R 43 I 1049 - no date).

²⁵ BA R 5 2045 - 26 March 1924.

submitted by Acworth and Leverve were condemned as being ignorant of the German understanding of the appropriate role of a transport undertaking. Von der Leyen claimed that the 'experts cannot understand such a commonweal rate-setting policy, because they are rooted in a private industry policy'.²⁶ The international actors added an international domain-orientation to the process, aiming to induce isomorphic processes towards a more commercial, business-type form of railway regulation.

Organisational Structure

The debate concerning the organisational structure of the operator focused on the legal status of the operator and, as a consequence, the degree of delegation of authority. The German government's key imperative was to minimise the exposure to the financial impact of the railways' deficits on the budget, while also minimising the organisational distance between state and operator in order to prevent not only 'non-German' participation but also to safeguard the continuation of a transport policy aimed at facilitating regional and sectoral economic development. In contrast, actors from the international policy environment requested an enhanced commercialisation of the Reichsbahn as safeguard against political involvement in the railway administration.

The 1924 law established the 'Deutsche Reichsbahn Gesellschaft' (DRG) as monopoly operator. It fully separated regulatory control and operational-managerial functions. The Reichsbahn remained in the ownership of the Reich and did not become the property of the new undertaking. The railway property

²⁶ BA R5 2047 - Alfred von der Leyen 'Das Schicksal der deutschen Reichsbahn', cutting

was administered by the DRG within the constraints of the regulatory regime. The DRG was set up as a special body of public law with some private law applications. The administrative board supervised the management of the company and decided on all major issues. Half of the 18 members were representatives of the German government, four of these seats were to be relinquished should the sale of shares become necessary. The other half was reserved for representatives of the countries to whom reparation payments were being made. Due to William Acworth's insistence, the 'traditional' privileges of civil servants were weakened and performance related pay was introduced.²⁷ These changes meant that a new category of civil servant had to be created by overruling Article 129 of the Weimar constitution which stated that civil servants were not to be forced to change employer or face alterations to their guaranteed welfare provisions. The new railway law also conflicted with other constitutional provisions: while Article 89 called for the administration of the railways by the Reich, the Reich would now mainly act in a regulatory function despite having representatives on the administrative board. Article 92, which demanded the inclusion of the railways' expenditure in the overall budgetary framework, was also overruled by establishing the railway operator as a special property.

The organisational structure represented the final stage of an evolutionary development of regulatory proposals with regard to the appropriate organisational distance between the operator and the state. Drafts of the 1922 Railway Finance Law proposed to establish the Railway as a 'special property',

from *Weltwirtschaftliche Zeitung*.

separating the budget of the railways from that of the government and establishing the Reichsbahn as an independent company. The existing functions of the Reichstag and Reichsrat were to be transferred to a administrative board consisting of representatives from business and other interest groups. However, as a separation of regulatory and operating functions was not envisaged, the transport minister acted in a dual function. Following the occupation of the Ruhr industrial area by French and Belgian troops, the draft law, then in its sixth draft, was taken from the political agenda.²⁸

In November 1923, the Finance Minister decided to end all financial support to the railways in order to reduce public expenditure. As a consequence, the Transport Minister argued that the Reichsbahn had to become an independent company with a commercial law framework that would suit its financial status. This would necessitate a split of the Reichsbahn from the Reich administration and an end to the special privileges for Reichsbahn civil servants. Furthermore, the Reichsbahn was to be debt-free and be provided with a lump-sum payment as initial support from the government.²⁹ Opposition was expressed by the Interior Minister who argued that the operational autonomy should not extend too far, while the Minister for Food and Agriculture emphasised the need to continue government influence on rate-setting.

²⁷ This could amount to five per cent of the overall wage (§26(3) Reichsbahngesetz).

²⁸ Other ministries had also voiced their objections. The Economics Minister successfully initiated the alteration of the provisions that any surplus profit should be used for rate reductions, enabling the government to utilise surpluses for general public expenditure. In contrast, the Post Ministry was unsuccessful in his attempt to veto the charging of rates at the commercial level for services provided for other government-owned undertakings.

²⁹ BA R 43 I 1046 - 9 November 1923.

The consequent directive (Verordnung) established the Reichsbahn as an independent commercial undertaking with its own legal personality, although not as a special property. It was argued that the first prerequisite for obtaining maximum competitiveness was the creation of an independent company operating according to commercial principles. The Reichsbahn remained in Reich ownership and administration. The status of the minister continued unaltered as both main supervisor and head of railway administration as the Directive aimed merely to demarcate the borders between operational and sovereign tasks (*'hoheitliche Aufgaben'*) and to enable the Reichsbahn to take on loans. The minister replaced both Reichstag and Reichsrat as expenditure controlling authority. Due to the constitutional constraints of Article 92 which demanded an integration of the Reichsbahn's finances into the Reich's budget and a lack of parliamentary and cabinet support for a constitutional amendment, a formal separation of regulatory and operational functions was not undertaken. Any further moves towards a new Reichsbahn law were postponed due to the occupation of the Rhine-Ruhr area by French and Belgian forces and the pending decisions in the reparation committee.³⁰

The differences between the international and national policy environments was highlighted in the publication of the expert report for the Dawes Commission. The Acworth and Leverve report, besides the restoration of German economic unity (i.e. the removal of the French-Belgian control over the Rhine-Ruhr area including the railway operations), a change in the legal status of the

³⁰ BA R 43 I 1049 - 2 May 1924.

Reichsbahn.³¹ Although the government had, in their view, already moved in the appropriate direction by starting to separate operational areas from regulatory control, by reducing the investment programme and by increasing rates, the German railways' main operational priority had remained the promotion of German economic interests rather than maximising obtainable profits. Nevertheless, Acworth and Lerverve conceded to the German demands that the majority of the administrative board should be German.

The German government decided that the main priority was to avoid any non-national influence on rate-setting. The detail of the organisational structure was regarded as a secondary issue, although the possibility of a dominance of non-German actors was to be averted. The government demanded that any 'privatisation' of the operator should be restricted to Reichsbahn operations and should not affect the Reich's ownership status over the railways. The Reich President should consent to the appointment of the chairman as well as of the members of the administrative board. No general meetings were to be held and all members of the administrative board who represented preferential shareholder interests should be German.³² This position was successfully maintained during the deliberations of the Organisation Committee, which was given the task of formulating the new law and consisted of Acworth, Lerverve and two German officials appointed by the transport ministry, who were,

³¹ R 5 2045 - 17 April 1924. The following reparation payments were set: 1924-5: 330 million Goldmarks, 1925-6: 465 million Goldmarks, 1927-8 and subsequent years: 660 million Goldmarks.

³² BA R 43 I 1049 - 12 May 1924.

however, leading officials in the finance ministry. The committee concluded that it 'did not seem possible to refuse a government such control as belongs to a sovereign power'.³³ The Reich retained the ownership of the Reichsbahn. It also secured a permanent German majority on the administrative council, while the president of the administrative council was also to be German. Moreover, despite becoming a private law undertaking operating in accordance with business principles, the operator was, by statute, to pay due regard to the interests of the German economy.

The DRG's organisational structure shows a continuation of the domestic domain-oriented character. Given the presence of international actors, the German government established an operator that in its constitution and operational management was similar to a commercial undertaking. At the same time, in many respects, the operator retained 'public' aspects and duties, in particular the obligation to safeguard the interest of the German economy. The special property law status which was introduced after previous domestic resistance might be regarded as a particular impact of the international policy environment, but domestic developments had, in any case, already moved towards that organisational status, despite considerable domestic (federal) opposition.

³³ BA R43 I 1049 - 24 July 1924. Organisation Committee Report 1924: 4. The report stresses that the Organisation Committee had used the previous expert report by Acworth and Lerverve as a basis. However, it was stressed that 'we have found it

Allocation of regulatory authority

The following section considers the regulatory functions of the minister and the formal autonomy of the operator. Furthermore, it assesses the role of the so-called International Commissioner. It is argued that while the 1924 Law established a substantial extent of formal operational independence, the government resorted to less direct means to 'persuade' the DRG to follow its policy intentions. First, the legal relationship between government and operator is analysed, then the creation of the position of the international commissioner is considered and, finally, the 'regulatory practice' is assessed.

As the DRG was established as an independent undertaking with its own legal personality, no legal links existed between the company and the Reichstag and Reichsrat. Neither the administrative board nor the Director-General of the DRG were accountable to parliament. The participation of the minister or other representatives of the Reich or the Länder in meetings of the administrative board was not envisaged in the 1924 Act. Previously, the reduction of the minister's role towards a regulatory function had been rejected following claims that such a separation would lead to 'permanent friction' between political and managerial preferences and even the argument that 'if a government is unable to manage a railway, it cannot be expected to be able to regulate a railway'.³⁴

According to the 1924 law, the transport ministry was responsible for so-called sovereign (*'hoheitliche'*) tasks. These included the supervision and enforcement

necessary in not a few cases to apply the principle which is sometimes described as interpretation' (Organisation Committee 1924: 2).

³⁴ BA R 43 I 1050 - 1 February 1926.

of the railways' technical and safety regulations. It licensed all major alterations and modifications and had to give its consent to any acquisitions by the DRG which were not part of the core railway business. The ministry also had the right to require information about the financial position of the DRG as long as this would not cause substantial costs.³⁵ However, this organisational separation of managerial and operational from the ministerial-regulatory functions did not lead to a 'physical separation': one part of the ministry continued as central administration of the DRG, whereas two units within the ministry remained as official regulatory and supervisory groups, responsible for administration and rates as well as technical aspects and safety (Ruser 1981: 131).

The report by Acworth and Leverve emphasised especially the need to secure the independence of the company and its commercial operation. To safeguard the independence of the Reichsbahn against the 'statist predisposition' of German civil servants, the creation of an independent Commissioner was proposed. An internationally recognised railway expert was to be appointed as Commissioner by the countries receiving reparation payments.³⁶ Otherwise the railways would remain an economic tool to be used to support German industry - they diagnosed that rates had continued to be used as 'weapons in the hands of the traders'.³⁷ Acworth and Leverve suggested that the International Commissioner should be able to sell shares of the DRG immediately once reparation payments were under threat. Powers were to be provided that the

³⁵ §32 Reichsbahngesetz.

³⁶ BA R 43 I 1036 - 13 March 1924.

³⁷ BA R 5 2045 - 17 April 1924. 'Allgemeiner Bericht über die deutschen Eisenbahnen von Sir William Acworth und Herrn Leverve', 26 March 1924.

Commissioner should, if necessary, be able to regulate the German railways and, as a last resort, to take over the management of the Reichsbahn. Should there be no surpluses and therefore no possibility of extracting reparation payments, the Commissioner was enabled to set directives, to reduce expenditure and to increase rates without any consultation. In terms of organisational resources, the Commissioner was to be given staff and information about all major decisions.

The proposed powers of the International Commissioner were restricted due to the concerns of the German government after discussions in the Organisation Committee (Organisation Committee 1924: 8). The German government objected particularly to the suggestion that the Commissioner should be involved even before any delay in reparation payments had occurred. The Commissioner was given the right to participate, but not to vote in meetings of the administrative board and its committees. Full access to all information was also granted. In cases where the Commissioner felt that reparation payments were endangered, the Commissioner had the legal authority, once consultation had failed, to restrict expenditures, to increase rates, to replace the Director-General, and, as a last resort, to take over the business himself. In addition, in cases where reparation payments were affected or where disagreements between countries receiving reparations and the German government emerged, an 'international arbitrator' was to be appointed on a case-by-case basis by the President of the International Court of Justice in The Hague. Conflicts between the Reichsbahn and the national government were to be resolved by a special court-like railway tribunal.

Thus, in a formal perspective, the ability of the ministry to interfere with the operations of the DRG had been limited. Nevertheless, the reduction (compared to the original proposals in the Lerverve/Acworth report) of the International Commissioner's involvement and competencies (Lerverve was appointed to the post), allowed for a substantial extent of discretion in terms of government-operator relations.

The relationship between operator and government was tense. A former transport ministry official and then member of the DRG's administrative board, Stieler, argued that, because of information asymmetries, the relationship between ministry and the operator was 'unsatisfactory'. This had led to a situation where the International Commissioner, who had full access to operational information, showed greater trust in the DRG than the government. He called for the participation of ministry officials in negotiations of the administrative board.³⁸ After the appointment of a new Director-General, Dorpmüller, without government consent in 1926 and a tribunal ruling in favour of the Reichsbahn against the government, the Chancellor took the opportunity to criticise the chairman of the administrative council, von Siemens, on the grounds that Dorpmüller's appointment had gone ahead without the consent of the Reichpresident. The government would only officially agree to the appointment once it had been established that the DRG would regard an appeal to the tribunal as a last resort. Furthermore, the transport minister should be provided with all the information on staff issues, on policy decisions and on rate setting while the rationalisation programme should only proceed with the

greatest caution.³⁹ The transport minister or his representatives should also gain access to the meetings of the administrative council. The DRG argued that its actions were pursued in order to prevent the worst 'evil': non-German influence on railway operations. In contrast, the Transport Minister criticised the DRG for not having shown sufficient consideration for the needs of the German economy, claiming that it was behaving too much in the spirit of the 1924 Act. It was also argued that despite the legal framework, the DRG should, in particular regarding appeals to the railway tribunal, subordinate itself to the state 'organism' and show restraint.

Thus, despite the legal provisions establishing a special railways tribunal for conflicts between government and operator to emphasise the full separation of the operator from political interference as well as evidence of 'commercial discretion' exercised by the DRG against the wish of the government, this separation was informally abandoned over time. The legal literature has often emphasised the formal separation and reduction of the ministerial role towards a regulatory role, as a successful example of a depoliticised public undertaking. The evidence presented here suggests substantial policy cumulation and continuation, especially with regard to policy practice, despite formal re-arrangements.

³⁸ BA R 43 I 1050 - 1 February 1926. This had been previously vetoed by the administrative board of the DRG.

³⁹ BA R 43 I 1050 - 24 June 1926, 2 July 1926.

Non-commercial objectives

The authority to determine rates and charges was regarded as one of the key tools of government. For the German government the main priority was to avoid any non-German influence on rate-setting while the legal status was merely a secondary issue. Similarly, one of the Länder's key demands during the intergovernmental negotiations was the inclusion of a requirement that the interests of all regions in Germany should be balanced, both by setting charges which facilitated transport into economically backward regions and by spreading procurement orders across the country. This section considers the successful attempts of the federal government to maintain its ability to use the DRG as a policy tool in terms of rate-setting and procurement against the demands of international actors.

Following the establishment of the DRG, the railway operator was in formal terms fully autonomous from public finances and also from any control by national auditors. Nevertheless, with regard to rates, the Reich maintained wide-ranging possibilities to propose and veto rate changes in addition to competencies with regard to timetabling and the planning and construction of new lines.⁴⁰ Despite the commercial orientation, 'imposed' by the Organisation Committee, the German government was granted the statutory right that the DRG was to pay due regard to the interests of the overall German economy. The government could therefore request reductions in passenger and freight charges which were regarded as being 'in the interest' of the German economy as long as these did not infringe on the Reichsbahn's ability to deliver its reparation

⁴⁰ §33 Reichsbahngesetz.

payments. The government was also provided with the authority to enforce the operation and establishment of particular services, being nevertheless under the obligation to compensate the operator should these demands negatively impact on the Reichsbahn's ability to service its reparation payments. At the same time, the DRG operated under the explicit objective to maintain and improve its assets according to the 'state of the art'. Financial assistance would only be granted in cases where politically demanded network extensions were loss-making (Ruser 1981: 149).

The rate-setting policy in the immediate post-war period provides an indication of the continuing role of the railways as a supposed facilitator for the growth of industry and also highlights the differences between the national and international policy environments. While freight charges and third-class passenger rates had been increased by 5.9 and 4.8 index points respectively up to April 1920 (1 = 1913/4), industrial prices had increased by 15.7, food prices by 12.3 and civil servant salaries by 6.8 index points.⁴¹ Exceptional rates to support the economic integration of economically backward regions and special sectors such as coal, food and fertilisers were continued.⁴² Despite pressures caused by the devaluation of the currency, by the constitutional provision that expenses

⁴¹ BA R 43 I 1067 - 'Tarifpolitik der deutschen Reichsbahn', Berlin, Verlag Georg von Stilke, 1922. In the 1923 edition, similar claims were made that rates had been kept as low as possible while attempts had been made to maintain a 'financial equilibrium' by reducing expenditures and rationalisation measures.

⁴² The case of fertilisers provides one example of the actor constellation at the time. The Transport and Finance Ministers resisted pressures from the Economics and the Food and Agriculture ministers as well as from the Chancellor. Following representations by the

should be covered by income and by the demands of the Versailles Treaty, the ministry committed itself to continue a policy of 'rate-setting in the interest of the German economy'. Further pressures to reduce rates, expressed primarily by the Economics Ministry, were, nevertheless, rejected by both the Finance and the Transport Ministers. The Finance Ministry argued that, given the scale of the budgetary burden, the main priority could no longer be to hold domestic prices down by low transport charges, but to reduce the deficit.⁴³ Similarly, Transport Minister Oeser argued that had passenger rates risen to the same extent as freight charges, the latter could be reduced by 20 per cent. Moreover, had he and the Finance Minister submitted to the pressure exerted by the Economics Ministry, business and agriculture and the Länder and discontinued the policy of 'eliminating rate exemptions', the Reichsbahn would have been completely ruined financially while the budget of the Reich would have been overburdened.⁴⁴ However, once, the economic and financial situation had stabilised, the cabinet agreed that all freight rates should be reduced by an average of 8 per cent from January 1924.⁴⁵

The issue of rate-setting was specifically addressed by the Dawes Commission and the experts' report. Acworth and Lerverve highlighted the extensive

industry to the Chancellor, the Cabinet decided on a reduction on fertiliser rates on 17 October 1923 (BA R 43 I 1046 - 17 October 1923).

⁴³ BA R 43 I 1046 - 12 July 1923.

⁴⁴ BA R 43 I 1046 - 23 July 1923.

⁴⁵ BA R 43 I 1046 - 12 July 1923.

subsidisation by the railways of transport services.⁴⁶ They suggested that an international arbitrator should be created to guard the commercial orientation of the operator against the interventionist tendencies of German civil servants. This proposal was rejected by the German government, claiming that the international arbitrator's role should be limited to disputes between the government and the states receiving reparation payments. The Organisation Committee, consisting of Lerve and Acworth and two German government officials, agreed that an international arbitrator provided with competencies as originally proposed by Acworth and Lerve would be 'not suitable for everyday use' (Organisation Committee 1924: 4). Therefore, in cases of lack of agreement between operator and government, the issue was to be settled by a special German tribunal.⁴⁷

The DRG's main operational priority was, however, to deliver reparation payments. It was therefore able, against protests from business and the Cabinet, to increase rates and to close down railway workshops, arguing that otherwise funds to meet the reparation payments would not be obtainable. Motivated by protests from Länder governments, Krone, the Reich transport minister, criticised the DRG for its behaviour, pointing out that in other areas, such as executive pay and expenditures for representative buildings, the DRG would not

⁴⁶ A transport ministry memorandum notes the German suspicion that behind Acworth's proposals lay the interests of English industry, using the imposition of higher railway rates as a hidden import duty against German goods (BA R 43 I 1036 - 9 March 1924).

⁴⁷ In 1928, the tribunal sided with the DRG against the government in favour of rate increases.

act with such frugality.⁴⁸ Nevertheless, the continuation of the statutory obligation that the DRG was to take the interest of the German economy into consideration indicated the rejection of international domain-orientated sources of isomorphism. As a consequence, this meant a rejection of minimising government discretion over a policy tool which was regarded as having a substantial impact on the future development of the economy.

The impact of institutional factors

The analysis of the regulatory regime of the DRG and its origins suggests a dominance of domestic and domain-oriented sources, despite the presence and influence of international domain-based experts. The German proposals to manage its railways as a 'special property' were made in order to find a solution which would maintain the 'economic tool' function of the railway operator while increasing organisational autonomy as means to reduce expenditures. There was little evidence that other policy domains, either nationally or internationally, were considered.⁴⁹

⁴⁸ BA R 43 I 1050 - 19 January 1926. In general, however, the rate structure was not changed to a large extent. Reduced rates and exceptional rates for freight developed along previous patterns (Sarter and Kittel 1931: 303).

⁴⁹ In 1924, the reform of the postal and telegraph services led to a direct 'reading across' from the German railway finance directive (*Archiv für Eisenbahnwesen* 1924: 413-24). Given similar circumstances - the intention to minimise the financial liability of the state - this transfer represented a case of administrative convenience rather than the application of a paradigm-type policy recipe.

Insulation of the regulatory space from coercive pressures

In terms of 'insulation', the example of the 1920s regulatory reform in Germany provides an ideal case for 'non-insulation', given Germany's status as a defeated power, obliged to make reparation payments with the status of the railways being decided in intergovernmental negotiations during a peace conference. Nevertheless, an imposition of international domain-oriented proposals, delivered by two railway experts, did not take place. Instead, regulatory reforms were domestic-domain oriented, isomorphic to the extent that all proposals were legitimised with reference to the traditional 'commonweal' and 'economic tool' function of the railways. Furthermore, the impact of international coercive pressures was limited as the proposals for reform were moving in a similar direction at the domestic level.

The interest in imposing a stringent settlement on the German government was not shared by all allied states. In particular, the British government regarded the settlement of the Versailles Treaty as potentially dangerous.⁵⁰ Lloyd George was urged not to sign a treaty which could potentially weaken Germany's economic, financial and, most importantly, political stability. Otherwise, military conflict was likely to re-occur. Therefore, the British government, like Acworth and Leverve in their report, did not support the occupation of the Rhine-Ruhr area by French and Belgian troops. Furthermore, the British government also reacted with astonishment to the French reconstruction efforts where a large part of public spending was invested in military facilities. To maintain a 'balance of power', the British government therefore attempted to maintain Germany as a

⁵⁰ HoL RO F/45/9/21 – 9 November 1918.

necessary counterbalance to France. The organisation and regulation of the railways were one part of this constellation. It resulted in a regulatory regime which maximised the discretion of the German actors who merely had to provide reparation payments in order to conduct their business without international involvement.

The domain-orientation of the proposals and final regime was further facilitated by the appointment of two railway experts to report on the German railways. While coming from a different, more commercial background, they showed commitment to maintaining the German railways and to paying due regard to existing laws.⁵¹ Furthermore, as noted in the previous chapter, William Acworth himself, although in principle opposed to state-owned railways, had accepted that even in Britain a nationalisation of the railway system had become inevitable.

As argued in chapter two, coercive pressures can also be exerted in 'indirect' ways, in that experiences are used to legitimise or develop policy instruments. Although the German government was to a considerable extent aware of the reforms in other European countries (and in the United States), this was used mainly to legitimise own proposals. For example, the London embassy reported that the British 1921 Railways Act signalled a tendency towards nationalisation.⁵² Similarly, a transport ministry official in a discussion on the advantages and disadvantages of 'privatisation' pointed to European evidence

⁵¹ Arguably, this understanding was facilitated by increasing domain-specific interaction in organisations such as the *Union Internationale des Chemins de fer* (UIC).

and argued that there was a tendency towards increasing state control, with the British 1921 Railway Act representing 'a preparation for the future nationalisation'.⁵³ Thus, the existence of an international domain environment was utilised in order to legitimise the ministry's own unwillingness to pursue options which were declared as dysfunctional or used to support positions developed in the domestic context. Nevertheless, as the dominance of the finance ministry vis-à-vis the transport ministry shows (see below), the international discussions enhanced the position of those domestic actors who advocated greater operational autonomy for the Reichsbahn.

Therefore, despite a minimum of insulation of the regulatory space from coercive pressures, the impact of these pressures was limited. Notwithstanding the establishment of a regulatory regime that increased the formal independence of the operator, this reflected more the position of domestic actors than an imposition of international experts or governments.

Insulation of the political-administrative nexus in the regulatory space

In spite of changes in the regulatory regime, the impact of the war and frequent changes in ministers and governments, with seven different governments from 1919 to 1924, there was little change in terms of officials, not only in the Ministry of Transport, but also in other departments. This continuation facilitated 'bounded innovation' (Weir 1989). The emphasis on increasing the organisational distance between state and operator by proposing a joint stock company

⁵² BA R 43 I 1048 (no date).

⁵³ BA R 3 I 1049 - 7/8 October 1921.

originated from both the finance and the foreign ministries rather than the transport ministry. In fact, the two finance ministry officials conducting the negotiations in the organisation committee, Bergmann and Fischer, criticised the transport ministry's resistance to considering organisational separation, claiming that such resistance would lead to a 'foreign franchise'.⁵⁴ However, the dominance of the finance ministry was not only facilitated by international negotiations. The provisions following the formal separation from financial subsidies in November 1923 were also substantially determined by the finance ministry's demand to end any linkage with the railway undertaking (Sarter 1924: 203, Sarter and Kittel 1931).

In terms of 'state structure' the federal organisation of the German Reich meant that the Länder were in a strong position to demand a recognition of their perceived interests. Their position was enhanced by their prior ownership of the railways and ensured by their power to veto in the Reichsrat any major alterations to the regulatory regime in the Reichsrat. The permanent (mainly Bavarian) opposition to Reich railway policy also induced a continuation of the 'commonweal' function, requiring a recognition of regional policy aspects in terms of rates, timetables and services. The potential veto of the Länder was also used by the German negotiators to weaken the international railway experts' proposals, claiming that a too autonomous operator would be unacceptable to the Länder.

⁵⁴ BA R 43 I 1036, 13 March 1924. Both were later to become members of the DRG's administrative board.

Therefore, while the federal structure shaped the terms of the inter-governmental debate, these debates were conducted within a relatively insulated regulatory space. The inclusion of the finance and foreign ministries contributed to the growing acceptance of the idea of increased operator independence. Nevertheless, despite the existence of international actors, there was a continuation of a domestic domain-orientation. Thus while the regulatory regime reflected a tendency towards more autonomy, the pre-war domain environment, regarding the railways as an 'economic tool', was maintained.

*Insulation of the regulatory space from societal actors*⁵⁵

While both trade unions and business were unsuccessful in their demands to establish a 'commonweal' joint stock company, most positions were shared with the government. This joint approach was, to a large extent, established by the membership of these societal actors in the regulatory space. For example, the pre-war arrangement of decentralised rate committees, which included members from industry, commerce and agriculture, continued to be responsible for the consideration of individual rate setting. Similarly, the trade unions, also due to the civil servant status of railway workers, were recognised and accepted in that work councils had been established.⁵⁶ Therefore, the pre-war institutionalisation

⁵⁵ Given the Reichsbahn's status as a formal part of the ministry prior to 1924, it is difficult to perceive the operator as a 'societal' actor. Furthermore, the public records which were examined do not indicate a distinct position from that of the Reich transport ministry.

⁵⁶ The pacification of trade union interests was facilitated by a collective agreement between business interests and the established trade unions in 1917/8 (the so-called 'Stinnes-Legien' agreement). Part of the agreement was the recognition of trade unions as

of societal actors facilitated the persistence of a domestic domain-orientation which continued the 19th century assumption of the railways as being a 'servant' of industry and economic development.

More importantly, however, the government perceived it as necessary to continue a policy of rate reductions following pressures from industry in order to stabilise the economy and to 'pacify' regional interests. Furthermore, the presence of 'experts', in particular former Prussian railway officials, added further influential members to the regulatory space which, to a overwhelming extent, claimed that 'railways' were 'special' and that an imposition of a more commercial, 'foreign' orientation would be inappropriate.

Conclusion

The 1920s regulatory reforms in the German railways provide a case of a maximum exposure to coercive pressures, which nevertheless led to domestic domain-oriented isomorphism. The analysis has provided a detailed account of the persistence of the 'commonweal' function of the Reichsbahn which was 'hardwired' in terms of the organisational structure, in which the state remained the owner of the railway property, in terms of the allocation of regulatory authority, where the government was successful in minimising the discretion of international control over its activities, and in terms of the rate-setting regime, which included, despite the need to fulfil reparation payment obligations, a primary duty to consider the perceived interest of the German economy and Germany's regional structure.

equal partners, the creation of collective wage bargaining and the imposition of the eight

Furthermore, the analysis has suggested why 'coercive' non-domestic pressures were not dominant, despite a minimum insulation to international factors. It has been argued that 'high politics' at the international level were one reason why full coercive powers were not exercised, thus allowing the German government and the operator considerable discretion in performing their obligation to deliver reparation payments. The domain-orientation of the regulatory reforms, represented in the continuation of the 'economic tool' function of the DRG, was facilitated by the joint interest of the Reich and the Länder governments, but also by the interest of business in low rates. In contrast, the need to find international agreement and a solution to problems of hyper-inflation introduced other administrative and political actors into the regulatory space, which led to the domestic acceptance of an increasing formal autonomy of the railway operator. Thus, despite the 'ideal conditions' for an imposition of a regulatory framework by international actors, the regulatory reforms in the German railways during the early 1920s provides a case of domestic policy cumulation.

Section III: The Age of Public Ownership

The late 19th and early 20th century saw the worldwide development of state enterprises. The rapid spread of various organisational forms of publicly owned undertakings in the inter-war period, ranging from being part of the national public administration to the public corporation form, reached a preliminary peak in the immediate period following the end of the Second World War (Hood 1994: 38). As in the 1980s and 1990s, when privatisation advocates claimed that privatised utilities were the natural form of public utility provision, by the late 1940s, state-owned enterprises seemed the natural form of public utility provision. While some observers point to economic decline of industries, nation-building or international competition as explanations for a shift towards public ownership, post-Marxists in particular stress the notion of 'Fordism'. Thus, the development of large, mass-scale production was most compatible with large state-run enterprises.

In particular in Britain, the post-war years represented the shift towards a welfare state, leading to a period of 'ungrounded statism' (Dunleavy 1989: 242-3). This notion reflects the mixture of relatively heavy governmental involvement in economic activities, which was paralleled by only small involvement of third sector bodies in the provision of public services. In contrast, the development in Germany in the post-1945 period reflected more continuity in terms of welfare and utility provision, despite a stronger emphasis on *ordo-liberal* principles in competition policy.

In terms of railway policy, challenges to the industry (as outlined in the introduction to section II) had increased during the inter-war period. In particular, competition from road haulage and road vehicles in general had facilitated the financial decline of the railway industries. In terms of the various forms of 'nationalisation', as discussed at the beginning of the previous section, this period saw, in organisational terms, a remarkable convergence. In both states, the railways were operated as unified state-owned undertakings.

The following two chapters provide an analysis of the two post-Second World War experiences and discuss in particular the sources of isomorphic change. It has often been argued that the election of the Labour government in 1945 marked a fundamental policy shift. However, here it is argued that the regulatory reforms resembled more domain-oriented policy cumulation. Germany was not only defeated, but also without a national government of its own. In terms of the overall argument, the British case provides an example of a conflict between domestic domain and, to some extent, more paradigm-oriented sources of isomorphism, whereas the German example offers a case of two competing domestic domain-oriented policy environments.

Chapter Five

The 'Socialisation of Transport' and the search for efficiency in Britain

*[...] and the minister's functions become more
regulatory and supervisory in character*

H. Morrison, 'Taking Stock'¹

The wave of nationalisation in Britain following the election of the Labour government under Clement Attlee in 1945 is regarded as the prime case for the emergence of the 'public corporation' model as part of a shift towards the 'positive state' (Majone 1997). Chester notes that socialisation was 'hailed as the pattern of a brave new world' (Chester 1952: 27). A crucial part of Labour's scheme of 'socialisation' of economic activities was the railway system. The Labour Party's manifesto for the 1945 general election 'Let Us Face the Future' called for the taking into public ownership of the Bank of England, the fuel and power industries, inland transport as well as iron and steel (Chester 1974: 1). Nationalisation of these industries was said to make possible the establishment of efficient undertakings which would consider the interests of the consumer and workers alike. In the particular case of transport, benefits were seen in a proper co-ordination of transport which could only be effected under public ownership, as otherwise particular interests would be able to veto any co-ordination.

¹ PRO MT 47/15 - S.I. (M) (47) (32) - 18. July 1947.

The established literature approaches the socialisation of the railways in various ways. In the regulatory literature, much scorn has been placed on the design of the regulatory regimes set up for the nationalised industries in post-1945 Britain. It is argued that too little attention was paid to the specification of regulatory objectives, the extent of public control and the reliance on informal relations and trust as main regulatory techniques (Thatcher 1998: 221; Majone 1996a: 11-15). Other accounts highlight the 'policy paradigm' shift involved with nationalisation as part of a consensual acceptance of a welfare state (Hall 1993). The 'public corporation' design idea received cross-party support. Delegated modes of control in terms of boards had been initiated and established in the inter-war period by both Labour minority and Conservative governments, such as for the British Broadcasting Corporation and the Central Electricity Board (both 1926), the London Transport Passenger Board (1931) and the British Overseas Airways Corporation (1939). This paralleled in particular the rise of Herbert Morrison's concept of the public corporation as a key influence on 'socialisation policies'. Its main emphasis was to create an 'efficient industry', which by being placed on a financially sound basis, would operate in the public interest.

The move towards public corporations as an organisational design for 'socialised industries' has also been interpreted as a consequence of previous dysfunctional modes of control and production, in addition to overall technological backwardness (Foster 1992: 73). During the inter-war period, various initiatives had been launched by the four railway companies to cope with the emerging competition from the road haulage industry. Legislation in 1930 and 1933, restricting the unlicensed operations of road undertakings but also allowing the

rail companies to operate services on the road, aimed to respond to the increasing economic and financial problems of the railway companies. In 1938, the railway companies launched the 'Square Deal' campaign, demanding a regulatory framework equal to that of the road haulage industry, including the abolition of such rules as the common carrier obligation. The outbreak of the Second World War prevented any legislative action being taken.

Derek Aldcroft notes that railway nationalisation was 'nearly a dead issue by 1945 [...] since some form of public ownership or control was largely inevitable' (Aldcroft 1968: 105-6). In contrast, Tivey (1973: 50) claims that the 'Transport Act of 1947 was a nationalization measure with a policy', designed 'to bring about the integration of the country's transport'. Similarly, Robson noted that the 1947 Transport Act 'embodied the most grandiose scheme of nationalization so far witnessed in Britain' (Robson 1962: 95). Numerous design ideas with regard to post-war railway organisation had been developed during the war, contrasting substantially with Emanuel Shinwell's experience as Minister for Fuel and Power where he 'found nothing practicable and tangible existed. [...] I had to start on a clear desk' (Shinwell 1955: 172).

This chapter highlights the substantial regulatory debates which were conducted and emphasises the importance attributed to regulatory issues in the British nationalisation debates in the post-war period. Two policy environments, both offering sources for isomorphism, affected the various regulatory ideas. The 1947 nationalisation of transport reveals a tension within the Government between those who regarded the socialised industries as primarily commercial undertakings and those who expected the industries to be extended arms of

government (Craig 1994: 100). In particular, the debate surrounding 'C licences' for road haulage² suggests not only that nationalisation was controversially discussed and various interests competed, but also that there were also competing sources - one drawing mainly on domain-oriented change in suggesting that a 'rational' organisation would provide sufficient incentives and the other, somewhat more paradigm-oriented proposals, aiming to establish an 'integrated' transport system. The former view was supported by the majority of the Cabinet and, in general, by the Ministry of Transport which was concerned not to offend industrial interests. The main political motivation for nationalisation rested in the elimination of potential excess profits reaped by private monopolies.³

This chapter discusses the formulation of various regulatory ideas during and immediately after the Second World War. It then considers the 'hardwiring' of regulatory instruments in terms of organisational structure, allocation of regulatory authority and non-commercial policies. Finally, it considers the impact of the three institutional factors.

The emergence of regulatory ideas

² The 1933 Road Traffic Act established three types of vehicle licence:

'A' licence for those who carried exclusively for hire or reward;

'B' licence for those who carried their own goods but also goods for others;

'C' licence for those who carried only their own goods (Gourvish 1990: 17).

³ In contrast, Zahariadis (1999) claims that the party political demand to obtain full employment and increasing operational dysfunctionism explains the socialisation of railways.

This section considers the development of regulatory ideas during the war and in the immediate post-war period. It argues first that the concept of public corporation was not uncontested and alternative proposals for regulatory change existed. Furthermore, proposals for a public corporation model were not solely introduced by the Labour Party or the Trade Union Congress (TUC). Even at these early stages, a 'board model' had already been discussed within the Ministry of (War) Transport.

Proposals for the future organisation of the railways and the transport industry overall were developed during the war. In contrast to the nationalisation of the coal, gas and electricity industries, where technical needs are claimed to have been pre-eminent, in transport the main virtue of nationalisation was supposed to lie in achieving 'co-operation'. In particular, the key concern was the pre-war problem of organising competition between the railways and the road haulage industry for the traffic of goods. As early as July 1943, Sir Cyril Hurcomb, the Permanent Secretary at the Ministry of War Transport, urged that a 'definitive' view was to be established in order to 'prevent slipping into competitive chaos' immediately after the end of the Second World War.⁴

The various alternative suggestions agreed that a return to the status quo ante bellum was infeasible. Nevertheless, the different proposals can be distinguished according to the extent to which they required the unification of railway companies. The so-called 'Mance scheme' advanced a model which separated responsibility for the infrastructure (road and rail) from responsibility for the

⁴ PRO MT 74/1 - July 1943.

operation of transport services. The operating bodies would be charged for the use of the permanent way.⁵ For Hurcomb, as for the modern advocates of the separation of infrastructure and operations, the theoretical attraction rested in the separation of the fixed costs for the infrastructure from the variable costs of providing services on these 'permanent ways'. However, one supposed disadvantage rested in the problem of allocating cost for track usage to the carriers, in particular the road haulage industry.

Whereas the Ministry does not seem to have seriously discussed this proposal, it formed one of the suggestions of the LMS and LNER railway companies, despite opposition by the Southern and Great Western railway companies. In May 1942, a LNER memorandum argued that the arrangements as existed before the war had been 'complicated, unsatisfactory and costly' so that any 'resuscitation' could not be 'reasonably contemplated' as there was a need for 'greater efficiency'.⁶ It was suggested that the most promising solution was the purchase of all land, the permanent way, stations and buildings by the government, while rolling stock and other moveable assets should remain with the railway companies, which would form a single financial unit under the control of a joint body. Due to internal disagreements, the railway companies presented a different platform in 1943, demanding that the road haulage industry should be placed on a joint organisational footing, that the inequality of track costs should be balanced

⁵ PRO MT 74/1 - July 1943. This vertical separation proposal was put forward by Sir Osborne Mance in his 'The Road and Rail Transport Problem' (1940).

⁶ PRO RAIL 1007/606 - 15 May 1942. This statement questions the claims made by Gourvish (1990) who emphasises the advanced quality of the service achieved by the

across modes of transport and that equality of charging power should be established.⁷ After the war, the separation of track and transport operations was advocated again by both the LNER and LMS chairmen, claiming that such a 'landlord-tenant' system was the only viable alternative to the government's socialisation proposals in the unlikely event that the government decided not to pursue its policies.⁸

Proposals advocating the establishment of a single monopoly were also placed on the agenda. In 1941, Dr William H Coates from ICI was asked to report on a possible scheme for the post-war railways industry. Coates proposed the setting-up of a public corporation which should be politically and financially independent.⁹ A single, well-informed control mechanism governed by one financial interest was regarded as the most effective instrument. This corporation was to be granted gradually expanding monopoly rights in

railway groupings by 1939, despite the poor financial position. His claims recall the 'official' post-war anti-nationalisation arguments by the railway companies.

⁷ PRO Rail 1007/606 - 13 May 1946 (summarising a meeting on 15 October 1943). The Department argued that it was difficult to frame legislation for these proposals. On 24 November 1943 the railway companies conceded that their proposed scheme could not be seen as a permanent solution.

⁸ PRO RAIL 1007/606 - 6 June 1946. These suggestions were rejected by Great Western chairman Lord Portal who argued that these proposals would only advance the support of nationalisation advocates (PRO RAIL 1007/606 - 22 March 1946).

⁹ PRO MT 74/7 - July 1942; 'Report on the Transport Problem in Great Britain'. Coates had been asked to produce a report in 1941 and submitted this report in July 1942. With the then Deputy Secretary, Sir Alfred Robinson, he had produced a report in October 1940, following a request from the then Minister for War Transport, Sir John (later Lord) Reith. It similarly recommended the establishment of a national corporation. The report received little attention, because of a change of ministers which resulted in a shift of policy priorities (see also Gourvish 1990: 16-20).

particular defined areas, also prohibiting the traffic of goods in traders' vehicles. The corporation was to have full commercial freedom in fixing rights and charges. Coates argued that a 'wise' transport policy would establish a system that would utilise road transport for short distance transport, while long journeys would be undertaken by the railways. Such a policy would include the electrification of these lines, while a substantial number of local railway routes would have to be shut down at the same time.¹⁰

These proposals were regarded as too far-reaching by the officials in the Transport Ministry. Alfred Barnes, the first post-war transport minister, objected, claiming that the Coates scheme would 'mean the building up of a machine which would be more powerful than the Minister himself'. Furthermore, the industry, and not the government, was to carry risks and should continue to 'pay its way'.¹¹ Among officials, the scheme was attacked for too readily assuming efficiency gains. The real problem was seen in ensuring the 'most economic allocation of transport'.

The Ministry's preferred solution was the establishment of a 'national clearing house' which would allocate rates and traffic.¹² Hurcomb reckoned that such a 'clearing house' solution was impracticable. In particular, he feared that if such a proposal was adopted, the department had to be 'all-knowing', leading to a

¹⁰ The immediate ministerial response to these proposals was negative. Lord Leathers, the then Minister of War Transport, claimed that a sufficient case for complete centralisation of all transport services had not been made (PRO MT 74/3 - 3 September 1945).

