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NOTE

from : Council General Secretariat
to : Delegations

No. prev. doc. : 13899/05 TRANS 212 CODEC 968
No. Cion prop. : 7147/04 TRANS 107 CODEC 335

Subject : LAND TRANSPORT

- **Proposal for a Directive of the European Parliament and of the Council amending Council Directive 91/440/EEC on the development of the Community's railways (Third Railway Package)**

and, as far as it concerns public passenger transport services by rail,

- **Revised proposal for a Regulation of the European Parliament and of the Council on public passenger transport services by rail and by road**

Delegations will find in Annex a new Presidency compromise proposal for a text modifying the Commission proposal for a Directive of the European Parliament and of the Council amending Council Directive 91/440/EEC on the development of Community's railways and Council Directive 2001/14/EC of the European Parliament and of the Council on the allocation of railway infrastructure capacity and the levying of charges for the use of railway infrastructure and safety certification.

The text in bold indicates the amendments to the Commission proposal the Presidency proposes. This text in bold corresponds with the text in bold of doc 13899/05 which was discussed in the Working Party of 8 November 2005. The amendments to doc 13899/05 that have been discussed in the Working Party of 14 November 2005, as well as the new compromise amendments the Presidency proposes as a result of the examination in the Working Party of 14 November 2005, are both in bold and underlined. Deleted text is between brackets [...].

All Member States and the Commission have a general scrutiny reservation on the text in annex. DK, MT and LT have a parliamentary scrutiny reserve. Specific reservation of Member States and the Commission are noted in footnotes.

2004/0047 (COD)

Draft

DIRECTIVE OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL
amending Council Directive 91/440/EEC on the development of the Community's railways and
Council Directive 2001/14/EC of the European Parliament and of the Council on the
allocation of railway infrastructure capacity and the levying of charges for the use of railway
infrastructure and safety certification

THE EUROPEAN PARLIAMENT AND THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty establishing the European Community, and in particular Article 71 thereof,

Having regard to the proposal from the Commission¹,

Having regard to the opinion of the European Economic and Social Committee²,

Having regard to the opinion of the Committee of the Regions³,

Acting in accordance with the procedure referred to in Article 251 of the Treaty⁴,

Whereas:

- (1) Council Directive 91/440/EEC of 29 July 1991 on the development of the Community's railways⁵ was designed to facilitate the adaptation of the Community's railways to the requirements of the single market and to improve their efficiency.

¹ OJ C, , p. .

² OJ C, , p. .

³ OJ C, , p. .

⁴ OJ C, , p. .

⁵ OJ L 237, 24.8.1991, p. 25. Directive as last amended by [...] **Directive 2004/51/EC of the European Parliament and of the Council (OJ L 164, 30.4.2004, p. 164; corrigendum OJ L 220, 21.6.2004, p. 58).**

- (1a) **Council Directive 2001/14/EC of the European Parliament and of the Council on the allocation of railway infrastructure capacity and the levying of charges for the use of railway infrastructure and safety certification concerns the principles and procedures to be applied with regard to the setting and charging of railway infrastructure charges and the allocation of railway infrastructure capacity.**
- (2) In its White Paper *European transport policy for 2010: time to decide*⁶, the Commission announced its intention to continue building the internal market in rail services by proposing to open up the market in international passenger services.
- (2a) **The aim of this Directive is to address market opening for rail services within the Community and not services transiting one Member State, nor services between a Member State and a Third country.**
- (3) In October 2003, the European Parliament adopted an amendment calling for the opening up to competition of all national and international rail passenger services by 1 January 2008. The Commission stated on that occasion that it intended to present a specific proposal which dovetailed with the existing legislation on public service contracts as well as measures to protect the rights of passengers on international services.
- (4) International rail services currently present a very contrasting picture. Long-distance services (night trains) are in difficulty and several of them have recently been withdrawn by the railway undertakings concerned to limit losses. The market for international high-speed services, on the other hand, has seen a sharp increase in traffic and will continue its vigorous development with the doubling and interconnection of the trans-European high-speed network by 2010. Nevertheless, there is strong competitive pressure from low-cost airlines in both cases and it is essential to stimulate the new initiatives by promoting competition between railway undertakings.

⁶ COM(2001) 370, 12.9.2001.

