

# CER POSITION PAPER



## THE THIRD RAILWAY PACKAGE

MAY 2004

*The Voice of European Railways*



COMMUNITY OF EUROPEAN RAILWAY AND INFRASTRUCTURE COMPANIES  
COMMUNAUTÉ EUROPÉENNE DU RAIL ET DES COMPAGNIES D'INFRASTRUCTURE  
GEMEINSCHAFT DER EUROPÄISCHEN BAHNEN UND INFRASTRUKTURGESELLSCHAFTEN

*The European Commission published its “Third Railway Package” on 3 March 2004.*

*The package consists of a Directive amending 91/440/EC (on the liberalisation of international passenger services), two Regulations –one on international rail passenger rights and one for freight services– and a Directive on train crew certification.*

*CER, the Community of European Railway and Infrastructure Companies, would like to state its position on the package.*



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## EXECUTIVE SUMMARY

This position paper should be viewed in the light of CER's commitment to the overall aims and principles of EU transport policy. As Community legislation evolves, railway companies are competing with other transport sectors as well as with each other, a single European market is developing and rail businesses are focussed on service quality improvement. CER welcomed the finalisation of the Second Railway Package, and continues to contribute actively to the development of further legislation.

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CER acknowledges the progressive liberalisation of the rail sector. In the proposed **passenger liberalisation Directive**, the Commission has taken account of a number of points previously raised by CER but there are still important issues requiring attention.

By including cabotage, the proposal opens not only international passenger services, but also to some extent domestic services. This may have far reaching consequences in some countries.

Public service contracts play a very important role in the rail passenger sector and it is vital that they are not adversely affected by open access services. While the proposed Directive attempts to address this need, the way in which this protection will be interpreted and implemented into national legislation and regulations will be of decisive importance.

The opening up of the European rail market has to take into account the need for appropriate framework agreements for infrastructure access, subject to significant, long-term, public and private investments. It is crucial that investors can adopt

a long-term perspective to achieve a reasonable return on investment. Past and future investments in high-speed and other specialised infrastructure with their long pay-back periods, as well as investments in rolling stock, stations and other business assets, call for a stable and consistent legal and contractual framework supporting long-term business development and allowing for the necessary incentives. The provisions for framework agreements in Directive 2001/14 need to be revised and strengthened, especially for those services developed with specialised infrastructures and large investments. In these precise and limited cases framework agreements should set out the parameters of the capacity to be allocated in sufficient detail to give appropriate commercial assurance, and prevail over other applications for infrastructure capacity. The duration should correspond to the specific pay-back period.

On pricing, liberalisation increases the need for transport infrastructure charges – across all modes as well as within the rail sector – to be transparent, non-discriminatory, and reasonably stable over time. In addition, any tariff regulation for national services must also be applied to international services.

Public authorities need to tackle capacity constraints causing rail infrastructure congestion. The provisions for infrastructure capacity improvement plans in Directive 2001/14 should be strengthened; the recent, very welcome TEN Decision should be urgently implemented.

An evaluation of the impact of the proposal on the specific business situation of companies in the new EU Member States is necessary, in order to determine whether special measures are needed.

## EXECUTIVE SUMMARY



The success of the proposed liberalisation critically depends on how it is implemented nationally, and on progress with the essential political decisions described in this paper. There is clearly a need for an early review of the consequences of the Directive's implementation, in particular for national passenger services.

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In both the passenger rights and the freight services regulations, CER sees a contradiction between the **entrepreneurial responsibilities** of the market actors as explicitly established in European law<sup>1</sup> on the one hand and, on the other, the kind of **political intervention** now proposed by the Commission into the customer-supplier relationship. The rail sector, which is going through a phase of deep structural changes, must have clear and unambiguous political direction.

The basis for this must be well-defined political framework conditions, as have recently been adopted in Community legislation (freight liberalisation), or proposed by the Commission (international passenger liberalisation, public service contracts).

If political decision-makers see these framework conditions as the basis of their policy – getting the market actors to take their responsibilities for providing customer-focussed rail services – it is quite clear that there is no place for state interventions telling the same market actors, at the same time, how to run their business and what they are supposed to do.

On the proposed **international passenger rights Regulation**, CER is strongly committed to enhancing passenger rights, but not on the basis of a regulatory approach. CER has significant specific concerns about both the all-encompassing scope and the excessive detail in the proposal, which could, when taken together, have negative business consequences.

The proposal does not take proper account of the very varied business conditions in the international passenger market; nor of the railways' own 2002 Charter on Rail Passenger Services, in which the railways commit themselves to quality improvements and to enforceable passenger rights. Coupled with national initiatives, faster and broader progress is being made in this way than is possible through European legislation.

The proposal's scope should, as a minimum, be limited on the grounds of practicality to international train services only, and not include connecting journeys on regional and local services covered by a public service contract. The scope would then be consistent with that of the proposed revision of Directive 91/440.

The proposed liabilities and compensation levels mostly discriminate against rail. Road passenger transport has no EU legislation, and air travel regulations are generally less onerous. Specific serious concerns are: the thresholds for delay compensation; unlimited liability for consequential damages; the scope of delay liability; and higher personal injury liability (a particular burden for the new Member States).

1. Directive 91/440EEC on the Development of the Community's Railways, Articles 4 and 5



## EXECUTIVE SUMMARY

The proposal does not properly relate to the existing COTIF<sup>2</sup> rules. Recently revised and strengthened, the COTIF is a more appropriate international legal framework for the railways' binding commitments on passenger rights than an EU Regulation.

The scope proposed for international ticket issuing and information is excessive and does not recognise the need for a market-driven commercial policy. Allowing third party business access to information systems restricts and discourages competition.

An assessment of the financial consequences of the proposed Regulation is being carried out and will be completed as soon as possible.

This paper highlights the serious practical concerns with the present proposal, which should not go forward as it stands; more time should be allowed for the railways' own initiatives on passenger rights to take effect.

