



European Rail
Infrastructure Managers



20 May 2008



EIM position paper

Recast of the First Railway Package

Introduction

The European Commission concluded in its Communication on monitoring development of the rail market of September 2007¹ that *“the degree of competition on the European rail market is still low, but steadily increasing as the regulatory framework for non-discriminatory access to infrastructure and for opening national and international rail freight services to competition is maturing. Nevertheless, there are still significant barriers to market integration at European level”*.

EIM fully supports this conclusion. On many occasions it has underlined that the rail mode can only achieve its full potential when national and international railway markets are open to competition². As a minimum, the conditions for infrastructure managers to operate in an independent and non-discriminatory manner should be further harmonised. These developments can only be realised if the legislation in the First Railway Package is fully implemented in all Member States, which should have already been realised by 15 March 2003.

EIM welcomes the Commission’s intention to publish proposals for a recast of the First Railway Package, as it concludes in its 2008 Work Programme: *“an ongoing review of the suitability of the EU legal framework appears appropriate with possible simplification and streamlining”*. The Commission added to this that new legal elements might be considered if appropriate³.

This document proposes changes to the legislation in eight areas which require special attention. Additional amendments may also be proposed in the short term, on noise related track access charges for instance. EIM is aware that some of the covered issues may be addressed by the Commission in infringement procedures and other initiatives such as the Action Plan on a Freight Oriented Network. However, EIM considers that inclusion of proposals in the framework of the First Railway Package would be more efficient, since it forms the primary basis for their regulation, and has a binding effect at Member State level.

Summary of proposals

The present position paper proposes a number of concrete amendments to the legal texts of Directives 91/440 (as amended by 2001/12) and 2001/14, in support of EIM’s positions related to the First Railway Package. The *main requirements* for a recast can be summarised as follows:

- 1) a. Introduction of a formal definition of “essential function”, as a vital activity that guarantees non-discriminatory access to-, and use of the rail network;
- b. Introduction of Annex III to Directive 91/440, proposing additional independence provisions for divisions in “single undertakings”.
- 2) Clarification of the arrangements related to ownership of-, and access to rail related services facilities and supply of services.
- 3) Definition of the concept of authorised applicants in Member States’ legislation.

¹ Communication from the Commission to the Council and the European Parliament on monitoring development of the rail market, 10 September 2007, p. 13.

² See EIM Paper “The First EU Railway Package”, April 2007

(http://www.eimrail.org/pdf/bro/EIM_ERFA_ERFCP-Revision_of_1st_RP-17.01.06_1.pdf).

³ Statements made by M. Castelletti during meeting between EIM and the EC on 18 July 2007.

- 4)
 - a. Independence of the Regulatory Body from any Ministry;
 - b. Appeal to the Regulatory Body against decisions concerning track access to services facilities;
 - c. Strengthening of the financial and human resources of the Regulatory Body, and extension of its public reporting requirements.
- 5) Mandatory introduction of compensation schemes for unpaid external costs in all Member States, to speed up policy objectives of “the user pays” and “the polluter pays”.
- 6) Introduction of a formal definition of “Multi Annual Contract”, and a Commission framework Directive that defines its main elements.
- 7)
 - a. Definition of common principles on priority rules by infrastructure managers, which shall be laid down in national rules, and monitored by the Regulatory Body;
 - b. Coordination between infrastructure managers of the timings of reservation of infrastructure capacity for scheduled track maintenance where international train paths may be affected, and publication of their arrangements in the network statement.
- 8) Incorporation of financial penalties and bonus systems, or non-financial measures in national performance schemes.

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1. Separation between infrastructure management and operations

Commission Directive 91/440

Amendments

Amendment proposal 1.1a

<p>Article 3</p>	<p>The following indent shall be inserted after the fifth indent:</p> <p>“Essential function” shall mean any activity determining the equitable and non-discriminatory access to-, and use of the infrastructure.</p>
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Justification:

The terminology “Essential function” is only used in Annex II of Directive 91/440, but a description is also given in Article 6 paragraph 3 of the same Directive.

The indication of a specific activity as an “essential function” means that it is of vital importance to achieve a truly open and competitive railway market. It follows from article 6.3 that these activities cannot be performed by companies offering rail transport services.

A definition of essential function in both Directives 91/440 and 2001/14, along with a minimum list (see amendment 1.4) is thus important to create transparency about this type of activity.

Amendment proposal 1.1b

Article 2	<p>The following indent shall be inserted after indent “e”:</p> <p>“Essential function” shall mean any activity determining the equitable and non-discriminatory access to-, and use of the infrastructure.</p>
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Justification:

The terminology “Essential function” is only used in Annex II of Directive 91/440, but a description is also given in Article 6 paragraph 3 of the same Directive.

The indication of a specific activity as an “essential function” means that it is of vital importance to achieve a truly open and competitive railway market. It follows from article 6.3 that these activities cannot be performed by companies offering rail transport services.