¹¹ PRO MT 74/1 - 8 October 1945.

distortion, if not destruction of the 'functional needs of transport'.¹³ Such an authority would also not only be exposed to numerous political pressures, but also possibly require too large an organisation which inevitably would be criticised for being bureaucratic in its conception and working. Moreover, it would also separate rate-setting from the financial responsibility of the railway companies and would not end the duplication of facilities. Furthermore, Hurcomb argued that expectations should not be guided 'by what can be done under war conditions'.¹⁴

Despite the initial rejection of the Coates plan, the option of a public corporation received further attention within the Ministry before 1945. Advantages of a 'public utility corporation' were seen in the possibility of facilitating co-operation between the various modes of transport. Difficulties were seen in the creation of a monopoly and in setting up a charging system. Hurcomb pointed out that such a scheme had been advocated before and that nobody favoured a solution to organise transport as part of a government department on the lines of the Post Office. The creation of a public corporation was also advocated by the Labour Party and the Trades Union Congress (TUC). The increasing interest of the Labour Party, already seen during the inter-war period, in the concept of a 'public corporation' reflected a more long-term change away from promoting either municipal or ministerial control of publicly owned undertakings. This shift was based on the initial interest of trade unions in participating in the management of operations, on the widespread distrust of the civil service's

¹² PRO MT 74/7 - 11 October 1943.

¹³ PRO MT 74/7 - 11 October 1943.

competence to run a 'business' as well as on developments within private industry, where an increasing tendency towards a separation between the ownership and management roles was prevalent (Chester 1952).

Most prominently, Herbert Morrison argued that transport required an organisation that would allow for commercial flexibility as well as public control and accountability. A public corporation would not be a capitalist business, the 'be-all and end-all of which is profits and dividends, even though it will, quite properly, be expected to pay its way'. Furthermore, boards and officials had to act as 'high custodians of the public interest' (Morrison 1933: 156-7). Rather than providing ministers with a wide margin of interventionist instruments, Morrison argued that responsibility should be 'thrust down [the Board's] throat' to establish clear lines of responsibility that would prevent any 'mischievous and not too competent minister' from harming the business and to prevent a 'weak and inefficient Board' from being able to shift the blame on to the minister (Morrison 1933: 170). These conceptions dominated the development of the Transport Act, but also in political terms Morrison 'held their hands, for example, Barnes asked Morrison what to do and how to do it and that went for a lot of the nationalising ministers' (Donoghue and Jones 1973: 349).

Although these proposals and the suggestions emerging from within and outside the civil service, provided only 'a limited number of accepted truths' (Chester 1974: 44), there were no alternative proposals for the organisation of the nationalised industries, given, in particular, the trade unions' reluctance to end

¹⁴ PRO MT 74/1 - July 1943.

their adversarial relationship vis-à-vis management (see Morgan 1984). The Labour Party argued that a national transport corporation with subordinate boards should be established. It was proposed that a unified and co-ordinated system under public ownership would prevent the evils of a private monopoly and would obtain a maximum of efficiency, the application of 'socialist' principles therefore represented 'good business for the nation'.¹⁵ Similar proposals were made by the TUC (*Railway Gazette*, 7 September 1945: 295). It was argued that a National Transport Authority, subordinate to the Ministry of Transport, would 'provide a door-to-door service of maximum efficiency and co-ordinating all forms of inland transport by road, rail and air' at least cost to the community. This National Transport Authority should be set up as a public corporation, independent of government control in matters of day-to-day administration, being ultimately responsible for the efficient operation of the industry and general policy. Seven boards would operate the various modes of transport, while the National Transport Authority would be responsible for establishing a comprehensive rates and fares system, for insurance schemes as well as for the training of staff and research and development.

After the election, officials were instructed that 'no policy will be acceptable to the present government which does not assert the principle of public ownership'. The railways should be unified under a centralised finance machinery for 'central direction of policy'.¹⁶ Ministers also decided to establish executive boards which were to be appointed by the minister. These were to be

¹⁵ PRO MT 74/3; Labour Party National Executive Committee, Post-War Organisation of Transport.

set up on the regional basis, although at first - to minimise disruption - boards were to be organised on a functional basis. The task of co-ordinating the boards as well as decisions on the machinery for controlling fares and charges and the provision of facilities were to be left to the central authority.¹⁷ Officials, working under these directions, argued that among the 'infinite graduations' in organising a public corporation, it was essential that the Board should be left relatively free of ministerial control.¹⁸ Thus, particular importance was attributed to finding a formula which would preserve the public interest as well as securing managerial freedom. It was most likely that the tension between these two interests would lead to clashes on issues such as rates and non-remunerative services as well as the timing and extent of new capital expenditures and specific provisions for national defence.¹⁹

In conclusion, the proposals for the re-organisation of the transport industry regarded the railways as an activity which should be run as a commercial activity. The degree of domain orientation focused on the extent of centralised authority - ranging from re-regulation and track ownership to the establishment of a central authority supervised by the Transport ministry. It was argued that a unified organisation under a central authority would enable the railways to function efficiently within a co-ordinated system including all modes of transport rather than obtaining an instrument for economic intervention.

¹⁶ PRO MT 74/32 - October 1945.

¹⁷ PRO MT 74/32 - October 1945.

¹⁸ PRO MT 74/1 - 19 October 1945.

¹⁹ PRO MT 74/1 - 19 October 1945. Officials pointed out that other 'public control' modes such as departmental organisations or guild socialism were to be dismissed.

Morrison claimed that these plans would avoid the 'waste' of competitive services, although the continuation of a 'healthy rivalry' was perceived to be essential.²⁰ Tension existed between the assumption that any central authority was likely to be overburdened and the suggestions that a closely integrated transport system should be established. The former view emphasised the need to combine the co-ordination of transport services with decentralised management. The latter view stressed the importance of central organisation for serving users with a regular and prompt service regardless of the mode of transport.²¹ Furthermore, proponents of this orientation were attracted to the possibility of large capital investments in the nationalised industry which could be used to balance the assumed inherent instabilities of the economic system (Cairncross 1985: 471; Chester 1974: 1034).

Organisational Structure

While the broad structure of the public corporation was undisputed, the nature of the central authority, the Board, attracted controversy, highlighting conflict between the two sources of isomorphism. The internal ministry discussions established the basic framework for the Transport Act. A National Transport Authority was to be subject to 'general directions' given by the minister. The Authority itself was to control the activities of separate operating boards and to ensure that an adequate and well co-ordinated system was provided. To 'avoid bureaucracy', the boards were supposed to hold all assets and property and be

²⁰ PRO MT 74/1 - 10 October 1945.

²¹ PRO MT 74/1 - 8 October 1945.

under an obligation to operate the undertaking efficiently.²² The detailed proposals for the functions of the transport authority drew on two distinct sources. On the one hand, the eventual Transport Commission was regarded as an instrument of the government; on the other hand, the 'appropriate' design idea was that of an 'independent public utility'.²³ This section explores the tension between these two sources of potential isomorphism which were evident in the three distinct debates. The following first discusses the different arguments concerning the character of a National Transport Authority. It then considers the debate with regard to the extent of aspired integration of policies for the different modes of transport and finally assesses the arguments relating to the allocation of assets in either the Transport Authority or the executive boards.

Substantial differences concerning the character of the National Transport Authority (renamed the National Transport Commission (NTC) after ministerial intervention) emerged in the discussion whether the NTC should be enabled to raise capital on its own behalf.²⁴ According to one perspective, the NTC should be regarded as an instrument of the government which could be guided via general and particular directions of the Minister of Transport, accepting 'disadvantages' from political involvement in order to allow for opportunities for intervention in the public interest.²⁵ The alternative view proposed that the NTC

²² PRO MT 74/1 - 15 November 1945.

²³ PRO MT 74/2 - 7 January 1946.

²⁴ It was claimed that a commission would be less powerful to resist ministerial demands than an authority.

²⁵ PRO MT 74/2 - 7 January 1946.

should be regarded as a public utility where the publicly owned undertaking would interpret the 'public interest' largely autonomously, with the minister exercising only remote powers of control and issuing directions of a more general character. This option favoured a wide distancing of the transport industry from political control with the business element remaining dominant. This view was particularly stressed by the economic section in the Cabinet Secretariat.²⁶ It was argued that the purpose of socialisation was to ensure that the industries were 'operated with the greatest efficiency and economy', making it an obligation that the board should be chosen only on its technical and economic abilities and on its experience in managing the industries in question. The goal of balancing 'control desirable on general economic grounds' and managerial independence could only be found incrementally over time.²⁷

The second view prevailed. Hence the NTC was to become the organ through which unification and co-ordination of the transport industry should be effected and through which the full power of direction and control of the activities of the executive boards should be exercised. To accommodate more 'interventionist' views, it was stressed that while detailed and permanent control by the ministry was to be avoided, ministerial control would not be too remote.²⁸ The NTC was to be established as an organisation which would be an instrument to implement government policy. Although it would not be an operational body, all assets and properties were to be vested in the NTC, now to be called the

²⁶ PRO MT 74/10 - 8 November 1945.

²⁷ PRO MT 74/10 - 8 November 1945.

²⁸ PRO MT 47/2 - 11 January 1946.

British Transport Commission (BTC).²⁹ Among its tasks was to organise the operational executives, if possible on a regional basis, while it would also control capital expenditures.³⁰ Decisions on the internal organisation of the Commission and the nature of delegation to the executive were to be left to the Commission.³¹ The BTC was to be a policy-making, co-ordinating and controlling body which would act as principal with regard to the operational executives. In a memorandum to the ministerial committee on socialised industries, the minister, Barnes, reasoned that 'above all I want them to be a thinking team, giving guidance and support to the various subordinate executives', with the functions of the operational executive boards to be specified by the BTC itself.³²

The second major discussion which separated proposals drawing on domain- and paradigm-oriented sources concerned the tension between the desired co-ordination and integration of the various modes of transport on the one hand and the interest in minimising transaction costs on the other. The key interest concerned the organisation of the executive boards, which were to execute the strategic guidelines of the BTC. Officials feared that without executive boards,

²⁹ PRO MT 74/2, S.I.(M) (46) 4 - 3 March 1946.

³⁰ PRO MT 74/3, S.I.(M) (46) 4 - 3 March 1946.

³¹ PRO MT 74/20 - 11 January 1946.

³² PRO MT 74/14 - 4 June 1946. In March 1946 the BTC's tasks were defined as instruments of the minister 'to carry out the general policy of the government and to see that due regard was paid to the over-riding public interest in the general organisation of inland transport', thus being vested with all assets, being responsible for the creation of executive boards and for the fixing of rates, as well as accommodating political demands to provide unremunerative services (PRO MT 74/16, S.M. (46) 3rd meeting - 8 March 1946).

the Commission would become an 'overweight central body'.³³ Three different plans were tabled, proposing either the establishment of transport executives on a regional basis, or on a so-called territorial basis along the lines of the existing railway companies, or on a functional basis. The Ministry favoured the functional solution, providing the Boards with the right to sue and be sued and to hold their assets. The Boards would also be obliged to manage efficiently and produce profits. Although a functional organisation was perceived to hinder real co-ordination of the various modes of transport, the Ministry was interested mainly in a smooth transition. An initial adoption of a functional organisation represented the most convenient basis.³⁴

In contrast, advocates of a territorial organisation agreed that assets and liabilities should remain with the various operational boards. In order to achieve proper co-ordination and some competition, all modes of transport should be integrated into territorial boards following the structure of the pre-war railway groupings. The trade unions objected to the notion of establishing functional boards, arguing that they would continue to divide the various modes of transport. The Cabinet, however, decided that, for reasons of administrative convenience, the executive boards should, at first, be set up on functional lines with the aim to establish regional boards later, thus opting for policy cumulation rather than 'integration'.

³³ PRO MT 74/1 - 21 December 1945.

³⁴ PRO MT 74/1 - 27 November 1945.

The third issue where differences in approach were observable concerned whether assets should be held by the BTC or by the executive boards. The ministry at first proposed the vesting of assets with the boards. Contrasting views argued that such an arrangement would lead to an 'illogical divorce' between ownership and direction of policy, leading to a dependence of the Commission on the resources and control of the Treasury. It was essential to establish clear lines of responsibility.³⁵ Additional advantages of vesting assets centrally were that it would facilitate co-ordination and integration among modes and that it would be closer to ministerial control (Chester 1974: 394). Furthermore, such an arrangement was regarded as a response to war-time experience, where tensions had occurred between the minister and the controlled railway and canal undertakings, when the minister was entitled to use the latter's property at his discretion.³⁶ In contrast, inside the Transport Ministry other arguments were voiced which argued that a vesting of assets in the transport commission would lead to a 'top-heavy' structure, all assets should therefore remain with the respective executives.³⁷ In December, the Minister decided that assets should be vested with the central authority rather than the operational executives.³⁸

The organisational structure established in the 1947 Act represented an attempt to combine multiple goals; first, to establish a commercially viable undertaking; second, to establish central direction, control and clear lines of responsibility;

³⁵ PRO MT 74/1 - no date.

³⁶ PRO MT 74/14 - 18 June 1946.

³⁷ PRO MT 74/1 - 28 November 1945; 30 November 1945; 5 December 1945.

³⁸ PRO MT 74/1 - 10 December 1945.

and third, by delegating authority to the executive boards in order to provide 'flexibility' and to prevent the creation of a 'top-heavy' organisation. The BTC was entrusted with establishing policy principles for the provision of an adequate and properly co-ordinated system of transport as well as fixing fares and charges in a way that would balance expenditure and income.³⁹ Ministry officials feared that this balance between commercial autonomy and strategic policy development could lead to BTC 'overload' should the executives not keep their detailed administrative work away from the Commission. Furthermore, it was feared that the BTC's tasks could lead to an increase in its size which would reduce its effectiveness. Thus, its resources were to be set deliberately small. The debates about the appropriate organisational structure of the socialised modes of transport reveal the inherent tension between domain-oriented views, regarding socialisation as an efficient form of business organisation, and to some extent more paradigm-oriented views, which demanded an integrated transport system.

Allocation of regulatory authority

In terms of regulatory control exercised by the minister, great stress was placed on the need to avoid involvement in the management of the industry. The public corporations were to be provided with a wide extent of discretion. This section analyses the debates concerning the extent of regulatory authority, which reveal the underlying tension between granting the operator managerial flexibility and limiting the operator's discretion. One example of this anxiety about limiting the discretion of the 'transport authority' was its relabelling as a 'transport

³⁹ PRO MT 74/4 - 21 March 1946.

commission': this commission would act as an agent to the minister and would control the executive boards according to the minister's general directions.

Great emphasis was placed on the significance of ministerial control being limited to general issues rather than allowing involvement in detailed policies. Only after consultation with the Transport Commission was the minister supposed to give directions 'of general character' in order to safeguard the perceived public interest concerning performance and management of the Commission.⁴⁰ Concerning direct means of command, it was stressed that 'the Government must avoid very carefully any suggestion that it is issuing directions to Boards of Socialised Industries [...] or attempting to teach them their business'; nevertheless, by indirect means, for example via appointments to the Board, it would be possible to bind members to particular policies.⁴¹ Barnes, the transport minister, against the intentions of his officials, extended this power of appointment to the membership of the executive boards.⁴² Intervention in policy detail was feasible in matters such as borrowing or requirements to provide non-remunerative services.⁴³

Morrison's intentions on the extent of ministerial control were given in a memorandum called 'Taking Stock'.⁴⁴ It was claimed that an industry would not

⁴⁰ PRO MT 74/21 - 4 July 1947.

⁴¹ PRO MT 74/12, S.I. (46) - 10th meeting - 10 October 1946.

⁴² PRO MT 74/19 - 28 October 1946.

⁴³ PRO MT 74/21 - 4 July 1947.

⁴⁴ PRO MT 74/14 - S.I. (M) (47) 32, 18 July 1947.

'become efficient by the mere act of socialisation and even the setting up of a good Board to run an industry does not, in itself, ensure that the long-term policy of the Board is on sound lines'.

Critical comments were made to the effect that no steps had been undertaken to provide the Boards with a standard of efficiency and cost which they were supposed to achieve. While rejecting any notion that Boards should be accountable to Parliament, Morrison advocated that the Boards should provide themselves with 'modern means of checking their efficiency'. There should be as few general ministerial directions as possible, directions should mainly be exercised via 'friendly' relations between the minister and the chairman of the Board of a socialised industry. Furthermore, a 'close channel of communication' should be established between the minister and the board so that the minister could exercise influence on appointments. At the same time, it was necessary to reorganise government departments. The transfer of the (war-time) 'mass of detailed work' from the departments to the boards would allow the nature of departmental work to become 'more regulatory and supervisory in character'.⁴⁵

The arguments surrounding the extent of regulatory powers of the minister over the transport undertakings reveals a tension between the anxiety to allow for managerial flexibility and the aim to see the government's policy intentions acknowledged by the BTC and the transport executives. The aim was to establish a government department as a regulatory and guiding body rather than as an interventionist and activist authority. The most significant controls on ministerial intervention were statutory policy instruments such as the 'pay their

⁴⁵ PRO MT 74/14 - S.I. (M) (47) 32, 18 July 1947.

way' obligation as well as the placing of the duty to achieve statutory objectives with the British Transport Commission and not directly with the minister or the government (also Chester 1974: 994). Regulation of the Commission was to be undertaken via consultation and not compulsion, based on close and friendly relations between the ministers and the Commission. This preference for informal tools of regulation made the possibility of applying formal 'directions' remote, while they provided an opportunity to undermine Morrison's aim to establish clear lines of responsibility and opened up the opportunity for informal pressures, leading to a 'no man's land [...] in which a nominal responsibility does not coincide with the real power of decision-making' (Robson 1962: 76).⁴⁶

The same principles were also applied with regard to the re-arrangement of the rate setting machinery. The initial debate focused on the question whether the Commission was to be provided with sufficient monopoly powers to determine the rate-level, or whether a 'more laissez-faire' attitude was to be taken, which would allow for a moderate degree of competition where it 'afforded sufficient benefit to industry and the public'.⁴⁷ At an early stage, it was decided that each of the operating boards was to be financially independent, with the collective revenues from all Boards being at least sufficient to pay the interest of the whole Treasury issue of Transport Commission stock.⁴⁸ While there was to be cross-

⁴⁶ Robson offers three explanations for this reliance on 'unclear lines of responsibility': an attempt by ministers to distance themselves from blame, a corporation's lack of courage to refuse a minister's pressures and a 'widespread habit of English life of preferring an informal understanding' and favouring 'gentlemanly persuasion to a formal instruction or a local document' (Robson 1962: 161).

⁴⁷ MT 74/2 - 7 January 1946.

⁴⁸ PRO MT 74/1 - 4 December 1945.

subsidisation across executive boards, there was no aspiration to harmonise rates and charges.⁴⁹ There was early agreement that a Transport Tribunal should take over the role of the existing Railway Rates Tribunal as a supposedly impartial and independent body to settle disputes between business, business associations and the railways. The Transport Tribunal was also allocated the competencies of the Railway and Canal Commission as well as of the so-called Appeal Tribunal which had been set up in 1933. Further ministerial guidance would allow the Transport Tribunal to set rates that would permit the railways to earn standard revenues.⁵⁰ However, in January 1946, it was realised that any reform of the rate structure would necessitate detailed preparations which would make any inclusion in a 1947 Act impossible. It was therefore proposed that the principles should be formulated by the Transport Commission with the Transport Tribunal being charged to settle the details.⁵¹

The proposals with regard to a modification of the rate regime offers a further indication of the existence of various approaches towards the function of the rate regime. None of the proposals, however, suggested that the government should occupy a central role. The Minister of Transport suggested that the Charges Advisory Committee should be asked to hold a public enquiry on rates. Parliament would then agree on the broad framework which was then to be implemented in detail by the Transport Tribunal. These proposals were opposed by the President of the Board of Trade, Sir Stafford Cripps, who argued that the government would deprive itself of one of the most powerful policy

⁴⁹ PRO MT 74/1 - 8 October 1945.

⁵⁰ PRO MT 74/32 - October 1945; PRO MT 74/1 - 4 December 1945.

instruments. As, however, an active governmental role in rate setting would attract political controversy, he proposed the establishment of an independent body. Morrison also criticised the Transport Ministry's proposals.⁵² He claimed that these proposals would create unclear responsibilities where the BTC could attempt to blame Parliament, the minister, the Charges Advisory Committee or the Transport Tribunal for its poor performance. Furthermore, he doubted whether parliament was a suitable arena for settling rate issues.⁵³ Barnes defended his position, claiming that business interests would oppose any provision that would grant BTC rate-setting powers, moreover, rate-setting in general was of too high importance not to be discussed by Parliament.⁵⁴ Morrison affirmed that the minister was not responsible for rate-setting as this would expose him to the 'activities of pressure groups in Parliament'. As the BTC was a public board, performing a public duty, it should be trusted to establish an 'equitable frame of charges'. The minister should merely ensure that the interests of government policy were taken into account, either by issuing formal directions or 'more normally' by informal discussion.⁵⁵

As a consequence, the Ministry of Transport withdrew its proposals concerning a public enquiry and suggested that the Transport Commission should establish the main principles which were then to be applied by the Transport Tribunal. The BTC was to prepare a draft scheme for charges for their services and these

⁵¹ PRO MT 74/2 - 25 January 1946.

⁵² PRO MT 74/20, C.M. (46) Cab 96 - 14 November 1946.

⁵³ PRO MT 74/20, S.I. (M) (46), 13th meeting - 11 November 1946.

⁵⁴ PRO MT 74/20, S.I. (M) (46), 13th meeting - 11 November 1946.

⁵⁵ PRO MT 74/20, S.I. (M) (46), 14th meeting - 15 November 1946.

proposals were to be presented to the Transport Tribunal for examination and confirmation. To accommodate the Transport Minister's interests, a public enquiry was announced that would allow all business and other 'users' to voice their concerns.⁵⁶ The main obligation of the Commission was to ensure that the rate structure allowed services to cover their expenditures and gave boards the opportunity to implement ministerial directions. It was agreed that the BTC should be financially self-sufficient, parliament should 'under no circumstance' be concerned with actual charges and the Minister was also preferably not to be involved with the fixing of rates.⁵⁷

In sum, the assumption was that rates were not explicitly to be used as instruments for economic policy. Regulatory relations were to be based on co-operation, friendly relations and a good understanding between the Commission and the Minister, while business interests were granted a right to appeal against rate decisions. The absence of any other formal powers other than to 'give directions' indicates the limited ambition of the government to direct the railways to a defined policy goal or to utilise the railways as a tool for its economic policy.

Non-commercial objectives

The issue of non-commercial policies was not governed by the perceived need to pursue policies which would actively promote access to the railways by providing extensive and inexpensive services, but rather by the debate whether

⁵⁶ PRO MT 74/36 - 30 November 1946.

⁵⁷ PRO MT 74/32 - 12 November 1946.

and how the whole transport system could be made self-sufficient in financial terms. As noted above, the operational obligation that revenues were to cover expenditures and possible contingencies was established at the earliest stage of decision-making. The following discusses the debate concerning the importance attached by the government to the 'self-sufficiency' notion and, more importantly, the controversy on the restrictions placed on 'C' licences, which, while not directly affecting railway regulation, is crucial for the understanding of the government's overall approach towards transport regulation.

The civil servants' 'Committee for Socialised Industries' argued against placing a rigorous obligation on the board to earn sufficient income to cover the servicing of their stock, maintaining that the relevant Boards should merely cover their expenses over a 'reasonably short period'.⁵⁸ The rule that the BTC should 'pay its way' was also attacked by the Minister of Supply, Wilmot, who complained to Barnes that 'political and social considerations [...] would make it desirable that in some cases charges should be deliberately fixed on an uneconomic basis - for instance, to assist enterprises in development areas'. Under the proposals, there was no scope to allow for such uneconomic arrangements. Furthermore, the Commission could be placed into a situation where it had to pay its way while the basis of charges was decided by someone else.⁵⁹ Wilmot's arguments, however, had little impact. The government's intention was that its charges should be set as low as possible to receive sufficient revenue to cover its expenses. However, when, in 1947, the economy deteriorated sharply, the

⁵⁸ PRO MT 74/12, S.I. (O) - 19th meeting - 22 March 1946; .

⁵⁹ PRO MT74/35 - 13 November 1946.

majority view that transport should cover its own costs was overturned. Despite the opposition of the Transport Minister and the Chancellor of the Exchequer, Attlee, the prime minister, sided with the Ministers of Health and of Fuel and Power in deciding against an increase in the transport charges for coal.⁶⁰

The notion of an 'integrated transport system' caused difficulties in finding appropriate policy instruments with options ranging from absolute monopoly to maintaining a moderate degree of competition between the various forms of transport. In order to make the Transport Board financially self-sufficient, it was proposed to restrict the operation of 'C' licence holders to a radius of 40 miles. Otherwise, it was feared that the economic basis of the BTC would be undermined. Initial proposals suggested that the Transport Commission should acquire all haulage undertakings which normally operated either for hire or reward within a radius of over 40 miles. Businesses operating between 10 and 40 miles could be granted permits. Ministers recognised that no proposal would be acceptable to the industry itself, but one could 'undoubtedly mitigate opposition if we avoid too drastic interference with a large number of small men who have a great deal of public sympathy'.⁶¹

Opposition towards restricting 'C' licences emerged from both the road haulage industry, including Co-operative Societies, and from within the government. Douglas Jay voiced his 'alarm' at the proposals to 'suppress "A" and "B" licences' and to restrict 'C' licences. He complained that while the whole transport

⁶⁰ 18 July 1947 - L.P. (47) 22; Lord President's Committee.

⁶¹ PRO MT 74/3 - 19 February 1946; Draft memorandum to the S.I. (M) committee.

nationalisation scheme was biased towards the idea of making a state monopoly profitable, too little effort had been spent on creating 'an efficient national transport system'. As the railways were already a monopoly, there was a case for nationalising them. Nevertheless, while it was inevitable that the railway industry would come to terms with competition from the 'A' and 'B' licensed operators, any move to restrict the operations of 'C' licences would be an interference with an essential part of the manufacturing process. Jay proposed that any restrictions on the road haulage industry should be eliminated, claiming that any monopoly would be inefficient 'ex-hypothesis'.⁶² Further resistance emerged in the Cabinet, with the Board of Trade and the Minister of Fuel and Power claiming that their regional development policies would be potentially undermined if 'C' licences were restricted. Further consideration by the ministerial socialisation committee was requested.⁶³

Morrison also favoured a less restrictive licensing system. He argued that a National Transport Commission would not have to fear competition if it worked efficiently or had economic advantages. The task of the public transport system was to maintain its profitability by being efficient and by reducing costs and not by restrictive practices. Monopoly profits were also less important than efficiency. Moreover, claims that fewer restrictions on the road haulage industry would lead to 'cream-skimming' (in modern parlance 'cherry-picking') could not be pushed very far.⁶⁴

⁶² PRO MT 74/3 - 16 March 1946.

⁶³ PRO MT 74/20 - C.P. (46) 149.

The Ministry of Transport opposed such arguments, although at the same time doubts were expressed whether the original scheme was administratively feasible.⁶⁵ The ministry claimed that if complete freedom for the 'C' licences was granted and 'A' and 'B' licences were free to operate up to the radius of 60 miles, more competition would be introduced than existed at that moment. While such a situation would possibly benefit business in the short term, in the long term this would lead to the provision of redundant and wasteful facilities which would be costly to the whole community.⁶⁶ A proposal to grant 'C' licence undertakings unrestricted operations up to a radius of 40 miles from their base was rejected, because, in the opinion of ministry officials, large volumes of haulage movements should not be automatically banned if they could be undertaken economically and efficiently. It was also pointed out that fewer restrictions would mean that the BTC would be forced to quote prices below cost and that further relaxations would attract opposition from Labour supporters, such as trade unions.⁶⁷ It was argued that the Transport Commission was at risk of being seriously undermined if the 'C' licencees were given too wide a scope for their operations.

Although the Ministry recognised that the argument that business should be free to choose and should be protected from any 'oppressive monopoly' was strong, it was claimed that any relaxation of the provisions, would lead to an over-

⁶⁴ PRO MT 74/14 - 26 March 1946.

⁶⁵ PRO MT 74/4 - 1 April 1946. Doubts were expressed whether, given the wide remit of the exemptions, any restrictions could be imposed by the administrative machine in the first place.

⁶⁶ PRO MT74/4, S.I. (M) (46) 11th meeting - 29 March 1946.

burdening of public services with uneconomic services and a disadvantage to those businesses which did not operate their own haulage operations. In July 1946, the Cabinet decided that the operations of 'C' licence vehicles generally should be restricted to a radius of 40 miles, with an overall exemption given to agricultural traffic following the Transport Ministry's claim that the imposition of restrictions would provide more political gain from the trade unions than any concessions to the road hauliers.⁶⁸ Given further opposition to the proposals, the Ministry decided in March 1947 to drop its 'C' licence proposals. This decision was not taken on a matter of principle, but rather as an attempt to minimise costs of transition so that 'it would be better to drop them altogether'.⁶⁹ The Cabinet concluded that it would be 'the wiser course [...] to abandon the proposals altogether [as it] would not prevent government action at a later date'.⁷⁰

Attempts to control and effect an 'integrated' transport policy were therefore abandoned for reasons of both political and administrative convenience. This case indicates not only the strength of a particular industry, but also the lack of a unified approach towards the socialisation of transport. The final act represented the success of the perspective which regarded 'socialisation' as a means to enhance business conduct, not as the creation of a government-shaped transport system. The lack of any interventionist or active state policies to provide 'public services' was also hardwired by the provision that the Commission had to 'pay

⁶⁷ PRO MT 74/14, S.I. (M) (46) 12th meeting - 1 May 1946.

⁶⁸ PRO MT 74/20 - C.O. (46) 225.

⁶⁹ PRO MT 74/20, CM (47) 28 - 14 March 1947. The anticipated difficulties in implementing and maintaining such a scheme were a further consideration.

⁷⁰ PRO MT 74/20, CM (47) 28 - 14 March 1947.

its way': Any ministerial request to provide non-remunerative services would possibly lead to rate increases and 'a maximum of publicity during the proceedings of the Rates Tribunal.

The impact of institutional factors

The regulatory regime established for the British railways provides a further case for domain-oriented isomorphism. The aim was to improve the performance of the railways in terms of 'efficiency' and to bring the historical trend of increased industry concentration to a seemingly logical conclusion rather than utilising the railways as an economic tool for reconstruction purposes or other interventionist policy endeavours. This was also noted by ministry officials: 'The Bill obviously cannot set the detailed machinery necessary to establish full integration. What it can, and I submit, does do, is to establish a sound basic structure on which integration can be built', by eliminating 'unnecessary duplication and overhead charges', by closer co-ordinating the different modes of transport and by specialisation and standardisation.⁷¹

In 1949, the Attorney General, Sir Hartley Shawcross, reflected that nationalisation

'does not seem to have been expressed in such a way as to enable nationalised industries to be used as instruments for promoting economic results outside their own immediate field. The power of direction has to be considered in the light of the general obligation

⁷¹ PRO MT 74/37 - no date. Notes for Second Reading.

placed on the Boards to make revenue balance over a period. Under Section 3 of the Transport Act, the Commission is not required to operate the industry in a way conducive to the economic good of the country as a whole but in a way which promotes the efficiency and economy of the industry itself [...]' (in Chester 1974: 984).

The insulation of the regulatory space from coercive pressures

As in the case of the 1920s, there were no direct or indirect coercive pressures which were exerted on British policy-makers to change domestic transport policies. There is little evidence in the historical records that experiences or models in other countries were investigated. Moreover, even on the domestic level, the ideational pressures emanating from the existence of the pre-1939 public corporation models, such as the London Passenger Transport Board, were negligible. The existing bodies were not organised in a uniform way, reflected pre-war thinking (and the London Passenger Transport Board represented a 'weakened' version of Morrison's original proposals after the change in government) and had been applied to specific problems. As Chester notes (1974: 387), it was not the uniform character of the public corporation model which led to the cross-party interest in its application for utility undertakings. It was far more the absence of agreed administrative and constitutional standards which allowed for considerable flexibility, thus making the public corporation an attractive policy tool. This inherent flexibility facilitated the domain-orientation of the policy-proposals and allowed for substantial flexibility with regard to the different socialisation laws across the industries.

The insulation of political-administrative nexus of the regulatory space

The existence of two inter-departmental committees for socialised industries, one ministerial, one for civil servants, did not lead to a convergence of policies nor did it facilitate paradigm-oriented isomorphism. Instead, the main proposals for the future organisation and regulation of the railways emerged from within the Ministry, while the inter-ministerial committee under the leadership of Herbert Morrison fine-tuned policies to allow for coherence and to prevent contradictory policies.⁷² Across all 'socialisation' policies, departments were to prepare the initial drafts and then submit these to the Cabinet or interdepartmental committees. Only in the final stages of preparing the draft bill was there to be consultation with external interests. While, to a limited extent, the Transport Bill followed the provisions of the previous Coal Industry Nationalisation Act and, in terms of compensation and property transfer arrangements, the arrangements setting up the London Passenger Transport Board (Chester 1974: 902), the controversial provisions, with the exception of the 'C' licence issue, were discussed and settled within the Ministry of Transport. At the stage of the ministerial committee's consent to the draft bill, 'the Ministerial Committee had little to say about either the general conception or the means of carrying it out' (Chester 1974: 399). Inside the Ministry of Transport, officials, such as Hurcomb, had already become acquainted with proposals concerning the post-war organisation of the transport industry. Finally, the Treasury was mostly concerned about the terms of compensation for the existing shareholders

⁷² PRO MT 74/14 - 11 December 1946; S.I. (M) (46) (38): '[...] some of the differences between the Transport Bill as introduced and the Electricity Bill as at present drafted, may not be easy to justify in debate as necessitated by the differences in circumstances

and played only a minor role in the formulation of the regulatory regime for the transport industry. Nevertheless, while this account has stressed the extent to which the socialisation of the British railways represented domain-oriented assumptions, building less on party-political, but administrative reasoning, the fact that the incoming Labour government advocated the creation of public corporations was nevertheless decisive for narrowing down the options for the organisation of the socialised railway operator.

The insulation of the regulatory space from societal forces

Foster (1994: 496) proposes (and discounts) the view that 'the railways had to wait until they could pay a low price in terms of influence to persuade a Labour government to nationalize them in 1948'. The evidence shows that far from being able to 'capture' the ministry or monopolise the alternative generation and agenda-setting process, the railway companies were internally split, unable to agree whether to propose a vertical separation or a cartel-like arrangement with the road haulage industry. The railway companies' position was further weakened by their lack of access to parliamentary opposition as they failed to agree with the Conservative Party on a joint approach to oppose the Labour government's proposals. The Conservatives defined co-operation of traffic as allowing free competition for services between all modes of transport. Any form of monopoly was to be prevented and all restrictive regulations to be abolished.⁷³ The railway companies found these proposals unacceptable, claiming that the Conservative's proposals were 'not in the realm of practical

and some of these differences will have to be shown to have valid grounds if we are to escape embarrassment.'

⁷³ PRO RAIL 1007/606; 26 February 1946.

politics in 1946'.⁷⁴ On the one hand, these arguments represented the opposite to the conclusions of discussions between rail and road interests. On the other hand, the proposals were perceived to lead inevitably to a 'transport crisis'. The railway companies themselves only managed to represent a 'minimalist' joint position, arguing that a 'complete fusion [...] would be disastrous', that any experimentation by institutional re-arrangements during a post-war period was harmful, and that the railways should be put on an equal footing with other forms of transport.⁷⁵ Finally, the railway companies position to shape policy proposals was further weakened by their refusal to contribute informally to policy formulation. Only from spring 1947 onwards did the railway companies allow their staff to deal with the Ministry on technical issues of the nationalisation policies (see Chester 1974: 75-7).⁷⁶

In contrast, trade unions were more influential. A report by the TUC on the advantages of the corporation model provided one of the main sources of advice in the alternative generation process. Nevertheless, regular meetings with either the TUC or a TUC committee, consisting of transport union representatives did not take place prior to January 1946 (with informal, non-recorded meetings previously). The trade unions were not allowed to shape the orientation of the Transport Act, as Barnes was advised that 'you cannot impart advance information of the government's plans'.⁷⁷ Furthermore, civil servants were anxious 'to avoid the impression that the Minister had entered into any kind of

⁷⁴ PRO RAIL 1007/606; 26 February 1946 & 25 October 1946.

⁷⁵ PRO CAB 21/2341; GWR, LMS, LNER and SR (1946) 'British Railways and the Future'.

⁷⁶ PRO MT 74/2 - 7 February 1946.

⁷⁷ PRO MT74/84 - 4 January 1946.

irrevocable commitment' vis-à-vis interests (Chester 1974: 85). In addition, the trade unions did not hinder the late 'liberalisation' of the 'C' licences, their initial support for a strict licensing system being mainly based on their interest in improving working conditions for their members rather than in establishing some form of 'integrated' transport system. The failure of the Ministry to pursue its original policies on 'C' licences had also less to do with the organisational strength of the road haulage industry, although anticipated protests were recognised. More importantly, it was the protests from the Co-operative Societies as well as the difficulty in administering the original scheme which allowed the opposition to oppose the proposals.

Conclusion

This chapter has discussed the case of the 1947 socialisation of British transport and railways in particular. It has shown that regulation and the appropriate regulatory regime in terms of organisational structure, allocation of regulatory authority and non-commercial policies formed a substantial part of the policy deliberation process. Furthermore, it has been considered that the 1947 Act was shaped by two competing sources of isomorphism, one motivated to establish an integrated and activist policy, the other relying on managerial liberty. The much-criticised lack of formal and detailed allocation of responsibilities and duties does not reveal a failure to debate regulatory and organisational principles. Indeed, regulatory issues were widely discussed. The debate on the power allocation between Transport Commission and the executive boards was conducted in terms of principals and agents. The account has also shown that the inherent tension between these two sources of isomorphism was not fully resolved and it therefore cannot be surprising that in times of 'political need', for

example during the economic crisis beginning in 1947, these informal regulatory arrangements were subverted.

Finally, the three institutional factors can to some extent explain why there was domain- rather than paradigm-oriented isomorphic change. First, there was no overarching 'recipe' but rather a loose definition of a public corporation. Second, policy-making took place within ministerial departments with, given the nearly equal timing of the policy initiatives in the various industries, only little transfer of staff. The horizontal co-ordination mechanisms aimed mainly to provide policy coherence and adjustment to decisions put forward by individual departments. Third, societal actors, despite the TUC's influential report in favour of public corporations, played only a little role in the selection of regulatory instruments. The success of the road haulage interest, including Co-operative Societies, in preventing the establishment of an 'integrated' transport system, was less an issue of capture by societal interests as predicted by Stigler. In contrast, the industry's success was due to a combination of factors, such as its electoral strength, the absence of countervailing forces and the domain-oriented preference within government for 'competitive forces' rather than establishing a transport monopoly.

Chapter Six

Choosing between domestic 'paths' in Germany

*'[...] ministers [...] act in a
trustworthy manner, given their role
as state organs'
civil servant¹*

Whereas previous chapters have been concerned with conflicts between various degrees of domestic or international domain- and paradigm-oriented isomorphism, this chapter provides an analysis of a limited choice between two domestic domain oriented 'policy environments'. Both offered, by referring to two sets of historical precedent, sources for the legitimisation of regulatory design ideas for the post-Second World War German railways' regulatory regime.

Furthermore, war-time defeat and, in contrast to the First World War, the complete collapse of all governmental functions with final authority being exercised by the allied forces, should be expected to have opened the regulatory space for international reform experiences, in particular influence from the US as the dominant occupying power. At the same time, following Mancur Olson's (1982) argument about the elimination of institutionalised rent-seeking positions of interest groups following total defeat, a substantial penetration and change in membership of the regulatory space should be expected. First, in terms of the political-administrative nexus, limited insulation could allow for the introduction of 'new' ideas into the policy domain, such as the rise of ordo-

¹ BA B121/434 - 5 March 1950.

liberal thinking as expressed in the (West) German currency reform of 1948 and the increased appeal of an US-style prohibition approach towards competition law (Berghahn 1986: 155-81). Second, war-time defeat can be expected to lead to an opening of the regulatory space to new interest groups, thus potentially leading to a change from the traditionally pro-railways bias in regulation, in particular with regard to freight.

The following illustrates the limited influence of allied authorities on the formulation of the regulatory regime. Instead, domestic actors based their conceptions on examples of domestic pre-war railway regulation, either stressing the importance of close government control of the railway operator on the lines of the National Socialist regime, or emphasising the need to grant commercial autonomy to the railway operator on the lines of the 1924 Act.

With the coming to power of the National Socialist/national conservative government (NSDAP/DNVP) in January 1933 a *de facto*, although not *de jure* (until 1937) centralisation and assertion of political control took place (accompanied by an overwhelming NSDAP membership among Reichsbahn staff and the early introduction of Nazi symbols and forms of greetings). Legislation in 1937 terminated all reparation obligations and combined the offices of the transport minister with that of the Director General of the Reichsbahn (Wilhelmi 1963: 421). The name was changed to 'Deutsche Reichsbahn'. In 1939, the Reichsbahn was integrated into the transport ministry's administration, eliminating the administrative separation between operator and ministry and also reducing the status of the administrative board to that of an advisory body under the chairmanship of the transport minister. Debates in the

post-1945 periods were shaped by two 'traditions' of railway regulation, tending either to emphasise the 'commonweal' function (*gemeinwirtschaftliche Funktion*) and close ministerial control on the formal lines of the 1937/39 legislation or the necessity for 'autonomy' along the lines of the 1924 Act by ensuring some degree of organisational distance between political actors and the operations of the Reichsbahn.

