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Delegations will find attached Commission document COM(2012) 426 final .

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EUROPEAN COMMISSION

Brussels, 23.7.2012  
COM(2012) 426 final

2010/0253 (COD)

**OPINION OF THE COMMISSION**

**pursuant to Article 294(7)(c) of the Treaty on the Functioning of the European Union,  
on the European Parliament's amendment[s]  
to the Council's position regarding the  
proposal for a**

**DIRECTIVE OF THE EUROPEAN PARLIAMENT  
AND OF THE COUNCIL**

**establishing a single European railway area (Recast)**

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**1. INTRODUCTION**

Article 294(7)(c) of the Treaty on the Functioning of the European Union provides that the Commission is to deliver an opinion on the amendments proposed by the European Parliament at second reading. The Commission sets out its opinion below on the single comprehensive amendment voted by the Parliament.

**2. BACKGROUND**

Proposal of the Commission:	17.09.2010
Proposal transmitted to the European Parliament and the Council:	21.09.2010
Opinion of European Committee of Regions:	28.01.2011
Opinion of European Economic and Social Committee:	16.03.2011
TTE Council general approach:	16.06.2011
European Parliament position in first reading:	16.11.2011
Council position in first reading:	08.03.2012
Communication of the Commission on the Council position in first reading:	12.03.2012
Transmission of the Council position in first reading to the European Parliament:	12.03.2012
Endorsement of the second reading agreement by Coreper :	19.06.2012
Adoption by the European parliament in plenary session:	03.07.2012

**3. 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 which needs to be taken to fully meet the objectives of the legislation.

In this context, the Commission proposal to recast the first railway package aimed 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.

#### **4. OPINION OF THE COMMISSION ON THE AMENDMENT BY THE EUROPEAN PARLIAMENT**

A number of informal contacts took place between the Council, the European Parliament and the Commission with a view to reaching an agreement on this dossier at second reading. Following these contacts, an overall compromise amendment was voted by the plenary on 3 July 2012. The Commission endorses this comprehensive compromise amendment on substance.

##### **4.1. Amendments of the European Parliament at second reading**

The Council's position at first reading has already been endorsed by the Commission (see the Commission's opinion on the Council's position<sup>1</sup>). The most important changes introduced by the comprehensive amendment of the European Parliament to the Council's position voted on 3 July 2012 are as described hereunder.

- In relation to infrastructure financing, the second reading agreement (a) introduces a new obligation to consult stakeholders on the national infrastructure development strategy, (b) clarifies that the period to balance the account of infrastructure managers shall not exceed 5 years, (c) extends the minimum duration of contractual agreements increased from 3 to 5 years and (d) ensures that contractual agreements can cover the development of new infrastructures.

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<sup>1</sup> *COM(2012) 119 final*

- In relation to infrastructure charging, the second reading agreement (a) makes compulsory the modulation of infrastructure charges on the basis of the equipment of trains with the ETCS (signalling system) circulating on ERTMS corridors, (b) makes compulsory reservation charges in specific circumstances under regulatory bodies' control, (c) obliges the Commission to set up common implementing rules for noise charging with the principle of non-distortion of competition and effective incentive to retrofit, (d) extends the method to apportioning costs to all services offered by infrastructure managers and (e) obliges infrastructure managers to demonstrate to railway undertakings that invoices comply with charging rules.
- In relation to market access conditions, the second reading agreement (a) makes mandatory the adoption of implementing rules to determine the purpose of a service, to assess impact on public service contracts and to introduce levies, (b) extends the principle of non-discriminatory access to essential facilities as for essential services, (c) extends the application of separation requirements to refuelling facilities and storage sidings, (d) ensures that regulatory bodies set time-limits to answer requests for access to essential facilities/services, (e) introduces restrictive definition of the concepts of "alternative route" and "viable alternative", (f) provides for a differentiated treatment of heavy maintenance facilities dedicated to high speed rolling stock, (g) reduces from 3 to 2 years the period after which the "use-it-or-lease-it clause" applies and (h) ensures that principles of capacity allocation established by associations of infrastructure managers are published in network statements.
- In relation to separation between infrastructure managers and railway undertakings, the second reading agreement (a) ensures that the accounts to be published by infrastructure managers and railway undertakings allow the monitoring of the use of infrastructure charges as well as the use of revenues from other commercial activities and (b) calls on the Commission to present a report and, if appropriate, to propose legislative measures to develop appropriate conditions to ensure non-discriminatory access to the infrastructure, building on the existing separation requirements.
- In relation to regulatory oversight, the second reading agreement (a) sets reduced and clearer deadlines for regulatory bodies' decisions, (b) ensures that their means are adequate to the importance of the rail sector, (c) establishes stringent rules for regulatory bodies' staff appointment (with no conflict of interest for the authority in charge and transparent selection criteria) and to guarantee their independence (cooling on/off periods of minimum one year, mandatory declaration of interest), (d) makes compulsory a regular consultation of users, (e) reinforces the regulatory bodies' control on the introduction of mark-ups by infrastructure managers, (f) give to regulatory bodies the possibility to issue recommendations to licencing and safety authorities, (g) creates a network of regulatory bodies with compulsory exchange of information, (h) ensures that the Commission is a member of this network, coordinating and support it work and making recommendations as appropriate, (i) allows regulatory bodies to request the Commission to examine specific measures adopted by national authorities in relation to the application of the directive and (j) obliges the Commission to issue a report on the cooperation between regulatory bodies and, if appropriate propose complementary measures to ensure a more integrated regulatory oversight of the European rail market.

