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from: Secretary-General of the European Commission,  
signed by Mr Jordi AYET PUIGARNAU, Director

date of receipt: 12 March 2012

to: Mr Pierre de BOISSIEU, Secretary-General of the Council of the European  
Union

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Subject: COMMUNICATION FROM THE COMMISSION TO THE EUROPEAN  
PARLIAMENT pursuant to Article 294(6) of the Treaty on the Functioning of  
the European Union concerning the position of the Council (1st reading) on the  
adoption of a Directive of the European Parliament and of the Council  
establishing a single European railway area (Recast)

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Delegations will find attached Commission document (COM )2012 119 final.

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EUROPEAN COMMISSION

Brussels, 12.3.2012  
COM(2012) 119 final

2010/0253 (COD)

**COMMUNICATION FROM THE COMMISSION  
TO THE EUROPEAN PARLIAMENT**

**pursuant to Article 294(6) of the Treaty on the Functioning of the European Union**

**concerning the**

**position of the Council (1st reading) on the adoption of a Directive of the European Parliament and of the Council establishing a single European railway area (Recast)**

**COMMUNICATION FROM THE COMMISSION  
TO THE EUROPEAN PARLIAMENT**

**pursuant to Article 294(6) of the Treaty on the Functioning of the European Union**

**concerning the**

**position of the Council (1st reading) on the adoption of a Directive of the European Parliament and of the Council establishing a single European railway area (Recast)**

**1. BACKGROUND**

Date of transmission of the proposal to the European Parliament and to the Council 21/09/2010  
(document COM(2010) 475 final – 2010/0253(COD)):

Date of the opinion of the European Committee of Regions: 28/01/2011

Date of the opinion of the European Economic and Social Committee: 16/03/2011

Date of the position of the European Parliament, first reading: 16/11/2011

Date of adoption of the Council's political agreement in view of a Council's position at first reading: 12/12/2011

Date of adoption of the Council's position at first reading: 08/03/2012

**2. OBJECTIVE OF THE PROPOSAL FROM THE COMMISSION**

Infringement procedures, complaints received from stakeholders as well as different studies and reports on the implementation of the first railway package, have demonstrated that there was an opportunity to improve the current regulatory framework.

In this context, beyond simplification and increasing transparency, the Commission proposal to recast the first railway package aims to address (a) the adequate financing of and charging for rail infrastructures, (b) the conditions of competition on the railway market, and (c) the organisational reforms needed to ensure appropriate supervision of the market:

- (a) Ensuring adequate, transparent and sustainable funding of the infrastructure and, thanks to better predictability of the infrastructure development and access conditions, facilitating investments by railway undertakings, together with a more appropriate level and structure of infrastructure charging, improving the competitiveness of rail operators vis-à-vis other transport modes and contributing to the internalisation of environmental costs constitute the first objective of the proposed recast.

- (b) Avoiding distortions of competition due to the use of State funds for commercial activities, preventing commercially sensitive information from being collected by incumbents and used against their potential competitors, eliminating conflicts of interest in the management of rail-related services and increasing their availability for new entrants as well as increasing market transparency to ensure effective competition are a second set of objectives.
- (c) Regarding regulatory oversight, the proposed recast intends to ensure that regulatory bodies are in a position to carry out their duties effectively, thanks to reinforced independence, extended competencies, and additional means at their disposal.

### **3. COMMENTS ON THE POSITION OF THE COUNCIL**

#### **3.1 General comments on the position of the Council**

The Council reached a political agreement on 12 December 2011 and a position in first reading on 8 March 2012 by qualified majority. While still being in line with the general objective of simplification and increasing transparency by consolidating three existing directives and their modifications, the Council weakened the Commission proposal concerning access to rail-related services, infrastructure financing, infrastructure charges and powers of the regulatory body. In some cases, the Council's position confirms existing law without further improvement despite the various reasons for such efforts listed above in section 2. In this regard, the Council's position would be improved by taking into account some amendments adopted by the European Parliament.

#### **3.2 Detailed Commission comments**

The detailed comments are presented according to the main fields of activity covered by the draft directive.

##### 3.2.1 General provisions (articles 1 to 3)

The Council's changes mostly aim at further clarification and simplification of existing provisions and are therefore acceptable for the Commission.