It has been claimed that post-war events were shaped by 'naive thinking in meta-economical and economically illiterate arguments' which advocated a 'healthy regional distribution as a higher moral goal via beneficial effects of the rate system' (Kloten 1962: 225). The following considers these claims by analysing the regulatory ideas prominent in the deliberation of the 1951 Bundesbahn-Law and then discussing the 'hardwiring' of these ideas in terms of organisational structure, allocation of regulatory authority and the imposition of non-commercial functions, in particular with regard to rate-setting. Finally, it assesses the dominance of domain-oriented and backward-looking design ideas in terms of the three institutional mechanisms and attempts to explain why there was both a lack of international influence as well as influence of the ascending ideas of 'social market' ordo-liberalism, which were ruled out as 'inappropriate' for the railways.

The emergence of regulatory ideas

This section first considers the discussion of various policy alternatives in the immediate post-war period and then discusses attempts to set the legislative agenda by North-Rhine Westphalia and the response of the federal government. At both stages there was a dominance of domestic actors and a notable absence

of decisive influence by allied forces. Furthermore, the following highlights the emerging debates that drew on two sources of domain-oriented policy environments, on one side, arguments drawing on the 1924 law and, on the other, support for a return to close ministerial control and limited operational autonomy along the lines of the 1937/39 laws.

From the outset, the deliberation of regulatory policy was shaped and conducted by domestic actors, especially in the German-run executive authority for transport, with only limited involvement of international actors. After the defeat of Nazi Germany, control over economic and political activities rested with the victorious powers. The US and British military administrations agreed to establish an 'bizonal economic administration' (*Bizonale Wirtschaftsverwaltung*) in their German zones in 1947. In the process of the economic 'unification' of the two zones, the responsibility for railways rested with the so-called 'Administrative Council for Transport' consisting of the transport ministers and senators of the two zones.² The failure to come to all-German solutions due to French and Soviet resistance as well as to the US aspiration to promote economic revival and to limit dependency on US aid, led to further administrative integration of the US and British zones and the creation of the 'Administration for Transport' for the Unified Economic Area of the two zones on 12 September 1948. The allied powers gave the 'Administration' the task of formulating a new

² At the same time other 'Administrations' were established to deal with public policies (see Niclauß 1998).

regulatory regime for the railways. In the meantime, the railways were run and regulated on the (slightly modified) lines of the 1939 law.³

First drafts by the Administration in 1947 proposed unlimited powers of direction for the Director of the 'Administration for Transport' over the railway operator (Nicholls 1999: 274-5). These proposals were rejected by the military government, arguing that the Director's powers should be limited to those of supervisory 'common direction'. Limited operational autonomy was to be granted to the Reichsbahn and its Director General. These objections were integrated into the temporary law of 1948. Organisational issues such as the establishment of an administrative board or the granting of independent legal personality were not considered (Haustein and Mayer 1950).

This orientation towards the post-1937 regulatory regime in the British and US sectors was not taken up in the French-occupied zone. There, following an intergovernmental treaty, the Länder established the 'Unified Operations of Southwest-German Railways' (*Betriebsvereinigung der südwestdeutschen Eisenbahnen*, SWDE) in 1947. The regulatory regime of the SWDE followed the tradition of the 1924 law and granted the operator the legal status of a non-profit making authority under public law with own legal personality. The Länder, as owners, acted as supervisor, while operational and administrative issues were handled by the SWDE under the direction of a General Director who was

³ These reforms also established the Economic Council (*Wirtschaftsrat*) as the highest German decision-making body, consisting of members elected by the Länder parliaments, and, later, the council for the Länder, the *Länderkammer*. These reforms

accountable to a 'Railway Administrative Council' consisting of representatives of the Länder and trade unions (Schmidt-Aßmann and Fromm 1986: 19-20).⁴

Despite the existence of these two regulatory regimes, developments in the French zone had only limited influence on policy formulation. Discussions were held in the so-called 'Committee for the Preparation of a new Reichsbahn-Law' in the bizonal administration. This committee consisted of representatives of the transport administration (whose director, Dr Frohne, later became state secretary in the federal transport ministry), the Reichsbahn, trade unions, business, the Länder and the Economic Council ('Wirtschaftsrat'), while representatives from the French zone were given full membership status only at a later stage. Nevertheless, policy deliberations were shaped by competing perspectives on the appropriate regulation of the railway operator. At first, the transport administration proposed to integrate the operator into the ministerial administration. In contrast, the operator aimed to establish a substantial degree of operational and organisational autonomy outside the federal administrative machinery (*Allgemeine Zeitung*, 9 June 1949).⁵

increased the power of the existing German institutions and made them more government-like (see Kleßmann 1991; for a 'practitioner' perspective Litchfield 1953).

⁴ The East German government, following the proclamation of the 'German Democratic Republic' in 1949, delegated operational autonomy to the railway operator with close and substantial supervisory and directing powers given to the minister (Wilhelmi 1963: 450)

⁵ Newspaper cuttings found in BA B108/28559.

Timetable of reforms

6 October 1948	First Draft
May 1949	Draft of the Committee for the Preparation of a new Reichsbahn law
23 May 1949	Passing of Basic Law
9 November 1949	Legislative Initiative North-Rhine Westphalia
14 September 1950	Federal Government Draft
13 December 1951	Bundesbahngesetz passed

Debates concerning the relationship between the ministry and operator and the status of an administrative board as well as the organisation of the executive were not solved in the negotiations of the Committee.⁶ In particular, the 'Administration for Transport' proposed that its Director should be chairman of the administrative board and that various departments of the Bizonal Economic Administration should be members of the administrative board. These initiatives were opposed by committee members as leading to too close political control. Advocates, in contrast, argued that this was the sole way to find consensus and to prevent conflicts.⁷

⁶ The provisional Basic Law, in contrast to the provisions of the Weimar constitution, did not establish administrative principles, but only stated that the railways were to be organised as a federal administration. The railways' role in performing state activities was not debated during the discussions leading to the establishment of the relevant Art. 87 of the Basic Law (Wilhelmi 1963: 429).

⁷ BA B108-285541 - 23 November 1949. The majority of the committee, however, favoured a solution that would appoint the Director as chairman of the administrative board without having membership status or the right to vote (BA B108 - 28541, commentary by Adolf Sarter, no date).

The proposed law in the version of 6 October 1948 suggested that the Reichsbahn⁸, following the provisions of the 1937 and 1939 railway laws, was to be established as a special property (*Sondervermögen*) without its own legal personality (§ 1,2).⁹ The Reichsbahn was to be directed by political priorities in transport, economic and financial policy. The transport minister was to give 'common directions' to the future Reichsbahn in order to secure 'co-ordination' with other modes of transport (§4). Furthermore, the minister was to approve all major investments over DM 1 million, line closures, changes to technical equipment and new acquisitions. The administrative board was to consist of four members of the Economic Council (*Wirtschaftsrat*), of the Länder Council, of the administrations of the Common Economic Area, of the trade unions and of business associations respectively. These members were to act in the interest of 'the German people, the German economy and the Deutsche Reichsbahn' (§5). Despite the requirement to cover its own expenditure, the Reichsbahn had to fulfil 'commonweal' principles (§15(1)). Furthermore, only a close organisational and regulatory distance between federal minister and operator would safeguard co-ordination between the modes of transport and would prevent the emergence of a 'state within a state'.¹⁰ It was argued that the opportunity for political

⁸ In June 1949, the military governors in the western zones banned the continuation of the term 'Deutsche Reichsbahn'. This did not apply to East Germany, where the Reichsbahn title continued until its unification with the Deutsche Bundesbahn in 1994.

⁹ BA B121 /434 - 20 May 1949.

¹⁰ BA B121/434 - 20 May 1949. The notion of 'state within the state' was widely used in political discourse across all political parties in the post-war period. The notion was based on the claim that big business had acted too autonomously during the inter-war period. Furthermore, it was argued that during the recession following the 1929 crash big business had contributed to the rise of National Socialism. As a consequence, most

intervention had to be provided for and that the nature of the regulatory relationship had to be congruent with the overall nature of the state.

In contrast to these domain-oriented proposals, taking as reference point the laws of 1937 and 1939, other actors referred to the regulatory regime established in 1924. For example, the Reichsbahn, while acknowledging that the transport minister should be responsible for overall economic, finance, construction, investment and personnel policy, proposed that operational success could be achieved best if a General Director under the guidance of an administrative board was responsible for operational issues. This would also prevent 'politicisation' and 'bureaucratisation'.¹¹ Particular criticism was directed at the suggestion that the Director of the 'Administration for Transport' should head the administrative board.¹² The demand for an enhanced autonomous status was formulated in a pamphlet called 'Why Bundesbahn Crisis?', which called for a far-ranging limitation of the road haulage industry's commercial activities and a 'liberalisation' of the Bundesbahn from financial and operational obligations.¹³ Similar demands were made by the main railway union, the *Gewerkschaft der Eisenbahner Deutschlands* (GdED). The over-proportional representation of members from the federal government and public administration on the administrative board in contrast to representatives from business and trade

parties argued that 'laissez-faire capitalism' had failed and that elements of public control over economic activity had to be established (see Niclaß 1998: 27-72).

¹¹ BA B108/28533 - 25 September 1949.

¹² BA B108/28559 - 13 October 1949.

¹³ Bundestag-Archive; Deutsche Bundesbahn (1949) *Warum Bundesbahn Krise? Ein Beitrag der Deutschen Bundesbahn zum Problem Schiene - Straße*, Offenbach. The publication of this report was suppressed by Seeböhm, the transport minister.

unions was criticised. The GdED proposed that the administrative board should be constituted of four members from parliament, the Länder, business and trade unions respectively. Finally, the administrative board would elect its own president.¹⁴

There were therefore two sources of isomorphism in the railway domain, both domain-oriented in being purely focused on the railways and not applying broad recipes from other domains. There was no substantial involvement of international actors. In terms of available 'policy recipes' neither international experiences nor domestic ordo-liberal ideas stressing the primacy of competition on the market were considered.

Following the passing of the Basic Law, all responsibilities for transport were transferred to the new federal transport ministry.¹⁵ Furthermore, the US High Commission requested an analysis by non-German experts of the organisational and economic situation of the 'Bundesbahn' in September 1949. The Federal transport minister, Hans-Christoph Seebohm, called for additional reports by an expert commission (named the 'Allgemeine Ausschuß') and by the advisory (transport)-Academic Council.

The legislative process was initiated by the government of North Rhine-Westphalia (NRW). While directly copying ninety per cent of the Administration for Transport's draft proposal, it rejected the draft's provision that compliance

¹⁴ BA B108/28559 - 30 May 1949.

¹⁵ BA B136/1500 - 26 April 1950.

with political guidelines should be among the regulatory obligations of the operator.¹⁶ Instead, the NRW proposal emphasised the importance of a commercial orientation of the operator and of operational autonomy along the lines of the 1924 regulatory regime for the 'Deutsche Reichsbahn Gesellschaft'. Overall control over the activities of a collegiate executive was to rest with an administrative board, consisting of representatives from the Bundestag, the Bundesrat, trade unions and business (*Die Welt*, 13 October 1949).¹⁷ The role of the minister was to be 'reduced' to 'classical sovereign tasks'.¹⁸

These proposals were criticised by the Transport Ministry and the railway operator. The Ministry argued that the NRW suggestions amounted to an 'impossible proposal' due to their lack of possibilities for political intervention and ministerial means to co-ordinate the various modes of transport. The senior Transport ministry official Hufnagel attacked the proposals for their distrust of the transport minister, claiming that one should assume 'that ministers would act in a trustworthy manner, given their roles as state organs'.¹⁹ The Bundesbahn criticised the suggestion of establishing a collegiate executive, doubting whether

¹⁶ BA B108/28541 - 23 November 1949. NRW's interest can be explained by its geographical position as the industrial core of West Germany, and thus reliance on the railways, and by political reasons in that premier, Karl Arnold, was a key Christian Democrat opponent of the Chancellor Konrad Adenauer. The main actor behind the NRW draft was, however, a senior NRW official and SPD member Brandt.

¹⁷ BA B136/1500 - 14 October 1949. Arnold publicised his proposal in a speech to the Bundesrat on 9 December 1949.

¹⁸ BA B108/28541 - no date, 'Stellungnahme zum Entwurf eines Gesetzes über die Deutsche Bundesbahn von Nordrhein-Westfalen'. The 'classical sovereign tasks' included mainly supervisory functions.

¹⁹ BA B121/434 - 5 March 1950.

such a body would have sufficient 'potency' (*Durchschlagskraft*). It was feared that the suggested autonomous status of the Bundesbahn would lead to a weakening of the federal government's responsibility for maintaining its property. Paul Schulz-Kiesow, a prominent transport academic, claimed that the realisation of NRW's proposals would expose the Bundesbahn, the road haulage undertakings and the inland shipping operators to the 'free market economy', leading to a 'struggle between all, which without government intervention, will lead to the collapse of all three modes of transport'.²⁰ The railway expert Adolf Sarter similarly claimed that the NRW proposals gave 'free licence to unhindered competition, in particular with regard to rates'.²¹

Seeböhm stressed that the NRW proposals were incompatible with the constitutional provision of Art. 87 of the Basic Law defining the federal railways as part of the federal administration. Requesting an investigation by the Justice Ministry into the implications of Art. 87, Seeböhm argued that due to the Basic Law's provisions, the Bundesbahn could not be established as a federal independent administration with its own legal personality on the lines of the 'Deutsche Reichsbahn Gesellschaft' of 1924. He argued that 'according to the Basic Law, the Bundesbahn is subordinate to me in all its functions and my power of direction is limited in no way'.²² It was even 'doubtful, whether the Bundesbahn can be established as a special property or whether it has to [...] be set up as a purely fiscal undertaking'. In any case, the administrative board of

²⁰ BA B108/28533 - 7 February 1950.

²¹ BA B108/28541 - no date, 'Sarter über Gesetzesvorlage NRW'.

²² BA B108/28533 - 9 November 1949. Letter of Seeböhm to the Minister of Justice, Thomas Dehler (FDP).

the Bundesbahn could 'not live its own life, but has to be, at least, under the chairmanship of the federal minister or state secretary'.²³

The Justice Ministry confirmed Seeböhm's claims to some extent. It concluded that the Basic Law established that the railways should be organised at the federal rather than Länder level. While Art. 87 did not specify the organisational form the 'federal administration' should take, the possibility of exerting considerable ministerial influence had to be ensured. A railway operator organised on the principles of the 1924 provisions or as advocated by NRW would violate the Basic Law's intentions.²⁴ This view was challenged by two railway experts (and Bundesbahn officials), Haustein and Mayer, who argued that the Basic Law's 'constitutional fathers' had merely intended to demarcate federal from Länder competencies, thus allowing for any form of organisational arrangement - ranging from full ministerial control to autonomy ('*zwischen Regie und Autonomie*') (Haustein and Mayer 1950). Haustein claimed that the Ministry of Justice's report was 'without doubt illogical and contradictory', supporting at the same time considerable operational autonomy and substantial ministerial control.²⁵

²³ BA B108/28533 - 9 November 1949.

²⁴ BA B136/1500 - 19 January 1950. Report on Art. 87 Basic Law by the Federal Minister of Justice. This report was used until the 1990s to claim that any major reforms of the Bundesbahn's status would require a constitutional amendment. Critics of this argument suggested that this interpretation of the Basic Law's provisions was little else than a scapegoat to prevent politically undesired consequences (see Fromm 1982)

²⁵ BA B121/878 - 2 March 1950.

The Ministry of Transport adapted its position to the Justice Ministry's report, now claiming that a substantial degree of operational autonomy should be provided to ensure commercial viability, while establishing sufficient levers to impose political choices, such as employment programmes.²⁶ The debate nevertheless continued and contrasted 'closer ministerial control' views with those advocating operational autonomy. The latter view was particularly stressed by reports of non-German experts whose contributions had been requested by the US military administration. For example, the analysis by the consultants 'Coverdale and Colpitts' from New York, requested after demands by the Transport Sub-Committee of the Allied High Commission in negotiations with the Bundesbahn and the Ministry of Transport on allied credits for the Bundesbahn, called for an increased commercialisation of the Bundesbahn. While overall control by the minister of transport was supported, commuter and freight fares had to be increased, personnel had to be reduced significantly and financial obligations placed on the Bundesbahn by the federal government should be eliminated.²⁷

²⁶ BA B121/434 - 5 March 1950.

²⁷ BA B196/1499 - 25 October 1950. A note by the Bundesbahn suggested that the Coverdale and Colpitts report was 'not convincing, because it applied US assumptions' (BA B121/435 - 21 November 1950). In particular, the demand that the Bundesbahn's staff should be reduced by 80,000 was critically received by the federal government with Seebohm insisting that the report contradicted many of his ministry's policies and that from the outset the report had neither been initiated nor supported by his ministry (BA B108/28536 - 5 September 1950). The US government made any credits for the Bundesbahn conditional on the implementation of the report's proposals.

Similarly, a report by the international experts Ludwig Homberger and Raphael Cottier in May 1950 reflected the demands for increased commercialisation.²⁸ The extent of ministerial control as envisaged by the federal transport ministry was criticised. It was suggested that the Bundesbahn should be granted special property status (*Sondervermögen*), allowing for the adoption of commercial business practices and protecting the operator from interference by day-to-day politics, while the interests of the German economy should be safeguarded. The executive, headed by three people, was to be supervised by an administrative board consisting of 17 members appointed by the federal minister of transport, drawing from representatives from business, agriculture, trade unions and the Länder. The minister of transport's role was to co-ordinate all modes of transport and to control rate-setting. The minister was also to be involved in directing the operator in economic matters, including the right to impose policies in order to establish a unified transport policy in 'exceptional circumstances'. At the same time, the Bundesbahn was told to rationalise its structure, to reduce personnel and to increase charges, leading to a transport market where every mode should charge according to its true cost.²⁹

The most influential contribution to the regulatory debate was made by the all-German 'Allgemeine Ausschuß' in the so-called Nitschmann report.³⁰ The report

²⁸ Homberger was professor of transport science at the University of Washington. Before 1933, he had worked for the Reichsbahn. His appointment was suggested by Adenauer. Cottier was director at the central office for international railway transport in Geneva.

²⁹ BA B108/28533 - 24 October 1949.

³⁰ Nitschmann, the committee chairman, was a former president of the railway directorate in Hamburg. He chaired a committee consisting of railway experts from the Länder, the trade unions and two accountants. Prior to its publication, the report was

claimed that the extent of autonomy as proposed by the NRW plans was unconstitutional.³¹ It was argued that the minister should be given sufficient regulatory and policy guidance powers as the Bundesbahn was 'the most valuable part of the federal property'. Nevertheless, the Bundesbahn was to be granted 'independence and flexibility'. In contrast to the Transport Ministry's proposals, the report suggested granting the administrative board 'decisive influence' on questions of 'common importance' and on 'crucial' individual issues. Members were to be drawn from business, the trade unions and the Länder. The Bundesbahn's executive was to consist of a general director and two deputies in co-operation with the heads of the various departments. It was proposed to provide the transport minister with competencies ranging from the supervision of the implementation of policy guidelines and control over safety, to supervising the modernisation of equipment that reflected 'technical developments'. In contrast to the NRW plans, the minister was to be given veto power with the federal cabinet acting as the final decision-maker in cases of disagreement between minister and administrative board. Due to the Bundesbahn's 'commonweal' functions, the Bundesbahn was to receive financial compensation for loss-making services.

Whereas the last two proposals signified a move towards a compromise solution between the two domain-oriented design ideas (the Homberger and Cottier report from the 'autonomy' perspective and the 'Allgemeine Ausschuß' from the

discussed by the committee members, Seeböhm and Frohne from the federal transport ministry, and members of the SWDE, and subsequently amended (BA B121/880 - 3 December 1949).

³¹ BA B136/1500 - 8 February 1950.

'commonweal' view), the suggestions of the Academic Advisory Council to the Transport Minister represented a position similar to the Transport Ministry's original opinion. It was argued that the administrative board should have a 'co-determining' and 'advisory', but not a 'decisive' function. The federal government was to be given a maximum of discretion in its appointments to the administrative board, although business and trade unions should account for half of this body's membership. The advisory council defined independence as being not directly administered by the federal transport minister. As the Bundesbahn was part of the federal administration, the transport minister should be provided with a substantial number of functions beyond mere 'supervision', such as policy guidance, influence on business decisions, appointments and the 'co-ordination' of the various modes of transport. The power to set tariffs was defined as an essential part of national sovereignty.³²

In contrast, business associations demanded a return to the 1924 status. The peak industry association, the 'Bundesverband der deutschen Industrie' (BDI) asked Adolf Sarter to assess the Bundesbahn's position (Sarter 1949). Sarter advocated a return to the regulatory regime of 1924 as 'the men of the DRG used the foreign pressure to make the operator fit in the interest of the German economy and overall German political interest'. By advocating a strong institutional and autonomous status for an administrative board for the railways, he criticised the Administration for Transport's proposals for suggesting neither a

'state nor autonomous operation, creating autonomy on the outside,
but reformulating it into a state-operated railway undertaking on the

³² BA B136/1500 - 22 January 1950.

inside. The main organ of the undertaking, the administrative board, by having the responsible minister as its chairman, is little else than an auxiliary tool of government' (Sarter 1949: 28).

There was a shared consensus that transport, and in particular railways, was a 'special' policy domain where liberalisation was 'inappropriate' due to high fixed costs, the inelasticity of supply to changes in demand and the still dominant position of the railway operator in the overall transport market (Gutmann *et al.* 1964). The various proposals can be categorised into two distinct domestic domain-oriented regulatory design approaches. These proposals either offered a variation of the Federal ministry of transport's policies or followed more closely the line taken by North Rhine-Westphalia. Nevertheless, in most respects, the proposals were to a large extent similar. On issues such as the appropriate scope of ministerial involvement or the role of the administrative board, the key doctrinal difference was between the assumption, first proposed by the Administration for Transport, that the railways should follow 'commonweal' aims and the assumption, represented in particular by North Rhine-Westphalia, that the railways should be organised along 'commercial principles', while giving due consideration to the interests of the Germany economy.

Nevertheless, in practice there was little fundamental difference between the various approaches, all sharing the basic assumption that the railways should to some extent be subservient to political and economic interests, being an essential part of the administrative doctrine of '*Daseinsvorsorge*', requiring, as a pamphlet from the Ministry of Transport pointed out, political interference for

'demographic, social, cultural as well as strategic reasons, and the rights of citizens [...]' (Most 1954, cf. in Gutmann, Hochstrate and Schlüter 1964).

Organisational Structure

The 1951 Bundesbahn Law established the Deutsche Bundesbahn as a special property (*Sondervermögen*) that was to some extent legally autonomous: §1 of the new law established the operator as a 'special property without legal personality with its own economic and accounting independence'. The 'Sondervermögen' status gave the Bundesbahn budgetary and relative operational autonomy, allowing the operator to borrow independently on capital markets. It consisted of an executive of four members, appointed by the federal transport minister in agreement with the administrative board. The latter included 20 members, drawn from four distinct interests, the Länder, business, trade unions as well as 'free' appointments by the minister. The executive's independence was limited to operational affairs. The administrative board had limited final authority on issues such as economic planning, annual reports, borrowing, appointments, rate setting, acquisitions as well as all questions regarding technical, operational and organisational changes. The federal transport minister was granted the right to veto any decision by the administrative board. The following discusses the (limited) debate between the Federal ministry of transport and the Bundesrat, the latter building on the proposals put forward by North Rhine-Westphalia. It again indicates two distinct policy environments which actors used to legitimise their proposals.

The Länder, aiming to limit the federal minister's extent of decisive influence, referred broadly to the provisions of the 1924 law, while the Ministry of

Transport, in particular during the early stages, built on the proposals made by the 'Administration for Transport'. There was, nevertheless, a consensus in favour of establishing the Bundesbahn as '*Sondervermögen*', representing, a 'legal status somewhere between an ordinary government department and a public corporation, though closer to the former than to the latter' (Ridley 1964: 185). Moreover, agreement existed on the importance of the Bundesbahn's obligation to follow political guidance and its need to operate on commercial lines, giving 'due regard' to the interests of the German economy.³³ Debates with regard to the organisational structure concerned the organisation of the executive as well as the composition and competencies of the administrative board. Controversy with regard to the organisational structure of the 'agent' (the Bundesbahn) concerned mainly administrative-organisational debates such as the competencies and composition of the administrative board and the structure of the executive. Nevertheless, although these debates focused mainly on administrative detail, the different proposals were based on the two sources of isomorphism, on the one side, closer ministerial control (collegiate executive, advisory administrative board) and, on the other side, wider operational discretion ('presidential' executive, administrative board given the 'competence-competence').

The Federal ministry of transport promoted the creation of a collegiate executive, consisting of three members, drawn from law, business and technology (§7 of the draft). Within the government, this position was opposed by the Finance Ministry, which preferred a 'presidential' solution. Similarly, the transport

³³ BA B136/1501 - 7 June 1950.

committee of the Bundesrat recommended that the executive should be led by a director general, assisted by deputy directors and the heads of individual departments (§13 of the Bundesrat draft). This position was shared by the GdED. In June 1950, it called for a presidential rather than collegial executive structure. It further advocated an administrative board consisting of 18 members, providing business, trade unions and the Bundestag with six members respectively.³⁴ A presidential executive as well as a powerful administrative board were also advocated by the Bundesbahn management.³⁵ For example, the former president of the Reichsbahn, Busch, argued that 'the railway, like an army, cannot cope with a multi-body directorate'.³⁶

The Transport Minister's original proposals were fully supported only by Seeborn's own 'Deutsche Partei'. Given this extent of opposition to the initial proposal, a compromise solution was offered: the executive was to consist of four members, whose chairman could not to be outvoted.³⁷ Although the transport committee of the Bundestag at first had proposed an executive consisting of eleven members, the final structure of the executive represented the proposal of the Transport Ministry. This followed the Ministry's indication that it supported majoritarian voting in the executive as well as the proposal that the

³⁴ BA B108/28533 - 19 June 1950.

³⁵ BA B121/887 - 27 May 1950.

³⁶ BA B108/28537 - 18 July 1951.

³⁷ BA B108/28536 - 10 November 1950. In the meantime, both Social Democrats and Christian Democrats demanded that one member of the executive, a so-called Social Director, should represent and be responsible for social affairs in order to appease the trade unions. The unions demanded the implementation of a co-determination regime similar to those implemented in the steel and coal sectors.

general director could implement measures once the support by a qualified minority in the executive had been secured.³⁸

The debate on the competencies and composition of the administrative board was motivated by the various political actors' desire to either establish or to prevent the establishment of a potential rival to the federal transport ministry. In particular, the debate centred on the question whether the administrative board should be set up as a political body (this option was named 'small parliament') or as an independent body (*unabhängiges Gremium*) whose membership would not include federal political actors. A further issue was the extent to which competencies were to be delegated and the extent of discretion the administrative board should enjoy in deciding its own agenda. The Ministry proposed to provide the administrative board with a list of competencies, relegating the administrative board to a mainly consultative body. The Finance Ministry opposed this proposal, supporting the option of a powerful administrative board which would consist of representatives from the federal government, the Bundestag and the Bundesrat in order to prevent political disagreement before issues entered the Bundestag.³⁹ This view was rejected by the Transport Ministry which argued that the influence of federal ministries would be safeguarded by its supervisory and regulatory powers.⁴⁰ Rather, in key areas, the transport minister should represent the final decision-making stage and could give policy guidance.

³⁸ BA B108/28537 - 20 July 1951.

³⁹ BA B136/1501 - 21 July 1950; BA B121/888 - 24 July 1950.

In contrast, the Bundesrat transport committee suggested that the administrative board should be given overarching competence on all aspects (and the ability to decide on issues of its own choosing), the so-called *Kompetenz-Kompetenz*. The administrative board would represent the main decision-making body and key unit of control of the executive's operations. The administrative board was to combine transport, business, financial and federal interests, and should be responsible for key decisions, while also supervising the executive. Among its decision-making competencies were standard operating procedures, senior appointments, line closures, expenditures over DM 1 million and rates and charges.⁴¹ Its membership was to include representatives from the Länder, three members from business, one from agriculture, five from the trade unions, three from financial interests and three transport interested actors. The federal government was accused of being mainly interested in making the executive dependent on the federal transport minister.⁴² As a compromise solution, mainly to avoid further delay by having to resort to the conciliation committee procedure between Bundestag and Bundesrat, the transport ministry offered both a decrease in number of members as well as an increase in the administrative board's competencies to all matters where the federal minister's approval was required.⁴³

⁴⁰ BA B136/1501 - 25 July 1950.

⁴¹ BA B121/434 - 8 August 1950.

⁴² BA B136/1502 - 18 August 1950.

⁴³ BA B108/28536 - 10 November 1950. This shift was also caused by internal government pressure. For example, a note by the Chancellor's Office noted that the Transport Ministry had abandoned its 'stubborn insistence' on its own proposals and was now willing to compromise on the lines of a stronger administrative board (BA B136/1503 - 14 February 1951).

The final outcome reflected a compromise position between the two domain-oriented proposals. It reflected to a large extent the overarching consensus on the 'appropriate' role of the railway operator. While the 'special property' status offered the Bundesbahn some extent of operational autonomy, its actions were nevertheless closely controlled by political actors. Furthermore, the debate with regard to the composition and competencies of the administrative board could be interpreted not only in terms of increased Bundesbahn autonomy, but also in an attempt by the Länder to establish their representation at the core of decision-making at the expense of the federal ministry. In contrast to the UK 'socialisation' of the railways, the regulatory objective to provide for 'efficiency' was of little concern to decision-makers. Instead, prime attention was paid to the issue of control, both in terms of federal-intergovernmental relations and in terms of state-operator relations.

The allocation of regulatory authority

There was a shared consensus that the federal minister of transport should be responsible for ensuring the Bundesbahn's compliance to political 'guidelines' and for executing 'sovereign tasks' (*hoheitliche Befugnisse*). The 1951 law required the minister to ensure that the Bundesbahn would take account of priorities concerning transport, economic, financial and social policy. More importantly, the minister was given the task to co-ordinate all modes of transport. Furthermore, ministerial regulatory powers included the imposition of 'common policy directions' (*allgemeine Anordnungen*), veto powers for decisions concerning internal organisational matters, economic planning, annual reports and issues with larger financial implications. At the same time, the

Bundesbahn was given regulatory objectives, including the obligation to operate along commercial lines, to safeguard the perceived interests of the German economy and to cover its own expenditures. Full financial independence was granted for the 'application of commercial principles', the production of an economic plan and an annual report and the right to borrow independently on capital markets. This independence was, however, balanced by the Bundesbahn's dependence on political decisions with regard to rate-setting, personnel and social policy.

Again, the debate on the allocation and extent of regulatory powers of the transport minister drew on the two domain-oriented proposals. In April 1950, the Transport ministry argued that the Bundesbahn had 'to serve the German people and the German economy as a federally owned transport agency'.⁴⁴ Therefore, appropriate regulatory powers were necessary, such as the ability to impose political imperatives with regard to financial, social, economic and transport policy. The Ministry claimed that the regulatory powers of the minister were legitimised by the constitutional provision of Art. 65 of the Basic Law. This clause, establishing, amongst others, the principle of ministerial responsibility, formed the basis of the ministerial demands for substantial regulatory powers. It was stated that the ministry's key task was to establish an 'equilibrium' between the various modes of transport.⁴⁵ Although direct intervention and guidance in operational activities were to be avoided, the public importance of the Bundesbahn necessitated that in some cases ministers needed to be involved in

⁴⁴ BA B136/1500 - 26 April 1950.

⁴⁵ BA B136/1501 - 7 June 1950.

individual policy issues and that certain issues were decided with the consent of the federal transport minister in co-operation with the finance minister.⁴⁶ Finally, Seebohm also argued that regulation was important as the Bundesbahn would otherwise exploit its market power and destroy its small-scale competitors in the road haulage industry.⁴⁷

This proposed degree of regulatory power contrasted sharply with the NRW proposals where the minister was not given any authority to enforce the Bundesbahn's compliance to government policies. Furthermore, neither finance nor transport minister were to be involved in formulating the annual business plan, a power both ministers had under the 1924 law. The Bundesbahn argued that the NRW plans would not sufficiently represent the operator's status as federal property. As federal property, the Bundesbahn argued that its primary role was to fulfil the demands for transport services according to 'commonweal' principles and political guidelines.⁴⁸

The debate concerning regulatory powers centred mainly on the ministerial right to intervene on individual policy issues. The railway expert Kittel stressed that the extent of supervision should be minimised and concerned with operational safety. Furthermore, it should not be exercised by the transport ministry. The Bundesrat transport committee argued that the minister should be given the power to issue 'common policy directions' only. This view was also shared by the reports by the railway experts Homberger and Cottier as well as by the

⁴⁶ BA B136/1501 - 7 June 1950.

⁴⁷ BA B136/1501 - 25 July 1950.

consultants Coverdale and Colpitts.⁴⁹ The Bundesrat transport committee proposed to give the federal minister powers to enforce the operator's compliance to political directions, the right to give 'common policy directions' as well as the requirement of ministerial consent to economic policy, annual reports and decisions made by the administrative board. The committee argued that the proposed extent of ministerial regulatory powers would contravene the administrative board's position as main source of supervision and guidance.⁵⁰ However, it was conceded that in terms of ministerial authority, the NRW plan provided for too little, while the proposals of the academic advisory council provided for too much. Most appropriate, in the opinion of the Bundesrat's transport committee, was an arrangement following the suggestions of the 'Allgemeine Ausschuß'. This granted the minister the right to consent to the annual business plan and report. The minister should have the limited right to give 'common policy directions' and the Bundesbahn was to be forced to comply with political guidance.⁵¹ The view that the Ministry's proposals allowed for too much ministerial power was shared by the main parties with the exception of Seeborn's national-conservative 'Deutsche Partei'.⁵² Similarly, the Chancellor's Office objected to the Transport Ministry's proposals, arguing that the suggested powers were too strong and should be limited to the power to give 'common policy directions'.

⁴⁸ BA B121/880 - 20 December 1949.

⁴⁹ BA B136/1501 - 21 July 1950.

⁵⁰ BA B136/1502 - 18 August 1950.

⁵¹ BA B121/887 - 7 June 1950.

⁵² BA B136/1502 - 25 November 1950. The 'Deutsche Partei' had 17 representatives in the first Bundestag, gaining 4.2 per cent in the first federal election in 1949.

In contrast, the Transport Ministry claimed that the proposed scope of powers was necessary as the notion of 'common policy direction' was already being applied under the law of the Unified Economic Area and its vague wording had caused difficulties between the minister and the Bundesbahn management.⁵³ Ministerial regulatory control was to be restrained and therefore not limitless or arbitrary. Any ministerial guidance was restricted to the achievement of three goals, the enforcement of political priorities, the co-ordination of the interests of the various modes of transport and the realisation of regulatory powers with regard to the appropriate conduct of operations and the technological development of the railway service.⁵⁴

The final compromise limited ministerial involvement to 'common ministerial directions' (§14). Nevertheless, the minister was granted the right to enforce 'political imperatives' (so-called *Grundsätze der Politik*), in particular with regard to transport, business, finance and social policy, the 'ability' to 'co-ordinate' the various means of transport in order to establish 'harmony', to maintain safety and to ensure adaptation to evolving technological developments. The federal government would decide in cases of disagreement between the minister of transport and the administrative board. At the same time, the Länder obtained considerable veto-powers over railway policy with regard to organisational re-arrangements, rates, timetables, line closures and senior appointments (§43). These powers of veto and delay were, however, not

⁵³ BR 615/50 - 3 April 1950. This view was also expressed in inter-ministerial negotiations in June 1950 (CAB B121/887 - 7 June 1950).

matched with financial responsibilities (Dernbach 1995: 124; also Fromm 1969). The Bundesbahn's regulatory objectives included the duty to balance its budget (§28(1)), to administer the railways according to commercial principles and to protect the interests of the Germany economy (§4(1)).

Debates concerning the allocation of regulatory authority was limited, with the sole exception of the proposals by NRW. There was a wide consensus on the 'appropriate' regulatory functions of the minister. The debate on key issues, in particular on 'common policy directions' resembled those in the UK. However, in contrast to the UK, there were no other regulatory bodies (such as the transport tribunal) which checked or reduced ministerial powers (with the partial exception of the administrative board which could be regarded as an internal regulator). The regulatory objective was to safeguard the Bundesbahn's 'commonweal' function, very much in contrast to the UK where the safeguarding of 'efficiency' was the key concern.

Non-commercial objectives

All actors agreed that rate-setting was one of the key political levers to conduct economic policy. The 'Allgemeine Eisenbahngesetz', which established the obligations for 'public transport', stated that the aim of the rate policy was to have 'a common and economically acceptable rate for all railways and to accommodate it according to the demands of transport, the economy and the modes of transport'.⁵⁵ The regulation and control of transport charges was

⁵⁴ BA B108/28536 - 10 November 1950.

⁵⁵ Allgemeines Eisenbahngesetz, 29 March 1951.

regarded as a 'sovereign task' which was a 'natural' part of the federal transport minister's brief. The existing rate structure reflected the previous market dominance of the rail operator, allowing for cross-subsidisation of local passenger services by long-distance freight operations. The increasing challenge of the road haulage industry had progressively undermined the cross-subsidisation mechanism, leading to restrictive regulatory arrangements with regard to road transport in the pre-War period: in 1930 parity between road and rail charges as well as restrictive licensing were imposed, leading to a cartel-like arrangement in the road haulage industry (Dernbach 1995: 122-3). The following describes the policy debate which centred mainly on the extent of exposure of the government's budgetary resources to the operator's demands for compensation for politically demanded non-commercial services, the mechanisms for compensation payments and the need to safeguard against 'unjustified' claims by the Bundesbahn.

The Bundesbahn's regulatory objectives included the requirement to 'serve' the Germany people and economy. This requirement was implemented mainly via politically manipulated tariff-levels. At the same time, the provisions for financial compensation of the Bundesbahn for losses incurred for the performance of 'commonweal' functions were of crucial importance to the federal budget, the extent of 'commercial' operations as well as relations to other modes of transport. For example, the Bundesrat transport committee argued that 'the Bundesbahn has via its traditional commonweal function been obliged to adapt its rates according to economic needs'. Due to changing market conditions,

however, the Bundesbahn had to be protected from financial damage incurred by the imposition of non-commercial policies.⁵⁶

Moreover, the rate-setting issue affected the extent of discretion with which the Bundesbahn should exercise its functions. In particular, the Finance Ministry was concerned with the likely impact on federal finances if an automatic right to financial compensation for loss-making public services was granted. As a consequence, the Federal finance ministry demanded close control of the Bundesbahn's operational conduct and threatened to demand joint regulatory authority, if 'commonweal functions' were to receive automatic financial compensation. In contrast, the Transport Ministry and the Bundesbahn both pointed out that the proposed clauses, requiring a review by the cabinet on the impact of measures on the Bundesbahn's finances when deciding on rate levels, represented a mere moral obligation.⁵⁷

Whereas the Finance Ministry urged that the autonomy of the operator should be strongly limited and provided for a high degree of discretion for ministers to decide on financial compensation, NRW's proposals granted the Bundesbahn a substantial degree of autonomy. Its proposals amounted, in the eyes of critics, to the 'abolition of the rate setting authority [*Tarifhoheit*] of the federal transport minister and the federal government [...] freeing the Bundesbahn's leadership of any duty to maximise economy'.⁵⁸ NRW's plans suggested that the

⁵⁶ BA B121/434 - 8 August 1950.

⁵⁷ BA B121/887 - 14 June 1950.

⁵⁸ BA B121/880 - 21 December 1949. Hufnagel also warned that an interest in maintaining the financial viability of the operator should not lead to an outcome which

Bundesbahn's executive and administrative board could alter rates autonomously if the impact was limited to two million DM annually per individual measure. Any upward change in rates put forward by the Bundesbahn and then vetoed by the government would require a financial subsidy to balance the loss in income. In cases where the federal government demanded rate changes, the Bundesbahn had to be compensated for any negative impact arising from these measures.⁵⁹ Should the Bundestag approve these additional expenditures, then the rate changes should be enacted. These proposals were widely criticised for their extent of delegation and agent discretion, not only by the federal government, but also by other Länder in the Bundesrat. While the Transport Ministry proposed that the Bundesbahn should be given the right to object to the imposition of any loss-making rate changes,⁶⁰ the Bundesrat transport committee argued that the Bundesbahn should be given the right to be compensated in order not to be financially damaged by political decisions with rate changes requiring ministerial consent.⁶¹ The Chancellor's Office took a similar line, claiming that it was necessary that the government, when imposing loss-making duties on the Bundesbahn, should question first whether it would compensate the Bundesbahn or whether it should impose these policies in the first place.⁶² Nevertheless, the 'official' government line was to give the Bundesbahn the right to question rate-setting measures that would

would give the Bundesbahn management a 'comfortable cushion (*Faulenzer- und Ruhekekissen*) to rest on' (BA B121/434 - 5 March 1950).

⁵⁹ BA B121/434 - 17 March 1950; BA B121/880 - 21 December 1949.

⁶⁰ BA B136/1502 - 25 November 1950.

⁶¹ BA B121/880 - 2 March 1950.

⁶² BA B136/1502 - 25 November 1950.

lead to financial losses, leaving the cabinet to decide whether any compensation should be paid.