- (5) It would not be possible to open up the market in international passenger services without detailed provisions on infrastructure access, substantial progress on interoperability and a strict framework for rail safety at national and European level. All of these elements are now in place following the transposition of Directives 2001/12/EC of the European Parliament and of the Council of 26 February 2001 **and 2004/51/EC** amending Council Directive 91/440/EEC on the development of the Community's railways, 2001/13/EC of the European Parliament and of the Council of 26 February 2001 amending Council Directive 95/18/EC on the licensing of railway undertakings⁷, 2001/14/EC of the European Parliament and of the Council of 26 February 2001 on the allocation of railway infrastructure capacity and the levying of charges for the use of railway infrastructure and safety certification⁸, and Directive 2004/49/EC on the safety of the railways⁹. This new institutional framework must be supported by established, consolidated practice by the proposed date for opening the market for international passenger services. The proposed target date is therefore 2010.
- (6) The number of railway services without intermediate stops is very limited. In the case of journeys with intermediate stops, it is essential to authorise new entrants to pick up and set down passengers along the route in order to ensure that such operations have a realistic profitability threshold and to avoid placing potential competitors in an unfavourable situation compared with the existing operators, which have the right to pick up and set down passengers along the route. **This right should be without prejudice to Community and national regulations concerning competition policy.**

⁷ OJ L 75, 15.3.2001, p. 26.

⁸ OJ L 75, 15.3.2001, p. 29.

⁹ OJ L 164, 30.4.2004, p. 44.

- (6a) ¹⁰The introduction of such new services with such stops should not bring about the opening of the market for domestic passenger services, but should merely be focused on stops that are ancillary to the [...] international route. On that basis, their introduction should concern services whose principal purpose is to carry passengers travelling on an international journey. The determination of whether that is the service's principal purpose should take into account criteria such as the proportion of turnover, and of volume, derived from either domestic or international passengers, and the length of the service¹¹.
- (7) Council Regulation (EEC) No 1191/69 of 26 June 1969 on action by Member States concerning the obligations inherent in the concept of a public service in transport by rail, road and inland waterway¹² authorises Member States and local authorities to award public service contracts. These contracts may contain exclusive rights to operate certain services. It is therefore necessary to ensure that the provisions of this Regulation are consistent with the principle of opening up international passenger services to competition. On 21 February 2002 the Commission presented an amended proposal¹³ for a regulation of the European Parliament and of the Council on action by Member States concerning public service requirements and the award of public service contracts in passenger transport by rail, road and inland waterway to replace Regulation No 1191/69. **On 20 July 2005 this was followed by a revised proposal for a regulation of the European Parliament and of the Council on public passenger services by rail and by road¹⁴.** The principal aim of this text is to [...] **provide greater legal certainty and transparency about the process for conclusion and award of public service contracts, for both domestic and international services.**

¹⁰ Scrutiny reservation NL and SI.

¹¹ HU wants mentioning the criteria in the body of the text.

¹² OJ L 156, 28.6.1969, p. 1. Regulation as last amended by Regulation (EEC) No 1893/91 (OJ L 169, 29.6.1991, p. 1).

¹³ COM (2002) 107, 21.02.2002, OJ C 151 E, 25.6.2002, p. 146.

¹⁴ **COM(2005) 319 final, 20.7.2005**

- (7a) Opening up international passenger services, which includes the right to pick up passengers at any station located on the route of an international service and to set them down at another, including stations located in the same Member State, to competition may have implications for the organisation and financing of rail passenger services provided under a public service contract. Member States should have the possibility to limit the right of access where this right would compromise the economic equilibrium of these [...] public service contracts and where approval is given by the relevant regulatory body or bodies referred to in Article 30 of Directive 2001/14/EC¹⁵ on the basis of an objective economic analysis, following a request from the competent authorities that awarded the public service contract.
- (7b) The assessment whether the economic equilibrium of the [...] public service contract could be compromised, could take into account pre-determined criteria [...] such as impact on the profitability of any services which are included in a public service contract, passenger demand, ticket pricing, ticketing arrangements, location and number of stops on both sides of the border and timing and frequency of the proposed new service. As a result of such an assessment and the decision of the regulatory body or bodies, Member States [...] might [...] authorise, modify or deny the right of access for the international passenger service sought [...] ¹⁶.
- (7c) The national regulatory bodies should on the basis of Article 31 of Directive 2001/14/EC, exchange information and, where relevant in individual cases, coordinate on the principles and practice of assessing whether the economic equilibrium of [...] [...] a public service contract is compromised. They should progressively develop guidelines based on their experience.