##### 3.2.2 Management independence; separation of infrastructure managers and transport operators (articles 4 to 7)

Once again, the Council's changes mostly aim at further clarification and simplification of existing provisions. The Commission can therefore accept these improvements.

##### 3.2.3 Improvement of the financial situation of infrastructure managers and railway undertakings (articles 8 and 9)

The Council links the requirement of balancing the accounts of the infrastructure manager to the contractual agreement between the competent authority and the infrastructure manager which may cover a longer period and is therefore provides a poorer basis for ensuring effective long term planning and implementation of infrastructure investment than the Commission proposal.

##### 3.2.4 Access to railway infrastructure and services (articles 10 to 13)

Most changes introduced by the Council are in line with the general objective of the Commission proposal. However, the Commission finds it regrettable that the requirement of a legal separation between railway undertakings holding a dominant position and operators of service facilities is reduced to independence in organisational and decision-making terms and to an obligation to have separate accounts. This will make it more difficult in practice to ensure full transparency and equal treatment between rail undertakings.

The reversed burden of proof in relation to the existence of viable alternatives is weakened.

Finally, the obligation to make available a service facility which is not in use, on a rent or lease basis, to another interested party is retained in the Council's position but in case of an explicit interest by railway undertakings for access to this facility on the basis of demonstrated needs and after an extended non-use period to 3 years instead of 2 years in the Commission proposal.

### 3.2.5 Cross-border agreements (article 14)

The Council's position detailing further the process to be followed to ensure compliance of cross-border agreements with EU law is acceptable for the Commission.

### 3.2.6 Monitoring tasks of the Commission (article 15)

The Council's changes specifying those tasks are acceptable for the Commission.

### 3.2.7 Licensing of railway undertakings (articles 16 to 25)

The Council has introduced a small number of changes to the Commission proposal that aim at the clarification of existing provisions and are acceptable for the Commission.

### 3.2.8 Infrastructure charges and allocation of infrastructure capacity (article 26 to 54)

Most changes introduced by Council aim at the clarification of existing provisions and are therefore acceptable for the Commission.

However the Commission regrets that the Council weakened its proposal by making only optional differentiation of charges on the basis of noise performance or the use of ERTMS as well as the introduction of reservation charges.

The Council reduced the minimum time period of the contractual agreement between the competent authority and the infrastructure manager for infrastructure planning and financing to 3 years; the Commission strongly believes its initial proposal of 5 years represented a good compromise, and (as with Art 3.2.3) the Council position will undermine long term investment.

Council included a provision allowing for full cost recovery for freight transport from and to third countries on a network whose track gauge is different from the main rail network within the EU. The Commission believes that such an exemption cannot be justified by such a purely technical as opposed to economic or operational difference.

### 3.2.9 Regulatory body (articles 55 to 57)

Most changes introduced by the Council result in weakening the position of the regulatory body in comparison with the initial proposal of the Commission. The Commission regrets that the Council made purely optional the possibility for regulators to intervene on financing issues (in particular in the adoption of infrastructure business plans, contractual agreements with National authorities and congestion plans). The Commission continues to believe that clearer requirements to protect the independence of regulators' staff are justified.

#### 3.2.10 Final provisions (articles 58 to 67)

In some cases, the Council restricted powers to the Commission to adopt delegated or implementing acts but the outcome is still acceptable for the Commission. While the Commission regrets a restrictive approach in determining the essential nature of specific annexes, the majority of changes would give to the Commission further possibilities to ensure harmonised implementation of the legislation and can therefore be considered acceptable.

The Council proposes 36 months for transposition. The Commission considers that a shorter deadline as foreseen by Parliament would be preferable.

#### **4. CONCLUSION**

The present proposal is particularly important to reach the objectives set out in its communication "Roadmap to a Single European Transport Area – Towards a competitive and resource efficient transport system" adopted on 28 March 2011. It should also pave the way to new Commission initiatives in 2012 to foster further market integration in rail transport and should therefore be adopted by co-legislators as soon as possible.

Despite the weakening of several provisions, the Commission considers that the Council's position reflects the main objectives of its proposal and therefore believes that the legislative process and the discussion with the European Parliament should continue in second reading.