- In relation to transposition and implementation deadlines, the second reading agreement provides for (a) 30 months for transposition of all provisions of the Directive and for the adaptation of the existing contractual agreement, (b) 4 years as from the adoption of the implementing act, to gradual adapt to the common modalities for the calculation of direct costs, (c) 2 years for the adoption by the Commission of a report on the cooperation between regulatory bodies.
- In relation to the scope of application, the second reading agreement introduces two new derogations on (a) timetabling requirements in case of cooperation on international train paths with third countries and (b) ECTS modulation in relation to aging locomotives used for regional passenger services.

#### **4.2. Comitology**

The second reading agreement confers on the Commission implementing powers in order to ensure uniform conditions for the implementation of the Directive. It makes sure that those powers will be exercised in accordance with Regulation (EU) No 182/2011 for the adoption of implementing acts.

The agreement refers to nine specific cases - pursuant to Article 10(4), 11(4), 12(5), 13(9), 17(5), 31(3), 31(5), 32(4) and 57(7) of the Directive, where the third subparagraph of Article 5(4) of Regulation (EU) N° 182/2011 shall apply. In those cases, the Commission shall not adopt an implementing act if the committee delivers no opinion. In three other cases – pursuant to Article 15(6), 41(3) and 42(8) - the normal procedure under Article 5(4) shall apply.

Cases where Article 5(4) subparagraph 2, point b) of Regulation 182/2011 for the adoption of implementing acts will apply have been justified by reasons of their potential impact on public finances or on the functioning of the rail market. However such justification is not reflected in a recital. Given that it is an exception to the general rule established by Article 5 § 4, the Commission considers that recourse to subparagraph 2, point b), cannot be simply seen as a "discretionary power" of the legislator, but must be interpreted in a restrictive manner and thus must be justified.

#### **5. CONCLUSION**

The European Parliament adopted its second reading comprehensive amendment on 3 July 2012 following informal contacts with the Council and the Commission. While the Commission confirms that it endorses the overall compromise amendment voted as it reflects the main objectives of its proposal, the agreement on comitology procedures however has led the Commission to make the following statement:

*"The Commission underlines that it is contrary to the letter and to the spirit of Regulation 182/2011 (OJ L 55 of 28.2.2011, p. 13) to invoke Article 5 § 4, subparagraph 2, point b) in a systematic manner. Recourse to this provision must respond to a specific need to depart from the rule of principle which is that the Commission may adopt a draft implementing act when no opinion is delivered. Given that it is an exception to the general rule established by Article 5 § 4 recourse to subparagraph 2, point b), cannot be simply seen as a "discretionary power" of the legislator, but must be interpreted in a restrictive manner and thus must be justified.*

*While the Commission supports the agreement reached by the European Parliament and the Council on the recourse to this provision in nine specific cases which they have justified by*

*reasons of their potential impact on the functioning of the rail market and public finances, it regrets that such justification is not reflected in a recital."*