¹⁵ OJ L 75, 15.3.2001, p. 29.

¹⁶ HU/IRE and NL want the criteria mentioned in the body of the text, whereas A/CZ/DE/DK/IT and the Cion indicated that they agreed with mentioning the criteria in a recital.

- (8) The application of this Directive should be evaluated on the basis of a report to be presented by the Commission two years after the date of opening up the market in international passenger services.
- (8a) **"A Member State which has no railway system, and no immediate prospect of having one, would suffer a disproportionate and otiose obligation to transpose and to implement Directives 91/440/EEC and 2001/14/EC. Therefore, such a Member State should be exempted, for as long as it has no railway system, from the obligation to transpose and implement these Directives."**
- (9) The objectives of the proposed action, namely the development of the Community's railways, cannot be sufficiently achieved by the Member States given the need to ensure fair and non-discriminatory conditions of access to infrastructure and to take account of the obviously international dimension of the way in which important parts of the rail networks operate. Because of the need for coordinated transnational action, these can be better achieved at Community level, so the Community may adopt measures in accordance with the principle of subsidiarity enshrined in Article 5 of the Treaty. In accordance with the principle of proportionality set out in that Article, this Directive does not go beyond what is necessary to achieve those objectives.
- (10) (Directive 91/440/EEC **and Directive 2001/14/EC** should therefore be amended accordingly,

HAVE ADOPTED THIS DIRECTIVE:

Article 1

Directive 91/440/EEC is hereby amended as follows:

0) The following paragraph is inserted in Article 2:

"4. Member States may exclude from the scope of this Directive any railway service carried out in transit through the Community."

1) The fourth indent of Article 3 is deleted.

2) The following indent is inserted in Article 3 after the fifth indent:

"– 'international passenger service' shall mean a passenger services where the train crosses at least one border of a Member State **and where the principal purpose¹⁷ of the service is to carry passengers between stations located in different Member States**; the train may be joined and/or split, and the different sections may have different origins and destinations, provided that all [...] **carriages** cross at least one border".

2a) The following indent is inserted in Article 3 after the sixth indent:

"– 'transit' shall mean the crossing of the Community territory which is carried out without loading or unloading of goods and/or without picking up of passengers nor setting them down in the Community territory."¹⁸

3) The first indent of Article 5(3) is deleted.

4) The phrase "and international groupings" is deleted in Article 8(1).

5) Paragraph (1) of Article 10 is deleted.

6) The provisions referred to in points 1), 3), 4) and 5) above take effect on 1 January 2010.

¹⁷ Presidency suggests to translate "principal purpose" in the French language as "objet déterminant"

¹⁸ Presidency suggests as a translation in French : "Transit veut dire la traversée du territoire de la Communauté qui s'effectue sans chargement ni déchargement de marchandises et/ou sans prise en charge ni dépose de voyageurs dans ce territoire." This definition is based on existing market access legislation in road transport such as Regulation No 684/92 of 16.3.1992 and Regulation No 881/92 of 26.3.1992.

7) The following paragraphs 3(a), 3(b), **3(ba)** and 3(c) **and 9** are inserted in Article 10¹⁹:

"3(a) Railway undertakings within the scope of Article 2 shall, by 1 January 2010 at the latest, be granted the right of access to the infrastructure in all Member States for the purpose of operating an international passenger service. Railway undertakings shall, in the course of an international passenger service, have the right to pick up passengers at any station located on the international route and set them down at another, including stations located in the same Member State²⁰.

3(b) Member States may limit the right of access defined in paragraph 3(a) on services between a place of departure and a destination which are covered by one or more public service contracts conforming to the Community legislation in force. Such limitation may not have the effect of restricting the right to pick up passengers at any station located on the route of an international service and to set them down at another, including stations located in the same Member State, except where [...] **the exercise of this right would compromise**²¹ the economic equilibrium of [...] a public service contract [...]²².

¹⁹ IT with the support of DE, ES and SE and the sympathy of A and DK, proposed the following wording for a new Article 3(ca):

"The provisions in this Directive shall not prevent a Member State from limiting, until 1 January 2010, the right of access referred to in paragraph 3(a) to railway undertakings and their directly or indirectly controlled subsidiaries, licensed in a Member State where access rights of a similar nature are not granted."

²⁰ EL/HU and PL want a gradual approach to the opening of the market for international passenger services and only include the right to pick up and set down passengers at stations located in the same Member State at a later stage.

