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DRAFT STATEMENT OF THE COUNCIL'S REASONS

Subject: Position at first reading adopted by the Council with a view to the adoption of a Directive of the European Parliament and of the Council establishing a single European railway area (Recast)
- Draft Statement of the Council's reasons

I. INTRODUCTION

On 21 September 2010, the Commission presented to the Council its proposal for a Directive of the European Parliament and of the Council establishing a single European railway area (Recast).¹

On 16 November 2011, the European Parliament voted its opinion at first reading².

On 12 December 2011, the Council reached a political agreement on the draft Directive. Following legal/linguistic revision, the Council adopted its position at first reading on [...], in accordance with the ordinary legislative procedure laid down in Article 294 of the Treaty on the Functioning of the European Union.

In carrying out its work, the Council took account of the opinion of the European Economic and Social Committee and of the Committee of Regions.

¹ Doc.13788/10

² TA/2011/503/P7

II. ANALYSIS OF THE POSITION AT FIRST READING

1. General

The proposal for a Directive of the European Parliament and the Council establishing a single European railway area (Recast) aims to recast the first railway package in order to simplify, clarify and modernise the regulatory environment in Europe's railway sector whilst making progress towards the Europe 2020 strategy. The objective of the recast initiative is to provide legal simplification through consolidating and clarifying the legislation on access to the rail market. Furthermore, the intention is to update the legislation by eliminating outdated provisions and by introducing new provisions which respond more appropriately to the functioning of the railway market today.

The recast proposal presented by the Commission encompasses mainly:

- the financing of and charging for rail infrastructures;
- the conditions of access to and competition on the railway market;
- the regulatory supervision of the railway market.

Although the Council agrees with the Commission as regards the objective of the proposal, the Council's approach involves several modifications of the original proposal. A number of the proposed provisions are not acceptable because they are considered to have a too far-reaching impact, in particular on the conditions for access by railway undertakings to service facilities, on the principles of charging for the use of railway infrastructure and of service facilities as well as on the functions of the regulatory body. Others are redrafted with a view to simplifying and clarifying the existing three Directives.

Resulting from this approach, the Council's first reading position modifies, to a certain extent, the original Commission proposal by redrafting it and deleting several provisions of the text. This implies that the amendments introduced in the European Parliament's first-reading opinion related to these deleted provisions cannot be accepted by the Council.

2. Key policy issues

- i) Conditions of access by railway undertakings to service facilities and to the services supplied in these facilities (Article 13 and Annex III)

In order to provide proper market access for new railway undertakings and thereby increase competition in the railway sector, the Commission proposes to introduce independence requirements, namely legal, organisational and decision-making independence for the management of service facilities and for rail transport provision to eliminate conflicts of interest between, on the one hand, the rail-related service providers or owners of the service facilities and, on the other hand, incumbent railway undertakings.

The Council considers that the Commission proposal needs to be modified in this respect, in order to replace the reference to "legal independence" by the requirement of independence "in organisational and decision-making terms". More specifically, the Council introduces a distinction between the essential services facilities for which an increased level of competition needs to be guaranteed, on the one hand, and the remaining services facilities, on the other hand. For the latter, the Council provides for the separation of accounts only; for the essential services facilities whose access needs to be improved, the requirement of independence in organisational and decision-making terms is introduced by the Council.

Moreover, the Council adds that such independence shall not imply the requirement of the establishment of a separate body or firm for service facilities and may be fulfilled with the organisation of distinct divisions within a single undertaking.

Besides, in its original text, the Commission proposes the introduction of "use-it or lease-it" provisions for the management of rail-related service facilities. When a service facility has not been in use for a certain time period, it must be made available by its owner (on a rent or leave basis) to another interested party. The proposed measure aims at increasing the availability of facilities in the market by avoiding problems of artificial saturation.

The Council agrees with the proposed approach but suggests setting the time period of three years against two years in the Commission original proposal. In addition, the Council considers that the railway undertaking will have to express to the operator an interest to use the facility which shall be based on demonstrated needs. Finally, the Council adds that the operator shall have the right to prevent the lease and rent of that facility by demonstrating that a process of reconversion is going on.

The European Parliament suggests imposing a broader scope for the separation requirements in Article 13 paragraph 2, while the Council does not accept to have additional service facilities subject to the separation requirements.

In this context, amendment 62 of the European Parliament was not accepted by the Council.

- ii) Principles of charging and exceptions to charging principles (Articles 31, 32 and Annex VIII)

Direct costs

In its original proposal, the Commission provides that the charges for the "minimum access package" for services laid down in Annex III. Point 1 shall be set at the cost that is directly incurred as a result of operating the train service, according to Annex VIII. Point 1. The latter includes a list of elements to be excluded when calculating the direct costs of the minimum access package. The Commission proposes to provide the possibility to amend it through delegated acts.

