



COMMISSION OF THE EUROPEAN COMMUNITIES

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Communication from the Commission
to the Representatives of the governments of the Member States
of the European Coal and Steel Community, meeting in Council,
concerning the termination of the Agreement of 21 March 1955
on the establishment of through international railway tariffs
for the carriage of coal and steel

OPINION OF THE COMMISSION,
ADDRESSED TO THE REPRESENTATIVES OF THE
MEMBER STATES OF THE ECSC, MEETING IN COUNCIL,

concerning the termination of the Agreement of 21 March 1955
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Aim of the proposal

1. Council Directive 91/440/EEC¹ - and Council Directives 95/18/EC² and 95/19/EC,³ which provide closer details of certain provisions of 91/440 - is intended to make it easier for the Community's railways to adapt to the needs of the single market by affording them independent-operators status. That management independence should, in particular, be expressed via the freedom to set prices in accordance with market needs.

The transposition of Directive 91/440 by the Member States will henceforth enable the railway undertakings to manage their pricing policies in an independent manner. In view of this new situation the Commission's departments have decided to examine the economic and administrative factors that are linked with the management of Tariff ECSC 9001, which emerged from the 1955 Agreement. This examination has led to the conclusion that, with the application of Tariff ECSC 9001, the 1955 Agreement would seem to have become obsolete and conflicts with the principles of independent management provided for in Directive 91/440.

2. The 1955 intergovernmental Agreement provides an example of a law adopted at a time when rail dominated the transport market for ECSC products and where the setting of maximum prices was considered to essential in order to eliminate tariff discrimination in the carriage of coal and steel products.
3. That intergovernmental Agreement introduces the requirement that the national railway networks should apply to the carriage of coal and steel both to and from another Community country the scales of charges, prices and tariff arrangements that in any way apply to the domestic carriage of a

¹ Council Directive of 29 July 1991 on the development of the Community's railways (OJ L 237/25, 24.08.1991).

² Council Directive of 19 June 1995 on the licensing of railway undertakings (OJ L 143/70, 27.6.1995), to be transposed into national law by late June 1997.

³ Council Directive of 19 June 1995 on the allocation of railway infrastructure capacity and the charging of infrastructure fees (OJ L 143/75, 27.6.1995), to be transposed into national law by late June 1997.

given product where this follows the same route.⁴ Railway tariff ECSC 9001 is the tool created in order to guarantee non-discriminatory prices for the intra-Community carriage of ECSC products.

4. The carriage of products covered by ECSC tariff 9001 has undergone major changes since the mid-50's. Tariff ECSC 9001 has lost its commercial significance since the maximum prices in the tariff have been replaced by customised contracts that obey laws of the market that have been dictated more particularly by road transport. The customised contracts are calculated on the basis of bilateral- or multilateral agreements concluded between the railway companies.

Therefore the tariffs arising from the 1955 Agreement are no longer applied, *strictu sensu*.

5. Article 17 of the Agreement provides for a revision clause as follows: "Should the High Authority or the Government of a Member State be of the opinion that unforeseen difficulties or a radical change in economic or operating conditions or fundamental and persistent disturbances of the market are seriously affecting the operation of this agreement, the representatives of the Governments of the Member States and of the High Authority shall meet in Council with a view to seeking appropriate means of dealing with the situation."

It is thus appropriate to question the relevance to the fifteen-member Community of the intergovernmental Agreement that was concluded in 1955, and which requires the Member States to establish through international railway tariffs in the light of (a) *its economic justification* as far as the parties involved are concerned and the administrative burden that this represents, more particularly for the network managing ECSC tariff 9001,⁵ and (b) *the political risk* involved in repealing the Agreement.

The 1955 Agreement, concluded by the members of the ECSC in pursuance of paragraph 10 of the Convention on transitional arrangements, provides for the application of tariffs that have been agreed by the contracting parties and drawn up in accordance with Articles 4-10 thereof. Those tariffs apply to all routes on which coal and steel are carried within the Community.

⁴ See Article 2 of the 1955 Agreement.

⁵ The SNCF was designated managing network in 1955 by the founding fathers of the ECSC in order to perform the co-ordinating and administrative work relating to tariff 9001 that was produced under the Agreement of 21 March 1955.