A definition of essential function in both Directives 91/440 and 2001/14, along with a minimum list (see amendment 1.4) is thus important to create transparency about this type of activity.

Amendment proposal 1.2

<p><i>Article 6.2</i></p> <p>Member States may also provide that this separation shall require the organisation of distinct divisions within a single undertaking or that the infrastructure shall be managed by a separate entity.</p>	<p><i>Changes in text</i></p> <p>Member States shall put in place a legal framework that guarantees the separation referred to in paragraph 1. This shall require that distinct divisions are created within a single undertaking, and that the conditions in Annex III are met, or that the infrastructure is managed by a separate entity.</p> <p>Where Member States have provided for such separation by means of the infrastructure being managed by a separate entity, these separation arrangements shall not be changed such that the business relating to the provision of transport services by railway undertakings and the business relating to the management of railway infrastructure are either combined or re-organised as distinct divisions within a single undertaking.</p>
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Justification:

Member States have implemented accounting separation requirements in various ways, as pointed out in the European Commission Report on the Implementation of the First Railway Package (COM(2006)189, 3 May 2006, p.32). However, concerns have persisted over the true independence of infrastructure management activities in relation to operations. This resulted in reports from new entrants on discrimination by the supposedly non-independent infrastructure manager.

Therefore, to take away concerns of accounting separation, but at the same time to guarantee the independent provision of essential functions (Art. 6.3), a legal framework should be in place at Member State level, specifying how the elements in paragraph 1 are incorporated in the formal setting chosen in paragraph 2.

Complementing the national legal framework, Annex III introduces additional safeguards for independence in the “single undertaking” model.

In line with the general philosophy of a distinction between infrastructure and operations⁴, as worded in the considerations to Directive 91/440, it is considered essential that existing separation models are at least consolidated. This means that once "full separation" has been achieved, Member States should not move back to a situation of single railway undertakings.

⁴ "Whereas the future development and efficient operation of the railway system may be made easier if a distinction is made between the provision of transport services and the operation of infrastructure; whereas given this situation, it is necessary for these two activities to be separately managed and have separate accounts".

Amendment proposal 1.3

<p><i>Article 6.3</i></p> <p>Member States shall take the measures necessary to ensure that the functions determining equitable and non-discriminatory access to infrastructure, listed in Annex II, are entrusted to bodies or firms that do not themselves provide any rail transport services. Regardless of the organisational structures, this objective must be shown to have been achieved.</p> <p>Member States may, however, assign to railway undertakings or any other body the collecting of the charges and the responsibility for managing the railway infrastructure, such as investment, maintenance and funding.</p>	<p><i>Changes in text</i></p> <p>Member States shall take the measures necessary to ensure that, as a minimum, the essential functions in Annex II, are entrusted to bodies or firms that do not themselves provide any rail transport services. Regardless of the organisational structures, this objective must be shown to have been achieved.</p>
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Justification:

The definition of essential functions introduced in Section 1 of the Directive, should be consistently used throughout the text of the Directives. In theory, guarantees for independence/non-discriminatory access to the network will be stronger if the list of essential functions is regarded as a minimum list, leaving it up to Member States to extend its scope. Therefore the list in Annex II should be interpreted as non-exhaustive.

The second paragraph of Article 6.3 could be seen as being counter productive to the spirit of the First Railway package. In particular, the management of railway infrastructure cannot be performed by a railway undertaking. In addition the paragraph seems redundant since, from a strictly legal point of view, functions that are not described in the minimum list of Annex II could also be performed by bodies providing rail transport services.

Amendment proposal 1.4

<i>Annex II</i>	<i>Changes in text</i>
<p>List of essential functions referred to in Article 6(3):</p> <ul style="list-style-type: none"> - preparation and decision making related to the licensing of railway undertakings including granting of individual licenses, - decision making related to the path allocation including both the definition and the assessment of availability and the allocation of individual train paths, - decision making related to infrastructure charging, - monitoring observance of public service obligations required in the provision of certain services. 	<p>The list of essential functions referred to in Article 6(3):</p> <ul style="list-style-type: none"> - preparation and decision making related to the licensing of railway undertakings including granting of individual licenses, - decision making related to the path allocation including both the definition and the assessment of availability and the allocation of individual train paths, - decision making related to infrastructure charging, - monitoring observance of public service obligations required in the provision of certain services, - Decision-making related to rail traffic control activities.

Justification:

Rail traffic control is essential to ensuring the safe and efficient running of trains on the network. To achieve this it has to be executed in a consistent way, based on non commercial principles and neutral to any operators' interests.

In practice, rail traffic control is often performed by the network manager in cooperation with prime geographical users in specific areas. In order for the process to be ultimately driven solely by the principles of safety and efficiency, a body independent from any railway undertaking should be appointed to deal with decision making.