In contrast, the Bundestag transport committee, arguing that the government's position was insufficient, recommended that the Bundesbahn should also be able to question 'other measures' beyond those of rate setting which the government wished to impose.⁶³ It was the duty of the federal government to compensate the operator for any losses incurred following these requests.⁶⁴ As before, the Finance Minister was strongly opposed to such proposals, claiming that it was necessary to protect the federal budget from unpredictable demands and to participate in the determination of the Bundesbahn's business strategies as otherwise the Bundesbahn would have full discretion in determining which policy measures it regarded as loss-making.⁶⁵

The final outcome allowed rate measures to be imposed against the Bundesbahn's intentions (§28). While the Bundesbahn was granted a right to compensation, this right was curtailed by political decisions: on the one hand, any compensation depended on the severity of its financial impact and whether an annual profit had been achieved, on the other hand, the federal government was to decide on the amount of compensation to be paid (see also Fromm 1971).

At the same time, a regulatory regime was devised for the road haulage sector, which, after the end of the Second World War, had been left unregulated.

⁶³ BA B108/28537 - 5 December 1950.

⁶⁴ BA B136/1503 - 14 February 1951.

Following pressure from the Bundesbahn, the federal government established a structure that resembled the pre-Second World War arrangements of 1936.⁶⁶ It represented an attempt to safeguard the Bundesbahn's (and the existing road haulage undertakings') status by restricting market access via licences, by allocating new licences only if a 'public transport need' could be established, by linking road haulage to railway rates and by establishing the 'federal authority for long-distance road haulage transport' (*Bundesanstalt für Güterfernverkehr*). The latter represented an 'officialisation' of the pre-war self-organised cartel (Laaser 1987: 14, also Diekmann 1989).⁶⁷

The issue of rate-setting highlights the importance attributed by the federal government to secure tools to steer economic and regional policy, despite a clear awareness of the potential costs of such a policy. The interest in restricting the operator's discretion in financial affairs was due to the wish to minimise the risk of financial liability on the federal budget. Furthermore, the veto-power of the Länder further minimised the commercial autonomy of the operator. Therefore, rather than the protection of the railway operator itself, the policy on non-commercial services was shaped by an interest to maintain political constituencies by minimising operational discretion in service delivery, while shifting the financial consequences for these services to the operator.

⁶⁵ BA B108/28545 - 5 March 1951.

⁶⁶ In 1936, a unified road haulage charge was established at the same level of railway rates. Later, a 'self-regulatory' organisation, the 'Reichskraftwagenbetriebsverband' was established to control the implementation of the unified charging regime by taking over the responsibility for billing and payments.

The impact of institutional factors

DiMaggio and Powell's claim (1991a: 70) that among the sources of isomorphism is a search by policy-makers for models they regard as more successful or legitimate. In the case of the 1951 Bundesbahn-Law, these 'legitimate' models were either the model established in the form of the Deutsche Reichsbahn Gesellschaft in 1924 or the model of close ministerial and political control as practised by the National Socialist government after 1933 and formally after 1939. Despite the conflict between these two 'policy environments', there was a shared consensus that the new regulatory regime was to maintain the railways' traditional 'commonweal' function rather than to enhance 'efficiency' as in the case of the UK.

The final outcome represented a compromise between the two sources of 'national tradition' in the domestic policy domain. Much attention was paid to the appropriate organisational distance between minister and railway operator as well as constraining the organisational strength of the operator in terms of the debates on establishing a director general and the competencies of the administrative board. In contrast to the UK public corporation approach, the German regulatory approach did not rely on informal understandings between public corporation chairman and relevant minister, but established an extensive and formalised catalogue of competencies.⁶⁸ There was a marked absence of 'paradigm-oriented' isomorphism, either in terms of domestic ordo-liberal

⁶⁷ 'Güterverkehrsänderungsgesetz' of 2 September 1949.

⁶⁸ This does not deny the importance and frequent occurrence of informal political pressure.

discourse, or in terms of a stronger emphasis of the US military government on institutional design.

The insulation of the regulatory space from coercive pressures

Despite the political authority of the allied powers over the German administration, in particular prior to 1955, these did not exert a decisive influence on the railways. While at the early stages of policy deliberation the US administration demanded a more commercial orientation of the Bundesbahn and tighter limits to ministerial powers of intervention, the formulation of the regulatory regime was to a large extent a domestic process. This can be explained by the absence of any financial interests via reparation demands of the allied powers and the desire to delegate the administration of the economic activities in the allied zones to German actors in order to encourage a rapid return of economic activities. This would also limit the allied financial commitment for the reconstruction of (West) Germany. Furthermore, even when international proposals existed, especially the report by Coverdale and Colpitts, these proposals focused mainly on the financial regime of the Bundesbahn rather than the overall regulatory structure. Most proposed measures were non-controversial for German administrators.

The insulation of the political-administrative nexus in the regulatory space

The domestic domain orientation of proposals was facilitated by the insulation of the regulatory space from non-domain actors. The competing proposals were used to legitimise the self-interest of the Länder, aiming to minimise the federal minister's powers, while maintaining control over the Bundesbahn via

membership of the administrative board.⁶⁹ Due to their institutional veto-power via the Bundesrat as well their prior existence vis-à-vis the federal government, the Länder were able to regain considerable decision-making power which they had lost following the 'nationalisation' of the Reichsbahn in 1920.

In contrast, the federal government, especially the Transport Ministry under Seebohm, was interested in maximising control over the railway operator for regional and social reasons and minimising discretion and potential financial liability. A further incentive to minimise the commercial autonomy of the operator was the desire to avoid staff reductions at a time of potential political, social and economic volatility.

While the debate between the Länder and the federal government on the domain-orientation of the regulatory reform can be understood in terms of their constitutional position, the regulatory reform can be regarded as an outcome of the insulation of the regulatory space from non-transport actors. The key debates had already been conducted by actors in a closed policy community which had co-operated across political-administrative and societal lines, formulating and deliberating policies before the establishment of the Administration of Transport, in the Administration's deliberative committee, in political

⁶⁹ Their lack of interest in commercial efficiency was also evident in their criticism of the 'Reichsbahn' in the immediate post-war period. The Economic Committee of the Länder Council condemned the railways' business conduct for not fulfilling its expected compensatory roles during business cycle downturns. Instead of investing in new assets or repairs to locomotives and rolling stock, the Reichsbahn was accused of having been over-cautious with its orders and of having asked manufacturers to delay their deliveries (*Allgemeine Zeitung*, 4 June 1949).

committees of the Reichsbahn and in Bundestag and Bundesrat committees. Other actors did not feature in these negotiations and were only involved (such as the Finance Ministry) where their institutional competence was affected. There was therefore no involvement of the Economics Ministry, which at the time was promoting the so-called 'social market' model. Arguably, the different schools promoting a 'social market economy', ranging from ordo-liberal pro-competition views to arguments emphasising the importance of social welfare, did not offer a clear policy recipe which could have been directly applied to a policy domain.

The insulation of the regulatory space from societal pressures

Accounts stressing the importance of societal actors in the formulation of regulatory regimes have difficulty in explaining regulatory choices in the railways in post-Second World War Germany. The Bundesbahn's initial demands, to be given operational autonomy along the lines of the 1924 model, were not fulfilled. While business associations were successful in maintaining 'political control' over rate setting, they were less successful in their demands concerning the organisational obligations of the Bundesbahn and their demands for a more autonomous Bundesbahn, proposing a substantial business influence via the administrative board. Similarly, trade union demands were accommodated by the cross-party support for the institution of a 'Social Director'.⁷⁰ Crucially, these 'private interests' not only acted in a 'private' capacity in advancing their own position, but were also drawn upon as 'public' actors in the deliberation process. Thus, former railway officials were used as

⁷⁰ See footnote 36.

'experts' in the influential 'Allgemeine Ausschuß'. Furthermore, the transport academic consensus on the 'particularity' of the railways as a state activity facilitated the insulation of the policy domain. The introduction of competition was seen as violating the 'organic' relationship between state and operator. There was, therefore, among societal actors, not only a consensus on domain-oriented reforms (thus, a continuation of low transport charges for freight), but also a far-reaching membership of societal actors inside the regulatory space.

Conclusion

The case of the 1951 Bundesbahn law offers a surprising case of lack of coercive influence (and lack of interest by the allied powers). Regulatory design ideas were purely domestic and domain-oriented. The absence of either international or domestic paradigm-oriented proposals has been explained by the unchallenged insulation of both the political-administrative nexus and of the societal actors in the regulatory space. This insulation prevented the introduction of 'international' or alternative, such as ordo-liberal, domestic ideas at the alternative generation and agenda setting stages.

This case provides an example of a choice between two domestic domain-oriented sources of isomorphism, differing in the terms of their 'tradition' as their reference point. The insulation of both societal as well as political - administrative actors in the regulatory space was crucial for the selection of design ideas. All actors agreed that the railways were a sector 'deserving' political control and which should not be exposed to competitive market forces. The combination of societal as well as political and administrative actors can be understood as a tightly knit policy community which elaborated on proposals

for the regulation of the federal railways prior to the setting up of the Administration for Transport and was in continuous interaction, both in political process via the Bundesrat and Bundestag committees, and also in committees of the Bundesbahn. The insulation of this policy domain was unchallenged.⁷¹ The shared consensus on the 'commonweal' and 'servant' functions of the railways was sustained not only by the self-interest of political and economic actors, wishing to please constituencies with regional and structural 'benefits' via low transport rates and railway connections, but also by the then dominant academic consensus.

⁷¹ This case therefore differs remarkably from the history of the competition law on competitive practices of 1957.

Section IV: Regulatory Reform and Forms of Privatisation

Privatisation became one of the key themes to describe the policies and politics of public sector reform during the 1980s and 1990s. So-called 'New Right' advocates regarded privatisation as the key to better government at less cost. A 'privatised agent' was said to offer substantial efficiency and productivity gains, being able to compete in a market which had supposedly become increasingly 'globalised' and 'informatised'. While privatisation has been broadly defined as the 'introduction of private ownership into trading enterprises previously owned by governments' (Hood 1994: 37), the actual practice of privatisation varied in both meaning and form. Four broad types can be distinguished:

- (1) organisational privatisation; an alteration in the legal status of the undertaking, but not its ownership status;
- (2) the sale of the operator;
- (3) service provision transferred to the private sector and the 'withdrawal of the state' (so-called 'deinstitutionalisation', Dunleavy 1991: 228-30);
- (4) service delivery undertaken by the private sector controlled by various mechanisms such as competitive tendering, contracting out, franchising or voucher schemes.

In Britain and Germany, a 'privatisation' of the railway sector was initiated in the early 1990s. However, while in Britain 'privatisation' involved a combination of (2) and (4), in the German case 'privatisation' followed (1) and (4). Both countries were headed by right-of-centre governments. The regulatory space of the railway domain in both countries was under challenge from numerous sources.

Europeanisation - both in terms of initiatives by the European Commission as well as reform attempts in other European countries (particularly Sweden) - encouraged organisational and regulatory change (Denkhaus 1997; Knill and Lehmkuhl 1998). Despite being one of the original common policy areas under the Treaty of Rome, European legislation had, prior to the 1980s, little impact on the national level. Nevertheless, the Commission's approach had been to demand greater commercial autonomy for the operators via the introduction of public service contracts. Following a ruling of the European Court of Justice in 1986, condemning the Council for its inaction after a complaint by the European Parliament, the European Commission took a more active, liberalising role in transport policy. In the wake of the Single Market initiative, the Council passed, on the initiative of the European Commission's Transport DG VII under Karel van Miert, Directive 91/440 EEC which called for the operational autonomy of the railway operators, the separation of the infrastructure from service operations at least in accounting terms, open access for international undertakings (defined as joint ventures between operators from more than one member state and any company transporting goods across borders by both rail and road), the introduction of track access charges and the demand for a sound financial basis for rail operators. Of further crucial importance for the organisation of 'public services' was Council Regulation 1893/91, which altered Regulation 1191/69, calling for the elimination of public sector obligations except for regional and local passenger transport and requiring the purchase of public services by contractual agreement by the 'relevant authority' (Magiera 1993).¹ The impact of 'Europe' on national railway policy has been analysed by

¹ In other transport sectors, the Commission's role in the liberalisation of domestic

Knill and Lehmkuhl (1998). They argue that in the case of the UK, European legislation provided additional legitimisation, while in the German case, 'Europeanisation' is claimed to have provided additional legitimisation, a conceptual framework for organisational reform and also a means to limit potential opposition. Thus, they conclude that the Directive is one example of integration by 'support building'. In contrast, Ira Denkhaus (1997) has highlighted the role of the European Commission as 'policy diffuser' of the vertical separation model. The following two chapters allow a re-examination of these claims relating to the importance of 'coercive forces'.

In terms of insulation of the regulatory space from societal actors, various changes occurred. There was an increasing concern with environmental pollution and traffic congestion (both politically as well as in terms of 'popular concern') which encouraged political actors to consider policies encouraging a modal shift from road to rail transport. At the same time, the financial and operational performance of the railway operators in both countries had weakened their institutional status. During the whole post-war period, the market position of the two railway operators had declined:

markets was more prominent. In the field of road haulage a policy eliminating restrictions on cabotage was launched in 1998 and fully completed by 1998. The liberalisation of road haulage markets can be regarded as one incentive to reform national railway regulation, given their competition for freight traffic (see Sitter *et al.* 1999; Héritier 1997, Schmidt 1998: 273-300).

Freight market share (in per cent)				
<i>year</i>	Germany		Britain	
	<i>rail</i>	<i>road</i>	<i>rail</i>	<i>road</i>
1965	38.6	17.9	20.8	57.5
1970	36.8	17.7	18.4	62.5
1975	31.1	25.2	17.9	65.7
1980	30.0	29.0	10.3	53.1
1985	28.8	33.6	8.0	55.1
1990	24.4	39.9	7.3	62.1
1993	23.2	41.0	6.6	64.0

(Source: Transport Statistics Great Britain, Statistisches Bundesamt).²

In the overall passenger market, official estimates suggest that the Deutsche Bundesbahn's market share in long distance passenger market decreased from 16 per cent in 1960 to 6 per cent in 1990.³ In Britain, there was a similar decline from 14 per cent in 1960 to a share of 6 per cent in 1990. The market share of car transport increased in the same period in Britain from 49 per cent to 86 per cent. At the same time the German financial performance worsened continuously, despite financial subsidies, DM 54bn in total from 1975 to 1990, yet the annual deficit increased from DM 4.4bn to DM 5bn. Long term debt had reached DM 50bn with annual interest payments amounting to DM 3bn (Link 1994: 251-2). The situation with British Rail was different. In contrast to other European railways, British Rail's financial position improved during the 1980s despite reductions in public subsidies. However, major losses were recorded again in the early 1990s, peaking in the financial year 1992/93 with losses amounting to £183.4 million.

² Official statistics for the British case were amended in 1986 for all data from 1983. Previous publications note that the freight market share of the road sector was 58% (1980) and 60% (1985). This decline was due to the increase in water and pipeline transport.

³ No official German data is published to show modal shifts in transport except for 'organised' modes of transport which exclude the use of individual means of transport.

Furthermore, there was also a change in the 'intellectual climate'. Besides the 'bandwagoning' of the 'privatisation' idea, which became increasingly acceptable as a policy instrument applicable to the railways following experiences in other domains, there was, within the transport domain, a change in the perception of the importance of infrastructure. A modern infrastructure was increasingly regarded as the most effective tool for effectively achieving the aims of national policy-makers, such as the reduction of accidents, pollution, congestion and energy consumption, while also promoting mobility. Furthermore, there was a growing academic consensus that the traditional role of the state in the provision of railway services was no longer appropriate: the traditional tools of national transport policy - entry and price controls - seemed to conflict with the general move towards greater market liberalisation (Baum 1992). Nevertheless, the ability to implement these policy measures was made possible only by the major technological innovations in information technology (Denkhaus 1997).

There were therefore considerable pressures on national actors in the railway domain. The following two chapters provide an analysis of the two 'privatisation' experiences and the design of regulatory regimes for the post-privatisation period. While the British railway privatisation involved the transfer of the fragmented undertakings to the private sector, in Germany, the railway operator was kept integrated and established as a private law undertaking in public ownership.

Chapter Seven

'Regulation by Competition' as switchman for the traffic of regulatory design ideas in Britain

The philosophy of the Act was competition

IUK22

The United Kingdom is said to have pioneered the introduction of competition into previously monopolistic industries. The case of the privatisation of British Rail has been regarded as the culmination of the 'privatisation experience' in Britain, given, in comparison with other railway reforms across Europe, the extraordinary fragmentation of the privatised industry. An analysis of the regulation of the privatised British railways is, however, not only valuable for the history of British privatisations or for comparative transport studies. In contrast to other privatisation accounts which highlight the 'state capacity' of a British government, in particular institutional features such as majoritarian government and the absence of constitutional and institutional veto-points as key variables for explaining far-reaching reforms in comparative perspective (e.g. Grande and Schneider 1991), the case of British Rail offers an example of a weak government implementing an extensive regulatory reform.

The British railway privatisation offers a case of a 'paradigm-oriented' regulatory reform. It also allows for the evaluation of the three institutional mechanisms and their impact on regulatory design ideas and policy instrument selection. First, the regulatory space, as already noted above, was operating within the scope of European legislation. Second, the existence of privatisation and regulation experiences allowed administrative and political actors to draw on

design ideas and experiences. Third, the private sector had become more sophisticated and interested in 'privatised' utilities. Furthermore, the 1980s saw the emergence of new bus companies following the deregulation of the bus industry with the 1985 Transport Act (Glaister, *et al.* 1998: 40-2). At the same time, British Rail had the reputation for being extremely difficult to reform due to the strength of the railway unions.

This chapter sets out the context of railway privatisation in Britain, then discusses the emergence of paradigm-oriented regulatory ideas and then assesses the development and implementation of the 'hardwired' regulatory regime. In particular, it highlights the importance of paradigm-oriented reform ideas, emphasising the importance of competition which in the course of the implementation process were in some cases facilitated, for example the privatisation of Railtrack, while in other issues, the doctrine was compromised, for example in the decision to 'moderate' competition.

Setting the context

Throughout the 1980s, when the Conservative government under Margaret Thatcher undertook major privatisation programmes, British Rail 'remained the hard nut to crack'. On the one hand, this was due to political reasons. Margaret Thatcher, despite her hostility towards public transport, and British Rail in particular, 'was always suspicious of one or two privatisations, the Post Office for instance, and the railways were another. She felt the unions were so entrenched and that we could have strikes and people not being able to get to

work'.⁴ On the other hand, there were administrative reasons, because of the perceived inherent loss-making of politically-sensitive railway services, 'we had not really got then to the point of seriously turning our minds to creating structures which could combine privatisation with subsidy requirement'.⁵

Until the late 1980s, the main initiatives were carried forward and developed by British Rail itself. The general hostile attitude of the Thatcher government, in particular following the critical 1983 Serpell Report, initiated due to the failure of British Rail to meet its Public Sector Obligation (PSO) targets because of the recession 1979-81, led to a reduction in PSO payments by 25 per cent in real terms between 1983 and 1986.⁶ Under the 1983 policy, set by the then Transport Secretary, Nicholas Ridley, British Rail was required to achieve an operating profit of five per cent in its freight business by 1988 and to break even in its parcels and catering businesses. The PSO grant was further reduced by an additional 25 per cent for the period 1986/7 - 1988/90, with the requirement that the InterCity business was to become ineligible for any public money after March 1988 (Dodgson 1994: 233). Despite these reductions in subsidies, Chris Nash argues that the government's policy of setting clear and transparent objectives provided British Rail with a far more formal and secure framework (Nash 1988).

⁴ IUK10.

⁵ IUK12

⁶ The PSO was established under the 1974 Act and defined the services imposed on BR by the government for which they received a block grant.

British Rail itself, under its then chairman Robert Reid, launched a major internal reform programme, making non-core businesses more autonomous and implementing internal organisational changes (Gourvish 1990). The so-called 'sectorisation' below the Board level led to a separation of BR's core businesses - InterCity, Network SouthEast (pre-1986 London & South East), Provincial, Freight and Parcels - with the intended goal of making BR 'business-led' rather than 'production-led' (Gourvish 1990: 118). Throughout the 1980s, BR's economic performance improved, productivity increased, property values boomed and the three passenger sectors showed substantial growth in real income from 1982 to 1988. In particular, the InterCity operations achieved the government's objectives and improved in real terms by 121 per cent, while the parcels and freight businesses remained loss-making.

British Rail's internal policy to make its non-core businesses more autonomous was soon followed by the Government's wish to sell these to the private sector, while the rail operator had hoped to introduce private capital in the form of joint ventures (Gourvish 1990: 136). The newly established British Rail Investment Limited (BRIL) acted as a holding company for the assets of the British Transport Hotels, Sealink UK, the hovercraft operator Seaspeed and other non-operational properties. The hotel, ferry and hovercraft operations were all sold by the end of 1984. In the engineering sector, competitive tendering for rolling stock requirements was introduced in 1983. By 1987, the engineering subsidiary British Rail Engineering Limited (BREL) had lost 53 per cent of orders for locomotives and coaches to the private sector. BREL was subsequently broken up in 1987 and, in 1988, sold to management buy-out teams. In 1988, British Rail also reported its best results since its formation in 1948. Benefiting from the so-called

'Lawson-boom', and in particular from its success in property developments, it made a surplus of £290.9 million after a loss in 1987 of £82.6 million.⁷

At the same time, train accidents brought the desolate state of an old-fashioned infrastructure to the attention of the public. British Rail suffered from chronic underfunding, leading to staff shortages and the failure to install modern braking systems throughout the whole network. A report in 1989 by Sir Anthony Hidden following the Clapham Junction incident, which had led to the death of 35 people, concluded that the main reasons for the accident were underpaid, overworked and unfit employees, an unwilling and incapable management and deferred investment decisions due to fluctuating government spending commitments as well as trade union practices which inhibited progressive change.

A summer of one-day railway strikes in 1989 led to a deterioration in the relationship between government and British Rail's management with the government accusing British Rail of being too 'wet' towards the trade unions and senior politicians such as Norman Tebbit making renewed calls for the privatisation of the railway operator (*Financial Times*, 13 July 1989). In contrast to the increased political hostility towards British Rail, there was a growing support for 'public transport' and environmental issues. While the Green Party gained a surprising share of the vote in the 1989 European elections, an increased number of party motions at the Conservative Party conference called for a viable system of public transport. Public opinion polls also suggested a

⁷ In terms of market share, British Rail's role remained marginal: seven per cent in the

general perception of government failure in the area of public transport (*Financial Times*, 1 October 1990). In addition, there was an increased interest in transport infrastructure projects with the Channel Tunnel Project, resulting in an doubling of British Rail's capital spending to £1.4bn in 1992/3 according to the White Paper on Public Expenditure. The departure of Margaret Thatcher and her Transport Secretary, Cecil Parkinson, and their replacement in the Autumn 1990 by John Major and Malcolm Rifkind seemed to herald a new era for government - public transport relations. A new emphasis was given to promoting transport by rail, partly to rectify the public perception that the Conservative government was against public transport and partly to attract more freight rail transport due to the opening of the Channel Tunnel.⁸

To summarise, BR's policy environment changed over the 1980s with an increased emphasis on liberalisation and privatisation. This emphasis, based on utility privatisations and bus deregulation of external policy environments was also followed by internal changes within BR, both in terms of the sale of non-core businesses and in terms of internal reforms such as 'sectorisation' which offered a potential blueprint for an eventual transfer to the private sector. However, these isomorphic pressures which encouraged an increasing homogenisation of the regulatory regime for the core activity of British Rail with its policy environment were, until the late 1980s, hindered by political (fear of strikes) and administrative (problem of subsidy payments) doubts.

The emergence of regulatory ideas

passenger and eight per cent in the freight market.

This section considers the discussions concerning the regulation and organisation of a privatised British railway system. It discusses the existence of domain-oriented proposals, expressed mainly by the Department of Transport and British Rail, which both, at first at least, argued for a continuation of the reforms British Rail had internally undertaken during the 1980s and early 1990s. In contrast, there was the accumulated experience of previous utility privatisations in the Treasury and the belief that the creation of a competitive structure was preferable to a reliance on post-privatisation regulation.

Interest in a privatisation of British Rail's core businesses emerged in the late 1980s. Two think tanks, the Centre for Policy Studies and the Adam Smith Institute published proposals for a privatised British Rail, the former suggesting a return to the 1921 structure, while the latter advocated the setting up of a track authority that would lease train paths to competing companies. Official work on rail privatisation did not start until the announcement by the then Transport Secretary, Paul Channon, at the 1988 Conservative Party Conference that the government was looking at the possibility of privatising the railways. Margaret Thatcher 'was a little annoyed about this, because she then amended it into an idea that [rail privatisation] was floated as a possibility rather than a serious proposal'.⁹ Channon's successor, Cecil Parkinson managed to convince Thatcher that he would suggest at the time of the 1989 party conference that the government was continuing to look at the possibility of rail privatisation. He commissioned his Deputy Secretary, Edward Osmotherly, to write a paper on rail privatisation. This report concluded that no viable privatisation option

⁸ IUK16.

existed and that the outcome of British Rail's internal organisation should be assessed before any further study of privatisation options should be undertaken again (*Independent on Sunday*, 13 January 1991).¹⁰ Nevertheless, at the time of the 1990 party conference, Thatcher was convinced by Parkinson that there was no reason not to privatise British Rail. Parkinson brought his experience of electricity privatisation into a 'privatisation-reluctant' Transport department and wished to introduce horizontal separation between track and infrastructure into the rail industry.¹¹ Thatcher, in contrast, recalls that

'Cecil Parkinson and I considered how to proceed in October 1990. Cecil was keen to privatize the separate rail businesses - like InterCity, Freight, Network SouthEast. I, for my part, saw attractions in the idea of a national Track Authority which would own all the track, signalling and stations and then private companies would compete to run services. But these were large questions which needed careful thought and economic analysis. So I agreed with Cecil that a working party involving Treasury and DTI as well as the Transport Department be set up to study the issue and report back to me' (Margaret Thatcher 1995: 686-7).¹²

⁹ IUK10.

¹⁰ IUK2.

¹¹ IUK10.

¹² '[The Treasury] wanted to interfere with railway privatisation, because they had not been allowed to interfere with electricity privatisation. Major was then Chancellor [...]. At that time as far as Margaret Thatcher is concerned, Major walked on water, beyond reproach. So he said, may we take part in this. [...]' (IUK10).

Besides the growing political interest in the privatisation of British Rail, there was also a growing administrative interest in applying the knowledge gathered in the previous utility privatisation to the railways industry, 'our thoughts on how you could privatise things had moved a great deal'.¹³ One learning effect had been that it was possible to successfully privatise public sector utilities. The second learning effect, first applied in the case of electricity, was that 'it is a mistake to simply privatise a monopoly and then rely on regulation to make it work'¹⁴ and that 'we could do a lot better if we changed the structure and got more competition'.¹⁵

The working group set up under Parkinson consisted of the junior ministers Roger Freeman (Transport), Francis Maude (Treasury), John Redwood (DTI) and several officials. This group presented a break-up model of rail privatisation which split the infrastructure from operations in most of the country, apart for the commuter lines into London which were kept integrated.¹⁶ Departmental differences, however, meant that these proposals were not taken up.

British Rail played no role at this stage of policy deliberation. Prior to the appointment of Malcolm Rifkind in 1990, British Rail, in particular at the managerial level, had not been against privatisation *per se*. It was hoped that a privatisation would result in a greater extent of operational independence from

¹³ IUK2.

¹⁴ IUK11.

¹⁵ IUK2.

¹⁶ IUK2.

the government.¹⁷ At that time, BR was advocating a privatisation as a single entity along the lines of the British Gas privatisation.¹⁸ Especially then chairman Bob Reid advocated this solution, in addition to opposing any vertical separation. The 'official' BR line was to advocate a solution where an operating BR core would contract-out most of its tasks.¹⁹ Other BR managers suggested that the internal BR reforms should be pushed forward towards privatisation. By 1990, BR had fully implemented its 'business sector' reorganisation, splitting its operations into independent businesses with their own assets. These business sectors were to be accountable to the Board as separate profit centres and were to be run as companies, with their own subsidiaries being responsible for staff and track. To gain access or service, each sector had to negotiate a contract with the appropriate subsidiary. It was suggested that the five business sectors - InterCity, South East, Regional, Trainload Freight and Railfreight distribution - should be sold as five businesses.²⁰

Within government, various actors approached rail privatisation with different agendas and options as to the appropriate regulatory regime.²¹ The Department of Transport, although independently, at first proposed a BR-like solution which would leave the InterCity business vertically integrated. In April 1991, Rifkind ruled out any option that would separate the ownership of the infrastructure from the operation of train services. It was argued that such a split would not be

¹⁷ IUK15.

¹⁸ IUK4.

¹⁹ IUK8.

²⁰ IUK20.

operational and would leave the track operator with too much market power. Rather, it was proposed to retain, in the private sector, those parts of BR which were, like the InterCity business, regarded as successful. Work was undertaken to formulate a scheme which would establish a track access pricing regime which would be policed by an independent regulatory body (*Financial Times*, 12 April 1991).

The Treasury and the DTI disagreed with the option to privatise vertically separated rail businesses and the Treasury

'outmanoeuvred [...] Transport, because the Treasury was very concerned particularly with InterCity, which after all was a quite profitable business, that if they got the infrastructure, in practice whatever regulation, they could abuse their monopoly position to keep the others off their tracks'.²²

It was the 'Treasury having clear basic principles as to what was important, in particular competition, and exploring ways in which it might be done and bringing the Department to that view too'.²³ One key concern of the Treasury was that a sale of InterCity would cause problems in maximising returns, 'they were smarting to an extent over the criticisms that had been levelled against them during the other privatisations, that they had sold the jewels for a song'.²⁴

As a consequence, in addition to the separation proposals, the Treasury developed the idea to franchise passenger services, which itself reinforced the

²¹ Although the Scottish and Welsh Offices were also involved in the process, they were mainly concerned to safeguard railway services to rural constituencies.

²² IUK1.

²³ IUK11.

proposals for a separation of infrastructure and operations.²⁵ Thus, the Treasury view, which developed in a departmental working group and was backed by John Redwood at the DTI, was to propose maximum fragmentation of the system with different undertakings performing different functions, 'if you could have turned the railways into 100 corner-shops, the Treasury would have done it'.²⁶ In contrast, the Department of Transport

'did not start with a model [but was] driven by a much more pragmatic concern [...] which tried to address itself to an industry in the transport sector, where [the] top priority was about greater efficiency and better services, more responsiveness to that particular market [...]'.²⁷

During 1991, opinion about the 'appropriate' organisational structure changed within the Department of Transport, shifting away from the sale of vertically integrated businesses to a separation of track and infrastructure. Given the preference to have diverse train operators, the experience in other utility privatisations with the splitting-off of services and infrastructure as well as for the extent of inter-running on the track

²⁴ IUK15.

²⁵ Franchising reinforced the separation proposal as vertically integrated businesses were regarded as being difficult to franchise. Moreover, the time frames for investment decisions of train-operating companies and track operators are different.

²⁶ IUK12. A further Treasury concern was to establish a different financial basis for the railways: 'Every year the railways undershot their target. Every year, there were weeks of negotiations and arguments with the Treasury in which they ended up getting more money. They were not so much in terms of absolute numbers a threat to the Treasury, but in terms of time they took. And there was a Treasury judgement; that is worth paying a lot of money to get them off our back' (IUK5).

²⁷ IUK12.

'we eventually persuaded ourselves that the least worse of all options was a vertical separation. And it took us an awful lot of agonising over that and I don't think we were terribly enthusiastic about it, we were pretty cautious, it was new territory and [nobody] has done this [...] we were heavily conscious, here is a huge national asset, and although we are not enthusiasts or sort of anorak-clad trainspotters, we do know that railways are a bit *sui generis* [...]. After all, Treasury and DTI have no responsibilities and they can be devoted to philosophy and theory and so on, the poor old Department of Transport was actually responsible for the transport system [...], we eventually got to a least worst view of the separation of track - operation distinction'.²⁸

John Major and his Policy Unit, however, proposed a return to the structure of the four main rail operators on the lines of the 1921 Railways Act, 'pushing [...] for presentational reasons and for reasons of comprehensibility, for a series of vertically integrated regional companies'.²⁹ However, these proposals were rejected, 'they were starting to play with a kind of nostalgia, why don't we create regional vertically integrated companies [...]. This was the moment when Transport and Treasury did sort of join forces and said, "this is totally bonkers"'.³⁰ The final agreement on an outline for the future organisational structure was reached in January 1992, when 'we [...] hacked out something,

²⁸ IUK12.

²⁹ IUK23. This development emerged from within the Policy Unit without reference to previous proposals and was based mainly on arguments of customer accountability and better saleability of privatisation to the public. It was then taken up by John Major.

which we could put to our ministers and then collectively to the Prime Minister and his colleagues'.³¹ In particular the Policy Unit of 10 Downing Street was pressing for a decision given the government's intention to place the issue of railway privatisation in the Conservative Party's election manifesto.³² Ministers agreed in February 1992 to propose the vertical separation of infrastructure and operating companies and a franchising system for unprofitable social services and this was signalled (discreetly) in the Conservative's general election manifesto.

Thus, the evolution of regulatory ideas suggests a strong ministerial and prime-ministerial desire to privatise, but little political direction as to how to privatise.

'[T]here was a tremendous emphasis by ministers [...] that they were in the business of privatisation. [...] If you have privatised, you have succeeded, would be, I think, the pretty accurate summary. If you have privatised and done it quickly, you have succeeded even more. And if you have privatised and have done it quickly and made it irreversible, you have succeeded even more'.³³

³⁰ IUK2.

³¹ IUK11.

³² The task for the Policy Unit was 'to stitch together a compromise in some language which would get us through a general election campaign without the whole thing becoming extremely embarrassing or politically damaging' (IUK23).

³³ IUK12. This role of ministers was widely shared. 'Using the particular form of a quadripartite parliamentary secretary committee to bash the policy out, it was rougher, they did not try to sort out their differences, there were a lot of rough edges' (IUK5); '[T]he role of ministers was essentially in fixing and facilitating, and keeping us to the mark' (IUK1).

This enthusiasm was nevertheless cautioned by a political interest in postponing the launch of a rail privatisation policy until after the general election in order not to attract controversy and opposition.³⁴

There was also a rejection of accommodating any arguments made by British Rail as 'all these things that had ever been said or promised in the past, I exaggerate, had gone wrong'³⁵; furthermore, there was the perception that BR was a 'management nightmare' where 'the tiller was not connected to the rudder'.³⁶ Thus, it was proposed to concentrate management activities on particular activities. There was a marked absence of any domain-oriented proposals or international perspective. No influence was exercised either by the EC-Directive 91/440 or other European reform experiences, 'we were aware of what was going on, but nothing influenced us'.³⁷

At the administrative level, this paradigm-orientation of the reform concepts was most dominant. Although the decision to vertically separate operations and infrastructure was strongly demanded by the Treasury, this nevertheless represented only to some extent a 'victory' of Treasury arguments. More important were the collective learning experiences of previous privatisations of

³⁴ IUK14.

³⁵ IUK23.

³⁶ IUK2.

³⁷ IUK1. The White Paper stated 'In other countries the private sector is actively involved in the railways. Already 40% of Japan's railways are private and it is the Japanese Government's intention to privatise the remainder. The Swedish Government enables the private sector to operate certain railway services through a tendering system. The

network industries and of contracting-out models. The problems with the post-privatisation regulation of British Gas were the key to the success of the 'fragmentation and separation' argument, which was 'at the zenith of popularity in the government' at the time of railway privatisation.³⁸ Furthermore, the effects of the British Telecom duopoly review in 1990, which resulted in a major rationalisation programme at British Telecom, seemed to confirm the view that efficiency and performance could be enhanced by introducing competition. The idea that competition was essential for any industry to behave efficiently and the view that a structural solution was advantageous in contrast to post-privatisation regulation were crucial in the development of the regulatory regime, 'the real drive was "let's get as much competition into this environment as we possibly can"'.³⁹

Organisational Structure

While the debates prior to the general election had led to a relative commitment to a vertical separation and therefore a domestic paradigm-oriented choice, the post-election period was characterised by remaining uncertainty. This uncertainty was caused by the decline of the Conservatives' parliamentary majority and the government's overall unpopularity as well as by the uncertainty about the timing of the next general election and the wish to hardwire the new regulatory regime prior to the election. This political

privately owned American freight railways have been successful and profitable over the past ten years' (Department of Transport 1992a: 2; para. 7).

³⁸ IUK4.

uncertainty expressed itself in the search for solutions which would, on the one hand, safeguard existing services and, on the other hand, make reversal too costly. The following discusses the organisational structure, in particular the establishment and sale of the infrastructure provider, Railtrack.

Following the election, the new Transport Secretary John MacGregor reconsidered all possible organisational solutions, as 'it was quite a strong manifesto commitment. In fact, it was properly spelled out more strongly in the manifesto than was there'.⁴⁰ He obtained cabinet agreement on the broad outline which had been suggested in the manifesto. A White Paper, called 'New Opportunities for the Railways' was published in July 1992 and set a rather vague framework for the future organisation of British Rail (Department of Transport 1992a; Glaister and Travers 1993). '[T]he White Paper was almost a target for getting agreement in government, a means if you like, for getting agreement quickly'.⁴¹ Existing track and signalling assets were to be vested in Railtrack, which itself was to be a new part of British Rail. BR was supposed to be the overarching owner up to the point of sale with two subordinate operations responsible for services and infrastructure.⁴² Railtrack, as part of BR, was not only supposed to be responsible for the operation and maintenance of the infrastructure, but also for train-control and timetabling. The White Paper

³⁹ IUK2. Similarly: '[...] the wish, if we were going to do it, to do it on a basis that made sense and a willingness to try out new ideas like franchising and to split it up that you had various forms of regulation' (IUK11).

⁴⁰ IUK14.

⁴¹ IUK14.

⁴² A solution which would have been, at this initial stage, not very dissimilar to the outcome in Germany.

stated that the Government 'would like to see the private sector owning as much as possible of the railway. Power will therefore be taken to allow the future privatisation of all BR track and operations' (Department of Transport 1992a: 4; para. 18; Department of Transport 1994). Railtrack was to sell train paths to 25 passenger franchisees, bidding for the lowest subsidy, for the provision of specified passenger arrangements and to open access providers. The freight and parcel operators were to be organised into four companies (Trainload Freight, Freightliner, Rail Express and Red Star) and sold directly to the private sector (Department of Transport 1992a: 11-2; para. 45-55). The White Paper suggested vesting BR's rolling stock and related traction equipment into three leasing companies which would lease equipment to the train operating companies. Instead of the previous system of a public sector obligation deficit grant, subsidy under the 'new' regime was channelled via the passenger franchising mechanism. Freight services were also eligible for subsidy; these were allocated by the Department of Transport.

The White Paper showed that the Government approached the issue of rail privatisation with great caution, especially given the then deteriorating economic climate. It contained little detail on how privatisation was to be achieved, on the way the franchises were to be offered or on the subject of track access charges. Nor did a time frame exist. Until February 1993, no further departmental guideline on either the track access regime or on the actual charges was published. The uncertainty was also reflected in the drafting of the legislation.

'If you looked at the way the White Paper, July 1992, treated Railtrack, very very much in terms of "Railtrack continues as part of

BR for the foreseeable future", generally tentatively moving into that direction of the final outcome. Although there was a commitment in there to some sort of track-operation split, it was pretty cautious. We were, of course, sensible enough in drafting the legislation to create sufficient flexibility and to do it in such a way that we allowed for all possibilities; hence when you look at the legislation, the accusation that it was too clever by half, no mention of the word Railtrack in any of the legislation, nothing of that and very deliberately too, because we tried to keep open a lot of options that the legislation left us a lot of scope.⁴³

External advisors and British Rail were allowed to take part in decision-making only after the publication of the White Paper. In fact, British Rail 'did not even see a draft of the White Paper', while in the preparation of the Bill the government 'did not take any notice of what we said'.⁴⁴ The House of Commons Select Committee on Transport condemned the strong emphasis given to the promotion of competition in the White Paper. Under the chairmanship of Conservative backbencher and railway enthusiast Robert Adley, the Committee recommended that severe restraints should be placed on open access for passenger operators and vertical integration should be allowed for in the

⁴³ IUK12. Similarly: 'We were writing it down, we were dreaming it up one evening and writing it down the next evening, in one particular case, we were writing it down one morning and dreaming it up that evening as it were' (IUK2).

⁴⁴ IUK4.

franchising process (House of Commons 1992).⁴⁵ The Transport Secretary MacGregor, stated publicly that he expected that the process would take ten years, indicating the Department of Transport's problems to find a compromise between the explicit commitment to competition and finding attractive terms of access which would not lead to an increased burden on public expenditures (*Financial Times*, 18 July 1992).

While the regulatory design ideas of vertical separation and competition had dominated policy deliberation stages, uncertainty rather than design ideas were crucial for the privatisation of Railtrack. Originally, in the White Paper, priority had been given to the transfer of train services to the private sector. Only after that process had been completed, would Railtrack follow (Poole 1996). Before the election, serious consideration had been given to a possible splitting up of the infrastructure operator in order to allow for yardstick competition. 'I think at the time, it was a fairly close run thing frankly. There was no knock-down argument in either direction, in my view, it would have been perfectly possible to have two or three railtracks'.⁴⁶ These arguments, proposed by the Treasury, were defeated by the Department of Transport on grounds of practicability, problems in splitting up the network, and complexity in terms of additional contractual

⁴⁵ The evidence given by the business associations also indicated that the government's proposals were received with considerable scepticism. The primary demand of business associations was an increase in transport infrastructure spending. When Adley died, the government no longer faced a potential policy entrepreneur who might have organised Conservative backbench MP opposition.