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CER is firmly committed to freight quality improvement: but is strongly opposed to the proposed **freight services Regulation**, which intervenes in commercial relationships for rail freight alone, as opposed to other freight transport modes.

Rather than encourage modal shift to rail, such a Regulation would increase rail's costs, and even actually discourage some customers from using rail

freight. The actual financial impact of the regulation is currently being evaluated. It is however already possible to say that the proposed regulation could lead to substantial price increases, distort competition with road and, at worst, severely jeopardize rail freight's economic viability (particularly for smaller, more recent operators).

Freight volume could suffer – with a knock-on effect on business margins – where freight operators chose to rationalise services passing through capacity bottlenecks to avoid penalty payments.

Generally speaking, compensation systems imposed by law do not automatically improve quality: particularly as responsibilities for rail system quality are shared between customers, railway undertakings, infrastructure managers and public authorities.

Moreover, the existing international legal framework provided by the CIM<sup>3</sup> imposes rules on the railways which are twice as strict as those for road freight: an even stricter regime cannot reasonably be justified.

CER supports the concept of quality commitments per se: the railways' 2003 Freight Quality Charter, and the railways' ongoing process of quality improvement, have already significantly boosted the number of quality agreements signed with rail customers.

2. Convention concerning International Carriage by Rail as amended by the Vilnius Protocol 1999

3. Convention Internationale Marchandises– which is applicable in 41 countries



## EXECUTIVE SUMMARY

Rail freight customers, with their varied business needs and expectations, are far from unanimous in their support for regulatory intervention in the market. A mandatory, regulated requirement could adversely affect customers whose first priority was price. Article 71 of the Treaty on the European Union (referred to in the proposed text) does not seem a sufficient legal basis for constraining contractual freedom between freight customers and their suppliers.

For these reasons, CER strongly opposes the proposed regulation and seeks its rejection.

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Finally, CER appreciates the Commission's intentions with the proposed **train crew certification Directive**: but has some specific concerns about its contents. CER regrets that the proposal does not take full account of the 2004 international agreement between CER and the European Transport Workers' Federation (ETF) on a European licence for train drivers.

The Directive should apply only to cross-border services. Legislation differences between Member States make this desirable. It should be further restricted to drivers, because of the limited and varied safety tasks carried out by other on-board staff.

Railway undertakings – and not competent authorities – should be responsible for driver assessment and for issuing the licence (as well as the complementary certificate). Nonetheless, it is welcome that railway undertakings may have delegated responsibility for delivery of the licence, and have full ownership of the complementary certificate. For operational reasons, CER does not

agree with the licence categorisation proposed (in particular the separate categories for passenger and freight trains).

CER is pleased that the Commission has taken some account of the CER-ETF agreement, particularly with regard to the importance of minimum health requirements and mandatory periodic checks. For practical reasons, these should however be fixed in the Traffic Management TSI, taking into account the content of the Annexes to the CER-ETF agreement.

Training methods and examination processes are the responsibility of individual railway undertakings, and should not be included in the Directive.

The economic impact statement shows the net benefits are low, especially in the second phase for domestic services.

CER supports the proposed implementation evaluation by the European Railway Agency, which will serve as a basis for, if necessary, new proposals from the Commission.

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While these proposals impact mainly on railway undertakings, the freight services and passenger rights Regulations have a wider rail system impact. The significant consequences and risks for infrastructure managers are described in the relevant sections of this paper.





# DIRECTIVE ON PASSENGER LIBERALISATION

## 1. The European Commission's proposal

The proposal for a Directive on Passenger Liberalisation<sup>4</sup> opens up international rail passenger services to competition. It consists of a Directive amending the articles in Directive 91/440<sup>5</sup>, which lay down the minimum rules for rights of access to operate rail services (access to the infrastructure).

For passenger rail services the existing rules grant access rights for international groupings of licensed railway undertakings to operate international services between their countries of origin and transit rights in other Member States. The individual Member States are free to prescribe wider access rights.

The Commission's present proposal will grant access rights (from 1 January 2010) in all Member States for any licensed EU railway undertaking to operate international passenger services. This right is extended to include the right to pick up and set down passengers at all stations along the route, including stations located in the same Member State (cabotage).

The proposal allows Member States to limit the rights of access to operate services on relations covered by a public service contract conforming to Community legislation in force. This limitation, however, may only be introduced where strictly necessary to maintain the economic equilibrium of the service defined in a public service contract – and only after approval of the national Regulatory Body.

4. 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 –COM(2004) 139

## 2. CER's assessment of the proposal

### 2.1 GENERAL

CER has contributed to the policy development in this area at a number of previous occasions and issued a general Position Paper on Passenger Liberalisation in November 2003. CER is satisfied to see that important parts of these contributions have been taken into account by the Commission in its present proposal.

Besides the fierce competition in the transport sector between rail and other transport modes, there is increasing intramodal competition within the rail sector. In the passenger rail business area, competition manifests itself in two different versions, each with its own scope of importance and relevance: Competition through access rights to the rail infrastructure ("competition in the market") and competition for contracts to deliver public service ("competition for the market"). To legislate and regulate passenger liberalisation appropriately, both approaches – and the way they interact – need to be taken into account.

There are a number of important issues which require careful consideration in the implementation process: these are discussed in detail in the following paragraphs.

5. "Directive 91/440/EEC on the development of the Community's railways" as amended by Directive 2001/12/EC (from the First Railway Package) and Directive 2004/51/EC (from the recently approved Second Railway Package)

### 2.2 CONSEQUENCES OF THE INCLUSION OF CABOTAGE

The guiding policy behind the proposed Directive is a progressive opening up of the rail transport market. Concerning the passenger sector, the proposed liberalisation of access rights to deliver international services marks a decisive step in this process. Cabotage has been added to this step for economic reasons, to make international traffic in general more attractive for operators.