Assessment of the economic, political and legal situation

6. The following information enables first of all the economic relevance of the Agreement and of the administrative burden linked with its operation, and secondly the political risk involved in repealing the Agreement, to be assessed.
7. The contractual requirement that the national networks should establish a maximum-price tariff would seem to run counter to Community policy, which is aimed at further liberalisation of the railway sector and independence in the management of the railway operators.
8. As the institution having succeeded the High Authority, the Commission must check that there is no discrimination in the prices for the carriage by rail of ECSC products, while leaving it to the Member States to define their transport policy, in accordance with Article 70 of the ECSC Treaty.
9. The economic justification for retaining the Agreement seems to have been undermined by the ECSC 9001 tariffs having been replaced, almost exclusively, by customised contracts between customer and carrier. The price of carriage by rail is based on the prices dictated by the other transport modes, and in particular road transport. Customers no longer refer to ECSC tariff 9001 in order to request a carriage rate since railway market forces and intermodal competition have replaced the economic justification for the Agreement. The distribution of receipts among the railway companies is governed by a pro-rata correcting coefficient applying to the price set out in the contract signed.
10. Another economic factor to identify is the effect of Community law which recognises certain rights of access to railway infrastructure in international traffic to the benefit of railway undertakings and international associations of railway undertakings.

The fierce competition in this sector thus forces the railway undertakings to adjust their prices. That competition would thus seem to remove the risk of any discrimination in rail-carriage prices, the very reason for the existence of Tariff ECSC 9001. In addition the opening up of the railway market will enable the national railway undertakings, that have been called upon to maintain a mandatory tariff *pro forma*, to set up transport subsidiaries which would not be subject to the tariff constraints imposed by the Agreement.
11. Under the system established by the 1995 Agreement requiring that a managing network be designated, the SNCF bears a fairly heavy administrative burden requiring an annual updating of the publication of the Tariff ECSC 9001 monograph, although this is only used as a reference price by certain steel making customers in their marketing policy, and by certain railway networks.

12. In order to assess the political impact of terminating the 1955 Agreement, the Commission sought the opinions of the Member States and of the national railway undertakings concerned, which can be summarised as follows:
13. In principle all of the Member States are in favour of abolishing the agreement. However, France, Belgium and Luxembourg expressed a wish for a transitional period in order to enable their national railway undertaking to replace the 1955 Agreement by multilateral agreements between networks. They also expressed a wish that the 1956 Agreement⁶ (ECSC/CH) should be terminated at the same time as the 1955 Agreement.
14. Finland and Sweden, which did not ratify the 1955 Agreement, stressed that they were in favour of terminating the Agreement, Tariff ECSC 9001 being of no commercial value to the railway undertakings owing to the particular conditions governing ground transport in those two Nordic countries;
15. The Commission feels that the Agreement could be considered obsolete in view of the transport policy context introduced by Directive 91/440. Therefore maintenance of the 1955 Agreement by the Member States would be contradictory for two reasons:

a) the political aim of Directive 91/440 is to introduce market principles into the rail sector in order enable the railway undertakings to set their tariffs without drawing a distinction between products covered by the ECSC Treaty and others, and

b) the majority of operators no longer apply Tariff ECSC 9001 in order to draw up a transport contract.

One may therefore maintain that the upholding of such an agreement by the Member States (who never implement it in practice) would be inconsistent in political terms (a) given that the aim of Directive 91/440/EEC is to apply to railway undertakings market principles that include freedom to set tariffs without any distinction between ECSC products and (b) from a practical standpoint given that the railway undertakings do not apply the tariffs referred to in the Agreement.

Moreover, the Court of Justice has declared that "the very terms of that provision (Article 232 of the EEC Treaty) require that it should be interpreted as meaning that, in so far as matters are not the subject of provisions in the ECSC Treaty or rules adopted on the basis thereof, the EEC Treaty and the provisions adopted for its implementation can apply

⁶ ECSC Switzerland Agreement of 28 July 1956 on the setting of through international railway tariffs for the carriage of coal and steel in transit through Swiss territory.

to products covered by the ECSC Treaty (item 10 of the grounds for judgment of 15.12.1987 in Case 328/85, Deutsche Babcock Handel GmbH, European Court Reports, p. 5136).

Since Article 70 of the ECSC Treaty provides simply that "the fixing and altering of rates and conditions of carriage of every kind and the making of rates (...) shall continue to be governed by the laws or regulations of the individual Member States", the setting and amendment of transport prices and conditions of all types, and the adjustment of prices, are not governed by the Treaty. Therefore, in the absence of specific rules, neither the ECSC Treaty nor the implementing instruments (including the 1955 Agreement adopted in accordance with the Treaty) prohibit the implementation of Directive 91/440/EEC.