Amendment proposal 1.5

	<p><i>New Annex III</i></p> <p><i>Independence shall be guaranteed by incorporating the following conditions:</i></p> <ul style="list-style-type: none"> - <i>Monitoring by an independent authority or third party. This role could be performed by the regulatory body. In case a complaint is filed about a breach of independence requirements, the rules formulated in Directive 2001/14 article 4 and 5 will apply,</i> - <i>Statutory and/or contractual independence provisions in the relationship between the controlling structure and the entity or division entrusted with essential functions, and between the entity or division entrusted with essential functions and other (rail service providing) divisions of the company.</i>
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Justification:

Complementing the national legal framework, Annex III introduces additional safeguards for independence in the “single undertaking” model. The two proposed conditions for independence are taken from a preliminary list of criteria that was proposed by the Commission in its 2006 report on the implementation of the First Railway Package, that aim to “demonstrate independence, the absence of a conflict of interest and to assess the compliance with EU legislation”.

2. Ownership and access to rail related services facilities

Commission Directive 2001/14

Amendments

Amendment proposal 2.1

<p><i>Article 5.1</i></p> <p>Railway undertakings shall, on a non-discriminatory basis, be entitled to the minimum access package and track access to service facilities that are described in Annex II. <i>The supply of services referred to in Annex II, point 2 shall be provided in a non-discriminatory manner and requests by railway undertakings may only be rejected if viable alternatives under market conditions exist. If the services are not offered by one infrastructure manager, the provider of the main infrastructure shall use all reasonable endeavours to facilitate the provision of these services.</i></p>	<p><i>Changes in text</i></p> <p>Railway undertakings shall, on a non-discriminatory basis, be entitled to the minimum access package described in Annex II.</p>
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Justification:

Second part of this article refers to Annex II point 2, and has been moved to proposed article 5.1.a (points 3 and 4 of Annex II refer to separate articles 5.2 and 5.3).

Amendment proposal 2.2

<p><i>Article 5.1 (second part)</i></p> <p>The supply of services referred to in Annex II, point 2 shall be provided in a non-discriminatory manner and requests by railway undertakings may only be rejected if viable alternatives under market conditions exist. If the services are not offered by one infrastructure manager, the provider of the ‘main infrastructure’ shall use all reasonable endeavours to facilitate the provision of these services.</p>	<p><i>New Article 5.1a</i></p> <p>Track access to services facilities and supply of services referred to in Annex II, point 2 shall be provided in a non-discriminatory manner and requests by railway undertakings may only be rejected if viable alternatives under market conditions exist. The main body responsible for providing the services shall use all reasonable endeavours to facilitate the provision of these services.</p>
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Justification:

Rail related facilities may be owned and operated by any competent body (not necessarily infrastructure managers or railway undertakings, but also other parties wishing to assume this role) as this is a means of expanding the market and developing competition.

Amendment proposal 2.3

	<p><i>New Article 5.1b</i></p> <p><i>The Regulatory Body shall monitor compliance with the principle of non-discriminatory access and develop public recommendations on viable alternatives to denied access.</i></p>
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Justification:

Directive 2001/14 does not give clear guidance on the circumstances in which the provider of rail related services should be required to grant access to a competitor or a third party. However, it does require services to be supplied “unless viable alternatives under market conditions” exist (Article 5.1). This “viable alternative” criterion is, however, contentious as it has not yet been defined. The Directive suggests that a market based test should be developed to determine when and how access should be granted. This should be monitored by the Regulatory Body (for instance, see the concept of viable alternative and interpretation of market conditions in “Office of the Rail Regulator: Initial Guidance on Appeals to the ORR under the Railways Infrastructure Regulations 2005”).

Amendment proposal 2.4

<i>Annex I</i>	<i>Changes in text</i>
A section setting out the nature of the infrastructure which <i>is</i> available to railway undertakings and the conditions of access to <i>it</i> .	A section setting out the nature of the infrastructure and all rail related service facilities , which are available to railway undertakings and; (a) in the case of infrastructure and facilities provided by the infrastructure manager , the conditions of access to them ; (b) in the case of other infrastructure and facilities , the relevant sources where such conditions of access may be obtained.

Justification:

To guarantee non-discriminatory track access to services facilities and supply of services, the conditions for access to rail-related facilities should be described in the Network Statement. If the infrastructure manager does not provide the infrastructure and/or facilities, it should at least indicate the sources where these conditions may be obtained.