The inclusion of cabotage, however, will clearly impact on the national passenger markets, partly depending on geography and service structure. The right to pick up and set down also domestic passengers along the route of any cross-border train is important for the economic viability of most international services, but may also in some countries have far-reaching consequences for the domestic markets, changing business conditions for the European passenger rail market in general – not only for the minor segment (approximately 10 % on a European average) consisting of passengers travelling on cross-border tickets.

By including cabotage, the Commission's proposal will therefore open not only international passenger services, but also to some extent domestic services.

### 2.3 PROTECTION OF PUBLIC SERVICE CONTRACTS

Public service contracts play a very important role in the rail passenger sector. This concept usually contains a financial compensation from the responsible public authority to the service provider, often combined with exclusivity (at least to a well-defined, pre-arranged degree) to keep total costs down. Moreover, this regime can be seen as a complementary model to the open access regime for liberalisation of passenger services, through appropriate arrangements for competition for a contractual package to deliver a (public) service, which the market would not deliver if left to itself.

These two regimes for liberalisation of the rail passenger market are not mutually exclusive, but complementary modes to introduce competition. They address different markets and different parts of the rail business sector. This is very clearly reflected in the choices made so far in the different Member States and the experiences already gained. The open access regime by its very nature addresses services, which are or could be commercially profitable without compensation from the public hand.

The European Commission is clearly – and rightly – attempting in its proposal to secure adequate protection of services operated according to a public service contract against possible negative consequences from open access services. CER is satisfied to see this important aspect – advocated by CER in different political contexts, recently in its general Position Paper (dated November 2003) on Passenger Liberalisation – taken into account by the Commission.



The way in which this protection will be interpreted and implemented into national legislation and regulation will clearly be of decisive importance. CER sees the need to discuss this issue, including the complex notion of “economic equilibrium”, with the European Commission and the political decision makers.

In public service contracts core components are either compensations for public service obligations or exclusivity or a combination of both; the economic equilibrium of the public service is therefore based on these elements and when one of these is changed, the consequences for the whole construction need to be taken into account. Affecting the exclusivity implies by definition affecting the economic equilibrium of the public service contract.

Some public service contracts on the basis of the present Regulation 1191/69 concern services on a specific route. Very often, however, contracts concern a whole combination of services on different routes or a well-defined network service. The economic equilibrium of a public service contract is in most cases not defined for a certain route, but for the total sets of routes covered by the contract. The combination of services/routes is therefore very often one of the main components of a very complex economic equilibrium; isolating and changing one of these components leads to putting at risk this delicate equilibrium.

### 2.4 THE CONTRACTUAL FRAMEWORK FOR LONG-TERM BUSINESS DEVELOPMENT AND INVESTMENT INCENTIVES

The opening up of the European rail market has to take into account the need for appropriate and flexible framework agreements for access to infrastructure, subject to significant, long term, public and private investments, especially high-speed or other specialised infrastructure. It is vitally important to ensure that investors can employ a long term perspective to achieve a reasonable return on investment. Otherwise it will be impossible to attract the investment, the innovation and the continued improvement of value against cost, which is absolutely necessary for the further development of the rail mode, both in terms of becoming a healthy, competitive business sector and in terms of satisfying the political demands for a substantial contribution towards increased sustainability of the transport system.

Past and future investments in specialised infrastructure with their long pay-back periods, but also investments in rolling stock and other business assets such as maintenance facilities or stations, call for a stable and consistent legal and contractual framework supporting long term business development and allowing for the incentives necessary to invest in specific and long term assets.

The existing legal framework (Directive 2001/14) contains certain rules with the intent of guaranteeing appropriate, long term pay-back periods for investments, taking into account the existence of specific investments or business risks that allow the conclusion of longer term framework agreements. These rules are valuable, but not sufficient: They need to be further discussed and extended, especially within the scope of services developed with specialised infrastructures and huge investments.

In view of their overarching importance for the desired development in the rail sector, the provisions concerning framework agreements should in certain precise cases (use of specialised infrastructure – and, as a consequence, of direct feeder lines – or other heavy investments) be revised into firm commitments concerning the characteristics of the infrastructure capacity. The framework agreement should set out the parameters of the capacity to be allocated to the applicants in such detail as is necessary to give the applicants appropriate commercial assurance, without writing the timetable in advance. These framework agreements concerning precise and limited cases would prevail over applications for infrastructure capacity when the annual working timetable is prepared by the infrastructure manager. To ensure the necessary certainty for investment in high-speed infrastructure the duration of a framework agreement should correspond to the individual pay-back period. According to the existing provisions of Article 17 of Directive 2001/14, framework

agreements extending beyond 10 years are already possible, but only as an exception. Article 17 also leaves it to the discretionary power of the Member States to put framework agreements under the condition of prior approval by the national regulatory body. CER advocates that framework agreements for specialised infrastructure with a duration corresponding to the pay-back period should be considered as the general principle (not as the exception) and should be possible without the need of prior approval by the national regulatory body. The conclusion of such framework agreements should not be refused by the infrastructure manager.

### 2.5 THE IMPORTANCE OF ACCESS CHARGES

Infrastructure access charges are among the key factors for economic viability for all transport sectors – and for the intermodal and intramodal competitive situation. Harmonisation, both of calculation rules and – politically more complex – of levels would be beneficial. On international routes different modes of calculation of access charges will be (re)creating barriers. As a clear stand on this issue could not be reached in the First Railway Package, and as the announced intermodal framework Directive on access charges was not proposed by the Commission, access charges constitute a vital problem for freight services and will be all the more so for passenger services in open access.

In an open access regime it would be especially important to ensure that access charges are transparent and predictable for a certain period of time and will be applied in a non-discriminatory way for all users of rail infrastructure, as well as between transport users of different modes. The access charges will impact heavily on the economic interest of actual and potential service operators, influencing the scope and possibilities both for public service and open access services.