⁴⁶ IUK12.

relationships which would have been necessary to devise'.⁴⁷ The initial plan to have Railtrack as part of BR was abandoned because of the perception that BR's chairman Bob Reid was fundamentally opposed to the government's privatisation plans and attempted, together with BR's senior management, to obstruct and delay the process in the hope of 'surviving' until the arrival of a Labour-led government. As a consequence, policy-makers decided in early 1994 under John MacGregor as Secretary of State

'that the only way we were going to get it, was actually to establish Railtrack as a wedge against BR and it was for that reason that we brought the other Bob [Horton] as chairman designate of Railtrack, vice-chairman of BR, and the timetable for splitting it off from BR as a separate government owned company in 1995 with flotation to follow a year later'.⁴⁸

Besides the 'stuff BR' argument, other political motives supported the separation of Railtrack and subsequent privatisation. One reason was that it would become increasingly difficult to franchise train-operating companies close to an election if 'the infrastructure is still owned by the state, because the potential operator would see huge political risks'.⁴⁹ Furthermore, to overcome problems in executing the franchising process (see below), it was found necessary to provide privatisation with additional credibility as a privatised Railtrack with its separate identity could help to drive the privatisation process. Although a

⁴⁷ 'The reason that we didn't have several [railtracks] was that the safety card was played rigour hard, if you have infrastructure companies which have to got to hand over trains between each other causes problems' (IUK2).

⁴⁸ IUK1. 'Everyone knew that Bob Horton and Bob Reid did not get on. [...] The Department knew that they did not get on when the appointment was made' (IUK21).

memorandum by the Chancellor of Exchequer, Kenneth Clarke, was leaked which argued that privatisation of Railtrack would provide necessary revenues for tax cuts, this motive was less crucial as the Treasury was mainly interested in animating the whole process, '[i]f you are dealing with another department who don't want to do something, you've got to find a ground where you can fight on, which is uniquely yours, and it is a Treasury sense, "we want the revenue", they can't say, "No, you don't"'.⁵⁰

In November 1994, Brian Mawhinney, the newly appointed Transport Secretary, announced that the Government intended to privatise Railtrack within the lifetime of the sitting Parliament. At the 1995 Conservative Party conference, the next Transport Secretary, Sir George Young, confirmed that Railtrack was to be floated in the spring of 1996. While the Labour Party attempted unsuccessfully to destabilise the whole selling process, the main conflict emerged between Railtrack and the Treasury and the Department of Transport on the level of debts inherited from British Rail. Railtrack wanted the whole £1.5bn debt to be written off, while the Treasury and Department of Transport showed little sympathy to Railtrack's case. A compromise deal left Railtrack with a debt of £586 million (a net debt write-off of £869 million). In order to facilitate the share issue, retrospective dividends were promised.

The main sources of Railtrack's revenue were the access charges levied on train operators and the receipts from the leases for stations and depots. Although it did not receive direct subsidies from the government, it was highly dependent

⁴⁹ IUK2.

on the subsidy paid to the franchised passenger train operators, which in turn had to pay access charges to Railtrack. This channelling of subsidies reflected the perception that infrastructure supply should be demand-driven. It was stressed that a supply-driven system should not be introduced where Railtrack would have been the direct recipient of the subsidies. However, a possibility for direct government subsidy did exist as 'the Government is also ready to provide direct support for infrastructure investment projects which, although not earning an adequate rate of return, provide a satisfactory cost/benefit return when wider benefits are considered' (Department of Transport 1992a: 10; para. 43). Concerning the level and structure of charges, ministerial guidance encouraged the regulator to adopt the regime established as the basis for Railtrack's vesting. This allowed Railtrack to set charges which after 2-3 years would recover its operating expenses plus a set of depreciation charges derived from the cost of modern equivalent assets needed to meet the expected future level of demand plan and an eight per cent real rate of return in the depreciated value of the assets. The first rail regulator, John Swift, argued that charges should be rebased in 1995/96, reducing charges for franchised passenger services by eight per cent compared to the levels in 1994/5 (ORR 1995a). From 1996/97 track access charges fell annually by two per cent in real terms. Furthermore, the rail regulator also announced that Railtrack should adopt a 'single till' business so that, similar to airport practice, revenue gains from property and other ancillary activities had to be set against Railtrack's costs when track access charges were calculated.

⁵⁰ IUK2.

The privatisation of Railtrack presented a clear expression of 'paradigm-oriented' design ideas in that vertical separation was one of the key 'lessons' drawn from previous utility privatisation and regulation exercises. However, its implementation was less a result of detailed planning and administrative and political argument, but rather a strategic choice in the face of perceived BR resistance, problems in the franchising process and the 'need' to make the reform irreversible before the next general election, leading to the decision to sell 100 per cent of Railtrack shares rather than a partial sale (National Audit Office 1998a: 5-9). The

'Railways Act was drafted with a view to Railtrack remaining in the public sector. When it was privatised, fairly hurriedly, I think it became apparent after that, that we did not have enough strings to pull to ensure that, for example, Railtrack was investing sufficiently'.⁵¹

Furthermore, the structuring of subsidies via the franchises rather than the infrastructure was an attempt to reduce uncertainty in being able to specify

⁵¹ IUK19. In January 1997, John Swift condemned Railtrack's investment record of under-investment by £700 million as 'wholly unacceptable' (*Financial Times*, 20 January 1997). In May 1997, Swift argued that his tools to monitor Railtrack's investment record were insufficient and that output measures were missing. He proposed an addition to Railtrack's licence that placed a 'general duty' on Railtrack to invest into and maintain the infrastructure, giving the regulator the power to intervene should Railtrack fail to meet its commitments. Although Railtrack at first resisted these proposals, it consented to Swift's proposals, fearing both the outcome of a MMC review and ministerial intervention in the case of non-agreement. Controversy about Railtrack's investment record and performance continued and became one of the key concerns of Tom Winsor when appointed as rail regulator in July 1999 (see also National Audit Office 1998a: 30-1).

certain minimum services by contracts for political reasons and the operator had to be subsidised into a strong position vis-à-vis the infrastructure operator.⁵²

A further part of the aim to fragment the railway industry and induce competition was to establish three separate rolling stock companies, so-called Roscos. In order to speed up the privatisation process, the rolling stock companies were sold by the Department of Transport at the earliest possible moment.⁵³ Given the political and public hostility to the process, and therefore high political risk attached to the purchase of the Roscos, the bidding process collapsed after several large banks and leasing companies pulled out of the bidding process at the last moment.⁵⁴ Because 'something which was never successfully solved [inside government] was the regulation of the Roscos [...], they are not regulated'⁵⁵; they had no licences, no obligations concerning

⁵² IUK2.

⁵³ The maintenance companies had been sold previously by a vendor unit set up at British Rail.

⁵⁴ IUK18. Following the commitment in the White Paper not to sell two Roscos to one undertaking, the Rosco 'Porterbrook' was not sold to the highest bidder and fellow Rosco, 'Angel', but to a management buy-out group for £55 million less. The Roscos later obtained critical public attention for their high resale values which led to large profits for their original owners. The National Audit Office criticised the sale of the Roscos, arguing that the Department of Transport should have obtained at least £700 million more (achieving a total sale value of £2.9 billion rather than the actual £2.2 billion). The failure to insert sell-on profit-sharing clauses into the sale contracts attracted particular criticism (National Audit Office 1998b).

⁵⁵ IUK6. '[...] Even worse was the scandal of the rolling-stock companies, sold in 1996. As the franchising process for train operators was only just starting, the government guaranteed 80% of the rolling stock firms' lease-income. But only inside managers understood that the unregulated leasing firms would therefore generate mountains of cash. They also knew that cautious BR engineers had overestimated the cost of maintenance, the firms' chief operating expense' (*The Economist*, 3 July 1999; p. 68).

modernisation and investment existed, nor were commitments placed on the Roscos regarding their conduct in the negotiations with the successful franchise bidders at the second letting period of the franchises.⁵⁶

In addition to structural means to implement and 'hardwire' the new organisational structure, especially the sale of Railtrack as an independent entity, personnel decisions were made to facilitate the credibility of the new regulatory regime. Reid's replacement at BR was John Welsby, previously BR's chief executive, who had to commit BR into fully supporting the process of privatisation as a condition for his appointment.⁵⁷

In conclusion, the selection of principles for the organisational structure shows, with its emphasis on 'regulation by competition' principles, a strong paradigm-orientation. The justification for vertical separation was based on previous domestic utility privatisations rather than either the principles of Council Directive 91/440 or other international experiences in the railway domain. However, despite the dominance of these design ideas, the actual hardwiring of the regime reflected the political and administrative need to signal commitment

⁵⁶ In January 1998, the Labour government asked the then rail regulator, John Swift, to investigate possibilities of regulating the Roscos. In his report, the argument that the three firms had market power was dismissed. The rail regulator regarded the establishment of a formal regulatory regime as unnecessary and advocated the introduction of a voluntary 'code of practice' with regard to the marketing of surplus rolling stock, more flexible leasing contracts and their negotiation behaviour for the next franchising round. The Labour government's 'White Paper on Integrated Transport' of July 1998 followed these proposals.

⁵⁷ IUK1; IUK21.

by making reversal for a future Labour government too costly and by reducing the opportunities for the British Rail executive to delay the process.

Allocation of regulatory authority

This section discusses the establishment of the Office of the Rail Regulator, its functions and regulatory objectives. It also considers the continuing role of the Railway Inspectorate. It highlights the importance of the 'competition' doctrine due to the dominance of paradigm-oriented proposals. While so-called 'passenger network benefits' (such as through-ticketing) were protected, the dominance of the competition doctrine was reflected in policies such as the setting of regulatory objectives for the regulator.

To reduce uncertainty and complexity, the rail privatisation legislation was formulated with the previous utility privatisations as well as emerging case law in mind. Thus, similar to the experience of the other utility regulators, a personalised regulatory body was established. In contrast to previous privatisation programmes, the first rail regulator, John Swift, was appointed in a 'shadow' function prior to the passing of the Act. The duties of the rail regulator were set out in section four of the Railways Act, ranging from protection of rail user interests, the promotion of the railway network in terms of economy, efficiency and competition and through-ticketing. These objectives also reflected the aims and ideas of the Conservative government with their priority on

economy and efficiency, 'it was very much a tenet of Thatcherite and Majorite theology that competition always worked to the benefit of the consumer'.⁵⁸

The debate between the Department of Transport and the Treasury whether to combine the functions of the Rail Regulator and the Franchising Director focused on the importance of an independent authority promoting competition. Originally, it had been intended to combine both regulator and franchising tasks, placing the regulatory functions as independent statutory duties and the franchising functions under a 'power of direction'. While the Department of Transport was advocating a unified office in order to reduce the complexity and numbers of regulatory relationships and to prevent, despite the theoretical difference between regulation and franchise supervision, an overlap in the exercise of the two functions and thus confusion. The Treasury, however, vetoed these proposals, fearing that a unified office would lead to a conflict between the goals of promoting competition and the responsibility for purchasing railway services. A regulator-cum-franchising director could potentially mute competition in order to reduce franchising subsidies. This argument was won by the Treasury in a meeting of cabinet ministers.⁵⁹

⁵⁸ IUK1. 'I think the law is absolute clear. The analogy is with competition, a DTI competition policy' (IUK5). In contrast, 'The Railways Act has got this long list of statutory duties, which is very long, is not set out in any ordered way, which enables the regulator to pick and choose, and to a large extent the duties are actually conflicting. [...] So you have a regulator who can virtually set his own agenda' (IUK4). The statutory functions were set out in Section 4(1) of the Railways Act 1993.

⁵⁹ IUK1; IUK2; IUK12.

Transport ministers and civil servants disliked the degree of independence that was granted to the rail regulator as the regulator's decisions on track access charges (stated in the Railways Act 1993, sections 17-22) would indirectly affect the level of subsidies necessary to pay the franchises. Although 'he as a regulator is - ought to be pretty well independent from government',⁶⁰ a clause was inserted into the Act that the rail regulator was required to take into account any guidance given to him by the Secretary of State until 31 December 1996 (Railtrack Act 1993, section 4(5a)). This was regarded as far enough ahead to ensure that the government's objectives could be implemented, while also reducing the risk that an incoming Labour government could utilise this policy handle.⁶¹ At the same time, great care was taken to maximise the discretion of the rail regulator.⁶² In practice, the 'guidance clause' had no effect on the rail regulator.⁶³ A second 'precaution' was to insert a statutory requirement that the regulator had, in his decisions, to take account of the effect of his decisions on the financial position of the Franchising Director (Railways Act 1993: section 4 (5c)).

The rail regulator issued licences to railway operators and, in co-operation with the Health and Safety Executive, validated the safety record of the operator. It was also possible to impose conditions concerning policing, the environment,

⁶⁰ IUK12.

⁶¹ IUK22.

⁶² In contrast to a formulation such as 'in accordance with', which would offer the government in cases of judicial review greater scope to overrule the regulator, the chosen formula 'to take account of' required the regulator merely to consider the government's objectives.

insurance requirements and through-ticketing (ORR 1996). Contracts were enforced by the parties involved, using normal legal procedures, rather than by the rail regulator. Following the split between rail regulator and franchising director, the rail regulator had no authority in the field of passenger fares, this competence falling under the competence of the franchising director. It was also the function of the regulator to decide whether any closure may occur and whether to attach any conditions to it, although it was possible to launch an appeal to the Secretary of State (Railways Act 1993: sections 37-50). Tom Winsor, appointed as rail regulator in 1999 and during the privatisation process seconded to the Office of the Rail Regulator, argued that the powers of the Rail Regulator were more extensive than those in other utilities, stressing the regulator's powers to approve or block access contracts to the railway infrastructure and to amend, unlike other utility regulators, the central commercial contracts for the industry. A further power was the absence of the right of industry actors to appeal to the Monopolies and Mergers Commission (MMC) in case of disagreement with the regulator's price control reviews. In contrast to other utilities, the price control regime was exercised via the access contracts and not the licences.⁶⁴ While regulatory powers were originally lacking in the enforcement of Railtrack's obligation to invest in the infrastructure (see footnote 51), in the control of Railtrack's disposal of land assets and in the benchmarking of Railtrack's spending behaviour, the regulator was given decisive powers to tackle anti-competitive and exclusionary behaviour (Winsor

⁶³ IUK9; This view was also expressed by John Swift at an LSE Regulation Seminar in January 1997.

⁶⁴ The ordinary licence amendment procedure would provide for an appeal mechanism to the MMC.

1996, 1997). This strengthened formal independence and extended powers of the rail regulator was, however, not a result of political interests further aiming to insulate the regulatory regime from future political interference, but were developed within the shadow regulatory authority itself, relying on considerable regulatory expertise and experience in other utilities.

Despite the formal autonomy, the independence of the rail regulator was challenged in January 1995, when an ORR consultation document on the future arrangement for the sale of rail tickets caused ministerial intervention. The rail regulator had proposed that the full range of railway tickets could only be sold at 300 stations, two further options were only added after the regulator's advisors intervened.⁶⁵ The then Transport Secretary, Mawhinney, rejected any proposal which suggested a reduction in the number of stations offering through-ticketing, although he later had to acknowledge his impotence in the face of the regulator's institutional status. Nevertheless, given widespread opposition, the regulator withdrew the proposals in March 1995.

In sum, the rail regulator was established to ensure that competition would be introduced into the network. Thus, his functions built on the experiences with other utility regulators where originally competition had only been a secondary objective. Furthermore, in appointing with John Swift a prominent competition lawyer, whose views on the benefits of competition were regarded to be similar to those prevalent under the Conservative administration, a further step was

⁶⁵ IUK18.

taken to ensure that 'competition' was hardwired into the institutional design, despite the political decision (discussed below) to 'moderate' competition.

In terms of social regulation, the White Paper stated that the Health & Safety Commission was to arrange an examination of the implications on health and safety issues due to privatisation. Railtrack and the individual operators were given the prime duty to guarantee the safe operation of the system. The role and function of the Railway Inspectorate was not altered (Department of Transport 1992a: 17-8; para. 76-84). At the outset of the policy deliberations, it was argued that the safety issue was potentially among the biggest threats to the reform process, 'the biggest threat that we thought to the policy was that there would be a convincing argument that we could not maintain safety under the regime'.⁶⁶ Thus, early consultations were started with the Health & Safety Executive and the Railway Inspectorate and a system was designed that found mutual agreement. It was decided, following a proposal from the Health and Safety Executive, that Railtrack should be given a role in safety provision, given its control over the key safety instruments in the railways, signalling and the control of traffic.⁶⁷ Opposition to this model emerged mainly from BR which argued that under this system the HSE would escape from its own responsibilities and, more fundamentally, questioned how safety could be delegated to a profit-oriented business such as the privatised Railtrack. Instead it was suggested to set up an independent safety agency, similar to British aviation regulation which is exercised by the Civil Aviation Authority. However, this

⁶⁶ IUK12.

argument was dismissed by the Government. The decisions to adopt the HSE's recommendations with regard to the regulation of health and safety shows the intention to reduce complexity in the institutional design of regulatory regimes.

Thus, in terms of economic regulation, the leading design idea was to introduce a competition authority into the sector which would facilitate competition on track and whose motivation was not potentially moderated by franchising considerations. The establishment of a regulator on the lines of other utility regulators, drawing on existing statutes and case law, provides a further example for the paradigm-oriented nature of the regulatory regime. As discussed below, this competition on track principle, hardwired as a statutory objective, contradicted the aim to reduce subsidy payments via the franchising process.

Non-commercial objectives

This section concerns the establishment of the Franchising Director and the shift of policy priorities towards advocating a moderation of competition. It discusses in particular the conflict of the dominant 'regulation by competition' design ideas with the political need to safeguard train services and the need to attract private interest in the passenger franchises.

Franchising Director

Relationships between the train operating companies were vested in the Franchising Director and the Office of Passenger Rail Franchising (OPRAF),

⁶⁷ This hierarchical approach, where the superior authority controls the respective

which via its franchise agreements defined minimum services. OPRAF controlled fares and booked train paths for its franchises in advance on known terms. Once the decision had been taken to separately organise the franchising and regulatory functions, problems emerged in the allocation of tasks.⁶⁸

'Actually they cocked it up. [...] It is crazy to have the rail regulator and the franchising director both regulating the passenger railway. [...] John Swift had taken the job as rail regulator thinking that a major part of the job was to look after the interests of consumers. But in practice the consumer interests were with the franchising director. And that became more clear with the passage of the Bill, because a clause was added concerning fares which put obligation on the franchising director to control fares. [...] It is an exclusive power. So effectively the rail regulator had no say on fares, except to be consulted. Which he resented.'⁶⁹

As a result of the organisational, but incomplete functional split, there was an amount of overlap in jurisdiction between the two offices, especially with regards to 'network benefits'. While the rail regulator regulated licenses, the franchising director set prices and regulated via the contractual detail of the franchising contract. In most areas, it was agreed that the rail regulator would take the 'lead function'. The main initial task of the franchising director was to define rail passenger franchises (undertaken by British Rail) and sell them to train operating companies using a competitive tendering procedure. Given the

subordinate level, was called 'Cascade model'.

⁶⁸ IUK4.

charges for station and track access, prospective operators bid for the lowest subsidy, paid from a budget fixed beforehand by the government, for which they would be willing to operate the services as defined in the franchise agreement. To reduce complexity, the various services were separated along the lines of British Rail's organisational divisions. The Passenger Service Requirement was at the core of the franchising agreement, comprising two components: a minimum level of services to be provided and certain mandatory service characteristics - such as train frequency, stations to be served, first and last trains, peak train capacity requirements and fares regulation (Railways Act 1993: sections 5 and 136(7)). Further responsibilities were the promotion of investment, the improvement of services and the development of arrangements which guarantee certain network benefits. In this respect, the 1993 Railways Act represented the continued search for the 'right' approach for combining subsidy for the provision of particular railway services with increasing commercial pressure which was first attempted in the 1968 Transport Act (Beesley 1996; Foster 1971).

As principal statutory objectives, the franchising director was required to let the franchises as rapidly as reasonably possible and to improve the quality of railway services. Furthermore, John Major set the target to franchise 50 per cent of all services by April 1996. In contrast to the rail regulator, who, by statute, could only be given 'guidance' which had to be taken into account, the franchising director can be given instructions and guidance. Thus, the

⁶⁹ IUK21.

franchising director was given limited autonomy, mainly because of his control over the spending of public money.

'I always remember the first day we all sat around the table over at Marsham Street and with the Permanent Secretary and various others. This was a get-to-know-you. The Regulator had been saying, I had a look at the Bill and I am not absolutely sure about the powers and certain modifications should be there and so on and so on. The Franchising Director said, Roger Salmon said, that is all very well for you John Swift, I do not even have a job description. The answer that came back was very telling, [...] "You are here only to do what you are told [...], [OPRAF] are nothing more like agents of government, they are there to discharge government policy"'.⁷⁰

The function of OPRAF and the Franchising Director were thus threefold. First, it was a convenient tool to 'shift blame'. As OPRAF performed functions which the Department of Transport could have similarly exercised, the Department 'wanted to make the decisions, and wanted [OPRAF] to have the responsibility for anything that went wrong. And that was overt'.⁷¹ Second, a specialised agency was perceived to be able to concentrate more expertise than a usual government department. Third, the increase of distance between franchising activity and transport ministers was regarded as essential to de-politicise the process, and thus boost private sector confidence and reduce the potential

⁷⁰ IUK4. Other accounts refer to the Department of Transport response as 'You will do what you are told (formally or informally) as is the convention for an officer subject to instruction'. This view was not shared by ministers.

⁷¹ IUK21.

impact of political interests, 'you needed to set up a framework which would reassure the private sector that it could safely invest and not have all of its plans forever messed about and destroyed by the political imperative of the day'.⁷²

The franchising process evolved slowly and only gathered confidence after the first round of franchises had been let.⁷³ The design of the franchises was exercised within Whitehall. Although potential bidders, such as bus companies, were used to test various ideas about franchising in terms of size, risk profiles and financial requirements, the proposed franchising agreements were not shaped by private interests, 'because, frankly, companies do not take you seriously until something real is being offered for sale in a serious manner rather than people from Whitehall asking theoretical questions about what they might be interested in'.⁷⁴ In the formulation of the approach towards franchising, substantial tensions emerged between the Department of Transport, which aimed to follow the political imperative to franchise as 'reasonably practicable' within the given timetable, and the Franchising Director, Roger Salmon. Salmon paid considerable attention to building a commercially-oriented 'flat' organisation unlike a ministerial department and resisted political and administrative pressures to speed up the franchising process, but as 'he was not a politician in any sense, if he thought something should be done, it had to be

⁷² IUK15.

⁷³ British Rail was initially not allowed to bid for services itself. This exclusion was later lifted, but after discussions between the Department of Transport, which was not keen to allow BR to compete for the franchises, and BR, the latter voluntarily consented to refrain from bidding.

⁷⁴ IUK12. Private interests had initially proposed franchising periods as long as 50 years. This option was not considered by Whitehall.

done, he would not [...] change his mind just to suit politicians'.⁷⁵ Besides the lack of private interest in the franchises, there were also problems on the administrative level with regard to access agreements, inter-operator agreements, the ticketing settlement system and the performance incentive regime. The belief that OPRAF was not delivering on the timetable led the Department to set up various working and steering groups to promote the franchising process. In the end, OPRAF succeeded in franchising all services before the general election in 1997;

'It is like so many of these projects, those who are charged with monitoring and oversight think that time spent in perpetration is potentially time lost and have a linear view of these processes, whereas practitioners have a skewed view on how it will proceed. They were right [...]. It is standard bureaucratic sort of relationship where the pursuit of the secondary body by the parent is what it is all about'.⁷⁶

In addition to the problems in the franchising process, there was also strong political pressure on the Franchising Director, mainly due to unease among Conservative backbenchers and fear of political damage from a reduction in service levels or increased rail charges. Brian Mawhinney's imperative was to secure quick tangible benefits to the passenger.⁷⁷ Due to the political sensitivity of rail privatisation, Mawhinney placed great emphasis on weighing the costs on electoral popularity with the theoretical benefits of the 'pure competition model'.

⁷⁵ IUK18.

⁷⁶ IUK12.

Furthermore, 'John Major believed [...] that under the privatised railways everything must be shown to be better than under the nationalised railways.'⁷⁸

The Conservative government pledged higher subsidies for privatised companies than were available in the public sector and restricted price increases after rises of 22 per cent in the last ten years of public ownership.

In May 1995, Salmon and Mawhinney announced a regime of capping fares for commuter fares around London and other cities, for season tickets and other standard class fares. This announcement followed the imposition of minimum timetables for passenger trains as well as the setting of standards on reliability and punctuality.⁷⁹ The extent of fare curbs - increases were not to exceed inflation for three years with rises for the following four years restricted to RPI-1 - went much further than envisaged by the Franchising Director. Mawhinney intervened, not only on the level of price capping, but also on the scope of prices which were supposed to be controlled. OPRAF and BR had to find a compromise solution.⁸⁰ In general, however,

'[he] did not interfere, the sort of thing that was more difficult was to write and re-write press releases over and over again late at night.

[...] [M]inisters are hyper-sensitive about anything that might hit the

⁷⁷ IUK13, IUK2.

⁷⁸ IUK1.

⁷⁹ While these measures were driven politically, they were regarded as essential and had been part of the administrative agenda of the Department of Transport prior to Mawhinney's appointment.

⁸⁰ IUK21.

press, you write the press releases now and decide on the policy afterwards. He was doing just that'.⁸¹

Similar pressure was placed on the Franchising Director with regard to the proposed subsidy removal from over-night services from London to the Scottish Highlands. Following considerable political pressure, Salmon was forced to continue the provision of public money for the continuation of the service.

In December 1995, the rail privatisation process suffered a further (if limited) setback when the Court of Appeal ruled that the Franchising Director had not fully complied with the requirements for protecting the level of train services. 'Save our Railways', the main anti-privatisation group sponsored by rail unions and local authorities, had launched a case arguing that Salmon had ignored instructions given to him under John MacGregor that forced him to base future service levels on existing levels. The last Conservative Transport Secretary, Sir George Young, subsequently rewrote the rules concerning the minimum acceptable level of services which passenger train operating companies had to offer, adopting the politically least costly way. The Franchising Director was also criticised in a National Audit Office report for failing to establish criteria for service alterations before awarding any of the franchises. The Franchising Director responded by arguing that he had been told by the government to give priority to the sale of the operators rather than the details of the regime (*Financial Times*, 29 October 1996).

The moderation of competition

⁸¹ IUK21.

The White Paper had stated that the Government wished to encourage liberalisation in network access (Department of Transport 1992a: 13; para 56-61). It was suggested that the rail regulator was to oversee an open access regime based on efficiency, competition and non-discrimination. Furthermore, it was also made clear that subsidy would be channelled via the franchises and would not be used to reduce access charges. The problem for policy-makers was therefore to balance the objective of promoting on-rail competition and containing the amount of subsidy paid through the franchising system. The Department of Transport persuaded the Treasury that it was possible to 'cherry pick' services that would undermine the financial performance of certain operators if open access was granted. As a consequence, it was agreed to 'moderate' competition during the first complete round of franchising, '[i]n the environment we were in, we just realised that this was the price we were having to pay, if we were going to make progress'.⁸² Thus, in contrast to a commitment to competition which had been expressed in a 1992 document on the franchising process (Department of Transport 1992b), ministerial guidance was issued in 1993 that competition should be moderated (Department of Transport 1993).⁸³ This measure not only reflected analytical considerations but also the 'franchising reality', 'whether he had given guidance or not, the reality of selling

⁸² IUK2.

⁸³ 'The arrangement for gaining access should be structured to achieve the orderly and safe transfer to the private sector [...]. The Government recognises the potential tension between liberalising access for private sector operators and successfully franchising British Rail's existing passenger services. This means that to the extent that it is necessary to ensure the success of the first generation of franchises, on-track competition between operators of passenger services may have to be moderated for a limited and specified period' (Department of Transport 1993: section 1.2).

franchises, [...] was that you had to moderate competition'.⁸⁴ The rail regulator allowed 'proposals for exclusivity' to be considered as long as they were regarded as derogation from a fully open access regime and were supplemented by specific principles which should ensure the operator's responsiveness to customer demand. As a consequence, limits were placed on Railtrack's ability to make open access paths available where these were likely to affect the incumbent franchisee's revenues negatively, thus excluding any possibility for introducing open access in passenger services until at least April 1999.

In contrast, restrictions on competition did not hold in the freight sector where access charges were settled in negotiations and approved by the rail regulator, at least covering avoidable cost and not being above the so-called 'standalone cost' which would be incurred by a notional efficient competitor (Department of Transport 1993: 21; ORR 1995b). As in the passenger sector, in the sale of the freight operations the original intention to introduce competition into the freight rail sector was muted by a lack of market interest: businesses were sold to one operator, English, Wales & Scottish, owned by the US railways operator Wisconsin. However, in the meantime, competition emerged in various niche markets.

The treatment of non-commercial objectives, starting with the political imperative that no services were to be cut, led to a muting of the original Treasury's 'competition' philosophy. The Conservative MPs' scepticism of the policy, 'there were quite a large element of people who needed to be convinced,

⁸⁴ IUK21.

[...]. I would not describe the proposal of railway privatisation as being the best thing since sliced bread',⁸⁵ the negative reporting of the media and bad publicity which reflected and reinforced hostile public opinion, led not only to a worsening market interest in the BR businesses, but also to an increased willingness to search for political compromises in order to minimise the political risk in terms of electoral impact. The original philosophy of the Act was therefore watered down, such as in the example of the 'moderation of competition' clause and the price-capping decisions. At the same time, the decisions made with regard to the non-commercial objectives reveal an attempt to minimise the political uncertainty of agency drift by establishing the franchising director as a 'creature of government' rather than a fully independent body. Delegation was exercised by shifting responsibility to both the Office of the Rail Regulator and to the Franchising Director who were largely responsible for setting up the detailed regulatory and contractual framework in which the privatised industry was to operate.

The impact of institutional factors

Due to the dominance of paradigm-oriented design ideas, the original emphasis of the regulatory regime was to maximise the possibilities for introducing competition. In contrast, other potential, more domain-oriented, priorities such as the promotion of the viability of the operator or the launch of a 'strategic transport policy' were not considered. One key assumption was to deal with a declining sector with fewer public resources.⁸⁶ On the one hand, this was evident in treating infrastructure as a demand-driven commodity. On the other

⁸⁵ IUK6.

hand, this was also reflected in fixing to a large extent Railtrack's track access income and by not providing incentives for expanding railway services (see *The Economist*, 3 July 1999: 67-70); similarly, as discussed below, the franchise agreements were designed to safeguard services rather than to facilitate expansion (Bradshaw 1998: 190). Despite compromises such as 'moderation of competition' and a process driven more by political need than full administrative planning, pressures for paradigm-oriented isomorphism, exemplified by the 'regulation by competition' doctrine, drew from previous British utility privatisations.

'All proposals were based very much around this whole thrust on competition. They had made mistakes in the past privatisations, they were not going to do the mistake this time. There were going to be oodles of competition built into the system and it has been done in the end'.⁸⁷

Insulation of the regulatory space from coercive forces

According to Knill and Lehmkuhl (1998) the existence of European legislation in the form of 91/440 had at least a legitimating influence on the British reform process. While the Directive was helpful in that it showed that railway reform 'was not simply a British political obsession of the Conservative Party',⁸⁸ the impact on existing regulatory design ideas was negligible, even in terms of legitimising the choice of regulatory instruments. The European Commission's proposals were 'principally concerned with international traffic, which to us in

⁸⁶ IUK21.

⁸⁷ IUK4.

England, in the days before the Channel Tunnel, was complete irrelevance'.⁸⁹ Furthermore, there was the perception of British leadership in the (then) Community, 'We dragged Community policy, and more importantly, practice behind us, and if you look at the state of Community policies on railways, they are effectively UK policy two years later'.⁹⁰ The existence of European legislation was 'used as pieces for illustration to support a particular view which was held anyway'.⁹¹ Similarly, while there was some documentation about other reform experiences, the main sources of conceptual thinking drew on domestic experiences of utility privatisations and not with reform experiences of, in terms of privatisation and regulatory policy, 'backward' states or reforms to railways. Thus, while

'the European position was an extra [...] comfort, [...] there was nothing to be learnt from them [other European countries] except some of the difficulties of having rail in a nationalised set-up. [...] So we were really out there pioneering. There was nothing to be learnt from the others in that context'.⁹²

Insulation of the political-administrative nexus of the regulatory space

At first sight, the extent of regulatory reform in contrast with European railway reforms, could be explained in terms of institutional structure. It could be claimed that the majoritarian character of British politics explains the lack of consultation with trade unions and the lack of any need for compromise.

⁸⁸ IUK14.

⁸⁹ IUK4.

⁹⁰ IUK12.

⁹¹ IUK23.

However, given a slim parliamentary majority, leadership battles and splits within the Conservative Party and, in the railway privatisation case, public and media hostility, difficulties in maintaining the pace of the franchising process and increasing concern among Conservative backbench MPs, the regulatory reform was a 'Whitehall-sustained exercise'⁹³ in which political choices were driven more by the political and institutional weakness of the government. Thus, the overriding political imperative was to finalise the regulatory regime within the lifetime of one parliament and make the organisational reform 'irreversible' so that a future parliament, possibly led by the Labour Party, then fully opposed to railway privatisation and advocating public-private partnerships, could not reverse the reforms. Similarly, the Secretary of State's instruction to franchise as soon as 'reasonably practicable' within a set timetable was placed above considerations of 'theoretical purity' or maximisation of sale revenues, for example in the case of the rolling stock companies or Railtrack.

Nevertheless, despite this political incentives, the overriding paradigm-orientation, i.e. the principle underlying the key regulatory instruments, was less a result of political choices, 'the role of ministers was essentially in fixing and facilitating and keeping us [civil servants] up to the mark',⁹⁴ but an outcome of the dominance of the Treasury, and more importantly,⁹⁵ administrative experiences gained from utility privatisations during the 1980s and, in the case of the franchises, of the existence of private bus companies as likely rail

⁹² IUK14.

⁹³ IUK12.

⁹⁴ IUK1.

operators, following bus 'deregulation' during the 1980s. The crucial source of 'learning' was the institutional mechanism of 'lateral transfer' in the British civil service system which allowed civil servants experienced in privatisation exercises to be 'shuttled' into the railway domain (see Hood 1996). This also reduced the domain-oriented position of the Department of Transport by facilitating the transfer of 'privatisation-experienced' officials into the Department.

Insulation of the regulatory space from societal forces

The process of British railway privatisation in 1990s was marked by a limited role of societal interests. British Rail's role was largely marginalised, and was only taken into consideration on technical issues. Suggestions to maintain a vertically integrated railway system, relying on extensive contracting-out, either as a single undertaking or as five separate businesses, were dismissed. In fact, the setting up of Railtrack as a separate government-owned company and its subsequent privatisation were policy measures taken by officials in order to break the perceived resistance of British Rail and to provide the privatisation policy with new momentum in the face of lacking private sector demand for franchises. While there was early consultation on the franchises, the limited interest of the private sector, and more crucially, the lack of interest in the contractual detail in the franchising agreement indicates that private sector interests did not dominate the franchising process.

⁹⁵ 'Most of these things are treated as an intellectual exercise rather than something that you get terribly upset about [...]' (IUK19).

Trade unions had, except for their support for the 'Save Our Railways' campaign group, no influence on the selection of policy instruments. The Department of Transport did not have a single negotiation with the unions. The threat of strikes had also declined, first, because 'the RMT was a fairly broken union by then. The signalmen's dispute [of summer 1994] had to happen - it was the last wave of the dinosaur's tail'.⁹⁶ Second, the government's underwriting of BR pensions 'guaranteed that people did not lose out'.⁹⁷ Similarly, the role of private merchant banks and law firms, while crucial in developing technical detail, were directed by administrative actors: 'We weren't well served by our merchant bankers, [...], earlier on, who should have driven us much more, so what we then set up was the weekly project control group'.⁹⁸ 'Experts', in contrast to the German case of 'privatisation' discussed in the following chapter, also played only a minor role. Although some commentators have stressed the role of Christopher Foster as advisor to the Department of Transport as well as his influence exercised by his book on 'Privatisation, Public Ownership and the Regulation of Natural Monopoly', his appointment followed the completion of the first drafts to the White Paper following the general election of 1992. Civil

⁹⁶ IUK1.

⁹⁷ IUK1.

⁹⁸ IUK1. The National Audit Office investigated the dual role of the Department's financial advisers, SBC Warburg, as advisers on a partial or 100 per cent sale of Railtrack and as 'global co-ordinator'. The suggestion that SBC Warburg might have had a financial incentive to bias its advice on a Railtrack sale was rejected by the Department, pointing to other advisers, and the bank itself, which claimed that its reputation was more important than 'short term financial benefit' (see National Audit Office 1998a: 9-10).

servants remained the key influence on the formulation and selection of regulatory instruments.⁹⁹

Thus, while political and administrative actors relied on societal actors, including British Rail as well as commercial law firms and merchant banks, in terms of technical information, the relations within the regulatory space were dominated by civil servants. It was their experience and choices which determined the original selection of regulatory instruments.

Conclusion

This chapter argues that the paradigm-oriented regulatory reform of the British railways can be explained by the 'lateral transfer' within the British political-administrative nexus, allowing for lesson-drawing across domains and facilitating a transfer of personnel into the railway privatisation domain. This 'lateral transfer' mechanism facilitated the dominant paradigm-oriented isomorphism observable in the privatisation debates. As a consequence, it was the policy environment of domestic privatised utilities which was regarded as legitimate, while the applicability or desirability of international railway reform models was rejected. This chapter claims that 'Europeanisation' either in terms of legislation or, as a horizontal effect, experiences in other states was of negligible importance for explaining the choice of regulatory instruments. Similarly, the privatisation of British Rail can neither be explained as a 'trade union smashing'

⁹⁹ IUK1, IUK5, IUK6, IUK12, IUK15. This view contrasts with Foster's published views, where he diagnoses a decline in the advisory capacity of the civil service (Foster 1998, Foster and Plowden 1996, see also Knill 1999).

policy nor as an attempt to win over political constituencies of dissatisfied railway users.

While the paradigm-orientation of regulatory design ideas was facilitated by the administrative structure, thus acting as (paraphrasing Max Weber) 'switchmen' who determined the tracks along which the action was pushed by the dynamics of political and administrative interests, it was the institutional weakness of the Conservative government and therefore the need to 'hardwire' policy instruments perceived as irreversible which explains the institutional hardwiring of, for example, a privatised Railtrack, the failure to regulate the Roscos or the introduction of a 'moderation of competition' clause.

Chapter Eight

Domain-oriented Isomorphism and Institutional Compromise in Germany

This was just a compromise, to do the pure philosophy was impossible. You are not living in a reality-free world.

ID12

In comparison to Britain, efforts in (West) Germany to 'roll back the state' are said to have been relatively modest during the 1980s. However, the context of increasing Europeanisation as a result of the Single European Market and the impact of unification were seen by many to herald a period of substantial public sector reform in Germany. Indeed, the 'privatisation' of the former public monopolies in railways, telecommunications and postal services seems to suggest that Germany, in terms of privatisation and deregulation themes, was 'catching up' during the 1990s (see Benz and Goetz 1996: 5-14). The following account of regulatory reform in railways offers analytical insight into processes of isomorphism given the presence of both paradigm-orientated sources, as part of the rise of the international privatisation environment, but also in terms of domain-orientation, given the increasing interest of European and non-European states in regulatory reform in the railway domain.

This chapter seeks to answer why the German railway 'privatisation case' was dominated by domain-oriented isomorphism. The German case provides an example of organisational privatisation. In terms of European influences, the

German transport sector was particularly exposed to the liberalisation policies of the European Commission. Attempts to maintain control over the road haulage market, for example by introducing road tolls while, at the same time, reducing national lorry taxes, were ruled out by the European Commission and subsequently by the European Court of Justice. Similarly, the German government's attempts to 'harmonise' vehicle taxes at the German level across the Community failed to gain support from either the European Commission or any other member state. Nevertheless, the German initiative to impose road charges at the European level resulted in the creation of the so-called 'Euro-Vignette'. Similarly, in the railway sector, the German government did not support Council Directive 91/440, arguing that it did not want to impose constitutional changes via European legislation.¹ Nevertheless, once the privatisation law had been passed, Germany and the UK were the first of the then EC member states that had implemented the Directive; both countries went further in their reforms than required.

As in the previous chapters, first the context of the regulatory reform and then the emergence of regulatory ideas are discussed. In particular, the domain-oriented nature of proposals is highlighted. Then the analysis considers the 'hardwiring' of the regulatory regime, while the conclusion claims that European legislation had only little influence on the conceptual development of the post-privatisation regime in the German railways. Instead, it is argued that while experiences from other reforms in the railway reform were gathered, these were

¹ ID1.

rather used as 'non-lessons' (as lessons in how not to proceed) instead of being directly translated into the German context.