3. Authorized applicants

Commission Directive 2001/14

Amendments

Amendment proposal 3.1

Article 2 indent b	Changes in text
<p>'applicant' means a licensed railway undertaking and/or an international grouping of railway undertakings, and, in Member States which provide for such a possibility, other persons and/or legal entities with public service or commercial interest in procuring infrastructure capacity, such as public authorities under Regulation (EEC) No 1191/69 (5) and shippers, freight forwarders and combined transport operators, for the operation of railway service on their respective territories;</p>	<p>'applicant' means a licensed railway undertaking, and other persons and/or legal entities with public service or commercial interest in procuring infrastructure capacity, as defined by Member States, which shall at least include public authorities under Regulation (EC) No 1370/2007 and shippers, freight forwarders and combined transport operators, for the operation of railway service on their respective territories;</p>

Justification:

At present, in some Member States entities other than railway undertakings may be allocated train paths. The concept of "authorised applicants" has been useful in the Member States concerned. By getting control over the whole logistic chain clients (e.g. freight forwarder) are more motivated to choose railway transport. This can lead to a more efficient organisation of co-modal transport, providing solutions for congestion of the rail infrastructure and consequently putting more transport on rail instead of road. In its Communication "Towards a Rail Network Giving Priority to Freight" (COM(2007)608, 18 October 2007), the Commission states that "It will propose enabling authorised applicants to request train paths throughout the freight-oriented network" (p. 9, section 3.4).

Despite all the perceived benefits, the fact that authorised applicants are not allowed in all Member States means that their advantages can not be leveraged when it comes to international transport. To achieve this, every Member State should as a minimum introduce the concept in national law, also defining the types of entities that are included.

Council Regulations 1191/69 and 1107/70 have been repealed by Regulation 1370/2007 of the European Parliament and of the Council of 23 October 2007 on public passenger transport services by rail and by road.

Amendment proposal 3.2

<p><i>Article 16 par 1</i></p> <p>Applications for infrastructure capacity may be made by railway undertakings and their international groupings and, in the territories of those Member States which so allow, by other applicants complying with the definition in Article 2(b). Member States may also allow other applicants to apply for infrastructure capacity on their territories.</p>	<p><i>Changes in text</i></p> <p>Applications for infrastructure capacity may be made by railway undertakings and by other applicants complying with the definition in Article 2(b). Member States may also allow other applicants to apply for infrastructure capacity on their territories.</p>
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Justification:

Despite the perceived benefits of authorised applicants described in amendment 3.1, the fact that they are not allowed in all Member States means that their advantages can not be leveraged when it comes to international transports. To achieve this, every Member State should as a minimum introduce the concept in national law, also defining the types of entities that are included.

4. Regulatory Bodies

Commission Directive 2001/14

Amendments

Amendment proposal 4.1

<p><i>Article 30</i></p> <p>1. Without prejudice to Article 21(6), Member States shall establish a regulatory body. This body, <i>which can be the Ministry responsible for transport matters or any other body</i>, shall be independent in its organisation, funding decisions, legal structure and decision-making from any infrastructure manager, charging body, allocation body or applicant.</p> <p>The body shall function according to the principles outlined in this Article whereby appeal and regulatory functions may be attributed to separate bodies.</p>	<p><i>Changes in text</i></p> <p>1. Without prejudice to Article 21(6), Member States shall establish a regulatory body. This body shall be independent in its organisation, funding decisions, legal structure and decision-making from any infrastructure manager, charging body, allocation body, <i>Ministry</i> or applicant.</p> <p><i>The regulatory body should function in a way which avoids any conflict of interest and any possible involvement in the activities of an applicant or an infrastructure manager or any actor in the railway sector.</i></p> <p><i>In particular, if for organisational or legal purposes it is closely linked to the competent body involved in the allocation of the path under consideration, its functional independence should be ensured.</i></p> <p>The body shall function according to the principles outlined in this Article whereby appeal and regulatory functions may be attributed to separate bodies.</p> <p><i>1a. The independence required for the regulation of competition on the rail services markets includes that the regulatory body must have a budget over which it is entitled to decide, and which allows it to recruit a sufficient number of competent staff in order to perform monitoring tasks and the investigation of all complaints referred to in paragraph 5.</i></p> <p><i>1b. Aside from the staff working on</i></p>
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	<i>technical matters, regulatory bodies shall have specially trained staff dealing exclusively with regulatory matters.</i>
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Justification:

The objective of a regulatory body is to ensure fair and non-discriminatory access to the rail network and to services. However, EIM is concerned about the structural weakness of some Regulatory Bodies. The fact that a body may be attached to a Ministry could, in practice, undermine its independence if a dependency exists between that Ministry and the incumbent railway undertaking⁵.

In other cases, it may be considered that, while a body has been formally set up, it is not operational and does not have enough human, administrative and financial resources to be able to play an active role in the operation of the market. However, it is essential that this body should have credibility with the market actors given that, when a railway undertaking encounters a problem concerning access to infrastructure or to ancillary services, it is important to it that the regulatory body is able to intervene to resolve the problem in question.

⁵ In ADIF's view, the Spanish experience shows that independence of the Regulatory Body can also be guaranteed if it is part of the Ministry.