### 2.6 LIBERALISATION OF TARIFFS

Liberalisation of international passenger transport, including cabotage, based on open access to the infrastructure requires the establishment and transition, where this is not yet the case, to a properly functioning market for these services, in which different operators can compete leveraging on all competition areas, i.e. fares, quality, frequency of service, etc.

In countries with price regulation, allowing the providers of international services to be the only operators not subject to tariff regulation for national transport would distort competition, giving them an unfair leverage both against incumbents and against possible new operators on national services.



### 2.7 CONGESTED INFRASTRUCTURE, BOTTLENECKS AND MISSING LINKS

The Commission, in opening up the international rail passenger transport market, aims at revitalising the rail sector by increasing both supply and supply quality, in order to make the train more attractive for passengers and induce customers to prefer rail instead of other more polluting transport modes.

However, supply cannot increase where the infrastructure is congested, which is already the case for a number of essential nodes and lines of the network, resulting in new operators simply operating in the place of the previous operators. In order to achieve a higher added value of the liberalisation of rail services, public authorities have to take on their responsibilities by providing for the necessary capacity within a reasonable timeframe. Directive 2001/14 already requires the development of capacity enhancement plans in the case of congested infrastructure; a formal obligation of implementation of these plans with a consistent fund allocation, which is not embedded in the current legislation, should be inserted to make this provision effective.

International missing links, bottlenecks and congested infrastructure are hampering traffic development. In this context CER welcomes the finalisation of the revision of the legal framework for the Trans-European Transport Networks. The TEN Decision properly highlights the financing and realisation problems of large railway projects.

CER calls for an urgent implementation of the Decision, including its new legal and organisational arrangements, and for a substantial increase of the EU TEN budget, which is at present extremely limited compared to the infrastructure needs acknowledged both by the European Parliament and the Council.

## 2.8 CONCLUSION

CER acknowledges the progressive opening of the rail sector, through successive revisions of Directive 91/440 and the ongoing revision of Regulation 1191/69 on public service. The way in which the proposed opening up of international passenger services will be interpreted and implemented into national legislation will be of decisive importance, together with the realisation of the necessary, consequential political decisions as described in this paper.

It is very important that there is a review of the consequences of the Directive's implementation, in particular for national passenger services. This could be achieved by the 2012 report required by the Directive.

CER would also like to underline the specific situation in the new EU Member States, which should receive special attention.



# REGULATION ON INTERNATIONAL PASSENGER RIGHTS

## 1. The European Commission's proposal

The proposed Regulation<sup>6</sup> is concerned with the rights and obligations of international passengers. It is developed from the emphasis on the importance of transport users in the 2001 White Paper on European Transport Policy; and the Commission believes a Regulation is necessary to improve the effectiveness and attractiveness of this transport segment.

It sets out minimum requirements for passenger information before, during and after the journey; contract conditions; the liability of railway undertakings in cases of accidents, delays or cancellations of services; conditions for assistance to persons with reduced mobility; the obligation to sell international tickets; and requirements for railway undertakings to co-operate to achieve the aims of the Regulation. It also defines some minimum obligations for the passengers themselves.

## 2. CER's assessment of the proposal

### 2.1 SUMMARY

CER has serious concerns about this proposal. While recognising the Commission's legitimate interest in consumer rights, CER is disappointed that the Commission has persisted with a legalistic approach that lacks flexibility, does not meet the stated goals of increased efficiency and goes against the Commission's own policy of favouring modal transfer to rail from the air and road.

The proposal:

- does not take proper account of the business conditions in the international rail passenger market, nor of the sector's own initiative to establish passenger rights under those conditions
- is unclear in its scope at the detail level, which would present major implementation difficulties and cost risks
- sets liabilities and compensation levels that
  - can be viewed as discriminating against rail when compared with other transport sectors' obligations
  - are potentially onerous and costly for a very differentiated market
  - do not fully recognise the operational environment of the rail system
- does not fit with the existing intergovernmental legislation on international passenger rights, nor with Member States' own rules
- requires cooperation between railway undertakings (on for example information systems) that is not directly concerned with passenger rights and that conflicts with normal business competition practice.

An assessment of the financial consequences of the proposed Regulation is being carried out and will be completed as soon as possible.

6. Proposal for a Regulation of the European Parliament and of the Council on International Rail Passengers' Rights and Obligations COM(2004) 143

### 2.2 BUSINESS CONDITIONS IN THE INTERNATIONAL RAIL PASSENGER MARKET

The railways' main business is to provide customers with appropriate passenger services, both national and international, of high quality with a reasonable fare. All railway restructurings of the past decades were intended to encourage the railways to behave as commercial businesses, taking commercial decisions independently.

Heavy competition from in particular air, coach and car provides the railways with clear and powerful market incentives. This is a guarantee for the right balance between demand and supply in terms of price and quality of passenger services by rail.

The international passenger market is a very differentiated market. In some areas rail has a good position due to short travel times and large traffic flows, and is able and ready to provide high quality, in particular taking other competitors' services into account. Other parts of the market are completely different, relatively low speed, small traffic flows, low levels of economic activity at the main destination, etc. It is important that rail can serve these different types of markets with differentiated services with differentiated quality levels. Creating a uniform EU-wide regulation seems to ignore the differentiation in the market in an expanded EU.

### 2.3 THE RAILWAYS PASSENGER CHARTER COMMITMENT

Against this background, the railways are already providing their customers with adequate rights at the European level by their own initiative for a strong quality commitment. This quality commitment – the CER / UIC<sup>7</sup> / CIT<sup>8</sup> Charter on Rail Passenger Services – was adopted in October 2002. The commitments cover both domestic (about 90% of the market) and international services (about 10% of the market).