²¹ F proposes to use "affecterait/would affect" instead of "would compromise". On the proposal for a reciprocity clause the Cion and F hold a reservation and NL a scrutiny reservation.

²² BE supported by LUX proposed the following addition:

"Such a limitation can consist of an obligation to contribute towards the compensation of the public service obligation under a public service contract in conformity with the applicable community law. This contribution is implemented in accordance with the principles of equality and non-discrimination."

F supports the idea of contribution of railway undertakings to the financing of compensation of public service obligations as defined in a public service contract but wants a system of a more global nature. DE expressed itself against any system of compensation.

Whether the economic equilibrium would be compromised [...] shall be determined by the regulatory body or bodies referred to in Article 30 of Directive 2001/14/EC²³ on the basis of an objective economic analysis, following a request from the competent authority or authorities that awarded the public service contract, the infrastructure manager or the railway undertaking performing the public service contract. The competent authorities and the railway undertakings providing the public services shall provide the regulatory body or bodies with the information reasonably required to reach a decision. The regulatory body shall consider the information provided, discussing with all the relevant parties as appropriate, and shall inform the relevant parties of [...] its reasoned decision within a pre-determined, reasonable time, and, in any case, within 2 months of receipt of all relevant information. The regulatory body shall give the grounds for its decision and specify the time period within which, and the conditions under which, the relevant competent authority or authorities, the infrastructure manager, the railway undertaking performing the public service contract or the railway undertaking seeking access, can request a re-consideration of the decision.

3(ba) Member States may also limit the right to pick up and set down passengers at stations within the same State on the route of an international passenger service where an exclusive right to convey passengers between those stations has been granted under a contract awarded before the entry into force of this Directive on the basis of a fair competitive tendering procedure and in accordance with the relevant principles of Community law. This limitation may continue for the original duration of the contract, or 15 years, whichever is the shorter^{24 25}.

3(c) Member States shall take the necessary measures to ensure that the decisions referred to in 3(b) and 3(ba) are subject to judicial review."

²³ OJ L 75, 15.3.2001, p 29.

²⁴ F makes agreement on the proposed paragraph 3(ba) of Article 10 of Directive 91/440/EEC dependent on agreement on the proposed Article 17 of Directive 2001/14/EC because it holds the opinion that the subject matter of both proposals regards investment certainty.

²⁵ IT/DK/ES and SE wonder why no right of access with the safeguard of compromising the economic equilibrium, applies to a service performed under concession. A/F/NL and PT support the Presidency text.

- 9) **By 1 January 2009, the Commission shall submit to the European Parliament, the European Economic and Social Committee, the Committee of the Regions and the Council a report on the implementation of this Directive.**

This report shall address:

- **implementation of this Directive in the Member States and the effective working of the various bodies involved,**
- **market development, in particular international traffic trends, activities and market share of all market actors, including new entrants.**

- 8) The following subparagraph is added to Article 14:

"By 31 December 2012 at the latest, the Commission shall submit to the European Parliament, the European Economic and Social Committee, the Committee of the Regions and the Council a report on the implementation of the provisions of Article 10(3)(a) and (3)(b)."

- 9) **The following paragraph is inserted as a third paragraph in Article 15:**

"The obligations for transposition and implementation of this Directive shall not apply to Cyprus and Malta as long as no railway system is established within their territory."

Article 1a

Directive 2001/14/EC is hereby amended as follows:

- 0) **The following paragraph shall [...] be inserted as a second paragraph in recital (46):**

"The body should function in a way which avoids any conflict of interest and any possible involvement in the award of the public service contract under consideration; in particular, its functional independence should not be affected if it is closely linked to the competent authority involved in the award of the public service contract under consideration for organisational or legal purposes."

- 0a) **The following paragraph 3.e) shall be inserted in Article 1:**

"Transport operations in the form of railway services which are carried out in transit through the Community are excluded from the scope of this Directive."

0aa) The following indent is inserted in Article 2:

"n)– 'transit' shall mean the crossing of the Community territory which is carried out without loading or unloading of goods and/or without picking up of passengers nor setting them down in the Community territory."²⁶

0b) The following paragraph 4 shall be inserted in Article 13

"When an applicant intends to request infrastructure capacity with a view to operating an international passenger service as defined in Article 3 of Directive 91/440/EEC, it shall inform the infrastructure managers and the regulatory bodies concerned. Regulatory bodies shall ensure that any competent authority that has awarded a rail passenger service defined in a public service contract and any railway undertaking performing the public service contract on the route of this international passenger service is informed."