Amendment proposal 4.2

<i>Article 30</i>	<i>Changes in text</i>
<p>2. An applicant shall have a right to appeal to the regulatory body if it believes that it has been unfairly treated, discriminated against or is in any other way aggrieved, and in particular against decisions adopted by the infrastructure manager or where appropriate the railway undertaking concerning:</p> <p>a) the network statement; b) criteria contained within it; c) the allocation process and its result; d) the charging scheme; e) level or structure of infrastructure fees which it is, or may be, required to pay;</p> <p>f) safety certificate, enforcement and monitoring of the safety standards and rules.</p> <p>3. The regulatory body shall ensure that charges set by the infrastructure manager comply with chapter II and are non-discriminatory. Negotiation between applicants and an infrastructure manager concerning the level of infrastructure charges shall only be permitted if these are carried out under the supervision of the regulatory body. The regulatory body shall intervene if negotiations are likely to contravene the requirements of this Directive.</p> <p>4. The regulatory body shall have the power to request relevant information from the infrastructure manager, applicants and any third party involved within the Member State concerned, which must be supplied without undue delay.</p> <p>5. The regulatory body shall be required to</p>	<p>2. An applicant shall have a right to appeal to the regulatory body if it believes that it has been unfairly treated, discriminated against or is in any other way aggrieved, and in particular against decisions adopted by:</p> <p>- The infrastructure manager concerning: a) the network statement; b) criteria contained within it; c) the allocation process and its result; d) the charging scheme; e) level or structure of infrastructure fees which it is, or may be, required to pay.</p> <p>- The infrastructure manager or where appropriate another body concerning: a) safety certificate, enforcement and monitoring of the safety standards and rules. b) track access to services facilities and supply of services referred to in Annex II, point 2.</p> <p>3. The regulatory body shall ensure that charges set by the infrastructure manager comply with chapter II and are non-discriminatory. Negotiation between applicants and an infrastructure manager concerning the level of infrastructure charges shall only be permitted if these are carried out under the supervision of the regulatory body. The regulatory body shall intervene if negotiations are likely to contravene the requirements of this Directive.</p> <p>4. The regulatory body shall have the power to request relevant information from the infrastructure manager, applicants and any third party involved within the Member State concerned, which must be supplied without undue delay.</p> <p>5. The regulatory body shall be required to</p>

<p>decide on any complaints and take action to remedy the situation within a maximum period of two months from receipt of all information.</p> <p>Notwithstanding paragraph 6, a decision of the regulatory body shall be binding on all parties covered by that decision. In the event of an appeal against a refusal to grant infrastructure capacity, or against the terms of an offer of capacity, the regulatory body shall either confirm that no modification of the infrastructure manager's decision is required, or it shall require modification of that decision in accordance with directions specified by the regulatory body.</p> <p>6. Member States shall take the measures necessary to ensure that decisions taken by the regulatory body are subject to judicial review.</p>	<p>decide on any complaints and take action to remedy the situation within a maximum period of two months from receipt of all information. All decisions of the body shall be public.</p> <p>Notwithstanding paragraph 6, a decision of the regulatory body shall be binding on all parties covered by that decision. In the event of an appeal:</p> <ul style="list-style-type: none"> - against a refusal to grant infrastructure capacity, or - against the terms of an offer of capacity, <p>the regulatory body shall either confirm that no modification of the infrastructure manager's decision is required, or it shall require modification of that decision in accordance with directions specified by the regulatory body.</p> <p>6. Member States shall take the measures necessary to ensure that decisions taken by the regulatory body are subject to judicial review.</p> <p>7. Regulatory bodies must be sufficiently accessible for the market players. They shall publish regular reports about their governance rules and decisions in order to create transparency on the criteria for their decisions.</p> <p>They shall be responsible for updated public registers containing information on licensing, safety certificates, access conditions, charging rules or agreements, exemptions, enforcements, penalties and administrative issues. This shall also include an overview of bodies responsible for providing the services mentioned in Annex II point 2.</p> <p>8. Regulatory bodies shall issue an annual report on market developments and competition in the rail transport market in general, and specifically on infringements to the provision of the essential functions listed in Annex II of Directive 91/440.</p>
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Justification:

In certain cases appeal should be possible against decisions by bodies other than infrastructure managers or railway undertakings. The proposed text makes it possible to appeal against for instance:

- *The notified body in case of (f.) enforcement and monitoring of the safety standards and rules;*
- *Private entities such as terminal owners in case of (g.) track access to services facilities and supply of services.*

Besides, the importance of the missions of the regulatory bodies is growing also for passenger traffic. According to Directive 2007/58/EC revising Directive 91/440, from 2010, regulatory bodies will have to assess:

- *Whether the “principal purpose” of a passenger service is domestic or international;*
- *Whether the “economic equilibrium” of public service contract is compromised.*

As a consequence of these assessments, Member States may have the possibility to limit the right of access to the international passenger market.

Moreover, regulatory bodies shall be responsible for authorising the entry into force of long term framework agreements between applicant railway undertakings and infrastructure managers as introduced by the Third Railway Package in the added article 17(5) a par.3 to directive 2001/14 (OJ n° L 315 of 3 December 2007).