In parallel, the railways have developed their national commitments on customer rights and quality standards. All the major EU railways have already introduced Charters or similar explicit commitments in compliance with the CER/UIC/CIT Passenger Charter. As an example, the German Government and the German Railway DB very recently agreed to integrate the DB commitments on passenger rights and quality standards into DB's enforceable general business conditions, making legislation on these issues unnecessary. All of these commitments are either already in force or will come into force legally before the end of 2004, thus improving passenger rights more broadly and more quickly than is possible through a European legislative proposal.

7. Union Internationale des Chemins de Fer, Paris (the world-wide railway association responsible for improving interoperability and cooperation between railways on technical and commercial matters)

8. Comité International des Transports Ferroviaires, Bern (the railway association responsible for the legal framework for international passenger and freight rail transport)

## 2.4 THE SCOPE OF THE PROPOSAL

Studying the detail of the proposal raises significant questions about its scope. The Regulation is concerned both with international passenger services and international passenger journeys. These terms have different definitions: “services” are the trains themselves crossing borders; “journeys” are between the passengers’ starting and finishing stations (which may be served by local services only), with the international service maybe just one of the legs of the journey. This reflects the relative complexity of rail compared with for example air travel.

This raises questions about liability and compensation for events happening anywhere within these definitions of the scope; about the justification for, and practicality of, the joint and several liability of all the railways involved in the entire journey; and about the fit with railways’ national obligations to customers – for example through a public service contract.

For services delivered through a public service contract, the public authority which contracts for and funds the services, should be the only body controlling service quality levels which are now an important element of most public service contracts. If the proposed Regulation applied to these services the public authority would have to bear the consequential costs.

CER believes that the scope is disproportionate to the Commission’s objectives: it should be limited to international services, and regional, local and rural services covered by a public service contract excluded. The exclusion of services covered by a public service contract would be consistent with public service contract provisions in the proposed passenger liberalisation directive.

## 2.5 COSTS AND LIABILITIES COMPARED WITH OTHER MODES

### 2.5.1 General

On several points the proposed Regulation worsens the competitive position of rail vis à vis other transport modes, by introducing more restrictive conditions for rail.

Road passenger transport does not have an EU legislative framework at all.

The existing EU rules for air travel are on several points totally incomparable with the proposed rules for rail.

International rail passenger services mainly operate under the existing, and in future maybe extended, open access rights of Directive 91/440. The services are, in most cases, not compensated for by public authorities. Cost increases therefore have to be covered by increased returns through increased usage or increased fares.

### 2.5.2 Delay compensation thresholds and consequential damages

The proposal contains a compensation scheme in the case of delays, starting with 50% compensation after thirty minutes of delay for high speed trains. For air, compensation is provided only after five hours of delays; and refreshments are provided only after two hours delay. Both air and rail will refund unused tickets that are not used due to major delay. Given the heavy competition between air and rail on several routes, these differences are potentially financially harmful for the railways. CER believes strongly in the concept of consumer compensation, but opposes its application by a blanket regulation rather than by market-sensitive arrangements.

Secondly, the proposal introduces liability for consequential damages after a delay of one hour, irrespective of journey type or length. This provision has no upper limit and is a serious financial risk. For air travel, consequential damages for delays are not covered at all in EU legislation.

Thirdly, the proposal's very limited exclusions from delay liability<sup>9</sup> reflect a lack of consideration of the rail system's particular characteristics. Railways have many more interfaces than airlines with potential risks on the ground; level crossing accidents, and objects thrown on the track are just two examples where essential safety requirements for incidents outside the railway company's control introduce delay.

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9. exceptional weather, natural catastrophes, acts of war, terrorism

### 2.5.3 Liabilities for personal injuries

The general liabilities of railways (for death, injury) and insurance requirements are increased beyond the already existing liability regime in the COTIF. Significant cost increases could be expected, without leading to a higher quality of rail passenger services in normal situations, and which could be a particular financial barrier in the new Member States.

### 2.5.4 Information and ticketing

The proposed Regulation contains several requirements on information and on the distribution of tickets. The general requirements seem to confirm existing practice and will have no added value for customers. However, the required geographical scope of the information, tickets and through-tickets that have to be delivered by railways is excessive and absolutely would lead to large inefficiencies. Having to sell tickets between all major railway stations everywhere in Europe, including on the train in some circumstances, does not take into account that commercial organisations must by definition focus their marketing and sales efforts on sufficiently large markets. It does not make sense to ask for an improvement for a small part of the market without considering the cost implications for the majority.

Air carriers have no comprehensive obligation to transport, to sell tickets or to provide information on behalf of other operators. Indeed, low cost carriers currently only provide tickets and information about their own services, mainly through the internet.



### 2.5.5 Intermodal competition – level playing field

Overall the different treatment of the rail sector would not help create the level playing field needed for rail to fulfil its potential. The proposal would add to the present inequalities between sectors in infrastructure charging principles, and in taxation on tickets and energy (compared with air) that, together with long-term improvement in rail infrastructure, have to be redressed to ensure fair competition on a European level.

## 2.6 THE EXISTING LEGAL FRAMEWORK FOR PASSENGER RIGHTS

A legal framework already exists for international passenger services, agreed upon by all European countries including the EU Member States. This framework, the CIV<sup>10</sup> from the COTIF<sup>11</sup> (as revised in 1999<sup>12</sup>, with the European Commission's agreement, so as to align COTIF rules with EU liberalisation rules), already governs the relationship between customers and railway undertakings; and – in addition – the relationship between railway undertakings themselves. Surprisingly, the draft Regulation appears not to recognise that new proposals on international passenger compensation were approved by the railways' organisations on 6 November 2003. They will be integrated into the CIT General Terms and Conditions in 2004, embedding the CIV obligations – particularly on delay compensation – into the business practice of international rail passenger services, thus making it legally binding.

International services crossing the external eastern borders of the new European Union are governed by a special combination of the COTIF and the OSJD/SMPS<sup>13</sup> provisions; the COTIF alone would be better for these services, but the proposed Regulation would further distort the situation.

