

Independent Regulators' Group – Rail

IRG–Rail

Position paper on the conclusions of the trilogue negotiations on the Fourth Railway Package

5 May 2016

IRG-Rail is the network of independent rail regulatory bodies from 26 European countries. The overall aim of IRG-Rail is to facilitate the creation of a single, competitive, efficient and sustainable internal railways market in Europe. IRG-Rail acts as a platform for cooperation, sharing of best practice on regulatory issues and promotion of a consistent application of the European regulatory framework.

This IRG-Rail paper is published on the responsibility of the IRG-Rail plenary. The opinions expressed and arguments employed herein do not necessarily reflect the official views of the governments of its Member States.

**Market Pillar – Fourth Railway Package,
Agreement April 2016**

I. Introduction

1. On 19 April 2016 an agreement was reached on the political pillar of the fourth railway package by the European Parliament and the Council of Ministers of the EU. The agreement was endorsed by COREPER on 28 April 2016 but still needs formally approved by Member States as well as the European Parliament. Formal adoption is expected to be complete by autumn 2016.

II. IRG Rail's main views

2. IRG-Rail welcomes the adoption of the fourth railway package as a step towards the creation of a genuine European railway market. This set of measures aims to improve the performance of railway services, and foster the competitiveness of the sector by the gradual opening of the domestic rail passenger markets.
3. However the package falls short of its original aims. IRG-Rail regrets some of the compromises that have been made which dilute the principles of competition, transparency and non-discrimination. Such principles are vital for the creation of a genuine European rail market with improved efficiency and performance, capable of competing with other transport modes.
4. On governance, IRG-Rail welcomes the improvements with regard to the independence of Infrastructure Managers (IMs), which will facilitate effective and non-discriminatory access to infrastructure. We particularly welcome the reduced risk of cross-subsidisation¹, a limit to the potential for conflicts of interest in decision making², and strengthened requirements for information and ticketing systems that are open to market entrants³. Powers for the independent regulatory body to monitor and enforce non-discrimination, including on its own initiative, have been reinforced⁴ which is vital to ensure compliance in practice. This includes the regulatory body's ability to assess and remedy conflicts of interest in traffic management and maintenance planning. Regarding cross-border issues, IRG-Rail welcomes the emphasis on cooperation between national regulatory bodies⁵.
5. However, some provisions create uncertainty and do not seem to be sufficient to ensure non-discriminatory infrastructure management and financial transparency, in particular:
 - The 'Chinese Walls' that were originally foreseen for vertically integrated undertakings have been weakened and extended to also cover separated structures. Some of the remaining independence requirements for vertically integrated undertakings lack clarity, creating serious "loopholes". Prevention

¹ Article 7d

² Articles 7, 7a, 7b

³ Articles 7b, 13a

⁴ Articles 7d, 55, 56

⁵ Article 57

of double mandates, for instance, does not cover all cases where a lack of impartiality in the decision making process may arise.

- Requirements for financial transparency have been diluted and this creates uncertainty regarding the extent to which the infrastructure manager's income is covered by such requirements.
 - The approach to regulatory bodies' decision-making on joint matters lacks clarity and raises legal concerns.
6. On the revised PSO regulation, IRG-Rail continues to stress that competition is the best guarantee and measure of efficiency and quality. IRG-Rail therefore welcomes the introduction of competitive tendering as a general rule. Competitive tendering should be the general mechanism for the award of public service contracts in rail, with exceptions permitted only in certain limited circumstances. We therefore regret the broader exemptions that have been included for direct award.
 7. With greater scope for direct award at the discretion of competent authorities, any decision to award a contract directly should be published, objectively justified, and open to independent challenge. Thus IRG Rail generally welcomes the agreed rules on the substantiation of directly awards, the possibility to review such awards, and the foreseen role for an independent body in assessing performance-based contract awards. IRG-Rail stresses that an assessment by the independent body can only be effective when there is a clear set of criteria to make this assessment. In addition the (legal) consequences of this assessment by the independent body should be clear. IRG-Rail recommends that national legislation should be clear in that regard.
 8. Provisions on rolling stock availability are, in IRG-Rail's opinion, crucial to ensure non-discriminatory access to public service contracts. Therefore, IRG-Rail appreciates any initiative at the EU level that facilitates access to rolling stock, whilst leaving flexibility for the way in which this is done. We welcome in particular the obligation on competent authorities to assess whether measures are necessary to ensure access to rolling stock, and to publish the results of this assessment.
 9. Finally, IRG Rail is disappointed at the extension of timescales and postponement of competitive tendering obligations up to 2023.