The Council supports the principle that the charges for the minimum access package and for access to infrastructure connecting service facilities shall be set at the cost that is directly incurred as a result of operating the train service but considers that Annex VIII-Point 1 is to be removed and that the methodology for the calculation of direct costs incurred as a result of operating the train services is to be adopted through implementing acts in order to ensure the harmonised implementation of this Article. Finally, the Council also introduces the possibility for the infrastructure manager to decide to gradually adapt to the methodology for calculating direct costs during a period of five years after the deadline for transposition of the Directive. This provision aims at giving time to Member States to increase gradually their infrastructure funding to comply with such common methodology.

Noise charging

The Commission proposes that, when charging the cost of noise effects, allowed by Union law applicable to road freight transport, the infrastructure charges shall be modified to take account of the cost of noise effects caused by the operation of the train. The proposed differentiation of track access charges based on the noise emission aims to create a clear incentive to modernise the rolling stocks.

The Council considers that the Commission approach concerning the charging for the cost of noise effects needs to remain an optional system for Member States so as to avoid negative financial implications for infrastructure managers. Furthermore, the possibility for the Commission to adopt implementing measures to set out the modalities to be followed for the application of the charging for the cost of noise effects is introduced, ensuring that differentiation of charges takes into account, where appropriate, the sensitivity of the area affected, in particular in terms of the size of the population affected and the train composition with an impact on the level of noise emissions.

European Train Control System

The proposal presented by the Commission provides that trains equipped with the European Train Control System (ETCS) shall enjoy a temporary reduction of the infrastructure charge. The Council supports an optional approach and is opposed to any compulsory measure in this respect.

In general terms, the European Parliament follows the Commission approach as regards the basic rules for infrastructure charging. It even suggests reinforcing the Commission proposal regarding the conditions for noise charging, and in particular to make it compulsory independently of measures in the road sector. The Parliament also insists to make the reduction of charges for trains equipped with ETCS a compulsory measure. Furthermore, the Parliament proposes to restrict the possibility to charge for other environmental costs only if such charging is applied by Union legislation for road freight transport and insists to earmark potential revenues to the benefit of transport systems.

In this context, the Council could not take into consideration amendments 78, 79, 80 and 132.

iii) Financing of the infrastructure manager and infrastructure cost and accounts (Articles 8, 30 and Annex VII)

In its original proposal, the Commission lays down that infrastructure managers shall be given incentives to reduce the costs of providing infrastructure and the level of access charges. It is proposed that the implementation of these incentives can only be done through a contractual agreement between the national competent authority and the infrastructure manager on infrastructure costs and access charges. The Commission proposal also provides that the contractual agreements between the national authorities and infrastructure managers are concluded for a period of not less than five years. The overall objective of the Commission on this issue is to stimulate the introduction of long-term strategies for the development of railways.

The Council agrees in principle with the Commission approach on this issue but prefers to retain the possibility to apply regulatory measures for the implementation of the above incentives, as an alternative to the above mentioned contractual agreements, as well as to reduce the minimum duration of contractual agreements to three years. In addition, the Council proposes to clarify that it is the responsibility of Member States to determine the level of public funding to be provided for infrastructure financing.

The Council shares the Commission objective to establish a development strategy for railway infrastructure managers provided that the publication of this strategy remains indicative. Moreover, the Council is not in favour of introducing a fixed deadline to guarantee the balance of infrastructure managers' accounts and prefers to refer to a reasonable period which shall not exceed the period of the contractual agreement referred to in Article 30 (2).

The European Parliament suggests increasing the duration of national infrastructure development strategies, to extend the consultation of the interested parties on the development strategies, to reinforce Member States' obligation to provide public financing and to reduce the deadline proposed by the Commission in its original text to guarantee the balance of infrastructure managers' accounts. In this context, amendments 55 and 78 of the European Parliament were not accepted by the Council.

iv) Separation between infrastructure managers and railway undertakings (Article 6 and 7)

The Council shares the Commission approach not to tackle the separation between infrastructure managers and railway undertakings in the context of the recast proposal establishing a single European railway area.

The European Parliament however suggests introducing specific requirements in relation with IT services and staff policies. Moreover, the Parliament modifies the existing requirements concerning the separation of accounts between infrastructure managers and railway undertakings. Finally, the Parliament invites the Commission to present a new legislative proposal on this issue before the end of 2012 to ensure a complete separation of infrastructure management from transport operations; the Parliament insists that the new proposal should also provide for the opening of the domestic rail passenger market.

The Council could therefore not take into consideration amendments 51, 52, 53 and 54.

v) Functions of the Regulatory Body (Articles 55-57)

The Commission proposal contains several new provisions, which aim to ensure that regulatory bodies are in a position to carry out their duties effectively, building on reinforced independence, extended competences and additional means at their disposal.

It is therefore proposed to modernise the provisions on regulatory bodies' independence by stipulating that they must be independent from any public or private authority. The proposed measure aims to reduce the potential for conflict of interest and thereby enhance the oversight capacity of regulatory bodies.