The relationship of the Regulation to the CIV/COTIF framework is not properly established in the draft text. Indeed, the Commission's Communication<sup>14</sup> on the Third Package suggests a misunderstanding of the status and potential of the COTIF/CIV for establishing passenger rights. The Commission expects to accede to the COTIF agreement in the future, taking over EU Member States' position in this field. CER believes that the COTIF is a more appropriate mechanism for the Commission's legal engagement to passengers than the proposed Regulation.



10. Uniform Rules concerning the Contract for International Carriage of Passengers and Luggage by Rail
11. Convention concerning International Carriage by Rail as amended by the Vilnius Protocol 1999
12. The revision will come into force in 2005
13. Agreements "Organisation of Cooperation of Railways /Agreement for Passenger Transport" between Eastern European countries, Russia and certain Far East countries
14. COM(2004) 140 Article 3.1

### 2.7 COOPERATION REQUIREMENTS

#### 2.7.1 Access to information systems

The access (by third parties) to information, distribution and booking systems should be considered as a competition, rather than a passenger rights, topic. Obliging a railway undertaking to promote and/or support the marketing and sales efforts of competitors, perhaps to its own commercial disadvantage, leads to a serious restriction of competition.

All significant business undertakings nowadays need their own information systems: being forced to open up an existing information system to other companies would deprive a railway undertaking of any incentive to improve or differentiate its systems for competitive benefit. Joint usage of a railway undertaking's information system by all market participants would discriminate against the railway undertaking bearing the (often heavy) financial burden of the original investment; and would seriously affect innovation, whose objective is to generate an advantage in a competitive market.

In the airline industry network carriers and low-cost carriers co-exist without an over-riding obligation on a network carrier to open its systems to low-cost competitors. Nonetheless, numerous low-cost carriers have most successfully entered the market.

#### 2.7.2 Other cooperation requirements

Different articles (on tickets, on security) in the proposal oblige railways to cooperate without prejudice to the provisions on competition in the Treaty. Mandatory cooperation in itself has nothing to do with improved passenger rights. Further, the question of security and how it is to be achieved goes well beyond the scope of any passenger rights legislation.

### 2.8 IMPACT ON INFRASTRUCTURE MANAGEMENT

Railway undertakings would seek to recover significant financial losses under the Regulation for infrastructure (including third party) delays. This would need either a comprehensive regime, or ad hoc arrangements for individual events. Both would entail additional costs and likely disputes.

It is also possible that, to minimise passenger claims, railway undertakings would be content to build extra journey time into train schedules, or declare different customer and operational schedules. This has potential adverse infrastructure management consequences for capacity allocation, passenger connections and operational efficiency.



### 2.9 OTHER COST EFFECTS

The main cost effects of the proposed legislation have already been mentioned. There are a number of other elements where additional compliance and administration costs would almost certainly arise.

**2.9.1** Fulfilling the obligation to provide customers with refreshments e.g. in a train stopping somewhere between two stations could be both expensive and impractical, in particular since delays are by definition unforeseen.

**2.9.2** The provisions on persons with reduced mobility underline the continued serious efforts by railways to provide this group of customers with adequate services. Unfortunately the regulation sets some detailed rules that are not really needed and would be unlikely to have the desired effect.

**2.9.3** Language obligations in complaints procedures imply higher costs that would nevertheless have to be covered.

**2.9.4** The level of provisions on quality and security of services mainly confirms existing practice. However the Regulation introduces several bureaucratic additions that would simply increase costs without improving quality. Moreover security is a much wider concern that goes beyond the question of passenger rights.

**2.9.5** The introduction of a new enforcement body, besides existing (legal) possibilities for enforcement would create mainly bureaucratic activities and expensive legal actions.

### 2.9 CONCLUSION

The railways have made and are planning to make significant improvements in respect of customer rights and the market environment. This paper highlights the serious practical concerns with the present proposal. CER believes that the proposal should not go forward as it stands, and that the ideal solution is for the Commission to allow more time for the effect of such changes to be properly assessed, and then consider implementing through existing formal channels any changes that are still needed.



## 1. The European Commission's proposal

The published proposal for a Regulation on Rail Freight Quality<sup>15</sup> is concerned with the setting up of a mandatory system of penalties for rail freight services. It includes provisions on liability, penalty levels and monitoring schemes.

## 2. CER's assessment of the proposal

### 2.1. GENERAL

CER is firmly committed to freight quality improvement: but is strongly opposed to the Commission's proposal. CER questions the legal basis for such an initiative, which discriminates against rail compared to other competitive transport modes.

Far from achieving its alleged purpose of encouraging a modal shift from road to rail, this regulation, should it be adopted, would simply overburden the rail system administratively and financially, to the extent of actually deterring some existing and potential customers from using the rail mode. Experience already shows that compensation systems imposed by law do not of themselves improve quality, nor safety, much on the contrary (see the British case).

This intervention of the public authorities into what usually pertains to normal business life harks back to the “old days” (when the railways were fully state-run) and is quite difficult to understand one year exactly after the “liberalisation” of the rail freight market (the precise purpose of which was to “deregulate” the rail freight market and “get rid of administrative constraints”). Furthermore, the existing international legal framework provided by the CIM<sup>16</sup>, which is applicable in 41 countries, already imposes rules on the railways which are twice as strict as those applicable in the road sector: this renders an even stricter – by six times – and potentially conflicting regulation all the more unnecessary.