Therefore, it is important to ensure a high level of transparency regarding the governance and decisions of regulatory bodies.

Amendment proposal 4.3

<p>Article 31</p> <p>The national regulatory bodies shall exchange information about their work and decision-making principles and practice for the purpose of coordinating their decision-making principles across the Community. The Commission shall support them in this task.</p>	<p><i>Changes in text</i></p> <p>The national regulatory bodies shall exchange information about their work and decision-making principles and practice for the purpose of coordinating their decision-making principles across the Community. <i>In this respect, the national regulatory bodies shall take into consideration the necessity of international cooperation foreseen in article 15 and of the possible impact of their decisions on the procedures or practices stated at European level.</i> The Commission shall support them in this task.</p>
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Justification:

Harmonised rules for the international allocation of train paths have become essential with the opening of European railway markets, a larger number of applicants, and the challenges on international networks in accommodating increasing traffic levels. Indeed, the Commission in its Communication "Towards a Rail Network Giving Priority to Freight" emphasises the importance of international cooperation between Regulatory Bodies to achieve this harmonisation.

5. Compensation schemes for unpaid external and infrastructure costs

Commission Directive 2001/14

Amendments

Amendment proposal 5.1

Article 10	Changes in text
<p>1. Member States may put in place a time-limited compensation scheme for the use of railway infrastructure for the demonstrably unpaid environmental, accident and infrastructure costs of competing transport modes in so far as these costs exceed the equivalent costs of rail.</p> <p>2. Where an operator receiving compensation enjoys an exclusive right, the compensation must be accompanied by comparable benefits to users.</p> <p>3. The methodology used and calculations performed must be publicly available. It shall in particular be possible to demonstrate the specific uncharged costs of the competing transport infrastructure that are avoided and to ensure that the scheme is granted on non-discriminatory terms to undertakings.</p> <p>4. Member States shall ensure that such a scheme is compatible with Articles 73, 87 and 88 of the Treaty.</p>	<p>1. Member States shall put in place a time-limited compensation scheme for the use of railway infrastructure for the demonstrably unpaid environmental, accident and infrastructure costs of competing transport modes in so far as these costs exceed the equivalent costs of rail.</p> <p>2. Where an operator receiving compensation enjoys an exclusive right, the compensation must be accompanied by comparable benefits to users.</p> <p>3. The methodology used and calculations performed must be publicly available. It shall in particular be possible to demonstrate the specific uncharged costs of the competing transport infrastructure that are avoided and to ensure that the scheme is granted on non-discriminatory terms to undertakings.</p> <p>4. Member States shall ensure that such a scheme is compatible with Articles 73, 87 and 88 of the Treaty.</p>

Justification:

The EC policy on infrastructure charging is based on “the user pays” concept (Green Paper of 1995 on fair and efficient Pricing; White Paper of 1998 on the fair payment for infrastructure use; White Paper of 2001 on the European Transport Policy until 2010).

Also according to various studies, charging regimes should provide the necessary incentives to promote a more efficient use of infrastructure, to reduce congestion and pollution (the polluter pays principle), to re-balance the modal split and to decouple transport growth from economic growth (Imprint-Net, “Pricing for (sustainable) transport policies – A state of the art”, March 2006). Pricing must also ensure an adequate level of revenue raising, both in connection with EU and Member States infrastructure

investment policies and with the role of public-private partnership in infrastructure managing. In this context, the 1998 White Paper identifies marginal social costs (including external costs) as a fair and efficient pricing principle.

The European Directives (such as the Eurovignette Directive in road transport) issued have only been partially translated into national laws by Member States because, at a national level, the principle of social marginal cost pricing is not always well accepted. However, in July 2008 the Commission will present an analysis on how internalisation measures can correct a specific type of market failure.

Based on the presumption that principles of marginal cost pricing should be adhered to in rail transport (which is aimed at in article 6.1), Member States have an opportunity to reward rail transport users over users of other transport modes, thereby triggering other modes to continue internalising infrastructure and external costs by applying article 10. This should be made mandatory (“shall” instead of “may”) to speed-up the stated policy objectives of “the user pays” and “the polluter pays”.

6. Multi Annual Contracts⁶

Commission Directive 2001/14

Amendments

Amendment proposal 6.1

<p>Article 2</p>	<p>The following indent shall be inserted after indent 'h':</p> <p>“Multi Annual Contract” means a contractual agreement or statutory arrangement between the competent authority and the infrastructure manager covering a period of not less than three years, which provides for funding for maintenance and renewal of the network to agreed outputs which could be measured by both quality and safety indicators which will be published.</p>
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Justification:

The concept of Multi Annual Contract should be officially introduced to allow for it to be used throughout the text of Directive 2001/14. This proposed definition covers the main elements described in amendment 6.3.

⁶ Banverket, the Swedish Rail Administration, does not subscribe to the concept of Multi Annual Contracts. Whereas it does make use of 3 year business plans for infrastructure maintenance, actual funding is eventually decided on a yearly basis.