Setting the context

Due to its long-term financial decline, a growing consensus among political parties and social groups emerged in the mid-1980s that more than just incremental change was necessary to provide the 'Deutsche Bundesbahn' with a stable and secure financial future. Reforms during the 1980s attempted to make the Bundesbahn 'more commercial' without attempting to amend the provisions of the Basic Law. In 1982, the then Social Democrat/Liberal coalition passed a law which granted the management of the Bundesbahn more autonomy and commercial discretion, selecting Reiner Gohlke, a former IBM manager, as chief executive of the Bundesbahn. The continuously rising debt burden (from DM 13.5bn in 1970 to DM 36bn in 1982) motivated the succeeding Christian Democrat/Liberal government to search further for policies offering financial consolidation. In November 1983, the government decided that the railway budget should be frozen at the same level until 1987 (a practice already undertaken by previous governments since 1979). The so-called 'principles for the consolidation of the DB' offered more investment in infrastructure modernisation, but also demanded rationalisation in terms of organisation and personnel, increases in productivity and a reduction in the deficit. Although an accounting separation into commercial, 'commonweal' (local passenger transport) and state tasks (infrastructure) was demanded, an outright separation of infrastructure and operation was regarded in terms of 'railway-political goals not worthy of being implemented' (*Deutsche Bundesbahn*, issue 12/1983). While the Bundesbahn achieved more positive results, political opposition indicated

resistance to any further reforms. The then Bavarian premier Franz Joseph Strauss (CSU) attacked the federal government's decisions, claiming that the current railway policy was as dominated by financial considerations as the previous government's. Future policies should consider both the fiscal interest of the federal government in commercial profitability as well as public interests, particularly regional and planning aspects. While the federal government claimed that its 1983 measures would be successful in limiting further increases in cumulated debts, the opposition Social Democrats (SPD), demanded a transformation of the Bundesbahn into a public undertaking, a separation of the accounts for the various Bundesbahn operations, a strengthening of the supervisory board's competencies and a transfer of responsibility for infrastructure to the federal government (BT 10/3009). Given the diversity of opinions both within the government and between government and opposition as well as the history of failed reform attempts, the federal Ministry of Transport showed little enthusiasm to launch another reform initiative, 'he said that he would do anything in order not to do it'.²

After 1987, when Jürgen Warnke became Minister of Transport, various initiatives were taken, all aiming to consolidate the Bundesbahn's financial position and to enhance its competitiveness.³ In spring 1987, the Federation of German Industry (BDI), advocated a three-way split in the Bundesbahn's operations, into state-owned infrastructure, state-financed social services and commercial operations, while the DB itself should become a more flexible public

² ID12.

sector organisation. Similar proposals were made by the SPD, not only demanding an organisational separation, but also the cancellation of all debts (by transferring them to the federal budget). The Bundesbahn's administrative board should be renamed 'supervisory board' and include employee and Länder representatives. The Green Party made similar proposals.

In March 1988, the Transport Minister asked a parliamentary group of CDU and FDP members to produce recommendations for a reform of the railways. The group recommended a transfer of all debts incurred prior to 1972 (so-called '*Altschulden*' - 'long-standing debts') to the federal budget, a separation of the Bundesbahn in infrastructure tasks (with the state taking over financial responsibility), subsidised regional passenger services and other commercial operations. The Bundesbahn was to pay track access charges. Further recommendations were a closer co-operation between the Länder and the federal government and a more 'business-like' organisational structure of the Bundesbahn.

While the Länder voiced their concern about the effects of a railway reform on the provision of regional services, the SPD issued legislative proposals in the Bundestag, demanding that infrastructure issues should be decided by parliament, the latter deciding on five-year plans (so-called '*Bedarfspläne*') instead of the existing traditional administrative planning procedures. Furthermore, profitable and non-profitable businesses should be separated, while the federal government was to take full responsibility for the provision of

³ This also followed personnel changes in the railways unit in the Federal transport

the infrastructure. The Bundesbahn was to be fully compensated for politically-demanded non-commercial operations.

At the same time, the Deutsche Bundesbahn was working on its own internal reform programme. A working group was established in the late 1980s which developed a so-called 'divisionalisation' plan (similar to, but not read across from BR's sectorisation programme). According to the group's proposals, autonomous units operating as separate businesses were to be established, leading to contractual arrangements and the setting up of internal pricing mechanisms. These reform proposals were supposed to create an effective and efficient organisational structure for the Deutsche Bundesbahn without requiring amendments (and therefore a two-thirds majority in both the Bundestag and the Bundesrat) to the Basic Law.⁴

In January 1989, a meeting between Chancellor Helmut Kohl, the Finance Minister Gerhard Stoltenberg and the Transport Minister Jürgen Warnke, set the agenda for future government policy on railways: DB was to be relieved of all its 'long-standing debts' that had been inherited from the post-war reconstruction period. Furthermore, the federal government should contribute to the costs of the provision of infrastructure and an independent commission was to be established to formulate reform proposals in greater detail. In the meantime, DB was to prepare cost accounting practices for a separation of its operations. The Cabinet agreed to these proposals and also initiated policies such as the introduction of road tolls for heavy freight lorries paralleled by a vehicle tax

ministry.

reduction (as noted above), a policy of prioritising investment into rail over road infrastructure and a policy to facilitate 'combined traffic' between various modes of transport.

Following German unification in 1990, the Deutsche Reichsbahn (DR), the former East German operator, was brought into the remit of the Commission. The desolate state of the Reichsbahn added to the pressures for immediate reform as its whole infrastructure and rolling stock required extensive modernisation. Furthermore, the total number of DR staff had been held at an artificially inflated rate during the era of the communist regime (see Fromm 1991: 70-3). Moreover, the political desire to unify the Reichsbahn with the Bundesbahn added to the factors favouring organisational change.

To conclude, approaches to reform the Bundesbahn were being developed during the 1980s. These did not seriously consider a 'privatisation' of the operator, as the possibility of a constitutional amendment was regarded as low. The main emphasis rested on the need to reduce the (future) financial burden of the Bundesbahn on the federal budget and to be more competitive on the transport market. This domain-orientation was encouraged by the lack of a German 'privatisation environment' (in contrast to the UK) which could have exerted pressures of isomorphism.

The emergence of regulatory ideas

⁴ ID4.

This section accounts for the establishment of the independent commission and its deliberations. The Commission, the so-called 'Regierungskommission Bundesbahn' was set up in 1989 to achieve (or fail to achieve) a 'technocratic' consensus across political and societal actors. This Commission was designed on the lines of a 'Royal Commission' and adopted the 'Japanese style' of public sector - and railway - reforms.⁵

The Railway Commission was mandated to search for options that would increase the railways' market share and would require less money from the taxpayer. The main political interest rested with the second objective. Options were to be considered which would provide the Bundesbahn, in the face of increasing financial liabilities, with a competitive and viable basis 'under transport policy, regional planning and environmental as well as economical and fiscal aspects' (Regierungskommission 1991: 4; Saßmannshausen 1995). Furthermore, the Commission was asked to define the range and extent of services and products which could be competitive in the long term both in terms of quality as well as in price. Particular emphasis was to be paid to issues such as commercially viable services, socially 'necessary', but unprofitable services, and

⁵ The reforms of the Japan National Railways (JNR) were first proposed by the 'Second Rincho', a 'shingikai', or commission, on administrative reform, being set up under the Nakasone government. The details of the railway reform were elaborated by a specific 'Commission to Supervise the Rehabilitation of JNR', which was set up in June 1983. As in the German case, the JNR suffered from an accumulated debt burden and a political lack of interest in reform as a decline in rural votes due to line closures would undermine the already dwindling support of the governing LDP. Moreover, trade unions were opposed to reductions in the work force. For the Japanese system of commissions or 'shingikai', see Schwartz (1998). I am most grateful to Katsuya Hirose for enlightening me on Japanese reforms.

the appropriate form of organisation and distribution of authority for regional passenger rail transport (Regierungskommission 1991: 4). To reflect a wide spectrum of political and societal interests, the Commission consisted of two academics, three representatives from business, four politicians and two trade union representatives. The Commission was chaired by Günther Saßmannshausen, a former private sector chief executive who later became chairman of the privatised operator's supervisory board.

The setting up of the Commission reflected the desire to integrate all political and societal opinions prior to any political debate. To some extent, its function was therefore to reduce political decision-making costs by attempting to solve potential policy conflicts at an early stage by creating a technocratic consensus; 'first tie them all in and then say, we want to go down this road'.⁶ More importantly, however, was the genuine uncertainty about potential options and the likelihood of success. 'In general, at the early stages of the Commission's work, the main view was, oh Lord, another commission already. And at the beginning of the job, it was really not clear what would happen at the end and what would come out at the end'.⁷ Despite the federal Ministry of Transport's (or rather its railways unit's) strong support for a railway reform, 'there was no complete idea of what was supposed to be done [...] there was nothing modelled beforehand; the Commission did not have, as often occurs when a Commission is set up, some form of psychological predisposition'.⁸ Indeed, 'we never

⁶ ID8.

⁷ ID8.

⁸ ID8.

believed that we would achieve anything with the Railway Commission'.⁹ Moreover, a political desire existed to postpone any decision concerning the future of the railways beyond the 1990 election (*Süddeutsche Zeitung*, 21 December 1991).

Despite the Commission's independent status which was to allow it to consider various reform options free of political constraints,

'the Commission worked for the government. And the government did not want an analysis whether its policies were correct, but wanted an analysis of what the railways were doing wrong and what the railways could do better. In that respect, the mandate was incomplete'.¹⁰

The Transport Ministry 'always tried to steer it a bit without making it too obvious', ideas were developed by members of the Commission in discussion with the Transport ministry and then were agreed upon by the Commission's members collectively.¹¹ Moreover, '[t]he report did not emerge in a completely empty political space, there were numerous conversations with the responsible people of the Bundesbahn and [with politicians]'.¹²

⁹ ID12.

¹⁰ ID4.

¹¹ ID12.

¹² ID11. Saßmannshausen pointed out that 'any major reform required the consent of all cabinet members. Therefore, I informed the inter-departmental committee of the affected ministries on a permanent basis and brought their suggestions into the work of the Commission; at the same time the transport spokespeople of the parties and the chairman

Outside the Commission and the Transport Ministry, little interest was expressed in conceptual issues of railway privatisation, given also the absence of a domestic privatisation programme. Lessons were therefore drawn from other railway reforms in other countries and from European legislation.

'I looked at Sweden, I looked at Japan, I went to Holland and I looked at all this, then we thought about it, and the 440 clearly showed the way to an opening of the European market. That's where we said, this is the right approach. And then we tried, after thinking about it, to analyse what a market should look like, to give it a try'.¹³

Experiences from Japan were drawn with regard to procedural aspects and the treatment of debts and personnel reorganisation. The reforms in Sweden, the early stages of the reforms in Britain, and discussions in Austria and Switzerland were analysed. However, there was no direct adaptation from these international domain-based sources. It was decided that it was not 'desirable' for any of these experiences to be transposed to the German railway system, in particular with regard to the organisation of the infrastructure in relation to the operation of transport services. Despite the attractions of the Swedish model of separation of infrastructure and operations, 'We did not like it, because the state is involved in the track. We don't see this as good, and it is a problem in Sweden

of the transport committee of the Bundestag were informed and prepared for the legislative process' (Saßmannshausen 1995: 48).

¹³ ID12. The Commission received a report on international railway reform experiences from its member Professor Gerd Aberle. 'The Commission did not travel to these countries. Also because the chairman said, "We are not here to do some tourism, but to work" [...] But they [the examples] had some influence' (ID8).

that the bureaucracy owns the track and a commercially oriented company undertakes the services; this does not work'.¹⁴

A further element was the existence of EC Directive 91/440 despite the original opposition of the government.¹⁵ The Directive did not directly affect the German reform debate, but acted as a parallel movement at another policy level which offered encouragement and legitimisation to the German reform attempts.¹⁶ Thus, a 'German approach' was sought which adopted other experiences to a limited extent. There was a sense of "'we do everything better than the others" and when something was done somewhere else in a similar way, then it was said, "yes it is the same over here" and if it did not fit, then it would be ignored'.¹⁷

Discussions inside the Railway Commission soon brought agreement that a clear separation between commercial and state responsibilities was desirable. Thus, the existing regulatory objective that the Bundesbahn was to be managed 'like' a

¹⁴ ID5. Similarly: 'The [track operator], the publicly-owned bit, which has to be run by the state with the aim that for two years debts mount up, and every two years debts have to be relieved. And then there is the SJ, the transport operator, which lives in luxury, which regards this [arrangement] as very nice and has positive results. Then we said, we could do this too, of course, but we do not want to' (ID11).

¹⁵ ID2.

¹⁶ ID1. Thus, '[the] emergence of Directive 91/40 did not directly have anything to do with the work of the Commission, but it acted as a catalyst, because the same ideas were used [...]' (ID8). '[The 91/440] practically came parallel. We never looked at it. We never had contact with Brussels because of 91/440' (ID5). Also, 'of course one looked at this Directive of 91, but as a politician I have to say, we did not accept it as a policy objective, but were of the opinion that something substantial had to happen [...]. If this was in tune with Europe, then this could only be convenient for us' (ID10).

commercial undertaking was to be abandoned (§28 of the former Bundesbahngesetz). More controversially discussed was the question whether a constitutional amendment should be proposed and whether such a reform was feasible in political terms given the two-thirds majority requirements for constitutional amendments. Especially after the Reichsbahn was brought into the remit of the Commission, the consensus turned towards advocating a proposal that would include a constitutional amendment in order to establish the all-German railways as a limited company. This was signalled in an interim report.¹⁸

Members of the Commission sought solutions to minimise the possibility of political control; 'if you want to bring in these kind of things, then you want to put it into a form that makes sure that it maintains a certain behaviour and does certain things and that a certain pressure is exerted by this formal structure, then this was only possible by choosing the limited company model'.¹⁹ Other private law solutions, such as the limited liability company (GmbH) were rejected as only the limited company law 'defines precisely the responsibilities of the management and supervisory boards. And this seemed very important to us, because, in the past, there was the tendency to intervene for political reasons'.²⁰

¹⁷ ID4.

¹⁸ The view that the establishment of a private law operator required a constitutional amendment was confirmed in 1991, when the Federal President refused to sign a law which would have allowed air control to be undertaken by private law operators as it violated constitutional provisions (see Riedel and Schmidt 1991).

¹⁹ ID12.

²⁰ ID5.

Most controversially discussed were personnel issues and the extent of separation of the infrastructure from operations. With regard to personnel, the key concern was to obtain the trade unions' consent to a sharp reduction in the work force, especially among Reichsbahn staff, and to find a solution for combining the civil service status of most Bundesbahn staff with a private law undertaking. As a consequence, the Commission's proposals were opposed by the representative of the civil service trade union. With regard to the separation of infrastructure and services, an overall agreement existed that the railways should be treated similarly to road transport, 'the background was that there was to be a competitive equality between the different modes of transport. In road traffic there is also no connection between transport undertakings and infrastructure'.²¹ As a preliminary result, the Commission argued the case not only for an accounting, but also for an organisational separation. However, 'the [Bundesbahn] tried to stop the separation between infrastructure and operations' and attempted to convince members of the Commission that any organisational separation was not feasible.²²

The Commission recommended that the German railways were to be unified as a limited company under the ownership of the federal government. The railway

²¹ ID5.

²² ID5. On the issue of vertical separation, the Bundesbahn tried to influence members that an institutional solution, the setting up of an independent infrastructure provider, would be detrimental to the railways' operational performance. As a result, advocates of a complete vertical separation faced increasing opposition: 'This was especially difficult with a member from industry. That was particularly difficult, because he had a huge electric railway at home. [...] That is how politics is' (ID5). However, the Bundesbahn was not against a vertical separation of functions within its organisation *per se*, 'this was a development which had been coming for a long time and had been prepared for' (ID3).

operator was to be relieved of its debts and to be allowed to strategically and organisationally concentrate on the most promising operational activities. Public service ('commonweal') tasks were to be provided according to contracts with regional or Länder authorities (thus implementing European legislation). The Länder were provided with financial compensation for their newly acquired tasks. It was argued that responsibility for the infrastructure should be given to the new 'German Railways' limited company, organised, however, as a separate part of the business. While the Commission advocated an immediate organisational and accounting separation of operational and infrastructure activities, the option of an institutional separation was 'to be kept open' (Regierungskommission 1991: 17).

Apart from personnel and the separation of infrastructure and services,

'all other issues were clearly harmony-inducing. When it came to making the railways debt-free, then everyone shouted, 'Hooray', of course, the debts are going to be paid by the taxpayer. When it came to devaluing the whole property value, then nobody would say anything against that either. [...] Regionalisation of local passenger transport as a public service operation, the principle of ordering these services, nobody was against that in principle. [...] It was very important to us that this "black box" disappeared, [the Bundesbahn] had always argued that they were good, but that they had to provide too many public service obligations. That was a "black box". Therefore, it was an important step to say that the railway cannot excuse itself anymore, bids are put out, they say this costs so and so much and we also allow third actors to bid, this is very important as

a regulatory device as nobody can sufficiently control the costs externally'.²³

Apart from the conceptual work undertaken by the Commission in conjunction with the Transport Ministry, there was little involvement of other actors. The Deutsche Bundesbahn, especially after Heinz Dürr had been chosen by Helmut Kohl to become chief executive of the Bundesbahn, and subsequently also of the Reichsbahn, actively advocated a 'privatisation' which would reduce public sector 'duties'. The main reform proposals advocated by the Commission were domain-oriented, driven in particular by the representatives on the Commission as well as the absence of domestic privatisation experiences in other sectors. While there was no direct 'reading across' from other railway experiences or from the content of European legislation, these were nevertheless used to draw lessons, building on the assumption that the railways should become a commercial transport undertaking, 'our original thought was that the Bundesbahn, as any other transport undertaking, has to offer a service which is purchased by a customer'.²⁴

The Commission established a political and societal consensus on the principles of reform among the transport policy community. There was initially little political interest in the Commission's activities. In fact, the results of the Commission came to many as a surprise, even within the Transport Ministry, 'they failed to notice the results, even the principle policy unit

²³ ID5.

²⁴ ID12.

[*Grundsatzabteilung*] missed out on it completely'.²⁵ Nevertheless, on 15 February 1992 the Cabinet agreed that the ideas to reform the railways should be developed further, that fair competition between modes of transport infrastructures was to be established, that the competitiveness of the Bundesbahn was to be secured, that a merger with the Reichsbahn as a limited company would be initiated as soon as possible and, finally, that the status of employees as well as the provision of essential public services was to be safeguarded (see Reinhardt 1995: 80).

The creation of a Commission represented a well-established attempt to overcome both internal government as well as overall political conflict. By setting it into a technocratic-domain-oriented context, the potential for politicisation of the railway issue was reduced. Furthermore, it also re-asserted the position of already existing members of the regulatory space and closed off experiences from other contexts. However, the search for domain-oriented reforms allowed for considerable 'lesson-drawing' from other European reform experiences, while the impact of European legislation was not decisive.

Organisational Structure

This section is concerned with the 'hardwiring' of the organisational structure which closely followed the proposals developed by the Commission. In particular, the Ministry of Transport used the Commission's financial calculations to advocate a substantial regulatory reform. The following discussion reveals the domain-oriented nature of organisational structure:

²⁵ ID12.

debates were dominated by the need to obtain agreement between institutional actors, which was reflected, for example, in the Länder's demand for continuing majority ownership in the infrastructure operator.

On 1 January 1994, the Deutsche Bundesbahn and the Deutsche Reichsbahn were merged to form the Deutsche Bahn AG and established as a limited company operating under private law, following the provisions of the amended Art. 87e of the Basic Law. The federal government remained the sole shareholder for an undetermined period. Initially, the Deutsche Bahn was separated into four internal business sectors: infrastructure, long-distance passenger traffic, regional passenger traffic and freight traffic (§2(1) and §25 Deutsche Bahn Gründungsgesetz).²⁶ The second stage of the railway reform was formally introduced on 1 January 1999 with the infrastructure, the two passenger and the freight businesses becoming independent limited companies; furthermore a limited company, responsible for stations was also established. The core organisation of the Deutsche Bahn took the form of a holding company, being the sole owner of the companies' shares. After a further unspecified period, a third stage, the abolition of the Holding, was indicated in the legislation. In a previous draft form, it had been intended that the Holding should be dissolved after a period of five years. The final wording represented a compromise between the demands for faster separation among CDU and FDP parliamentarians and SPD and trade union opposition to any solution involving

²⁶ The provision to split the passenger traffic operations into two businesses for regional and long-distance traffic was introduced at the last stage of the legislative process due to Länder demands, which had been expressed first by local authority associations (BT 12/6269: 134).

the institutional separation of the infrastructure provider from service operations; 'there was this thought that we set up a holding with subsidiaries underneath. Following that, take the holding away; but then there was this ideological muddle'.²⁷ The Deutsche Bahn was to develop plans for its further development. It used this discretion to establish a strong holding organisation that 'has still strong opportunities to exert influence on the various limited companies'.²⁸ This was strongly criticised by the academic advisory council, accusing the federal government of not having paid sufficient attention to the Deutsche Bahn's behaviour, fearing that the strong position of the holding would lead to discriminatory behaviour against third parties and cross-subsidisation (Wissenschaftlicher Beirat 1997).²⁹

'What the Bahn thinks about this is obvious. What kind of entrepreneur would voluntarily do something like this? It is, of course, a huge advantage for the Bahn to keep it all together. But it is going this way and the federal government has two interests: on the one hand, it wants to encourage competition on the infrastructure, but on the other hand, it has to be careful too, so that the Bahn,

²⁷ ID12. A Cabinet memorandum indicated the Transport Ministry's argument that a compromise solution was necessary for reasons of practicability, given the 'required political consensus, a restructuring process proceeding by gradual steps' would lead to 'substantially reduced friction costs and losses' (Kabinettsache Datenblatt 12/12074-05, 6 June 1992: 31 in Lehmkuhl and Herr 1994: 636 (footnote 6)).

²⁸ ID3. Officially, the Deutsche Bahn argued that a strong control was necessary in order to safeguard synergy effects and to support the aim of 'steering, co-ordination and control', while the subsidiaries were responsible for their financial performance. The chairman of the Holding was also at the same time chairman of the supervisory boards of the subsidiaries (Deutsche Bahn 1997).

²⁹ ID4, ID5.

which it owns 100 per cent, is not over-stretched. This is why [the Ministry] originally agreed to this compromise'.³⁰

This organisational outcome followed earlier debates with regard to the appropriate legal status of the various railway businesses, in particular with regard to infrastructure. Financial forecasts by the Railway Commission established a cross-party consensus on the necessity of action. The Commission argued that without organisational reform, the annual deficit of the two German operators would increase to DM 42bn. The cumulated losses of the railway operators would amount to DM 266bn for the period between 1991 and 2000 with the federal government's cumulated financial burden increasing to DM 417bn for the same period. Thus, the main political imperative was to find a solution to the 'fear that the railway would become uncontrollable in its financial demands. This was the central [motivation]. [...] Not because of insight, [...] but because of pure fear that the budget would break apart'.³¹ Following the Commission's proposals to establish the railway operator as a limited company under federal ownership, separated into three sectors (infrastructure, passenger and freight traffic), the Transport Ministry presented five different models to Cabinet. All options accommodated the political will to merge Bundesbahn and Reichsbahn, that non-discriminatory access to the infrastructure should be guaranteed and that the federal government would take on the 'long-standing debts' (Julitz 1998: 61). The various models suggested (*Handelsblatt*, 13 April 1992):

³⁰ ID8.

³¹ ID5.

- the creation of three 'special properties' (*Sondervermögen*) for passenger traffic, freight traffic and infrastructure; it was calculated that this option would lead to losses of DM 82.6bn by 2002, requiring federal government subsidies amounting to 476.7bn DM;
- the establishment of a 'special property' for infrastructure operations and a 'limited company' for operations; it was claimed that such a policy would lead to a loss of DM 25.4bn, requiring a financial subsidy of DM 437.9bn;
- the transfer of all activities to a limited company;
- the setting up of a holding company and two subsidiaries for operations and infrastructure; it was argued that this option would lead to DM 4.8bn operational profits by 2002, reducing the amount of federal contributions by DM 105bn (to DM 405.5bn) in contrast to a continuation of the status quo;
- the establishment of two autonomous limited companies for track and operations.

The Transport Ministry argued that the option of a holding company consisting of two subsidiaries was the most preferable, offering both profit-orientation and synergy-effects. However, any reform had to be preceded by an elimination of debts (to be financed by the sale of non-essential property) and of other public sector burdens (*Die Tageszeitung*, 22 April 1992; Jobst 1995: 29). Transport specialists of the CDU and FDP parliamentary groups demanded an immediate institutional separation of infrastructure and services, and the setting up of three separate limited companies for passenger and freight transport and infrastructure provision. A 'holding' should only be regarded as a medium-term solution, as the 'real' aim was to run the three businesses independently. Much

importance was placed on network access and the introduction of contractual relations for local and regional services.

In contrast, Heinz Dürr, chairman of the Bundesbahn and the Reichsbahn, opposed any option that would have set up a legally separate infrastructure organisation. Separation was only to be undertaken within the organisation of the railway operator in terms of accounting and internal organisational arrangements.³² The railway operator argued that a close relationship between the track and services within a framework of an all-German railway undertaking was necessary. As a limited company, it was claimed, an operating benefit of DM 6bn could be achieved by 2000. Dürr also demanded the right to sell and manage non-essential property, opposing therefore the Ministry's intentions to organise a sale of these properties as a means of debt reduction (*Frankfurter Rundschau*, 22 April 1992). Similarly, the SPD and the trade unions, while in general supporting the reforms, opposed an institutional separation of track and services and argued that the federal government, given its role with roads and inland waterways, was responsible for the railway infrastructure. The SPD argued that the key to a 'railway revival' was an European Community-wide 'level playing field' in terms of track access costs rather than an organisational reform. The largest railway union, the Gewerkschaft der Eisenbahner Deutschlands (GdED), unlike the civil service union, backed the reform initiatives, hoping that successful reforms would end its continuous decline in

³² The operator advocated that under a broad framework structure, four separate units were to be established along the lines of track, freight traffic, passenger traffic and property management (*Rheinische Post*, 22 April 1992). The Commission chairman,

membership. More importantly, it gave the GdED the opportunity to obtain full co-determination status and therefore gain full autonomy from the larger public sector union, the ÖTV (Gewerkschaft Öffentliche Dienste, Transport und Verkehr) (*Süddeutsche Zeitung*, 19 March 1992).³³

The key argument with regard to the organisational structure concerned the legal status of the infrastructure operator. There were two central motives which encouraged a 'safeguarding' of the political interest. First, the argument that infrastructure had to be perceived as part of the German administrative principle of *'Daseinsvorsorge'*, obligating the state to provide essential services in order to enhance the economic well-being of its subjects. Second, the Länder in particular regarded the provision of infrastructure in their own territories as part of their economic well-being:

'the infrastructure of the railways and the services offered by the Bundesbahn always had a strong impact on regional development and planning. Areas connected to the main lines have developed better in the past than others [...]. They feared that a purely private railway would only operate between major conurbations and would neglect marginal areas. Or the railway would come along and blackmail a Land by saying "well, dear Land, if you want some

Saßmannshausen, also opposed a full separation of the infrastructure and the services into separate undertakings.

³³ The civil service union as well as the locomotive drivers' union opposed any privatisation, proposing the establishing of an autonomous public law body. A 'protectionist' view in respect of civil service rights is provided by Laschefelder (1993). A potential further reason for the GdED's accommodating position was the already

service, then you have to give us money." This is a position the Länder did not want to be in. [...]. The Länder would never have consented to a solution that would have pushed public responsibility (*Staatsverantwortlichkeit*) too far away'.³⁴

The Transport Ministry, in contrast, argued that any 'administrative' solution for the organisation of the infrastructure provider would lead to bureaucratic inertia rather than entrepreneurial flexibility, claiming that 'if it was operated as [the opposition] demanded, then we would have a situation like the butter mountains in the EC which are caused by subsidies. If we subsidise the track, we will get track mountains. Loads of track, but nobody uses it'.³⁵ Furthermore, as the core of railway operations, the infrastructure was to be managed commercially, because the other (private law) undertakings depended on its performance.³⁶ In addition, the federal government's responsibility for the railway infrastructure would be maintained regardless of ownership status via the law regarding infrastructure modernisation (*Bundesschienenwegeausbaugesetz*, Art. 6; Para 135 *Eisenbahnneuordnungsgesetz*).³⁷ The final compromise gave the infrastructure operator a private law status as a subsidiary of the Deutsche Bahn holding. For the Transport Ministry the most important aspect was 'that [we] got away from the idea to make the infrastructure a

competitive situation in the transport sector; the absence of monopoly rents (in contrast, for example to telecommunications) made it less difficult to accept liberalisation.

³⁴ ID4.

³⁵ ID12.

³⁶ ID8.

bureaucracy. They wanted to create a public law body, [...] to stick civil servants in there, something which [the Ministry] regarded as completely wrong'.³⁸ However, the Länder and the opposition parties ensured the constitutional hardwiring of a provision which determined the federal government's permanent majority ownership of the track operator. Furthermore, any sale of shares in the infrastructure undertaking required the consent of the Länder via legislation passed with Bundesrat approval (§ 2 *Gesetz zur Gründung einer Deutschen Bahn Aktiengesellschaft* (law establishing a Deutsche Bahn limited company)).³⁹

Besides the 'protection' granted to the railway operator and the institutional blockage of any more far-reaching proposals, there was also a strong interest in establishing the financial health of the Bahn, allowing it to start an extensive modernisation programme, in particular in terms of its rolling stock. Thus, the federal government consented to a restructuring of the railways' debts and a devaluation of the asset value. Initially, it had been planned that the debt burden would be served by a long-term credit financed programme via a newly established institution, the *Bundeseisenbahnvermögen* ('railway property').⁴⁰ The transfer of all existing debt to the 'Bundeseisenbahnvermögen' allowed the

³⁷ This law established the legal equality between rail and road infrastructure, clarified the state's responsibility for the rail network and provided a legal basis for the Bundestag to decide on the infrastructure planning programme.

³⁸ ID12.

³⁹ 'It is clear already that the Länder will never consent to any sale. This is not an ideological issue, this unites them all' (ID5).

Deutsche Bahn to begin its operations debt-free, similar to the organisational solution adopted in Japan where a similar institutional construction dealt with debts and with safeguarding the social security of former civil servants.⁴¹ Finance Minister Theo Waigel, linking (and forced by the Länder to link) the railways' reforms to the simultaneous debate on the future of federal financial equalisation policies, opposed the creation of a 'shadow budget' and demanded that debts should be relieved directly by raising additional charges (Lehmkuhl 1996: 78).⁴²

In its 'Federal Consolidation Programme', the Finance Ministry argued that the federal government should no longer be financially involved in regional

⁴⁰ The 'Bundeseisenbahnvermögen' rather than the federal budget serviced the railways' debts. The BEV was also granted limited borrowing powers. From 1996, any new railway deficit was to be serviced by Deutsche Bahn funds.

⁴¹ In addition to its role in servicing the debt burden, the Bundeseisenbahnvermögen (BEV) was also assigned the role as guarantor for social benefits to former civil servants. To maintain their financial position, the BEV provided additional payments to the civil servants above the market rates paid and set (unsupervised) by the Deutsche Bahn. Pension payments were also provided by the BEV. To be able to transfer to the Deutsche Bahn, former civil servants either had to leave the service, 'take leave' or were possibly even compulsory assigned by the BEV (Art. 143a (1) Basic Law). Earlier drafts had applied these conditions to all former Deutsche Bundesbahn employees (Fromm 1994: 194). The law establishing the BEV provided for the possibility that this body could be abolished after 2004 with its tasks being transferred to either the Eisenbahn-Bundesamt, the Ministry of Transport or the Federal Debt Administration (Bundesschuldenverwaltung).

⁴² 'Another factor was that the Finance Minister wanted to combine this with the reform to the federal finance. This is had to do with Maastricht and the question to what extent such shadow budgets exist or do not exist, continue or not continue. Then he tried in an unfair way to blame us that the mineral oil tax was increased by 16 Pfennigs. This was blamed on the railway reform, but no, that was not the railway reform, that was his Maastricht idea, but they did not like to hear that' (ID12).

transport operations and that future funding was to be obtained by raising mineral oil taxes. In contrast, the Transport Ministry was more interested in gradually imposing road charges (Lehmkuhl and Herr 1994: 637-8).⁴³ To some extent, the position of the German Finance Ministry, with its aim to minimise future financial burdens, was similar to that of the UK Treasury. The Finance Ministry 'wanted a solution that would have stopped, with the first day of the railway reform, all financial commitments of the state'.⁴⁴ However, unlike the Treasury, the German Finance Ministry, or indeed other ministries, showed little interest in conceptual issues with regard to a reformed regulatory regime. The Finance Ministry's arguments on future transport funding proved extremely unpopular with the SPD, the Länder, the trade unions and the Transport ministry. Only after Matthias Wissmann, who 'had more of the political environment behind him'⁴⁵ had replaced Günther Krause as transport minister in June 1993, could this inter-governmental and inter-institutional conflict be resolved. It was decided to raise mineral oil and diesel fuel taxes by 19 and seven Pfennigs per litre respectively from 1 January 1994. This was a consequence of substantial opposition to the imposition of road tolls at a level regarded as politically impossible given the numerous forthcoming elections in 1994.

Similar controversy occurred with regard to the method of financing future infrastructure programmes. The Finance Ministry opposed the proposal whereby the federal government would have had to pay for the construction and the extension of infrastructure, while the Bahn was to pay back the

⁴³ ID8.

⁴⁴ ID12.

depreciation costs interest-free. The Transport Ministry overruled the Finance Ministry's objections, stressing that otherwise any proposal would be vetoed in the legislative process.⁴⁶ Nevertheless, in the final legislation the obligation of the federal government to provide funds was limited by stressing that the extent of the federal government's responsibility for infrastructure was subject to the availability of federal budgetary resources (Lehmkuhl 1996: 79).⁴⁷

The revaluation of the railways' assets represented a further financial 'present'. In a politically motivated act, the asset value of the railway property was underestimated in order to promote the (initial) financial viability of the Deutsche Bahn. In the Commission, a revaluation had been 'brought up by the academics, and [it] was also demanded by the Bahn, and it also fell on fertile ground [in the Transport Ministry]. The asset value of the Bahn was hopelessly high, if one had calculated it properly before, the Bahn would have been bankrupt a decade ago'.⁴⁸ The Commission proposed that the asset value should be estimated at DM 53bn, instead of the official DM 110bn (Regierungskommission 1991: 19). However, the asset value was further reduced:

⁴⁵ ID8.

⁴⁶ 'Nevertheless, we managed to corner them [the Finance Ministry] with our calculations, they no longer knew what to say. They tried all possible avenues, even going so far as to sending some people from the Finance Ministry to the Bundestag to stir up some opposition parliamentarians to stop this, but it didn't work.' (ID12).

⁴⁷ ID12.

⁴⁸ ID8. 'One had to start every session of the Commission with a reminder *why* certain things did not exist and *that* they did not exist. [The Bundesbahn] did not even have a proper accounting system. People always thought that they had and even the

'to an absolutely incomprehensible extent. They have [devalued] the most modern and expensive parts of the infrastructure [...] 453 kilometres which cost DM 16bn originally. The whole asset value of the Deutsche Bundesbahn plus Reichsbahn and all ICE trains and the like was only estimated to be DM 25bn in total'.⁴⁹

This 'present' provided the track operator with the advantage that its amortisation rates were decreased significantly, reducing the necessary interest payments, thus potentially allowing more resources to be used for investments. In particular, the strong position of Heinz Dürr, as the Chancellor's choice as chief executive, led to this 'political present' of both eliminating the debt burden and devaluing the asset value which, in the view of the Deutsche Bahn, 'really was done in a perfect way'.⁵⁰

The choice of organisational structure reveals the domain-oriented nature of the German railway reforms. The foundations of these choices were laid in the final report of the Commission, whose members had been selected according to their expertise in the policy domain. This domain-orientation was particularly visible in the debate concerning the organisational distance between service and infrastructure businesses. The 'success' of the argument that the synergy effects of a holding-type structure would be more substantial than the expected benefits of a fully autonomous network operator indicates the dominance of 'railway'

[Bundesbahn] executive always acted as if they had one, because they did not know that they hadn't' (ID12, emphasis added).

⁴⁹ ID5.

⁵⁰ ID3.

arguments. Furthermore, it was attempted, partly as a result of the strong position of the railway operator (given in particular the selection of Heinz Dürr by Chancellor Helmut Kohl) to make the future Deutsche Bahn 'fit' for future competition by enhancing its competitive position. Mainly political considerations shaped the final choices of the organisational structure. Thus, the Länder were able to exploit their institutional veto power in the Bundesrat (together with the federal government's need to obtain the votes of the SPD for amending the Basic Law to change the organisational status of the rail operator) and established a 'stronger' Deutsche Bahn than was intended by the Transport Ministry. Similarly, the provision that the infrastructure was to be in permanent majority federal ownership was due to the Länder's interest in limiting the discretion of a 'private law' actor, given the restricted opportunities for exercising control over the management under the limited company law provisions.

The allocation of regulatory authority

The following discusses the distribution of regulatory competencies in the 'post-privatisation' regime. It highlights the shift from self-regulation to a more hierarchical arrangement in safety regulation. However, while an independent agency was created for safety and investment assessment matters, there was a conscious choice not to consider the establishment of an economic regulator to monitor track access. This section considers the continuing role of the federal government, then illustrates the establishment of the Eisenbahn-Bundesamt and finally discusses the regime governing infrastructure access.

The Basic Law's provisions in Art. 87 stated that railway administration remained the responsibility of the federal government (the 'Bund'). Administration in this context was defined as the supervision of the legality of service and infrastructure operators (BT 12/5015: 7). As the federal government remained sole owner of the Deutsche Bahn it was able to directly, if discreetly, influence the rail operator's management,

'100 per cent of the shares are with the federal government. This grants the owner influence, as an owner has influence [...] I think this goes on permanently. [...] That goes straight to the executive level, [...] one can see this when certain formulations have changed when they are published or otherwise are held back until the election [in September 1998]. I think this is natural how it works at the moment'.⁵¹

However, other accounts suggested that the Deutsche Bahn resisted any 'requests' by the federal government, justifying this stance with its private law status, '[i]t is not as if it is just necessary to give a signal from Bonn, [...] that would be nice. It would be nice, but it is good that things are the way they are'.⁵² The main regulatory tool, besides informal direction, was the federal allocation of financial support for infrastructure projects. In contrast, the Länder via their public service contracts could control the behaviour of the Deutsche Bahn directly for the delivery of regional services.⁵³ Similarly, the Länder's relations

⁵¹ ID3.

⁵² ID8. 'In many things one has to discuss issues, and in many cases, the railway say, that is our responsibility' (ID8). Also ID2.

⁵³ In the autumn of 1998, the Deutsche Bahn suggested a reduction in a number of so-called InterRegio services (long distance non-high speed), pointing to the availability of

with the Eisenbahn-Bundesamt extended to the supervision of planning procedures and federal grant expenditures to enhance the railway infrastructure,

'it is an illegitimate interference of the Eisenbahn-Bundesamt in an area of responsibility of the Deutsche Bahn, if the discussion extends to issues such as the design of stations, to ensure that resources are used economically, that customers like going there, that it looks nice and therefore people use railways. This is where the Eisenbahn-Bundesamt interferes too much and says this is too expensive, this has to be cheaper. Although they do not carry any entrepreneurial responsibility for their decisions'.⁵⁴

The Commission did not consider the issue of regulation. However, it was decided from the outset that no specific sectoral economic regulator was to be established, 'because we know how this is abused politically; [...] that there is always someone trying somewhere to start meddling with and steer a company [...] by state influences'.⁵⁵ Besides this attempt to curb any possibility to 'politically meddle' with the future rail operator, it was argued that a sectoral regulator would be open to capture by the industry,

'we do not believe in sectoral regulation. [...] Special regulators always have their dangers, [...] we need a competition authority which approaches transport in the same way as any other economic

alternative regional (i.e. Länder supported) services. The Länder succeeded in negotiating a reduction in the amount of service cuts. The Länder nevertheless criticised the lack of formal authority to enforce the continuation of these services (*Der Tagesspiegel*, 27 December 1998).

⁵⁴ ID4.

activity too. [...] Experience suggests that with such regulators, in banking, in the insurance sector for a long time, they have protected the insurance companies and when the Cartel Office came and complained they always said "the insurance sector is really different" [...].⁵⁶

As part of the federal administration, an executive and regulatory agency, the Eisenbahn-Bundesamt, was established. Its task was to carry out regulatory supervision which previously had been exercised by the Deutsche Bundesbahn itself. The Eisenbahn-Bundesamt was therefore regarded as the inheritor of sovereign authority within the railway sector and therefore took on traditional supervisory functions. It was constituted as an organisationally autonomous '*Bundesoberbehörde*' under the direction of the Ministry of Transport, representing both a regulatory as well as an authorising body for the federal railways and for foreign operators who operated in Germany (§55(1) Allgemeines Eisenbahngesetz). 'It is subject to guidance as it is not a real regulator. It is only a decision-making body in the case of disagreement'.⁵⁷

The establishment of the Eisenbahn-Bundesamt represented a further 'regulatory bargain' between the Transport Ministry and the Deutsche Bahn as the latter had originally proposed a continuation of the previous self-regulatory approach. However, the Transport Ministry rejected any continuing self-regulation where 'they sat in a room and someone said, "Fritz, I will do this like this now" and

⁵⁵ ID12.

⁵⁶ ID5.

Fritz said, "Yes, I will put a stamp on this".⁵⁸ Nevertheless, the Deutsche Bahn had considerable influence on the establishment of the new authority. Following Dürr's veto against any appointment of a lawyer as president of the Eisenbahn-Bundesamt, the former head of the construction department in the Deutsche Bundesbahn, Stuchley, was chosen as President.⁵⁹ Despite this attempt at minimising 'relational distance', relationships formalised over time as 'former colleagues [in the Eisenbahn-Bundesamt] suddenly realised what kind of powers they have which they then also wanted to exercise without thinking about their former collegiality'.⁶⁰ Similarly, 'four years ago things might have been clarified with a phone-call, now [the Deutsche Bahn] wants an administrative act [*originären Verwaltungsakt*].⁶¹

The Eisenbahn-Bundesamt was responsible for network planning procedures, the supervision of operations, including technical aspects such as construction works, licensing of both services and infrastructure operations and further regulatory functions according to secondary legislation. A further role was to act as an arbiter if no agreement could be reached between two parties in terms of access or connection to other services, its key concerns being those of technical conditions of access, capacity constraints and of terms of agreement. Thus, the

⁵⁷ ID8.