### 2.2 RESPONSIBILITY FOR RAIL FREIGHT TRANSPORT QUALITY

In the railway sector (and probably more than in any other transport modes), responsibilities for quality are multilayered, involving several actors of the transport chain from the customers themselves through railway operators to infrastructure managers (and, beyond, as far as public authorities). Each of these actors plays a part in the quality delivered to the end customer; each of them depends heavily on the others to achieve the desired end result. Also each of them, notably those closest to the customer, are unambiguously committed and firmly

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15. Regulation of the European Parliament and of the Council on compensation in cases of non-compliance with contractual quality requirements for rail freight services - COM(2004) 144

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16. Convention Internationale Marchandises

determined to use and control quality as one of their major marketing arguments and as an essential tool of competitive differentiation in their commercial strategy. Against this background, CER is very concerned about the Commission's intention to set up a compulsory system of penalties on the layer which is most vulnerable and most dependant on the others, namely the "customer-operator" layer.

### 2.3 CER INITIATIVE ON FREIGHT QUALITY

The move to "regulate back" the rail freight sector also seems to conflict with the European Commission's apparent support up to now for the railways' own endeavours to take up full "entrepreneurial responsibility" in the field of freight quality, in particular through the implementation of the CER / UIC / CIT Freight Quality Charter (adopted on 4 July 2003). It is all the more surprising as this voluntary commitment of the railways has, in the context of the railways' ongoing process of quality improvement, already brought about visible changes after only six months, and led to a substantial increase in the number of quality agreements signed between railways and customers. The European railway community therefore sees the proposed regulation as a definite step backwards after the progress brought about by previous legislation.

### 2.4 IMPACT ON COSTS AND COMPETITION

From an economic analyst's point of view, it is quite clear that the proposed regulation would have a profound impact on the economy of freight in general and of rail freight in particular.

Regarding the cost aspect, an evaluation of its actual economic impact on operations is currently being carried out. At this point in time, it is however already possible to say that the cost associated with the implementation of such a regulation could lead to substantial price increases and could seriously distort the competitive situation of rail towards road (which would not be subject to the same regulatory straightjacket). In the "worst case" scenarios, a significant part of the total rail freight revenues would be absorbed, severely jeopardizing the economic viability of rail freight as a whole. It is therefore important that, before taking definite decisions, the political stakeholders are well aware of the potential harmful cost implications associated with such a far-reaching regulation.



## 2.5 IMPACT ON INFRASTRUCTURE MANAGEMENT

As the railway system is susceptible to secondary (knock-on) delay, the effects of the regulation are not isolated to freight. In practice therefore the infrastructure managers would need a comprehensive regime to analyse delays and recover penalties from other railway undertakings, as well as accounting for payments for infrastructure delays. While such regimes exist (for example in Great Britain) experience has shown that this would almost certainly lead to further transaction costs, a proliferation of internal disputes and even legal action, without necessarily improving performance. All these extra costs would be a drain on resources which would be much better used in effectively improving quality.

There is also a likelihood that, to minimise claims from railway undertakings, infrastructure managers would seek extra pathing or recovery time for delayed trains. This would inevitably result in a decrease of the availability of infrastructure capacity, the opposite of what is required to achieve transport policy goals. This problem would be particularly acute where low access charges have been introduced to encourage modal shift and capacity has been stretched.

## 2.6 IMPACT ON CUSTOMERS AND RAIL FREIGHT GROWTH

From a strict business point of view, as saturation is already apparent on many parts of the European rail network, severely limiting the potential for quality improvements, the proposed regulation would lead existing operating companies (whether historic or recent) to reduce their freight activities in order to relieve congested areas and automatically improve quality (thus avoiding penalties). They would also be encouraged to concentrate on regular domestic flows for which production processes can be better streamlined and secured, leaving aside more diffuse “production-disruptive” ones (single wagonload traffic and other non-regular flows in block trains) and a large number of international flows (carried out through a chain of subsequent carriers). Alternatively, as already mentioned above, they may increase their selling prices to integrate the risk of having to pay penalties. In both cases, the effect would be a reduction of rail freight.





In this context of traffic reduction, the already narrow margin of the freight operators would be further reduced, as the marginal cost of the use of the most capital-intensive resources (locomotives, wagons, etc.) would increase, encouraging operators to gradually disengage from rail freight (and put the smallest, most recent ones out of business). On this background of threatened margin, potential newcomers would be deterred from entering the rail freight market, resulting in an adverse effect on the development of intramodal competition expected by the European Commission and most actors on the market.

In the end, all this would obviously limit the customers' ability to choose between various operators and products. Having little regard to individual customers' needs and expectations, the proposed Regulation forces all customers into the same regulatory straightjacket. Especially, those customers who place more importance on price than on performance will simply no longer be able to afford rail. Regulation will deprive the market actors of their ability to use "quality" as a marketing tool of competitive differentiation and of their natural capacity to regulate quality through contractual agreements. In this respect, the proposed Regulation heavily restricts contractual freedom and Article 71 of the Treaty on the European Union referred to in the text does not seem to provide a convincing enough legal base to justify such a heavy EU intervention into contractual freedom.

### 2.7 CUSTOMER REACTION TO THE PROPOSAL

More generally, CER regrets that, in developing this Regulation, the European Commission has not taken into account the reservations of most customers, who were far from unanimously supporting such a heavy intervention into the natural functioning of the market at this point in time but were rather in favour of leaving more time to the railways to implement their Quality Charter.

### 2.8 CONCLUSION

For all the above reasons and on the basis of a number of other more detailed technical points (which CER is ready to provide to those interested in this issue), CER strongly opposes the proposed text and seeks its rejection.



# DIRECTIVE ON TRAIN CREW CERTIFICATION

## 1. The European Commission's proposal

The Directive on Train Crew Certification<sup>17</sup> lays down structures, requirements and responsibilities for train crew certification throughout the Community. It sets minimum requirements for medical fitness and psychological suitability, obligatory periodic checks and describes essential skills. It proposes a two-part structure for the certification: first, an EU-wide licence which reflects the minimum Community requirements, issued by the national competent authority and belonging to the driver. Second, a harmonised complementary certificate with restricted validity (reflecting the particular requirements of the service for which each driver is authorised), and issued by the railway undertaking. It also establishes training and assessment requirements for certification purposes.