Amendment proposal 6.2

<p>Article 7.4</p> <p>Within the framework of general policy determined by the State, the infrastructure manager shall draw up a business plan including investment and financial programmes. The plan shall be designed to ensure optimal and efficient use and development of the infrastructure while ensuring financial balance and providing means for these objectives to be achieved.</p>	<p><i>Changes in text</i></p> <p>Within the framework of general policy determined by the State and the Multi Annual Contract referred to in article 6 of Directive 2001/14, the infrastructure manager shall draw up a business plan including financial programmes. The plan shall be designed to ensure optimal and efficient use and development of the infrastructure while ensuring financial balance and providing means for these objectives to be achieved.</p>
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Justification:

In Directive 2001/14 the concept of "Multi Annual Contract" is officially introduced, so that it can serve as a consistent reference throughout other legal texts such as the present article.

The infrastructure manager's business plan and the Multi Annual Contract contain many similarities in terms of content, and should thus be fully aligned. For instance, the "financial balance" that needs to be ensured will largely depend on the incentives provided to infrastructure managers to reduce the costs of provision of infrastructure as mentioned in article 6 paragraph 3 of Directive 2001/14.

Amendment proposal 6.3

<p>Article 6</p> <p>2. Infrastructure managers shall, with due regard to safety and to maintaining and improving the quality of the infrastructure service, be provided with incentives to reduce the costs of provision of infrastructure and the level of access charges.</p> <p>3. Member States shall ensure that the provision set out in paragraph 2 is implemented either through a contractual agreement between the competent authority and infrastructure manager covering a period of not less than three years which provides for State funding or through the establishment of appropriate regulatory measures with adequate powers.</p> <p>4. Where a contractual agreement exists, the terms of the contract and the structure of the payments agreed to provide funding to the infrastructure manager shall be agreed in advance to cover the whole of the contract period.</p>	<p><i>Changes in text</i></p> <p>2. A Multi Annual Contract shall be entered into between the competent authority and the infrastructure manager covering a period of not less than three years.</p> <p>3. The Multi Annual Contract shall provide a reliable framework for State funding, and provide the infrastructure manager with incentives to reduce the costs of provision of infrastructure and the level of access charges, with due regard to safety and a sufficient quality of the infrastructure service.</p> <p>4. The terms of the contract and the structure of the payments agreed to provide funding to the infrastructure manager shall be agreed in advance to cover the whole of the contract period.</p> <p>5. No later than January 2011, the Commission shall propose a framework Directive setting out the main elements to be agreed in a Multi Annual Contract.</p>
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Justification:

The concept of Multi Annual Contract is introduced (see amendment 6.1) and becomes the basis (new article 6.2) of the article. Article 6.3 describes its basic elements.

Long term stability in maintaining the network can only be secured through a Multi Annual Contract. Regulatory measures as mentioned in the original text could in principle deliver the same result, but only if they would also be of a multi annual nature. In addition, a contract with obligations from two sides can deliver a more balanced approach, which is reflected in the new article 6.3. This specific model of mutual commitments is also suggested in the ECs Communication on the Implementation of the First Railway Package (page 54): "It is therefore recommended to conclude contracts over several years based on mutual commitments: the state committing itself to stable

financial contributions and infrastructure managers committing themselves to maintaining their network at predefined quality levels”.

In its “Communication on Multi-annual contracts for rail infrastructure quality” (COM (2008)54, 6 February 2008) the Commission already indicated it may propose more ambitious proposals for Multi Annual Contracts to be included in the Recast of the First Railway package. At the minimum, this should cover the definition of the concept. The main elements to be agreed in Multi Annual Contracts (proposed in Annex III of the Communication) should be elaborated by the Commission in a separate Directive by 2011.