⁵⁸ ID12.

⁵⁹ ID1.

⁶⁰ ID3. Similarly, 'They are the real railway-people. [...] They are the ones who tell [...] the railway how to really run a railway. They really enjoy doing this. They are very attentive' (ID12). The notion of 'relational distance' defines the degree of intimacy between regulator and regulatee. It influences the conditions in which law is used to order social relations and to enforce law (see Hood *et al.* 1999: 60-5; Black 1976).

Eisenbahn-Bundesamt had both legal and technical supervisory functions.⁶² It had no political role similar to those of UK utility regulators, 'it is never represented in political negotiations, it is only an executing agency of federal policies'.⁶³ The aim was to establish a subordinate body to the Ministry of Transport on the same line as the 'Bundesämter' for air transport and shipping, thus establishing a congruence in the supervision structures among these modes of transport, again indicating the domain-oriented nature of the railway reforms.

In remarkable contrast to the wide-ranging control functions, the railway law lacked legal provisions granting the Eisenbahn-Bundesamt enforcement powers. The Federal Administrative Court (the *Bundesverwaltungsgericht*) ruled in October 1994 that the clause assigning control functions should also be regarded as the legal basis for the enforcement of legal obligations,⁶⁴ as the Court regarded the Eisenbahn-Bundesamt as the relevant body to fulfil the traditional role of an executive authority. The Court argued that otherwise the establishment of the Eisenbahn-Bundesamt would have been meaningless

⁶¹ ID9.

⁶² These regulatory functions were carried out to the extent to which they applied to 'federal railways' and non-German operators. Rather than defining the term 'federal railways' as concerning all cross-regional and long-distance traffic, the government overruled Bundesrat demands and set a definition which was based on mere ownership criteria - a 'federal railway' was any part of the Deutsche Bahn in which the federal government owned more than half of the shares. An administrative court clarified that the term 'federal railways' applied in a functional sense in that the federal competence extended to all areas where in some respect the operations both in terms of services and infrastructure were affected (Schmidt-Aßmann and Röhl 1994).

⁶³ ID4.

⁶⁴ §3(5) Gesetz über die Eisenbahnverkehrsverwaltung des Bundes and §(3) Allgemeines Eisenbahngesetz.

(Studenroth 1996: 110-1). Other legal opinions claimed that the lawmakers had forgotten that the organisational privatisation of the Deutsche Bahn meant that the traditional self-regulatory approach was no longer applicable (Grupp 1996: 595; Blümel and Kühlwetter 1996: 297-316). More important, however, was the decision to provide the privatised operator with a non-restrictive regulatory framework. Based on this framework, the Eisenbahn-Bundesamt claimed to have adopted a 'co-operative negotiation'-based enforcement strategy.

Competition issues fell under the joint competence of the Federal Cartel Office and the Eisenbahn-Bundesamt. Access to the infrastructure was supervised by the Federal Cartel Office with regard to legal competition issues, with the Eisenbahn-Bundesamt concentrating on technical-railway related issues. In accordance with EC Directive 91/440, the rail network had to be opened to cross-border traffic and to international groupings between railway operators. The German regulatory framework went beyond these provisions and opened the infrastructure to international groupings, cross-border traffic and non-domestic operators in so far as they were based in either the EU or EFTA and have introduced open-access provisions themselves (§14, Allgemeines Eisenbahngesetz). It was argued, in particular by the Deutsche Bahn itself, that the monopoly position of the infrastructure provider could be best controlled within the company, while its autonomous character would give it sufficient interest to fill the network rather than to protect fellow subsidiaries, 'the guardian is the commercial interest of the [Deutsche Bahn] [...] I want to have the network filled up'.⁶⁵

⁶⁵ ID10.

In contrast to the UK, conditions for access had to be published and prices to be made publicly available, with the amount of technical and operational conditions kept at a minimum. At first, the federal government intended that in cases of competing bids for a particular train path, negotiations were to be held in the first instance by the parties themselves under the supervision of the Federal Cartel Office. However, the Länder, eager to prevent a 'competition' authority being granted too many competencies, succeeded with their argument that the issues at stake were of a technical nature and therefore it would be more 'appropriate' to delegate this task to the Eisenbahn-Bundesamt (BT 12/5015: 19; BT 12/6298: 139). Only in cases of non-agreement was the Eisenbahn-Bundesamt to investigate access agreements and prevent discriminatory practice in terms of technical aspects, capacity constraints and the appropriateness of the assessment criteria; 'here is pure competition, the role of the Eisenbahn-Bundesamt has been pushed into the background'.⁶⁶ However, this 'pure competition' was limited by the Länder's successful intervention to protect and promote regular ('vertaktete') regional rail services. In the final negotiations between the Chancellor, intervening at the final stage to obtain agreement on the overall reform, and the prime ministers of the Länder, it was agreed that in order to promote these services, they should be privileged under the terms of the access regime vis-à-vis bids of less regular, but potentially more lucrative national or international services.

⁶⁶ ID9.

Access to the infrastructure was specifically defined in the so-called 'Railway Infrastructure Usage Regulation', passed in 1997 after a two-year negotiation period. The Deutsche Bahn as well as 'independent' rail operators were opposed to the track-access regulation, particularly with regard to open-access provisions, granting subsidiaries of foreign undertakings (or the undertaking's own cross-border services) access to the German network despite the lack of a mutual open-access regime. Further criticism was focused on the clause regulating the application duration for the booking of train paths. The eight-month period restricted the possibility of setting up new (in particular freight) services, thus protecting the position of the Deutsche Bahn's regular freight operations.⁶⁷

The first price access regime published by the Deutsche Bahn in July 1994 (soon revised in January 1995) was also regarded as an attempt to support its own position. In addition to giving an advantage to operators of regular ('vertaktete') services, discounts were available both on the quantity and duration of the specific contract. The interest of the infrastructure operator in offering these discounts could only be explained as an attempt to cross-subsidise operations of

⁶⁷ ID9. Furthermore, '[t]he whole thing can be regarded as a closed shop, because you cannot turn it - by using rain-dances or oracle-men - from a company Deutsche Bahn into an infrastructure company and a service company overnight, which then also competes in a fair and non-discriminatory way against third parties which immediately emerge. [...] The other thing is high track access prices. [Y]ou have to pay DM 6 per kilometre and then also, in addition, for guides, electricity and any of the other charity works of the infrastructure operator [...]. But given the kind of investment costs applied for, then DM 6 is credible, beyond good and evil' (ID8).

other Deutsche Bahn subsidiaries (Aberle and Brenner 1996: 55).⁶⁸ At first these discounts amounted to ten per cent, but were reduced to five per cent in January 1995, combined with an average reduction by nine per cent. Moreover, the Länder negotiated a kilometre price of DM 5 for additional regional services.⁶⁹ In the late summer of 1998, a new pricing regime for track access, based on an energy pricing model, was introduced.⁷⁰

In sum, the regulatory regime relied on the belief that commercial incentives were sufficient to constrain any monopolistic behaviour by the infrastructure operator. The creation of an independent regulatory agency was actively ruled out. The encouragement of competition did not emerge as a central issue in the

⁶⁸ Quantity discounts offered considerable benefits to the Deutsche Bahn as the quantity (train kilometres) was cumulated on a federal and not a regional basis, thus giving a clear cost advantage to the Deutsche Bahn as the sole operator of country-wide services.

⁶⁹ '[T]his was a tragedy. Although a proposal should have come from the Bahn and from the federal government on how to attract additional services, which do not cost that much [...], this was all down to the Länder [...]. Five DM is still too high a sum for marginal costs. But that again was an example that the transport policy of the federal government is mainly a financial policy, the sole intention was that the Länder had to pay back as much as possible [of the federal subsidies]' (ID4).

⁷⁰ This system set up a two-part tariff for 'large customers' based on a fixed sum for the overall access to the infrastructure and variable track costs for individual train kilometres, and a one-part tariff for smaller operations, consisting of variable track access charges for particular train paths at a higher level. This system eliminated to some extent the ability to price-discriminate via quantitative discounts, although the threshold for qualifying for the two-part tariff was set at a relatively high number of services. For an extensive (and positive) discussion on the change in pricing regime, see Aberle (1998), Haase (1998), Knieps (1998) and Schwalbach (1998). This system was challenged by (rail freight) competitors, leading to the opening of an official investigation by the Federal Cartel Office (encouraged by the European Commission) into alleged discriminatory

policy debate; thus, in contrast to the UK, competition (and regulation by competition) was not regarded as the key to higher 'efficiency'. Instead prime importance was attached to the notion of increased commercial autonomy. The Eisenbahn-Bundesamt was not an economic regulator; its conception was a 'read across' from similar, technical-supervisory, bodies in other modes of transport. Nevertheless, given the ownership status of the Deutsche Bahn and the contractual relationships for regional services, considerable control could still be exercised by the 'principals'. At the same time, in order to enhance the competitive viability of the Deutsche Bahn, the operator was granted substantial autonomy to develop its own mechanisms for internal control and pricing processes as well as track access prices. Thus, far from learning from other privatisation experiences in other policy domains such as telecommunications, German regulatory reforms in the railways sector indicate that domain-specific policies were implemented.⁷¹

Non-commercial objectives

This section discusses the shift of subsidised 'public service' provision to the Länder level. On the one hand, this transfer of policy competencies provides an example of an attempt to increase financial responsibility and transparency and the need for federal side-payments to obtain the consent of the Länder. On the other hand, the regionalisation of regional transport policy also intended to alter transport policy rather than represent a mere 'financial' interest, 'what was of

practice with regard to infrastructure access (*Frankfurter Allgemeine Zeitung*, 12 October 1999).

⁷¹ In the later case of telecommunications, the German federal government installed an independent regulatory authority.

primary importance to us was to build, develop a system where one can clearly say, "rail goes here and bus goes there".⁷²

According to the pre-privatisation framework, the federal government carried the financial responsibility for the loss-making system of regional passenger rail transport, while the Länder, regional and local authorities maintained crucial veto-positions regarding line closures, being able to at least postpone closure-decisions. After 1976, dissatisfaction with the existing policy-arrangements emerged following attempts by the federal government and the Bundesbahn to establish a 'commercially optimal service' by reducing the amount of services to a core network. It was also proposed to regionalise local services. These plans were vetoed by the Länder and local authorities, leading the federal government to freeze all payments to the Bundesbahn, although the Länder still 'managed' to prevent substantial line closures (Kuchenbecker and Speck 1998). Nevertheless, line closures were obtained by a policy of so-called 'cold rationalisation', in which the Bundesbahn demanded financial compensation from the Länder or the communes if the services were to be maintained or modernised. The decline of regional services was further facilitated by the Bundesbahn's policy to make unprofitable services even more 'unattractive' by running services down, offering poor connections and reduced services. Dissatisfaction with the state of regional passenger services had targeted the lack of clearly assigned legal responsibilities which led to constant tension and blame-shifting between the federal government, the Länder, local authorities and the railway operator (Klein

⁷² ID12.

1992). By the early 1990s, the Länder and local authorities had become advocates of a regionalisation of the policy competence for regional passenger transport.

The Länder succeeded in overcoming the federal government's initial intentions to restrict the scope of regionalisation to the railway domain, demanding instead that they were given all competencies in the area of public regional transport. The issue of regionalisation was also enthusiastically embraced by the Ministry of Transport:

'we developed this trick that we said that regional rail passenger services are run by the Länder according to our rules, we give them the money so that they purchase what they want. If they order services, then everything is fine. If they do not, then, by not purchasing services, the Länder are closing these services as a consequence'.⁷³

Following the provisions of Art. 143a of the Basic Law, the responsibilities for planning, operation and finance for the whole regional passenger transport sector was transferred to Länder as of 1 January 1996.⁷⁴ According to Art. 106 of the Basic Law, the Länder obtained specific tax revenues from the federal government to finance these services which they allocated either via competitive tendering or by immediately assigning services to a single operator. The issue of finance soon developed into the most controversial issue of the whole reform process. At the outset, the federal government was not willing to offer more than

⁷³ ID12.

⁷⁴ Regional railway services were defined as services where the main demand was in urban, suburban or regional areas. These services could be defined as not operating on a

DM 7.7bn for the provision of regional services, equalling the amount of payments the federal government had made for the provision of regional services prior to the reform. The Länder demanded DM 14bn, arguing that 'regional services had been operated in a way that was far from being modern and attractive. [...] The Länder said, it costs much more to do it properly. [...] This costs DM 14bn. Although, this number was purely invented'.⁷⁵ Given their threat to veto the whole reform process in the Bundesrat, the Länder 'were able to blackmail the federal government'⁷⁶ and obtained an annual subsidy of DM 12bn, the sum was increased from 1998 according to the increase in tax revenue, following the agreement that mineral oil tax revenues were to be shared between the federal government and the Länder. As a further concession, the federal government granted the Länder a delay in the reduction of subsidy paid under the 'Gemeindeverkehrsfinanzierungsgesetz' (GVFG). Overall, the level of subsidy fell from DM 6.28bn in 1996 to DM 3.28m in the following years. In addition, the federal government was obliged to provide 20 per cent of its investment in infrastructure for the regional passenger network.⁷⁷ In general, the shift of the financial subsidy mechanism from GVFG to mineral oil tax revenues

service beyond 50 km or where the whole journey did not take longer than one hour (§2 Gesetz zur Regionalisierung des öffentlichen Personennahverkehrs).

⁷⁵ ID4. This sum included the existing DM 7.7bn payment, DM 2bn for uncovered deficits, DM 1.1bn for necessary modernisation, DM 1.5bn for modernisation in East Germany specifically and DM 1.5bn for increased costs.

⁷⁶ ID3.

⁷⁷ This clause led subsequently to disputes between the federal government and the Länder. The federal government argued that any investment in infrastructure which was, even partly, used for regional services was to fall under the 20 per cent rule. In contrast, the Länder argued that they should be given 20 per cent of the planned expenditure. The

allowed the Länder a far higher degree of flexibility for the use of finance than under the previous framework; 'the Länder can use the monies at will. There is no control. This was another mistake [...]. [The Länder] established proper railway administrations. That was not intended'.⁷⁸ While the financial responsibility remained with the federal government, the financial issue has become rather a question of federal redistribution than direct subsidy.⁷⁹

In the case of regionalisation, regulatory reform provided the financial 'principal', the federal government, with a clearer allocation of responsibilities by establishing a framework which shifted the responsibility for line closures and other policy decisions to the Länder. The Transport Ministry had hoped that this would lead to a 'small, but high quality' regional passenger network. However

final agreement established that 5 per cent of all investment was to be allocated to regional projects in co-operation with the Länder (ID4).

⁷⁸ ID5.

⁷⁹ Until 1999, the regionalisation of rail passenger transport led to an increase of rail services. The Länder established a range of transport delivery mechanisms, ranging from centralised authorities (Bavaria) to decentralised transport authorities with or without local government influence (North Rhine-Westphalia, Rhineland-Palatinate, Hesse). However, dissatisfaction was widespread. The Deutsche Bahn complained that the relevant authorities punished the Deutsche Bahn in the bidding process for perceived neglect in the past and 'the wish to make change visible' (ID7). It was complained that the 'monetary carrot' was used to demand particular services and that performance measurement schemes had been established *ad hoc*. Furthermore, it was argued that the Deutsche Bahn was at a disadvantage in comparison to low-cost international bidders or bidders owned by the local authorities themselves (ID7, ID10). The Länder were still unhappy with the non-transparent cost structure of the Deutsche Bahn, relying on the bidding process to reduce the subsidy demands of the Deutsche Bahn (ID4). On the basis of an analysis, required by the regionalisation law, on whether the amount of federal financial subsidies required adjustment, the federal government argued that the Länder

the Länder succeeded in increasing the amount of services, given the federal subsidies. Furthermore, by providing for the possibility for competitive tendering, the discretion of the Deutsche Bahn to 'hide' costs was reduced. Regionalisation developed as an interest of the Länder and was not driven by the railway operator which had shown little interest in regional transport and had concentrated its resources on the development of high-speed long-distance traffic. Only after competitive tendering was introduced, did the Deutsche Bahn's interest in regional traffic develop and major investment in rolling stock was undertaken.⁸⁰ The increases in railway services suggests, however, an interest in transport by the Länder beyond a mere interest in gaining additional financial resources.

The impact of institutional factors

The organisational privatisation of the German railways was domain-oriented. This domain-oriented isomorphism was already reflected in the government's mandate to the Commission. Furthermore, rather than drawing on experiences from the international 'privatisation bandwagon', the experiences from other railway reforms across Western Europe and Japan were assessed and, in some cases, similar instruments were selected, although no direct 'read across' occurred. Similar to the UK, the separation of the infrastructure from service operations was promoted. Unlike the UK, where this proposal was advanced as a result of past utility privatisation experiences to introduce competition by minimising the monopoly element, in Germany, separation within the

had been given too high subsidies and that the annual increase of subsidy payments should be reduced (ID8; also Herr and Lehmkuhl 1997; Lehmann 1999: 164-82).

⁸⁰ ID7.

undertaking had been a long-held idea and was motivated by the perception that separation would increase financial transparency and cost reduction via the so-called 'limited company effect' and inter-modal competition rather than the belief in competition *per se*. Furthermore, 'privatisation' as such was never a political imperative. The main political interest was a reduction of the financial burden. Although not a 'new issue', the urgency for dealing with the Bundesbahn's financial decline was reinforced by unification and the political demand to merge the Bundesbahn and the Reichsbahn as soon as possible. In addition to these regulatory ideas, the organisational structure, in particular the debt-free start of the Deutsche Bahn as a limited company and the revaluation of its assets indicate that the reforms were targeted mainly at making the railway operator more commercialised and competitive inter-modally rather than importing and hardwiring a regime prioritising competition within the sector.⁸¹ The conscious rejection of paradigm-oriented sources of isomorphism was noticeable in the establishment of the Eisenbahn-Bundesamt which was modelled on other transport-specific authorities in the German administrative landscape, but was not given legal-economic competition competencies.

In terms of the specific timing of the railway reform, the impact of unification, with the need to deal with the Reichsbahn and the increasing financial constraints on the federal budget, was crucial to establishing and sustaining the basic political interest and consensus on the principles of the railway reform. The financial 'challenge' as such was an old issue. In 1972, after reform attempts had

⁸¹ For example, the lobbying efforts by a merchant bank, advertising its expertise in selling shares of publicly owned companies were regarded as 'irrelevant' as such a policy was not 'what we are intending to do' (ID2).

been stalled by the then Transport Minister Georg Leber (under a Social-Democrat/Liberal coalition), it had already been argued that the unwillingness to reform was based on an 'overall puzzlement in the Department on what possible measures to adopt'. Only by changing the bureaucratic organisation and procedures of the Bundesbahn and the public law status of its employees would a reform be worthwhile.⁸² Given the anticipated opposition of the Bundesbahn and the trade unions, no further major initiatives were undertaken. Thus, rather than the worsening financial situation itself, it was the two issues emerging from unification - the merger with the Reichsbahn and the increased financial demands on the federal budget - which sustained the political interest in a railway reform and allowed institutional veto-points to be overcome.

The insulation of the regulatory space from coercive pressures

Previous accounts of the German railway reform have emphasised the importance of 'Europeanisation'. Three kinds of impact have been stressed by Knill and Lehmkuhl (1998) in their analysis of the impact of Directive 91/440. They distinguish its role as providing additional legitimisation, offering a conceptual framework for solving domestic problems and limiting the resources of potential opposition. Knill and Lehmkuhl claim that the Directive provides a good case of legal integration via 'support building' rather than 'top-down implementation'. In contrast, it is argued here that while liberalisation of European transport policies may have reduced the 'acceptability' of arguments opposing privatisation and relatively open access to the infrastructure, the impact of European legislation was not substantial. Similarly, the role of the

⁸² Corroborated by ID12.

Commission as a 'policy diffuser' using the case of Sweden as the prime example, as stressed by Denkhaus (1997), was not reflected in the interviews. While there was an awareness of European legislation and also a recognition that it pointed to vertical separation of track and operations, the debate was dominated by domestic actors using their analysis of international reforms in the policy domain. Thus, international 'lesson-drawing' took place, but instead of exerting pressures to force the German railway regulatory regime to resemble any of these international examples, there was a formal analysis of these experiences at the domestic level which was then translated into national legislation.

Insulation of the political-administrative nexus in the regulatory space

The need to obtain the consent of multiple actors shaped the lines of political conflict and therefore also the final form of regulatory regime. The provisions of the Basic Law required the federal government to seek agreement with the opposition parties, mainly the Social Democrats, and the Länder. The railway reform was not merely concerned about the re-arrangement of the relationship between a single principal (the federal government) and its agent (the railways), but also about the relationship between two principals, in which the Länder could exploit their constitutional veto-position to obtain additional and more 'flexible' resources, in order to take full control over regional passenger services. As part of this 'regulatory bargain' the federal government was (formally) 'released' of its involvement in dealing with line closures. The existence of multiple veto-points, ranging from parliamentary opposition and coalition restraints, the threat of a Länder veto via the Bundesrat and trade union demands, ensured that not only had consent to be 'bought off' in negotiations

but also that rather than liberalisation, the safeguarding of the interests of these institutionalised actors was the main political priority. To overcome these hurdles, a traditional 'German' problem-solving approach was chosen: by setting up a technocratic Commission the stages of problem-definition and of alternative generation were de-politicised.

However, while institutional veto-positions were crucial for explaining the membership of actors inside the regulatory space, these were not decisive for the selection of regulatory instruments. Besides the Commission and the work inside the Transport Ministry, there were no alternative sources in the domestic process proposing rival conceptual ideas nor were there any alternative domestic privatisation experiences to draw upon. Therefore, the privatisation process and railway policy overall continued to be dominated by 'railway-minded' actors, in particular within the Commission; 'who works for the railways or in their supervision, is somewhat motivated to do good things to the railway mode of transport'.⁸³ The Commission's membership, selected to achieve consensus among societal and party-political actors before the politicisation of the process, was domain-oriented, consisting of transport-related trade unions, transport academics and transport-interested politicians (one being a former federal transport minister, Werner Dollinger). This domain-orientation was further facilitated by 'information' provided for the Commission by the Bundesbahn and the Transport Ministry. Finally, the domain-orientation was also evident in post-privatisation personnel change (which was also noticeable pre-privatisation) with the SPD spokesperson on railways, Klaus Daubertshäuser, and the former

⁸³ ID9.

head of the Transport Ministry's railway unit, Peter Reinhardt, moving to the Deutsche Bahn as chairmen for regional passenger services and for property and stations respectively.

Insulation of the regulatory space from societal actors

Arguably, the account of the domestic domain-oriented isomorphism of the regulatory regime change could be interpreted as a result of straightforward 'producer' capture. Unlike in the UK, the railway operator, the Deutsche Bundesbahn, was part of all key decisions, given in particular the decisive role played by the Chancellor's choice of chief executive, Heinz Dürr, whose independent financial standing further advanced his political position. Furthermore, 'what came out of it [the reform process] that was pretty close to the opinion of the joint executive of the Bundesbahn and the Reichsbahn'.⁸⁴ In addition, in the past, proposals

'somehow had all been prepared by the Bundesbahn. That is always the same "What to you think about how the future should look ", the government asks the railways. The railways deliver something. "Yes, that looks nice, we can use that somehow". That is how it works in practice. This happened for decades and also here, with the Commission, it was required that we delivered our proposals. And these were taken up. I do not want to say that they blindly.... But they went beyond our own expectations.'⁸⁵

⁸⁴ ID3.

⁸⁵ ID3. Similarly, the financial 'presents' were less a success of 'capture', but that 'was a benefit of the federal government[...]. They accommodated us. We did not do it ourselves' (ID3).

Nevertheless, the Bundesbahn was dependent on the interests of political and bureaucratic actors. For example, the decision to separate the various businesses within the framework of a holding company did not merely reflect the interest of the Deutsche Bahn. It was, more importantly, a political compromise between the Social Democrats and the Länder on the one side, wishing to maintain influence over the infrastructure operator, and the federal government on the other side, demanding the setting-up of a private law organisation. Furthermore, the setting-up of the Eisenbahn-Bundesamt took place despite initial opposition by the railway operator. Similarly, the regionalisation of regional transport was driven by intergovernmental considerations.

Other actors, while making proposals and submissions, were less important in terms of exerting isomorphic pressures. The trade unions' role was crucial in that they offered support to regulatory reform once employment terms had been safeguarded. Furthermore, as argued above, the railway unions also profited from regulatory reform, first in terms of the hope of protecting their membership basis and, second, to obtain autonomy from the main public sector trade union. At the same time, the role of the academic advisory committee to the transport ministry and the membership of two transport academics on the Commission highlights the crucial importance played by 'experts' in the policy domain.

In sum, it was a combination of technocratic actors, drawn from the administrative, political and societal spheres, which was crucial for the selection of regulatory instruments and thus the domain-oriented isomorphic nature of reform. The sharing of responsibilities of both public as well as societal actors in the regulatory space was particularly evident in the agenda setting role of the

Railway Commission. It was the Commission's decision, based on near unanimous support, to advocate constitutional alterations and not merely incremental change which allowed the Ministry of Transport to further promote the 'privatisation' of the unified German railway operators. The institutional setting, with its multiple veto-points, promoted the domain-oriented membership and also domain-oriented suggestions. Moreover, the Commission's membership was selected to obtain (or even fail to obtain) consensus across party and societal actors. Furthermore, on transport, there was a relative political consensus with the question of state involvement in the infrastructure's modernisation mainly being one of degree and where the rhetoric of the need of a modal shift from road to rail was shared across all parties.

Conclusion

This chapter has argued that the case of regulatory reform of German railways in the 1990s provides an example of domain-oriented isomorphism. Experiences were drawn from changes in the domain-environment, thus from railway reforms in other countries, rather than, as in the case of the British railway privatisation, from the policy environment of national utility reforms. International lessons were drawn and interpreted, but there was no direct import of policies. It has also been argued that coercive pressures were not of crucial importance. Instead, it was a mixture between the political-administrative nexus and societal, in particular academic actors, which selected policy proposals and shaped the design of regulatory instruments, 'participants are obviously the railways, the executive of the railways, then transport politicians, but the transport academics' voice is influential, too. The discussion

takes place in this triangle'.⁸⁶ It has also been shown that the institutional veto-position of the Länder forced substantial side-payments and compromises.⁸⁷ Nevertheless, the design ideas that were selected reflected a domain-orientation, which was domestic in its analysis and choices, but was informed by international experience.

⁸⁶ ID3.

⁸⁷ 'Then comes the legislative process and you never know what will happen there, when all the committees which have something to say and the other dear old friends, they begin to meddle around with the thing, you are permanently forced to make compromises and if you are unlucky, not much remains at the end. The highlight surely was in the Bundesrat where the Länder had the chance to blackmail the federal government into giving more money to the Länder' (ID12).

Section V: Conclusion

Chapter Nine

Conclusion

Having completed the journey across the empirical case studies of major reforms in railway regulation in Britain and Germany, this conclusion draws the findings together and assesses the wider implications of this study. It has been argued that an institutional approach, stressing membership and relationships within the regulatory space, is valuable for explaining regulatory change. In particular, the concept of isomorphism – the bounded homogenisation of a unit's organisational form with other units in its policy environment – has been utilised to stress the importance of regulatory design ideas and their sources. Three institutional factors, the insulation of the regulatory space from coercive pressures, the insulation of the political-administrative nexus in the regulatory space as well as the insulation of the regulatory space from societal actors, have been examined with regard to their impact on whether regulatory reforms were domain- or paradigm-oriented. This study claims that the differentiation between paradigm- and domain-oriented isomorphism and the examination of the impact of three specific institutional factors offer for a useful step forwards towards establishing what institutions matter for what outcomes. This conclusion compares the empirical findings and relates these to the wider analytical framework. It questions whether there has been a common, cross-national or a persistent national 'track' in railway regulation in Britain and Germany. It also discusses the concept of isomorphism and assesses the explanatory value of the three institutional factors. Finally, given the study's concern with regulatory regimes, it considers the contribution of this study to wider debates regarding the concept of the 'regulatory state'.

The Findings: On Different Tracks?

This section brings together and compares the findings of the individual chapters. It compares the experiences in both states across time and questions whether it is possible to speak of a common or a national 'track' in railway regulation. It argues that in all cases, policy-makers, far from moving along increasingly common or national trajectories that determined policy solutions, had a choice between multiple approaches available in the policy environment.

Arguably, the inter-war period provides a case of narrowing differences in regulatory approaches in the two countries. From different starting points - an oligopolistic private railway industry in Britain and fragmented, partly state-owned, partly privately-owned railway industry in Germany - railway regulation was 'nationalised', in terms of the establishment of national ministries of transport. Witte (1932) claims that these tendencies represented a convergence of approaches - from commercial towards greater state regulation (Britain) and from state administration towards greater delegation to provide for increased commercial flexibility (Germany). It has been argued that beyond this form of 'nationalisation', there was little convergence. In Britain, four regional monopolies were established, while, in Germany, a formally autonomous operator under Reich ownership was formed. The formal shift in regulatory approaches was based on different motivations and policy environments. The British examples, the 1919 Ministry of Transport Act and the 1921 Railways Act, represented cases of domain-oriented isomorphism following the rejection of the initial, more paradigm-oriented alternatives, which stressed the role of railways as part of a broad post-war reconstruction policy. In the German case, the

regulatory regime for the Deutsche Reichsbahn Gesellschaft (DRG) represented a domain-oriented compromise between the domestic domain-oriented and backward-looking policy environment (represented by the German Reich's government), and the domain-oriented international policy environment, represented by the two railway experts Gaston Lefevre and William Acworth, who demanded a more commercial orientation of the railway operator.

Similarly, the regulatory reforms in the immediate post-Second World War period reveals superficial convergence. In both countries, the operators were organised as state-owned monopolies with a national transport ministry acting as regulatory authority. However, the empirical analysis indicates that the regulatory regimes differed substantially in both their degree of formality and their objectives. In Britain, reliance was placed on informal relations between the minister and the chairman of the public corporation. The need to maximise delegation and commercial orientation was emphasised. This requirement was furthered by an additional institution, the Transport Tribunal, that was to provide another safeguard against ministerial intervention. The 'socialisation' of the railways was to enhance the efficiency of the operator. In Germany, in contrast, regulatory debates were concerned with domestic considerations at the federal and the Länder level on how to maximise their respective leverage over the economic behaviour of the railway operator to safeguard the traditional 'commonweal' function of the railway operator. In contrast to the British approach, the regime relied on a formal allocation of roles and competencies.

The privatisation cases of the 1990s also provide examples of a joint term divided by different policy assumptions and design ideas. In Britain, the

regulatory regime was based on previous utility regulations with the explicit aim to introduce competition into the sector. In contrast, in Germany, privatisation meant a continuation of public ownership under a private law form with the explicit objective to increase the competitiveness of the railway operator.

Thus, while superficially it could be claimed that there was convergence of regulatory systems in all three time periods, a closer analysis of the sources of regulatory design ideas and the forms of change reveals substantial differences. At the same time, an analysis of the national cases over time, examined in terms of continuation of organisational form, 'ideas' and dominant decision-making patterns, reveals no distinct 'national track'. In terms of organisational form, Britain experienced a privately owned oligopolistic market prior to the First World War, regional private monopolies in the inter-war period, a single, publicly owned monopoly following the Second World War and a fragmentation into separate private undertakings in the 'age' of privatisation. The German case provides a larger degree of continuity in terms of ownership (in all time periods, the railways were in federal ownership), but less in terms of organisational structure: the study examined cases of formal autonomy in the inter-war period, limited operational autonomy after the Second World War and a unified private law undertaking after 'privatisation'.

Continuities are also identifiable at the 'ideational' level. In the British case, there was a persisting assumption that the railways should operate on commercial lines and that organisational and regulatory reforms were to provide for an economically viable operator. In contrast, the assumption that railways were to provide commonweal functions in the perceived interest of the German

economy dominated regulatory debates in all three time periods under investigation. A regulatory regime was to safeguard these functions; for example, the assumption (in the 1990s) that infrastructure provision belonged to the German state's key activities resulted in the 'hardwiring' of permanent federal majority ownership of the infrastructure operator in the constitution. Nevertheless, the discussion in the individual chapters has shown that rather than near-automatic policy continuation, there was, often substantial, contestation and competition between regulatory design ideas, drawing on various sources of isomorphism. Furthermore, despite these differences, similar proposals were made in both countries, for example, the establishment of 'corporatist' undertakings under the administration of business, trade union and political interests was suggested after the First World War.

In terms of recurring decision-making patterns, Germany's federal structure as well as quasi-corporatist decision-making patterns led to a repeated generation of similar conflict cleavages. This allowed for membership in the regulatory space of societal actors, such as the railway operator, business and trade union associations as well as 'experts', which were usually drawn from the railway or transport academic community. In the British case, it has often been argued that the majoritarian and unitary character of British government facilitates rapid policy change. For example, Morrissey and Steinmo (1987) found that tax policy in Britain has been shaped by 'adversarial politics'. This study's cases provide examples of weak rather than strong governments, leading, in the 1921 Railways Act, to corporatist and bureaucratic decision-making patterns with little party-political input. Only the British privatisation case revealed party-political considerations: nevertheless, instead of the 'adversarial politics' assumption that

parties in government please or harm specific constituencies, in this case it was the desire to make policy reversal by future governments as difficult as possible. In contrast to the assumptions of the 'adversarial party government' hypothesis for extensive policy change, it was the weak position of the Conservative government which induced the demand for rapid, extensive and 'irreversible' policy change in order to 'hardwire' the new regulatory regime. Nevertheless, while decision-making rules provided opportunity structures for actors, they, at best, facilitated, but did not explain the selection of particular regulatory instruments in terms of their paradigm-or domain-orientation.

In sum, this study has neither found conclusive evidence for inter-temporal convergence nor for national persistence as explanatory factors for the selection of domain- or paradigm-oriented regulatory instruments. The next section assesses the value of the concept of isomorphism and the impact of the three institutional factors. However, these findings face certain limitations. First, only the stages of policy formulation and alternative generation are examined. It therefore does not consider the performance of the regulated industries, nor does it attempt to evaluate and 'benchmark' regulatory regimes. Secondly, this study is limited in its focus on two states. Despite increasing the number of observations by taking a historical perspective, the findings would have greater weight if the study had considered further European states and/or other utility sectors. Nevertheless, the study of a 'sector close to the state' in two major West European countries allows the analysis to draw some wider conclusions. Thirdly, the nature of these findings does not offer law-like generalisations as demanded by Przeworski and Teune (1970: 4). They claim that social science research should lead to explanations in terms of general laws. It is doubtful

whether (social) scientific studies can establish laws rather than aspire to the disproving of hypotheses or the establishment of a theory. This study did not aim to establish law-like generalisations, but sought to evaluate the significance of various institutional factors and to compare their impact on the orientation of the regulatory regime. An assessment of these more detailed institutional factors, rather than establishing broad claims concerning persistence and diversity, provides more information towards addressing the question of 'do institutions matter'. Such a comparison allows for an assessment of the strength and weaknesses of the particular institutional factors and thus enables an evaluation of different institutionalist perspectives.

Isomorphism and institutional factors

The analysis of the various cases of regulatory change has stressed the importance of an institutional approach. This section discusses the contribution of isomorphism to the analysis of institutional design. It further considers the value of the three institutional factors and questions whether any wider generalisations of the impact of these factors on the 'transport' of regulatory design ideas can be made.

Among the study's central claims is that isomorphism - constraining pressures which force one unit to resemble other units in its policy environment - can be differentiated in terms of domain- and paradigm-orientation. Thus, policy domains are exposed, not to a single, but to multiple policy environments which provide different, often contradicting legitimating sources of policy design ideas and standards of reference, allowing actors 'to try to act upon these design prescriptions' (Goodin 1996: 36).

The cases examined in this study stressed the significance of rival policy environments offering diverse regulatory design ideas. Different actors argued for diverse and contesting ideas as to the 'appropriate' regulatory regime for the railways. In the case of the 1920s, there were rival conceptions inside the British government as to the role of the railways in the period of post-war reconstruction. In the German case, debates as to the orientation of the regulatory regime focused on the German government's attempts to secure political influence on the operator against more commercially-oriented demands of the two international railway experts.

Similarly, in the German 'privatisation' case of the 1990s, the policy environment of international railway reforms was considered and investigated in detail, policy-makers, however, decided that the reforms should not directly draw on international sources. In the British privatisation experience, officials dismissed the relevance of domain-oriented sources, both domestically and internationally. Paradigm-oriented reforms, based on domestic models of utility regulation were introduced. In the post-Second World War period, contesting regulatory design ideas referred to different sets of legitimating sources, for example, in the German case, the controversy between models based on the 1924 DRG approach or on the 1937 Reichsbahn law.

The notion of institutional isomorphism focuses on the sources of decision-making. By stressing processes of isomorphism, it is argued that decisions with regard to regulatory instruments are not based on extensive and comprehensive calculations as to the precise impact of any particular measure. Neither is the

selection of regulatory instruments based on extensive competition and 'tests' of rival concepts. Instead, choices concerning regulatory instruments involve bounded searches for attractive policy templates offered by various policy environments which can be transposed in the particular policy domain. These provide legitimacy and a standard of reference to a variety of actors which advocate their application in the policy domain. The selection of regulatory instruments therefore reflects an institutional process in which actors' searches for applicable policy instruments refer to standards of appropriateness, acceptability, feasibility and legitimacy instead of relying on an exhaustive analysis of all possibilities. By claiming that there are numerous sources of isomorphism, which can be aligned according to their domain- and paradigm-orientation, this study has argued that organisational forms – such as regulatory instruments – are not merely embedded in one policy environment. A regulatory space is exposed to numerous, often overlapping policy environments which offer differing, often competing sets of 'legitimate' policy instruments.

The concept of isomorphism also highlights the importance of institutional factors which facilitate or constrain processes of increasing homogenisation of organisational forms. This study has focused on the impact of three institutional factors on the degree of insulation of the regulatory space:

'the critical question for the analyst of the European regulatory scene is not to assume "capture", but rather to understand the nature of this shared space; the rules of admission, the relations between occupants and the variations introduced by differences in markets and issue arenas' (Hancher and Moran 1989: 276).

In order to counter the criticism that such an approach leads to 'theoretical pluralism' and fails to generate general claims (see Prosser 1999: 205), three institutional factors were analysed according to their impact on the selection of regulatory design ideas by facilitating the exposure to different policy environments. These factors define the extent of insulation of the regulatory space from various policy environments.

The insulation of the regulatory space from coercive pressures

It has been argued that coercive pressures encourage isomorphism due to direct and indirect effects of higher legal and political orders. These coercive pressures are said to facilitate a homogenisation of organisational forms and public policies across levels of government. This study has examined cases where the extent of coercive pressures could be assumed to be high, thus the insulation of the regulatory space was limited. These cases included war-time defeat, non-domestic control over the national administration and, in the more recent cases, the impact of supranational law and the so-called 'Europeanisation' of policymaking.

In terms of Europeanisation, little evidence was found to suggest a crucial role of European legislation in shaping regulatory choice beyond providing additional support for positions already held at the domestic level. In both the British and German privatisation cases, legislation went beyond the requirements of Community law. At the same time, the European Commission did not play an entrepreneurial role in the reform experiences. The railway domain therefore contrasts with telecommunications where there has been an increasing convergence of forms of regulation, at least partly driven by supranational

actors. Susanne Schmidt has pointed to various reasons why the application of Art. 90(3) TEU by the European Commission was successful in telecommunications (in contrast to energy), stressing in particular the political and institutional environment and 'policy climate' (Schmidt 1998). In contrast to telecommunications, the European Commission's railway policies could not rely on international actors, changing technology and a merging of markets and sectors to facilitate liberalisation. Similarly, the existence of other European reform experiences was also not of major importance. While reports on these reforms existed in Britain, they did not affect any of the domestic choices, which were informed by the domestic experience of utility regulation. Equally in Germany, despite elaborate studies – not only in the European, but also in the Japanese context – these were mainly used to legitimise existing positions.

Moreover, the two cases of wartime defeat did not lead to an imposition of a different regulatory regime on Germany. Despite contemporary claims to the contrary, the case of the 1924 law establishing the 'Deutsche Reichsbahn Gesellschaft' represented to a large extent an accommodation of the German government's position and an allied (in particular, British) interest in a 'light-handed' approach (by imposing sanctions and close supervision only in the case of non-payments) as well as a recognition of an already occurring domestic policy tendency towards greater operational autonomy. In addition, it strengthened those German actors, who also advocated a more commercial orientation of the regulatory regime.

This study's examination of potential examples of direct imposition of regulatory design ideas and the Europeanisation of the regulatory space found little

evidence to argue that this factor was decisive, moderating considerably the claims made by previous studies of the impact of 'Europeanisation' on national railway regulation (Knill and Lehmkuhl 1998, Denkhaus 1997). Instead, this finding lends considerable support to historical institutionalist claims of the dominance of national adaptation to new, and arguably, common challenges rather than radical change and increasing uniformity of policies across states (see Kitschelt *et al.* 1999).