The present proposal arises from a commitment given by the Commission to the European Parliament and the Council when political agreement was reached on the Second Railway Package in March 2003, to support the development of interoperability.



17. Proposal for a Directive of the European Parliament and of the Council on the certification of train crews operating locomotives and trains on the Community's rail network – COM(2004) 142

## 2. CER's Assessment of the proposal

### 2.1 GENERAL

CER appreciates that the European Commission intends to support interoperability in the developing liberalisation of the European rail transport market and in this context takes initiatives in the field of personnel certification. CER signed an agreement with the European Transport Workers Federation (ETF) on the European driving licence on 27 January 2004 and regrets that the Commission did not fully take into account the most important principles of this Agreement for the proposal on the certification of train crews.

### 2.2 SCOPE OF THE PROPOSAL

CER considers that the Directive should only apply to train drivers involved in cross-border services. Problems associated with differences in the legislative requirements of different Member States make this desirable. This was one of the main reasons why CER recently concluded an agreement with ETF in regard to the licensing of train drivers, limited to those involved in cross-border services.

Restricting the scope to drivers is necessary because other on-board staff have limited safety tasks and these tasks vary considerably from one company to another. This being the case, CER does not believe that the certification of other on-board staff would bring any benefits (including benefits in regard to the establishment of a single railway market) and notes that the costs involved would be high.



In regard to drivers involved in domestic services and any other on-board staff with safety responsibilities, CER believes that, if needed, any safety related requirements should be defined in the appropriate TSIs<sup>18</sup> or CSTs<sup>19</sup>, and/or these aspects should be regulated in a second stage on the basis of a recommendation of the European Railway Agency provided for in Article 31.

## 2.3 RESPONSIBILITY FOR CERTIFICATION

CER considers that the continuous improvement of train driver training and competence management arrangements are key to improving the safety performance of train drivers.

CER is very concerned about the proposed involvement of competent authorities in the delivery of the train driver certification. CER believes that the best approach would be for railway undertakings to both assess train driver competence and issue train driver certificates, and that competent authorities should assess and oversee railway undertakings as fit to do both these vital tasks. CER is surprised that the European Commission is advocating new administrative tasks at a time when the Member States want to decrease all administrative costs.

CER regrets that the Commission did not take the Agreement between CER and ETF on the European driving licence fully into account in its proposals. Importantly, the agreement between CER and ETF foresees that railway undertakings, rather than competent authorities, will issue train driver certificates and that the driver will lose his licence when he leaves the undertaking.

Nevertheless, CER is happy to see that the delivery of the licence can be delegated to the railway undertaking and that the railway undertaking is fully responsible for the delivery of the harmonised complementary certificate, and owns it.

## 2.4 CERTIFICATION CATEGORIES

CER does not agree with the categorisation proposed because it does not reflect the reality of railway operation. In particular it has concerns about having separate categories for passenger and freight trains.



18. Technical Specifications for Interoperability

19. Common Safety Targets (Second Railway Package, Safety Directive)

### 2.5 BASIC REQUIREMENTS FOR CERTIFICATION

CER is pleased that the European Commission has taken some account of the CER-ETF agreement on the European driving licence, particularly in regard to minimum health requirements and obligatory periodic checks.

The members of CER are in favour of fixing these requirements in the Operation & Traffic Management TSI taking into account the contents of the annexes of the CER-ETF agreement because this procedure offers more flexibility with respect to possible changes and adjustments in the future without touching the obligatory character of its substance.

Training methods and examination processes are the responsibility of individual railway undertakings. Therefore CER feels strongly that a training method and examination process, as described in Annex IV, should not be described in the directive. On the other hand minimum standards and minimum required competencies of train drivers should be described. When CER studied the training systems of the European countries in a joint study with ETF, the conclusion was that, while the harmonisation of competencies was possible, the harmonisation of training methods was neither possible nor desirable.

### 2.6 QUALITY OF THE ECONOMIC IMPACT STATEMENT

Whilst CER appreciates that assessing the economic impact of these proposals is understandably difficult, nevertheless CER notes that the net benefits are low, especially in regard to phase two, the implementation of the proposals to drivers of domestic services. More generally CER believes that a number of cost items are understated and the benefits overstated. One specific point to note is that there are no figures in the statement regarding other on-board safety related staff.

### 2.7 CONCLUSION

CER believes that the proposal should be limited to cross border services and limited to train drivers and that the railway undertaking should deliver the licence. CER underlines the importance of the contents of the annexes describing professional knowledge and health requirements and believes that they should be taken into account in the context of the TSIs and CSTs.

CER supports the Commission's proposal that the European Railway Agency should present an evaluation of the implementation of this Directive. This evaluation will serve as a basis for, if necessary, new proposals by the Commission for changes to the Directive including its scope.

The Community of  
European Railway and Infrastructure  
Companies (CER) brings together 35 railway  
undertakings and infrastructure companies from the  
European Union member states, accession countries as well  
as Switzerland and Norway. It is based in Brussels and represents its  
members' interests vis-à-vis the European Parliament, Commission and  
Council of Ministers as well as other policy makers and transport actors.

CER's main focus is promoting the development of rail as essential to  
the creation of a sustainable transport system which is both efficient and  
environmentally sound. A key priority in this  
respect for CER is the achievement of a more  
balanced modal split in the transport system,  
minimising external costs arising to society and  
improving economic efficiency. In parallel to the  
railways' own initiatives for improving the quality  
of rail services, CER sees ensuring sufficient  
investment in infrastructure rail projects as a  
prerequisite for achieving the desired modal split. All policy areas of  
significance to railway transport are dealt with by CER, which offers  
advice and recommendations to European policy makers. CER  
monitors and contributes to railway policy making. Its inter-  
ests span the whole spectrum of European transport policy:

infrastructure planning, passenger and freight services,  
public service, the environment, research and  
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