²⁶ Presidency suggests as a translation in French: "Transit veut dire la traversée du territoire de la Communauté qui s'effectue sans chargement ni déchargement de marchandises et/ou sans prise en charge ni dépose de voyageurs dans ce territoire." This definition is based on existing road transport legislation.

1) Article 17(5) shall be replaced by the following²⁷:

"Framework agreements shall in principle be for [...] a period [...] of five years and shall be renewable for periods equal to their original duration. The infrastructure manager may agree to a shorter or longer period in specific cases. Periods longer than 5 years must be justified by reference to the existence of commercial contracts, specialised investments or risks.

For services using specialised infrastructure, as referred to in Article 24, [...] which requires substantial and long-term investment, duly justified by the applicant, framework agreements may be for a period of 10 years [...]. Any period longer than 10 years shall be permissible only in exceptional cases, in particular where there is large-scale, long-term investment, and particularly where such investment is covered by contractual commitments including a multi-annual amortisation plan."

²⁷ F proposes the following modification of Article 17.5 of Directive 2001/14/EC:
"1. Pas de modification du §1

5. L'accord cadre est conclu en principe pour une durée de 5 ans, **renouvelable par périodes égales à cette durée initiale**. Le gestionnaire d'infrastructure peut, dans des cas spécifiques, accepter des périodes plus courtes ou plus longues. Toute période d'une durée supérieure à 5 ans est motivée par l'existence de contrats commerciaux, d'investissements particuliers ou de risques. [...]

5bis. Pour les services utilisant une infrastructure spécialisée au sens de l'article 24 et qui nécessitent des investissements importants et à long terme, dûment justifiés par les candidats, l'accord cadre peut être conclu pour une durée de 15 ans. [Une durée supérieure à 15 ans n'est possible que des cas **exceptionnels** ~~très particuliers~~, notamment lorsqu'il s'agit d'investissement importants et à long terme et spécialement lorsque ceux-ci font l'objet d'engagements contractuels **comprenant un plan pluri-annuel d'amortissement.**]

Les besoins exprimés par le candidat peuvent dans ce cas nécessiter de définir de façon détaillée les caractéristiques des capacités – entre autre les fréquences, le volume et la qualité des sillons – garanties au candidat pour la durée de l'accord-cadre.

Le gestionnaire de l'infrastructure peut réduire la capacité réservée dont l'utilisation sur une période d'au moins un mois, est inférieure au seuil prévu à l'article 27.

5ter. A compter de l'ouverture à la concurrence des services prévus dans la directive XXX, un premier contrat-cadre peut être établi pour une durée de 10 ans sur la base des sillons utilisés par les candidats exploitants les services afin de tenir compte des investissements particuliers engagés ou de l'existence de contrats commerciaux. "

EL supports the French proposal in its entirety. A/DE/NL/PT and SI support the F proposal to extend the period of a Framework Agreement to 15 years. Cion supports the text of the Presidency.

- 2) **The following sentence is inserted before the final sentence of Article 30(1):**
"It shall furthermore be functionally independent from any competent authority involved in the award of a public service contract²⁸."
- 3) **The following paragraph is inserted as a third paragraph in Article 38:**
"The obligations for transposition and implementation of this Directive shall not apply to Cyprus and Malta as long as no railway system is established within their territory."

Article 2

1. Member States shall bring into force the laws, regulations and administrative provisions necessary to comply with this Directive at the latest by²⁹. They shall forthwith communicate to the Commission the text of those provisions and a correlation table between those provisions and this Directive.
- When Member States adopt these provisions, these shall contain a reference to this Directive or shall be accompanied by such reference at the time of their official publication. The methods of making such reference shall be laid down by the Member States.
2. Member States shall communicate to the Commission the text of the main provisions of national law which they adopt in the field covered by this Directive.

Article 3

This Directive shall enter into force on the day following its publication in the *Official Journal of the European Union*³⁰.

²⁸ Scrutiny reservation IRE and EE.

²⁹ 18 months after the final adoption of the Directive.

³⁰ BE proposes the following rephrasing: "This Directive shall enter into force on the day of entry into force of the regulation on public passenger transport services by rail and by road."

Article 4

This Directive is addressed to the Member States.

Done at Brussels,

For the European Parliament
The President

For the Council
The President