The insulation of the political-administrative nexus in the regulatory space

As one key aspect of the 'architecture of the state', the political-administrative nexus is said to have a substantial impact on policy development by generating different patterns of bureaucrat and ministerial career structures. In chapter two, it was argued that a high degree of insulation, allowing for the development of long-term relationships, was likely to lead to domain-oriented isomorphism. In contrast, limited insulation was argued to facilitate the introduction of paradigm-oriented and/or international regulatory design ideas.

The two privatisation examples offer substantial evidence for the impact of this institutional factor. The 'lateral transfer' mechanism, as identified by Christopher Hood (1996), provided the key variable for explaining the adoption of the British utility privatisation experiences. Actors from within the civil service with considerable privatisation experience were brought into the railway domain. At the same time, the dominance of the Treasury further facilitated the introduction of domestic paradigm-oriented ideas into the regulatory space. In contrast, the German case provided an example of domain-orientation. There was little influence from non-domain actors in the choice of regulatory instruments; it was

the Railway Unit within the Federal ministry of transport which promoted the proposals of the Railway Commission. Crucially, the Railway Commission's membership drew solely from the transport domain. These findings highlight the crucial role of the civil service in both countries. In the German case, this confirms the traditional importance attached to civil servants and close academic advisers for defining and preparing (administrative) policy reforms in Germany (Knill 1999). Christoph Knill has contrasted the German pattern with the United Kingdom's administrative system and its role in administrative and policy reforms. He claims that these relied mainly on actors outside the civil service. In this study, the British privatisation case does not confirm his argument, instead the regulatory space seemed more insulated from 'non-governmental' policy actors than in the German case. Rather than 'innovation from outside' (Knill 1999: 133, see also Foster 1998, 1996) by political leadership and inspiration from think-tanks, the British railway privatisation case provides an example of a 'Whitehall-sustained exercise' in the face of a lack of 'innovation' or even enthusiasm from the outside.

The British 1919 Ministry of Transport Act provided an example for a lack of insulation of the political administrative nexus in the regulatory space. In this case, paradigm-oriented proposals were developed by a small group of (future) transport ministry officials with a military and railway background. These officials, led by Geddes and, at the time, supported by Lloyd George, regarded the railways as crucial for economic development, representing a key part of an overall programme of active reconstruction policies. However, as the Ministry was new to the domain itself and because other departments, in particular the Treasury, asserted their role in the domain, more actors increasingly entered the

regulatory space. This decline in the insulation of the regulatory space led to a contestation of regulatory design ideas and finally the rejection of the original policy proposals. Thus, the lack of insulation allowed for the introduction of competing regulatory design ideas to the existing paradigm-oriented perspective.

The various cases examined in this study indicate the critical importance of the political-administrative nexus in the regulatory space. The composition of the membership of the regulatory space depends on the composition of the political administrative nexus, which defines the *Dienstwissen* and *Fachwissen* of the bureaucratic actors, facilitating the access of policy actors from particular policy environments to the regulatory space.

The insulation of the regulatory space from societal actors

The importance of membership in the regulatory space has been highlighted by most 'regulatory theories', ranging from industry capture approaches in the Stiglerian tradition to Wilson's interest group typology based on the distribution of costs and benefits across affected groups (J.Q. Wilson 1990). Similarly, institutionalist accounts highlight the importance of societal actors, whose pressure and direction of pressure is shaped by the institutional access to the regulatory space in particular and policy-making in general (Hall 1986).

Previous chapters show that a 'capture' approach has difficulty in explaining both the origins of regulatory change and also the selection of regulatory design ideas. The impact of the railways on industries and other users leads to a broad distribution of regulatory costs and benefits and thus does not provide the

railways with a monopoly membership inside the regulatory space. With the exception of the 1921 Railways Act, British railway operator(s) did not play a significant role in the formulation and selection of regulatory design ideas. For example, in the British privatisation case, the feeling that British Rail (BR) was exploiting its information asymmetries in order to frustrate reform policies, led to a policy of disempowering BR by establishing Railtrack. The British privatisation case was unique in its rejection of domain-oriented actors and their concepts; 'legitimate' sources for regulatory design ideas were provided from within Whitehall's interpretation of utility regulation.

The analysis of regulatory reform in Germany highlighted the importance of institutionalised membership in the regulatory space. In Britain, 'experts' did not play any major role in the three examined cases (even at a time of widespread privatisation where the importance of think tanks, consultants and investment banks has been stressed and a decline of the advice capacity of the civil service has been diagnosed). In contrast, in Germany the institutionalised position of the 'Academic Advisory Council' provided influential (transport) academic views in both post-1945 cases. This influence of experts was facilitated by Germany's political institutional environment. In order to overcome institutional veto-points, it was attempted to establish an expert-based technocratic consensus. In the German 'privatisation' case, the role of the operator was also of crucial importance. This influence, however, was based less on the ability of the operator to capture the reform process than the selection of the operator's new chief executive by Chancellor Helmut Kohl. Quasi-corporatist decision-making patterns, involving business, railway and, sometimes, trade union interests, were, however, not only unique to the German case. The British 1921 Railways

Act similarly represents a case of an insulated regulatory space granting the peak railway and business associations relatively exclusive access to decision-making. Nevertheless, in general, societal actors were not as crucial in developing regulatory regimes as assumed by original capture approaches, with the influence of societal actors remaining dependent on the acceptance by political-administrative actors.

The study's findings with regard to the impact of the institutional factors on processes of isomorphism can be summarised as follows:

- The impact of coercive forces on the choice between domain- or paradigm-oriented sources of isomorphism was limited. Even in cases of relatively limited insulation from 'coercive pressures', domestic institutional arrangements were powerful enough to shape and control change. Thus, rather than seeing the direct importation of international models into a regulatory space, the selection of regulatory instruments was mainly shaped by considerations based on domestic policy environments. At the same time, the nature of coercive pressures allowed domestic actors a considerable scope for discretion, in the 'privatisation' cases, for example, the nature of the European Directive 91/440 allowed for sufficient scope for national variation in the transposition process.
- Societal actors did not play as significant a role as predicted by established capture approaches. A Stigler-type capture by the railway operator could not be established in any of the case studies. As predicted by the notion of regulatory space, institutional access to and membership of the regulatory space was crucial for explaining the impact of societal actors. While the operator was in some cases

more influential than in others, for example, the Bundesbahn in comparison to British Rail in the 'privatisation' cases, the extent of involvement depended on political and administrative decisions. The German cases, in particular, also highlight the importance given to 'experts' in terms of providing the intellectual foundation for dominant regulatory design ideas.

- The role of the political-administrative nexus was crucial for the selection of regulatory design ideas. The political-administrative nexus shaped the nature of the regulatory space and offered incentives and direction to societal actors. Furthermore, political decision-making structures allocated membership roles and provided veto-positions.

- The more insulated the membership of the regulatory space, granting exclusive membership to peak societal interests, academic advisers and domain-based civil servants, the less likely is paradigm-oriented isomorphism, while not excluding international sources.

Regulation, Institutions and the Regulatory State

In numerous publications, Giandomenico Majone has argued that the last two decades have seen the rise of a regulatory state. Multiple causes for this shift from a 'positive' to a 'negative' state have been identified. These range from a change in policy preferences towards prioritising 'economic efficiency' (Majone 1996b), the rational behaviour of bureaucrats in aiming to maximise their influence over policy-content at a time of budgetary constraint and 'fiscal stress' (Majone 1994) to a broader cultural and societal shift towards an 'audit society' (Power 1997). It is claimed that such a 'rise' of a regulatory state has been

noticeable in particular with regard to three areas; first, the end to direct service delivery by the state, second, the creation of free standing regulatory offices and, third, a higher degree of (legal) formality between policy actors. This final section considers these claims in the light of the findings of this study. It assesses the implications of this study's historical and institutional perspective and then discusses whether the alleged shift towards the 'regulatory state' represents a shift towards policy stability.

Despite claims that 'regulation is the new border between the state and industry', representing the 'battleground' on how the economy should be run (Veljanovski 1991: 4), regulation itself as well as regulatory relations have been shaped by legal, political and cultural traditions. The historical chapters show that the regulation of the railways was a recurring and significant 'battleground' for competing regulatory design ideas since the mid-19th century. In all three time periods under examination in this study, perceived problems and subsequent debates were conducted with regard to the 'appropriate' regulatory design in the key areas of organisational structure, regulatory powers and 'public services'. These reflected administrative arguments concerning the extent of delegation and operator discretion, the scope of regulatory oversight and control as well as the recognition of the interests of specific constituencies. Debates concerning the degree of monopoly and commercial pressure, the nature of 'efficiency', the nature and scope of regulation and of 'public services' continue and are likely to persist.

Despite the evidence of the historical importance of regulation and regulatory debates, it has been argued that the shift towards the 'regulatory state' during

the 1980s and 1990s is unique in following the US model of free-standing regulatory agencies. Such a claim relies on a particular interpretation of Selznick's definition of regulation as 'sustained and focused control exercised by a public agency over activities that are valued by the community' (Selznick 1985: 363). While such a definition allows for a broad interpretation of regulation, it does not necessitate the establishment of free-standing regulatory agencies. The epigraph to chapter five (discussing the British 1947 socialisation) showed that if one includes ministerial departments as 'public agencies', the period of the 'positive state' was as much a period of the regulatory state as was the period of privatisation in the end of the 20th century.

Nevertheless, if one were to test the hypothesis of the rise of a 'regulatory state' by pointing to the increasing use of US-style free-standing agencies, then the evidence of the privatisation cases provides little evidence to support the notion of a 'rise' of a 'regulatory state'. The comparative analysis of the privatisation period shows that regulation is not a universally accepted concept. The German regulatory debate has a strong bias against the setting up of independent sector-based regulatory agencies, while the importance of an unchallenged position of the Federal Cartel Office continues to be stressed. In the German case, the absence of a free-standing regulator in the railway domain was also paralleled in the approach taken with regard to the liberalisation of electricity supply. This contrasted with the telecommunications domain, where the establishment of an independent regulatory authority remained contested and was regarded as an, at best, temporary exception. In contrast, in Britain, once the example of telecommunications had been established (following the opposition of the competition authority, the Office of Fair Trading, to take on the responsibility for

telecommunications), the creation of regulatory 'watchdogs' became one key tenet of the British regulation template for public utilities, extending to the lottery, financial services and food safety.

In addition to this absence of structural congruence, there was also little 'ideational' agreement as to the proper purpose of regulation. In Germany, the notion of regulation has not enjoyed growing usage. Instead, the activities of the Eisenbahn-Bundesamt were widely described as 'supervision', which places this office into the tradition of historical – they were already part of the 1838 Prussian railway law - oversight authorities as part of so-called 'sovereign' (*hoheitliche*) functions. In contrast, in Britain, regulation was a substitute and promoter of 'competition' with, in the later cases of utility privatisation, structural reforms being prioritised over ex post regulation. Furthermore, the emphasis given to 'competition' as regulatory objective during the 1990s in British utility regulation contrasted sharply with the regulatory objective of the early 1920s that 'competition was wasteful'.

In sum, the interpretation of appropriate regulatory instruments did not only vary over time; across countries, regulation has been interpreted in different ways. Given these variations in contemporary regulation as well as the importance attached to regulation and regulatory design in previous decades, the claim of an emergence of a 'regulatory state' does not offer any major content. At the same time the history of railway regulation in both countries following the period under examination in this study also suggests the continuation of 'old style' political involvement. Ministers in both countries wielded substantial influence, in the UK, following the election of the Labour

government, regulatory independence was limited and constrained as well as regulators replaced¹, in Germany, a change in government led to the predictable, although delayed sacking of the CDU-appointed railway chief executive Johannes Ludewig in October 1999. Equally the behaviour of train operating companies and infrastructure providers in both countries (especially following accidents) did not evade public attention and therefore also political attention-seeking, criticism and intervention. Poor performance in terms of punctuality, timetabling chaos as well as severe accidents led to calls for abolishing the fragmented nature of the British industry, while in Germany, calls were made to fully separate the provision of infrastructure from the Deutsche Bahn and to establish an economic regulatory authority. Thus far from representing a 'new' form of control of economic activities, current methods of regulation represent similarly contested policy instruments as those in the past leading to recurring debates.

The claim that the reform of regulatory instruments should be understood as a process of isomorphism – where policy-makers select between competing sources of legitimacy, based on the distinction between domain- and paradigm-oriented policy environments – also supports the prediction that regulatory regimes are inherently unstable. Different policy environments exert often competing legitimating sources for regulatory design ideas. As already noted above, institutional approaches have stressed that institutional change and reform is constrained by institutional embeddedness and a 'logic of

¹ John Swift expressed the claim that regulatory independence was constrained by the intentions of the government of the day. A former telecommunications regulator at a LSE seminar shared this view (November 1998).

appropriateness' (March and Olsen 1989). Similarly, Robert Goodin asserts that a 'well-designed institution [...] is both internally consistent and externally in harmony with the rest of the social order in which it is set' (Goodin 1996: 34).

In a social environment which offers competing sources for isomorphism, an institution which fulfils Goodin's 'goodness of fit' criteria with regard to one policy environment is likely to be incongruent with another policy environment. Thus, while regulatory regimes are to some extent embedded into their wider institutional policy environment, this embeddedness is by no means deterministic and replicating but diverse and often contradicting. Instead, how and why particular regulatory instruments draw on specific policy environments is a matter of choice by actors within the regulatory space. Membership in the regulatory space is facilitated by institutional factors which connect the regulatory space to different policy environments. Any choice of regulatory instruments represents a rejection of one source of legitimisation, leading to tension with regard to the 'legitimacy' and 'appropriateness' of the selected regulatory instruments.

Conclusion

It has been argued that viewing regulatory change as a process of isomorphism – the growing homogenisation of a regulatory regime with regimes in one of its policy environments – provides a perspective for analysing the formulation and selection of regulatory instruments which moves beyond broad institutional claims that 'institutions matter'. The study has shown that the extent of insulation of a regulatory space to isomorphic pressures matters. In particular, three institutional factors have been examined and their impact of the extent of

domain- or paradigm-orientation of regulatory reform assessed. It has been argued that the nature of regulatory reform could be best explained by the organisation of the political-administrative nexus rather than by the openness of the regulatory space to coercive pressures or the influence of societal actors.

In the light of the findings which neither reported convergence across countries nor clear patterns of persistence as well as the claim that pressures of isomorphism can be differentiated, this study has implications for debates concerning the 'regulatory state'. It has been argued that the proclamations as to the emergence of the regulatory state in the last two decades should be regarded with considerable caution. Regulation is far from a newly emerging policy issue, regulatory debates concerning organisational structure, extent of regulatory authority and the provision of non-commercial 'public services' have been part of the history of the railways since its emergence as new mode of transport. More importantly, regulation does not offer a unifying set of organisational principles, nor is regulation interpreted in similar ways at similar times across countries. Finally, stressing that isomorphism can be distinguished in its domain- and paradigm orientation and that reforms are based on a contest between various templates emerging from different policy environments further points to the potential instability of a regulatory regime.

Appendix I

Interviews

United Kingdom

IUK1	15/9/97	Former Senior Official, Department of Transport
IUK2	18/9/97	Senior Official, Treasury
IUK3	19/9/97	Transport Journalist
IUK4	14/10/97	Senior Officials, British Rail
IUK5	16/10/97	Former Advisor, Department of Transport
IUK6	16/10/97	Senior Politician, formerly Department of Transport
IUK7	9/10/97	Senior Official, Office of Passenger Railway Franchising
IUK8	20/10/97	Former Senior Official, British Rail
IUK9	22/10/97	Senior Official, Office of the Rail Regulator
IUK10	28/10/97	Senior Politician, formerly Department of Transport
IUK11	29/10/97	Senior Official, formerly Treasury
IUK12	12/11/97	Senior Official, Department of the Environment, Transport and the Regions
IUK13	14/1/98	Senior Politician, formerly Department of Transport
IUK14	15/1/98	Senior Politician, formerly Department of Transport
IUK15	21/1/98	Senior Consultant
IUK16	25/1/98	Senior Politician, formerly Department of Transport (telephone interview)
IUK17	26/1/98	Former Senior Official, Office of the Rail Regulator
IUK18	18/3/98	Transport Journalist
IUK19	26/3/98	Official, Department of the Environment, Transport and the Regions
IUK20	26/3/98	Former Senior BR official
IUK21	4/4/98	Former Senior Official, OPRAF
IUK22	30/10/98	Transport Academic
IUK23	2/6/99	Former Advisor to 10 Downing Street

Germany

ID1	26/6/97	Former Senior Official, Eisenbahn-Bundesamt, Bonn
ID2	27/6/97	Senior Official, Ministry of Transport, Bonn
ID3	24/4/98	Senior Officials, Deutsche Bahn, Berlin
ID4	12/5/98	Senior Official, Ministry of Transport, Agriculture and Viticulture, Rhineland-Palatinate, Mainz
ID5	13/5/98	Transport Economist
ID6	12/5/98	Senior Official, Bundeseisenbahnvermögen, Frankfurt/M.
ID7	27/5/98	Senior Officials, Deutsche Bahn, Frankfurt/M.
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Appendix 2

This appendix aims to provide an overview of the evolution of railway regulation in Britain and Germany during the 19th century. In both countries the emergence of the railways as a new mode of transport for both goods and passengers demanded that states should take some form of regulatory action. The scale of the railways, their impact on the environment and the development of industry, agriculture and population mobility as well as their significance for the military meant that the railways attracted political attention from their early beginnings.

This Appendix does not apply the analytical framework of the previous chapters and merely wants to sketch the main developments in both countries. In the British case, some consideration is also given to railway policy in Ireland and India. While not part of the overall argument of this study, this appendix nevertheless allows for a critical assessment whether railway regulation has emerged on common, cross-national or diverse national tracks. A related claim has been made by Frank Dobbin (1994). He argues that a state's political culture is reflected in the state's industrial culture and therefore shapes economic policy in biasing the selection of perceived problems and also the selection of proposed solutions. The following first discusses the British and then the German case, before returning to a concluding discussion which argues that in both cases there was a similar conception of problems and, more importantly, little evidence to suggest national uniformity over time in regulatory 'solutions'.

Britain

In contrast to the European continent, Britain had delegated most of its state functions in the 17th century to individuals and to bodies at the local level. Despite numerous

mercantilist policies in the later part of the 18th century, there was, following the Napoleonic Wars, a deliberate attempt to curtail the state's involvement in economic affairs. The main responsibility of the state was perceived to lie in the protection of all varieties of property (Harling and Mandler 1993; Finer 1952). Until the end of the 18th century, public authority remained diffused, being in the hands of a large number of relatively independent legal entities or officers. The First Reform Act in 1832 marked the partial shift of political power away from the Crown to Parliament and from the landed aristocracy to the middle classes, while it also represented a decisive point for the relationship between law and administration (Chester 1981; Parris 1969). While the legislature dominated the administration, Parliament's involvement in the economy was restricted to being the authoriser and constitutor of canal companies and turnpike trusts. Given the absence of a professional administrative staff, the expertise in emerging technical systems lay purely in the private rather than the public sector. Due to the non-existence of public prosecutors or professional judges, there was no judicial oversight.

To a large extent, British parliamentary procedures were responsible for the piecemeal and unorganised growth of the railway system. Given the absence of a dominant executive, Parliament demonstrated its sovereignty by passing at any time any legislation on domestic affairs without any regard to consistency. This was reflected in the fact that private bills outnumbered the amount of public acts.¹ As railway companies required limited liability status for their shareholders and required the granting of the right of way for their tracks with the associated compulsory powers for

¹ Foster defines this first period of railway regulation as 'Regulation by Parliament' with the private acts resembling, to some extent, modern-day licences (see Prosser 1997: 181-4, Foster 1992: chapter 1).

land purchase, companies needed to obtain a private act of parliament (Foreman-Peck and Millward 1994: 16). Early railway acts were drawn from legislation concerning privately owned turnpikes and canals, based on the assumption of private ownership and competition between different operators on the same track (Cleveland-Stevens 1915: 11).² The private acts defined the terms for the planning, construction and operation of the entity in question. They were considered individually by Select Committees, whose membership was (prior to 1844) biased towards those with a vested interest in the particular line. Before 1840, regulation proved to be largely ineffective as maximum rates and charges were perceived to be set too high, competition did not emerge and no effective enforcement mechanisms of the existing statutory obligations were in place.³ Access to members in both Houses of Parliament and membership of select committees rather than bureaucratic initiative explains the beginning of railway regulation in Britain.

Demands by traders concerning perceived discriminatory pricing by railway companies and, as a result of a select committee report in 1839, which had complained about monopolistic behaviour and cartelisation in the industry, and a private member

² A parliamentary report of 1808 remarked critically that 'instead of the roads of the Kingdom being made a great national concern, a number of local trusts are created, under the authority of which large sums of money are collected from the public and expended without adequate responsibility or control' (in Cleveland-Stevens 1915: 1-2). In 1840, a Select Committee on Railway Companies stated that competition represented a 'total misapprehension of the best means of providing locomotive power on the railways' (Dobbin 1994: 199).

³ The view that the law might be enforced by administrative means outside the courts was only gradually introduced in factory legislation and in education. Furthermore, there was no provision for a public prosecutor in English law (Parris 1965: 13-5). In cases brought to court, there was a clear judicial bias towards the railways. In cases of an adverse judgement, railway companies relied on new legislation to 'legalise' their behaviour.

initiative (the government took no action), a Railway Department, allocated at the Board of Trade, was established. The Act stipulated that lines could only be opened after the Department being given four weeks' notice and the right to initiate inspections.⁴ The Department's functions also included the enforcement of legislation and the collection and storage of statistics. The parliamentary representation of the 'railway interest' successfully managed to weaken the Department's capacities. The departmental authorities were circumscribed to the protection of safety rather than on restricting monopolistic behaviour.⁵

In 1844, William Gladstone, then President of the Board of Trade, attempted to introduce a Bill which would have given the government the opportunity to revise fares and charges giving a rate of return over 10 per cent, and the power, after 15 years, to purchase the particular line. The concerted action by the railway interest convinced prime minister Peel to force Gladstone to back down, extending the period after which the government could purchase the line and also altering the precise purchasing terms in favour of the companies. Thus, in spite of the introduction of so-called 'parliamentary trains', providing covered third-class accommodation, establishing a minimum speed and setting third-class rates, the 1844 Act represented a major victory for the railway companies (Alderman 1973: 17). The Royal Commission

⁴ One of the 'successes' of the railway interest was the provision that no inspector could be appointed who had been part of the industry in the previous year, which meant that at the beginning the Board was staffed by officers with little knowledge of the railways.

⁵ The lack of enforcement powers given to the inspectors placed great stress on persuasion rather than coercion as regulatory tools. In general, railway regulation benefited from the experience gained in factory law and the Poor Law where a system of central supervision and inspection had been established (Lubenow 1971). This reflected a shift from a former reliance on

in 1867, reviewing the provisions of the 1844 Act, concluded that the Act 'had made the operation [of government purchase] more difficult, and indeed almost impractical with a due regard to the guarantees it has accorded to the railway companies.'⁶ The regulation of the rate of return led to an over-capitalisation by the companies, resulting in non-economical network extensions and to the adoption of expensive technology.⁷

The ability to re-design regulatory bodies via parliamentary action led to a rapid succession of governmental bodies supposed to regulate the railway companies. The Railway Board established by Gladstone in 1844 was quickly abolished in 1845 after the railway companies had protested against its operating procedures and prime minister Peel had refused to support his own railway administration (Parris 1965: 83-8). A further attempt to shift the burden of work from the parliamentary select committees during the 'railway mania' to a 'Railway Commission' was made in 1846. The Commission was vested with the authority to process all proposals concerning construction or amalgamations, to arbitrate and to 'make suggestions' concerning railway rates. However, as Parliament failed to provide the Commission with a clear

criminal law, where prosecutions before local justices had been disappointing, to administrative regulation (Arthurs 1985: 105).

⁶ This view contrasts with the 'public interest' account provided by McLean and Foster (1992). McLean and Foster (1992) do not account sufficiently for the importance of trading and agricultural interests, the context of the 'railway mania' at the time and the potential interest of the existing companies in regulation to rule out newly emerging competition, and discount the long-term self-interest of Peel and Gladstone in a political career, although both continued their political careers, with Gladstone showing no further interest in railway issues.

⁷ Because of their iron tracks, which allowed for comparatively high average speeds, the British railways spent most capital per kilometre of track; also the price paid for expropriation of landowners contributed greatly to the costs.

remit and as the amount of railway bills subsided, opponents of the Commission were successful in demanding the abolition of the Commission in 1851 (Cleveland-Stevens 1915: 152). The absence of any 'state interest' in a coherent railway network was also evident in the 1846 Railway Gauge Act: instead of fixing one single gauge size, there was a recommendation in favour of the narrow gauge (4ft 8½in), while the usage of the broad gauge (7ft) was not abandoned (until 1890) and the broad gauge network even expanded.

The impact of the Second Reform Act, an increasingly 'radical' Liberal Party, strengthened party discipline, the growth of other effective interest representations, such as chambers of commerce and trade unions, accompanied a shift in the nature of railway regulation towards becoming more legalistic and judicial (Foster 1992: chapter 2). Foster defines this period as 'Regulation by Commission', following the establishment of the Railway Commission in 1873.⁸ Policy initiatives were often vetoed and blocked by the adversarial interests and 'progress' often depended on accidents. For example, the 1889 Act, which made automatic continuous brakes and block-working signalling compulsory, could only be passed in parliament after a major accident in 1889, following 15 years of advocacy for this measure which had been blocked by the railway companies (Parris 1969: 180; Alderman 1973: 132). At the same time, despite a high level of concentration and informal cartelisation, attempts by several companies to amalgamate formally were blocked by business groups campaigning with their concern about potential abuse of increased monopoly powers. The crucial shift in the power between trading interests and railway companies was most visibly represented in the 1894 Railway and Canal Act. The burden of proof for

the reasonableness of rate increases was shifted from business to the railway companies, making it difficult for the railway companies to raise rates (Cain 1973).⁹

This general account of railway regulation in mainland Britain during the nineteenth century provides an indication of the great amount of contestation with which regulation expanded. There was little state interest in guiding the development of the railway network, nor was there much concern about directing economic development. Instead, regulation developed as a combination of accidents, conflicts between interests and, to some extent, by the institutional adaptation and learning effects of the various railway commissions (Parris 1965).

The following section considers the experience of British railway regulation in Ireland and India in order to question whether a 'national' track is visible in the export of policies to colonial jurisdictions. In both cases, the dominance of commercial objectives was subject to other political considerations, such as the alleviation of economic plight or the facilitation of transport links.

In Ireland, the British government, although eager to maintain the assumption that the railways should be run by private organisations, recognised that the Irish situation required a more 'interventionist' stance (Conroy 1928).¹⁰ Ireland had peculiar

⁸ In 1888, a Railway and Canal Commission replaced the previous Commission. Its procedures more closely resembled a judicial court than an administrative tribunal.

⁹ Prior to the Act, business interests had to prove the 'unreasonableness' of the rate increase.

¹⁰ In Scotland, no 'interventionist' policy was adopted with regard to the railways, in contrast to early policies in road building and the construction of the Caledonian Canal for military purposes (Checkland 1983). Appeals for public financial support were unsuccessful, lines were sponsored by wealthy landowners.

difficulties in attracting private railway capital as its population was decreasing and widely dispersed, mineral resources were absent and the application of Westminster regulations mainly reflected mainland industry rather than Irish agricultural production patterns. Although the idea of state railway construction and management was rejected, in 1846, it was decided that the Commissioner of Public Works was to be granted the right to make loans to railway undertakings.¹¹ Following the 1847 famine, the government passed a bill that attempted to relieve distress by favourable loan terms, advancing £620,000 at a rate of five per cent (later reduced to four per cent) per line and which fixed the gauge at the (non-English) size of 5ft 3in. Although Irish interests demanded nationalisation and additional financial support for the construction of an Irish railway system, this was rejected in London in order not to give a precedent for mainland policy. Despite these efforts, the extent of railway construction was still perceived to be insufficient, thus additional guarantees were provided and further amalgamations between companies encouraged. Nevertheless, given the poor economic state of Ireland where the poorest regions were not connected to the network, the government decided to pass a Light Railway Act in 1889 as a regional policy tool. This provided for a directly available state guarantee on capital returns of three per cent for closely supervised light railway construction (on a narrower gauge) which also required a contribution by local authorities. Further legislation in 1890 and 1896 was aimed to encourage existing Irish companies to extend their networks by facilitating light railway construction. In sum, the Irish example shows that the British government, while aiming to maintain the assumption of the railways as a private undertaking, used the railways for an active regional policy to alleviate economic disadvantages. However, rather than involving state

¹¹ At the time, 500,000 people were on poor relief. The railways were regarded as tool to

ownership, this involved the safeguarding and facilitating of investment by private undertakings.

Railway policy in India offers a case for substantial changes in the British approach towards organising and regulating a colonial railway.¹² At the time when India was under the ultimate control of the Secretary of State for India in London, three distinctive phases of railway policy can be distinguished, financial guarantees, ownership and a dual system of public ownership and financial guarantees.

India was regarded as an important source for raw materials (such as cotton) and cheap food as well as an ideal market for finished goods. The politically encouraged construction of railways, however, started from the early 1850s onwards. The explicit aim was to encourage British capital to invest in railways in India, while placing these undertakings under regulatory control, setting route, number, speed and time of train services as well as fares and employment conditions and accounts.¹³ To attract capital, the Indian government offered capital return guarantees in order to acknowledge the non-commercial functions of the railways which were used as a means for transporting the military as well as to contain famines more effectively. Nevertheless, this policy of public involvement met with scepticism from the 'home' government as well as from the parliamentary board of control, while the court of directors of the East

facilitate trade as well as employment.

¹² This section draws on Prasad (1960), Thorner (1977), Andrew (1884), Mehta (1927) and Jagtiani (1924).

¹³ Significantly, this policy was launched as a personal initiative by the then Governor-General of India, Lord Dalhousie, who had headed the Railway Board from 1844 until its abolition in 1845. He was determined to implement policies which he had been denied in the British domestic domain (he also established the larger 5ft 6in gauge).

India Company followed the private railway companies' demands in advocating capital return guarantees.

During the period 1849-1869, the Indian government guaranteed railway companies for a term of 99 years an interest of five per cent upon their subscribed capital, while the amount advanced on the guarantee was to be repaid with the interest from profits obtained by the railways above a set minimum rate. The Government was given a right to purchase the line after 25 or 50 years. The government was granted overall supervisory competencies, free mail and postal services as well as reduced rates for military transport. A so-called Government Director, equipped with veto-powers, was allowed to attend all Board of Director meetings. The company could hand the railway over to the Government with six month notice. The Indian government therefore relieved shareholders of all risks, leading, according to Prasad, to 'extravagantly constructed' lines (Prasad 1960: 52).

Following 1869, the Government of India demanded from London the right to construct its own 'political' (in contrast to so-called 'commercial') lines as well as to purchase the 'guaranteed lines' as this method was claimed to be less costly than a policy relying on financial guarantees. The government in London granted this right until 1874, when it intervened and restricted public construction works to those projects which were commercially viable with some exceptions made for those lines which were constructed to prevent famines. As all capital had to be raised within India itself, the Indian government, driven by financial duress due to the Afghan war and urged by the Famine Commission's demand to expand the railway network, was forced to re-introduce private enterprise into railway construction. From 1855 to 1924, railway provision by private enterprise went hand in hand with further extension of

public railway lines. The private undertakings were given new guarantees (at 3.5 per cent), the railways were defined as government property with only the capital being supplied by the companies. Thus, companies functioned as agents to work the property belonging to the government.

The two 'Empire' examples of Ireland and India provide some evidence that British railway policy differed substantially between the 'home' and colonial territories. This indicates that British policy did not follow a 'national' track or was driven by, to use Dobbin's term, an 'industrial paradigm', but was able to adapt according to circumstance and environment. In both colonial cases, the perceived need to use the railways for economic, political and military demands, led to a policy which allowed via financial control for substantial government involvement and regulatory control.

Germany

The development of the German railway system was shaped by the active state policies of 39 sovereign, non-parliamentary states, characterised by uneven economic development (Lee 1988). As the amount of through traffic was considered to be an indicator of a state's economic well-being, states started, from the early 1840s, to promote the development of a railway system in their territory (Fremdling 1977a, 1977b). The perceived need to develop a railway system often conflicted with financial and constitutional structures; thus across German states there was a wide variety in organisational and regulatory structures, ranging from private railways, mixed systems to purely state-owned systems.¹⁴

¹⁴ The only German state which relied on a purely state-owned system was Hanover, driven by the absence of private capital and strategic-geographical competition with neighbouring states. In contrast, Saxony refused any public involvement (Wilhelmi 1963: 387).

From the earliest stages, states took a close interest in the operation of privately-owned railway projects. In Bavaria, where several private initiatives were planned, '*Fundamentalbestimmungen*' (fundamental guidelines) were issued in 1836 in co-operation with the companies to regulate these 'bodies of public utility' (*gemeinnützige Anstalten*) on issues such as the raising of capital and inter-company and company-state relationships (Ziegler 1996: 32). When private interest in promoting railway development declined, the Bavarian state felt obliged to intervene by building its own lines as well as purchasing the two existing private lines. Only one further railway line was allowed to be constructed and managed by private owners - the 'Ostbahn' which was considered as being economically important but whose construction by the state proved impossible due to a lack of public resources. The 'Ostbahn' was later taken into state ownership, when the operator's private interests conflicted with the regional interests and policy goals of the Bavarian government. States perceived the railways as an instrument for regional, financial and social policies. Thus, control of the railways by regulation was often considered to be insufficient in contrast to full state ownership.

In contrast to Britain, the large German states, in particular Prussia, Saxony and Bavaria, had well-established and powerful bureaucracies. They had originated under absolutist rule and had turned themselves, in the absence of parliaments, into strong, reform-minded bureaucracies (Kocka 1981). Prussia had been in the process of radical reform since the military defeats against Napoleon in 1806 (Koselleck 1975). Driven by reparation payments and war debts, the civil service embarked on a policy of economic liberalism and of rapid industrialisation to prevent a 'French revolution' and to replace the old feudal elites. By radically reforming the administration, the

bureaucracy was supposed to become the 'intelligence of the state' which was to unite the reformed Prussia, which, after 1815, included an extensive, but divided territory. Prussia's industrial policy of radical industrialisation meant that 'liberalism' was always abandoned when industrial progress conflicted with existing practices. The bureaucracy as a 'technical intelligence' was 'to educate, to financially and technically support and to patronise' the private citizen (Koselleck 1975: 617, *own translation*). When the construction of railway lines was first proposed, Prussian officials responded with considerable scepticism, fearing negative financial consequences for the recently expanded network of state toll-roads as well as for postal services. However, once France had initiated an active policy of railway expansion, the Prussian government also encouraged the construction of the railway system.

Following an Act of 1820, the Prussian state debt had been fixed at a particular level with any increase triggering the constitution of a '*reichsständige Versammlung*' (general assembly) (von der Leyden 1914: 3). As liberals hoped to use such an assembly for an overall constitutional liberalisation of the Prussian political system, the Prussian government refrained from calling for such a convention. As a consequence, Prussia's government relied on private capital and regulation for its initial railway policy. In 1836 a 'criteria catalogue' was issued (without consultation of the private sector), which was followed by the 1838 Prussian Railways Act. The Act not only reflected the Prussian government's interest in controlling railway and capital market development, but also Junker demands to reduce the pressure on wages by curbing railway construction. The 1838 Act provided the operator with exclusive rights for operation and rate-setting as well as safeguards that net profits would not fall below six per cent and not exceed ten per cent. While the construction of directly competing tracks was banned, 'on-track'-competition was allowed. Safety standards

were set, a Commissioner for every line was established to act as interlocutor between state and company and provisions were made which allowed for the subsequent purchase of the operator by the state (Dunlavy 1994: 89). The Act was widely criticised by the railway industry for its rigidity and private construction only started once a construction fund had been established and interest guarantees on capital had been introduced. Following the 1848 'revolution', a new Prussian constitution was passed in 1850 which abolished the limits on state levels, the Prussian minister of commerce, von der Heydt, embarked on the construction of state-owned railway lines and also initiated a policy of 'creeping state ownership', taking companies which took up interest guarantees into state administration, but not ownership. From 1853, a special railway duty was raised to gain revenues for further railway shares. Furthermore, the railways were seen as a tool to promote the economy by, for example, forcing the introduction of a 'one-pfennig' tariff for Silesian coal transport on private and state-administered Silesian rail operators. Other goals of the state railway policy were the alleviation of negative consequences of industrialisation and the facilitation of industrial development in economically backward regions.

In the following decade there was, among states in North Germany, a shift away from state ownership of the railways and a renewed reliance on private capital. This can be explained by the increased liberal representation in state parliaments, (such as Prussia) which were given (after 1848) the right to veto budgets, and also the poor state of public finances. The Prussian government was forced into promoting direct competition between lines and by advocating the construction of rival lines. Prussia also sold one railway operator to a (state-administered) private company in order to be able to finance its army (Ziegler 1996: 56-93). The Prussian state did not abandon its involvement in the railway sector: Prussia remained owner and administrator of

numerous lines and was able to weaken established private companies considerably by promoting competition, while also fulfilling demands from industry in the Ruhr for more and cheaper railway connections.¹⁵

The constitution of the newly created German Reich in 1871 stated that the railways were a matter of Reich supervision. Bismarck, convinced of the economic and military benefits of the railway system, while also being driven by malpractice within his own administration, resulting mainly from the dual role of the Prussian trade ministry as regulator of the private railways and administrator of the state railways, attempted to bring the railways not only under state control, but also Reich ownership.¹⁶ A 'nationalisation' was also advocated by commercial interests which criticised the extent of rate discrimination across railway lines. However, the individual states were unwilling to hand over their economic tools to the Reich, therefore, only a national supervisory authority, the *Reichseisenbahnamt*, was established in 1873 (Neumann and Freystadt 1876).¹⁷

¹⁵ This policy proved advantageous to the Prussian state. It weakened the existing private companies and therefore also reduced their resistance to the adoption of the 'one-pfennig' coal transport rate due to the companies' requests for financial safeguards. Furthermore, financially weak companies were less expensive to take into state ownership. In other North German states, such as Saxony, there was a similar move towards advocating more competition and encouraging private enterprise. There was, however, only one case of an outright sale of a state operator to a private agent.

¹⁶ The constitutional provisions were adopted from the constitution of the 'Norddeutsche Bund' which itself had borrowed the wording from the 1848 draft constitution.

¹⁷ Among the *Reichsbahnamt's* responsibilities were the administration of the railways in occupied Alsace (annexed after the 1870-71 war with France), the drafting of legislation which would establish the Reich's competencies in railways as well as the provision of a common set of rates. The latter endeavour was unsuccessful, while it nevertheless achieved a Germany-wide

Given this rejection by various states, Prussia embarked on a policy of bringing all Prussian railways into state ownership, which was completed by 1885. In general, the 1870s saw the overall ownership patterns among the German states turn towards shifting state-ownership partly because of the private companies' poor financial situation during the economic depression of the late 1870s and partly as a response to the action taken by Prussia. Until the First World War, Prussia showed little further interest in a 'nationalisation' of the railways for three reasons; first, they fulfilled their politically desired function in promoting industrial development in previously less advanced regions; second, by making railway workers civil servants, it led to a 'moderation' of 'socialist elements' within the railway staff; and third, and most importantly, the substantial surpluses were essential for the provision of social policies and reductions in direct taxation.

The case of German railway development shows that there were several forms of organisational patterns during the early phase of German (and Prussian) railway development. These organisational changes arose mainly for pragmatic financial or constitutional reasons, although there was a clear interest in regulating the railway as a 'commonweal' operation. The regulatory structure of the sector changed according to how the state could best control the railways and enforce its desired policy - the control of the economic and social consequences of industrial modernisation. While the impact of 'private interests' can be traced in Prussian railway regulation - for example, East Elbian racehorses enjoyed special reduced rates and railway workers

adoption of 'rate-councils' between companies and industry (Ziegler 1996: 240-58). It also facilitated the co-operation across states on rolling stock for freight.

were sent on 'holiday' during harvest time - these private interests were only successful in so far as they did not contradict the state interest.

Conclusion

In contrast to Dobbin's comparison between France, the United States and Britain, the analysis of Germany and Britain provides evidence that railway regulation was, especially in the 'formative period', not dissimilar. In both cases, regulation regarded the railways as a turnpike-like undertaking with monopoly power, thus in both cases competition on track was 'theoretically' allowed, but did not occur in practice. Only in later developments did German (and, in particular, Prussian) and British railway regulation diverge: on the one hand, the state-led industrialisation in Germany as well as federal competition between states meant that the railways soon became to be regarded as an economic tool for economic policies, while in mainland Britain, policy was developed by contests between business and railway interests, safety concerns and by some form of bureaucratic adjustment and accumulation. This difference between policy approaches can be seen in the introduction of parliamentary trains in Britain, which were mainly concerned with the accommodation and service provided for working-class workers, and 'one-pfennig' coal transports across Prussia. However, that British railway policy and regulation were not culturally biased in considering the railways only as private undertakings is visible in the case of Ireland and, more importantly, India. In both cases, the railways were used for regional and also (in India) military goals. Thus, Dobbin's claim that industrial cultures shape the perceived problems or the adopted solutions is not supported in these cases. This broad account has shown that in either case there was no distinctly national track of policy solutions, that, in particular at the early stages, policy solutions were similar and, more importantly, that they responded to similar policy problems. Instead, the

organisational structure of the state (or, in the German case, the non-existence of a 'central' state) helps to explain the varying interest in the railways as a 'sector close to the state', especially at later stages of regulatory developments in the second half of the 19th century.

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