Furthermore, the Commission proposal includes the extension of the competencies of regulatory bodies to the following functions: (1) decisions related to access to and charging for rail-related services which are essential to allow market entry and ensure fair competition; (2) preventing State funds devoted to unprofitable activities from being shifted to finance commercial activities; it is also proposed that regulatory bodies will have the power to carry out audits or to initiate external audits with the railway undertakings and infrastructure managers to verify compliance with accounting separation provisions laid down in Article 6. Finally, in its recast initiative, the Commission proposes that cost-accounting data are to be provided by infrastructure managers in an aggregated and standardised format as "regulatory accounts" in order to allow regulatory bodies to operate more effectively.

Although the Council generally follows the Commission approach as far as the reinforcement of the regulatory bodies is concerned, it however considers it necessary to review the proposed provisions regarding independence requirements for regulators' staff. Moreover, the Council makes optional the possibility for the regulator to intervene on financing issues and the publication of regulatory accounts is not accepted by the Council.

The Council also decides to give the regulatory body the power to monitor the competitive situation in the rail services markets and to adopt appropriate measures to correct undesirable developments in these markets, without prejudice to the competences of the national competition authorities for securing competition. The Council also agrees on the principle to create a coordinated cooperation framework between the national regulatory bodies.

The European Parliament intends to give extensive power to national regulatory bodies in supervising the implementation of the Directive and suggests further reinforcing the independence and means of the national regulators, while limiting at the same time their existing power to the correction of undesirable developments of the market. Finally, the European Parliament also supports the formalisation of the cooperation between national regulators through the creation of a network and introduces a request to the Commission to issue a legislative proposal concerning the establishment of a European regulatory body.

In this context, the Council did not take on board amendments 48, 96, 97, 98, 99 and 100.

vi) Delegated acts and implementing acts

In the initial Commission proposal, delegated acts are proposed as an instrument to amend various annexes, including their sections.

The Council considers however that the annexes and sections for which the Commission should be empowered to adopt delegated acts have to be reduced and be limited to certain amendments to Annexes V, VIII point 4c, IX and X. The Council removes therefore the possibility for the Commission to adopt amendments to Annex I (railway infrastructure items), II (essential functions of an infrastructure manager), III (services to be supplied to the railway undertakings), VI (network statement), VII (contractual agreement), part of Annex VIII (charges) by delegated acts on the grounds that these annexes contain essential elements.

In addition, the Council introduces implementing measures for the adoption of uniform conditions of application of certain elements in the annexes and sections, such as Article 13 on the conditions of access to rail-related services, Article 31(3) to establish a method for the calculation of direct costs, Article 31(5) to establish a common method for noise charging, Article 32 to establish a common method for ETCS modulation.

In general terms, the European Parliament suggests either restricting further or removing powers from the Commission to adopt delegated acts; in addition, the Parliament rejects the use of implementing acts for the adoption of uniform conditions of application of certain elements in the annexes and sections.

In this context, amendments 62, 65, 68, 69, 70, 71, 72, 76, 78, 80, 81-82, 87 were not accepted by the Council.

3. Other policy issues

In general terms, the Council rejects those EP amendments which do not respect the provisions of the Inter-Institutional Agreement on a more structured use of the recasting technique for legal acts (2002/C 77/01). In point 8 of this Inter-Institutional Agreement, it is stated that *"where, in the course of the legislative procedure, it appears necessary to introduce substantive amendments in the recasting act to those provisions which remain unchanged in the Commission proposal, such amendments shall be made to that act in compliance with the procedure laid down by the Treaty according to the applicable legal basis"*.

The Council considers that the EP amendments that concern provisions not included in the Commission recast proposal are not indispensable for reasons of coherence and clarity. Consequently, the Council could not take into consideration amendments 16, 17, 27, 29-30, 33, 36, 38, 39, 40, 51, 52, 53, 57, 59, 67, 73, 85, 88, 89, 90, 94 and 95.

4. Other amendments adopted by the European Parliament

Further EP amendments not included in the Council's first-reading position concern the:

- inclusion of additional requirements relating to information and ticketing for passengers (amendment 57);
- provisions governing the deadlines for the decisions of national regulatory bodies (amendment 59);
- extension of the scope of market monitoring to employment and working conditions as well as to the investments in railway infrastructure (amendment 65);

- requirement according to which the applicant railway undertaking shall also demonstrate at the time of the application that it holds a safety certificate (amendment 73);
- obligation to publish the network statement in English (amendment 75);
- restrictive deadline imposed to the infrastructure manager to inform interested parties about unscheduled maintenance work (amendment 93);
- transposition deadline of 12 months (amendment 112);
- reinforced provisions concerning services available to passengers at station (amendment 115);
- inclusion of a reference to Directive 2009/72/EC as far as the supply of traction current is concerned (amendment 115);
- extension of the information for Rail Market Monitoring as referred to in Annex IV. Point 1 to the collection of data on incidents, accidents and serious accidents (amendment 116);
- additional requirements relating to cover for civil liability (amendment 140).

III. CONCLUSION

In establishing its position at first reading, the Council has taken full account of the proposal of the Commission and of the European Parliament's opinion at first reading. With respect to the amendments proposed by the European Parliament, the Council observes that a certain number of amendments have – in spirit, partially or fully – already been included in its first-reading position.