7. International harmonization of path-allocation processes

Commission Directive 2001/14

Amendments

Amendment proposal 7.1

<p><i>Article 15 par 1</i></p> <p>Infrastructure managers shall cooperate to enable the efficient creation and allocation of infrastructure capacity which crosses more than one network. They shall organise international train paths, in particular <i>within the framework of the Trans-European Rail Freight Network.</i> <i>They shall</i> establish such procedures as are appropriate to enable this to take place. These procedures shall be bound by the rules set out in this Directive.</p> <p>The procedure established in order to coordinate the allocation of infrastructure capacity at an international level shall associate representatives of infrastructure managers for all railway infrastructures</p>	<p><i>Changes in text</i></p> <p>Infrastructure managers shall cooperate to enable the efficient creation and allocation of infrastructure capacity which crosses more than one network. <i>In particular</i> they shall:</p> <ul style="list-style-type: none"> - Organise international train paths, in particular <i>along the Freight Oriented Corridors as defined in Community legislation, and</i> establish such <i>harmonised</i> procedures as are appropriate to enable this to take place. These procedures shall be <i>made public and</i> bound by the rules set out in this Directive; - <i>Co-operate as regards co-ordinating, as between relevant infrastructure managers, the timings of reservation of infrastructure capacity for scheduled track maintenance where international train paths may be prejudicially affected. The arrangements for publishing them shall be set out in the network statement;</i> - <i>Define common high level principles in relation to priority rules in respect of both path allocation and final traffic operation processes. Member States shall put in place such arrangements as are necessary to deliver the application of these rules on a national level. The Regulatory Body shall be tasked with monitoring this.</i> <p>The procedure established in order to coordinate the allocation of infrastructure capacity at an international level shall associate representatives of infrastructure managers for all railway infrastructures</p>
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<p>whose allocation decisions have an impact on more than one other infrastructure manager. Appropriate representatives of infrastructure managers from outside the Community may be associated with these procedures. The Commission shall be informed and invited to attend as an observer.</p>	<p>whose allocation decisions have an impact on more than one other infrastructure manager. Appropriate representatives of infrastructure managers from outside the Community may be associated with these procedures. The Commission shall be informed and invited to attend as an observer.</p>
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Justification:

Rail freight markets have been open since 2007, which makes the reference to TERFN redundant. Instead, international train paths could be organised along the freight oriented corridors as promoted by the Commission in its Communication “Towards a Rail Network Giving Priority to Freight” where it states that “It will encourage Member States and infrastructure managers to create transnational freight-oriented corridors. Each Member State will have to participate in at least one corridor structure by 2012”.

To enhance the efficiency of freight oriented corridors by minimising the risk of day-to-day traffic disturbances, the existing requirement for infrastructure managers to establish procedures for the organisation of international train paths should be further extended to also promote cooperation in the following areas:

- *The co-ordination of timings of reservation of infrastructure capacity for scheduled track maintenance where international train paths between 2 or more networks may be affected. The arrangements for publishing these timings shall be set out in the network statement;*
- *The definition of common priority rules, which shall be laid down in national legislation, and monitored by the Regulatory Body.*

Amendment proposal 7.2

<i>Annex I</i>	<p><i>New paragraph 2</i></p> <p><i>The arrangements for publishing the timings of reservation of infrastructure capacity for scheduled track maintenance where international train paths may be prejudicially affected.</i></p>
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Justification:

To enhance the efficiency of freight oriented corridors by minimising the risk of day-to-day traffic disturbances, the existing requirement for infrastructure managers to establish procedures for the organisation of international train paths should be further extended to also promote cooperation to co-ordinate of timings of reservation of infrastructure capacity for scheduled track maintenance where international train paths between 2 or more networks may be affected. The network statement should provide sufficient information to make it possible for operators to anticipate on possible disturbances from these maintenance activities.

8. Performance Regimes

Commission Directive 2001/14

Amendments

Amendment proposal 8.1

<i>Article 11 par 1 and 2</i>	<i>Changes in text</i>
<p>1. Infrastructure charging schemes shall through a performance scheme encourage railway undertakings and the infrastructure manager to minimise disruption and improve the performance of the railway network. This may include penalties for actions which disrupt the operation of the network, compensation for undertakings which suffer from disruption and bonuses that reward better than planned performance.</p> <p>2. The basic principles of the performance scheme shall apply throughout the network.</p>	<p>1. Infrastructure charging schemes shall through a performance scheme incentivise railway undertakings and the infrastructure manager to individually and collectively minimise disruption and improve the performance of the railway network which may be measured by the reduction of delay to services. This may include financial penalties for actions or omissions which disrupt the operation of the network, and bonuses that reward better than planned performance.</p> <p><i>These financial measures will be at a level such that they are deemed by the Member State to provide, in themselves, a sufficient incentive to reduce delay.</i></p> <p><i>If no financial measures are in place, non-financial measures must be introduced, which are deemed by the Member State as having an equivalent incentive to reduce delay on the network.</i></p> <p>2. The basic principles of the performance scheme shall apply throughout the network</p> <p><i>3. Member States shall agree and publish targets for railway undertakings and infrastructure managers, and regularly publish data of performance levels achieved against these targets.</i></p> <p><i>The railway sector, in consultation with interested parties, shall within one year recommend to the Commission a common currency by which delay should be measured.</i></p>

Justification:

The railway sector should be encouraged to reduce system delay as a whole, rather than only punctuality at destination. It is important that the sector does not achieve this by one party achieving an improvement at the expense of the other, and that it focuses both on those areas where the parties have direct and shared control.

While financial incentives are believed to be the most effective method of reducing delay, the Commission should provide scope for different arrangements where a Member State believes this is more appropriate. However, the alternative method should provide an equivalent incentive to reduce delay.

In either case, it is essential that clear targets are agreed between the Member State and the sector, and that these are published to enable passengers to make informed comparisons between railway undertakings, as well as allowing the Member State to measure and benchmark the performance of the infrastructure manager. In addition, to help achieve these comparisons a common currency should be introduced to express delay on the network.