In addition it should again be pointed out that in Opinion 1/94 (European Court Report p. 5267 (25-27) (WTO)) the Court of Justice stated that the ECSC Treaty only applied to agreements specifically concerning ECSC products, whereas under Article 113 of the EC Treaty, only the Community was competent to conclude general agreements covering all types of products, even if this included ECSC products.

16. It would therefore seem appropriate to again point out that, in accordance with Article 5(3) of Directive 91/440/EEC, "railway undertakings shall, in particular, be free to control the supply and marketing of services and fix the pricing thereof [...]". Article 8 of Directive 91/440 only authorises Member States to define the rules for determining [the fee for the use of the railway infrastructure] and not to set transport prices overall.
17. In addition Article 8(1) of Directive 95/19/EC, which incorporates the abovementioned terms contained in Article 8 of Directive 91/440/EEC, states that "the fees charged by the infrastructure manager shall be fixed, in particular, according to [...] the market situation [...]; thus leaving the setting of prices to the judgment of the undertakings involved, which is clearly not the case as regards Tariff ECSC 9001.
18. Finally, it would seem useful to state that since the Agreement of 21 March 1955 is an agreement under international law and thus has a legal existence that is distinct from the ECSC Treaty although concluded in pursuance of Article 70 of that Treaty, it does not necessarily lose force once the ECSC Treaty expires in 2002. This is an international convention, concluded by the Member States, which does not automatically lose its legal validity.
19. The Agreement does not contain a provision for its duration nor a provision regarding its termination. Therefore, the general international law rules on treaties, expressed in the Vienna Convention on the Law of Treaties (1969), are applicable. Pursuant to Article 54(b) of the Vienna Convention, the parties to an agreement at any time by their common consent.

In the light of the above considerations, the Commission is of the view that the Agreement of 1955 should be terminated and that it can be terminated at any time by the common consent of the parties to the Agreement. Such common consent could be expressed through a decision of the representatives of the Member States meeting within the Council.

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of [---] 1998

**concerning the termination of the Agreement of 21 March 1955
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THE EUROPEAN COMMISSION, REPRESENTING THE HIGH
AUTHORITY

HAVING REGARD to the Treaty establishing the European Coal and Steel Community, and in particular Article 70 thereof, and the Convention on the transitional provisions, and in particular Article 10, second and third paragraphs thereof;

HAVING REGARD to the Treaty establishing the European Coal and Steel Community, and in particular Article 14 thereof;

HAVING REGARD to the general provisions of international law as regards international agreements, as reflected in Article 54 lit b of the Vienna Convention on the law of the treaties (1969);

WHEREAS the Commission has adopted a communication concerning the repeal of the Agreement of 1955 on the establishment of through international railway tariffs for the carriage of coal and steel (in the text which follows "Agreement of 1955");

WHEREAS that in the report annexed to the revision of the Agreement of 1955 in preparation for the 5th Supplementary Agreement to this Agreement⁷, certain national delegations asked to examine, in conjunction with the railways, the possibility of subsequently terminating the Agreement;

WHEREAS Council Directive 91/440/EEC,⁸ and Council Directives 95/18/EC⁹ and 95/19/EC¹⁰ which expand upon the provisions of Directive 91/440/EEC, seek to make rail transport efficient and competitive compared with other modes of

⁷ COM(86)51 final of 13 February 1986 - Commission communication to the Council

⁸ OJ No L 237, 24.8.1991, and in particular Article 5 thereof

⁹ Council Directive of 19 June 1995 on the licensing of railway undertakings (OJ No L 143, 27.6.1995, p. 70), to be transposed by end of June 1997

¹⁰ Council Directive of 19 June 1995 on the allocation of railway infrastructure capacity and the charging of infrastructure fees (OJ No L 143, 27.6.1995, p. 75), to be transposed by end of June 1997

transport, while guaranteeing rail enterprises independent operator status enabling them to operate in accordance with commercial principles and adapt to market needs;

WHEREAS the evaluation of the economic situation, explained in the communication adopted by the Commission;

WHEREAS the Agreement of 1955 and the ECSC tariff 9001, established by this Agreement, are "de facto" no longer applied;

WHEREAS the contracting parties of Agreement of 1955 have decided to put an end to this agreement;

IS OF THE OPINION THAT

The Agreement of 21 March 1955 on the establishment of through international railway tariffs for the carriage of coal and steel should be terminated.