III. Conclusions and Outlook

10. The fourth railway package is a welcome step towards the creation of a single European rail market, but more is needed to achieve an efficient, competitive and sustainable rail sector that can successfully compete with other modes of transport.
11. The principles of competition, transparency and non-discrimination are fundamental to the creation of a single and open market for rail services in Europe. They can bring improvements in quality and efficiency for both customers and taxpayers. Strong, independent regulation is necessary to safeguard these principles, and ensure that a single European rail market delivers on its potential.

12. Implementation and application of the fourth railway package will be crucial to ensure that the new rules bring maximum benefit. IRG-Rail members commit to using and applying the powers, tools and instruments provided by the law, to help ensure non-discrimination and enhanced customer-orientation.

ANNEX – Detailed views

I. Governance

Infrastructure management

1. Infrastructure management. Railway undertakings must be able to operate on a level playing-field. In particular, market entrants should not be at a disadvantage in terms of finance or decision-making, when faced with a vertically-integrated infrastructure manager. Infrastructure management must be functionally and financially independent from operations. IRG-Rail thus generally welcomes the addition which requires involving the regulatory body in the assessment of potential conflict of interests, including in the field of traffic management and maintenance planning. However IRG-Rail has serious concerns that the final compromise refers to a national framework in this regard and does not specify the degree of involvement of regulatory bodies, especially in the ex ante assessment of potential conflicts of interest. IRG Rail considers that the role to assess potential conflicts of interest should be clearly allocated to Regulatory Bodies to ensure sufficient safeguards for independence and impartiality of infrastructure managers. With regard to the upcoming transposition process IRG Rail therefore strongly recommends that the regulatory bodies are provided with necessary legal clarity and effective tools on this matter. (Article 7b).
2. Double mandate. IRG-Rail supports clear rules, to ensure that there is no conflict of interest, and that the impartiality of decision making is guaranteed. However we regret that some provisions have severely narrowed the applicable scope compared to the original proposal, in particular with regard to the Management Board (Article 7c).
3. Financial transparency. Financial transparency is essential to guarantee an open rail market. The rules on financial flows, loans and debt, help to remove the risk of distortive cross-subsidization between publicly-funded infrastructure managers and transport operators in open markets. However there seem to be considerable loopholes. For example, requirements to ensure *separate* financial circuits have been softened and weakened. IRG-Rail welcomes that the regulatory body will have the necessary power to address financial transparency in holding companies but regrets that with the general requirements of “transparent financial circuits” regulatory oversight might be more complex and difficult in practice (Article 7d).
4. Through-ticketing assessment. IRG-Rail welcomes any measures that encourage the market to facilitate through-ticketing, without undue delay. In particular the provision stipulating that the Commission shall assess the development of through-ticketing in EU Member States and report on a regular basis is helpful. (Article 13a).

Regulatory supervision

5. Cooperation agreements. IRG-Rail supports such agreements between infrastructure managers and railway undertakings insofar as they contribute to improved efficiency

and quality of services, but they must include strong safeguards against discrimination, and should make clear that decision-making and accountability remains with the parties as provided under legislation, and in particular the infrastructure manager with regards to essential functions. To ensure that these agreements are proportionate, transparent and non-discriminatory, they should be subject to regulatory approval and scrutiny “*ex-ante*”. In this context IRG-Rail welcomes the requirement of an independent assessment but has serious concerns that the regulatory supervision task is not clearly allocated to the regulatory bodies. By referring to the supervision by the regulatory body or any other independent competent body, this introduces the risk of a new body with supervision powers over the infrastructure manager, thus creating confusion as regulatory supervision is the core responsibility of the regulatory bodies (Article 7c (3)).

6. Coordination mechanism. IRG-Rail welcomes the potential role for regulatory bodies to participate in the coordination between infrastructure managers and other rail stakeholders and strongly recommends and expects that regulatory bodies will be invited to participate as an observer in all areas that are subject to regulation (Article 7d).
7. High speed lines. IRG-Rail expresses its concerns about the provision related to the possible application of the economic equilibrium test to the high speed passenger services (Article 11a). IRG-Rail supports the development of high speed passenger services promoting the optimal use of available infrastructure and welcomes the role that is foreseen for the regulatory body (Article 11a).
8. Provision of information on unscheduled maintenance. IRG-Rail fully recognises the importance of providing timely information on the unavailability of infrastructure capacity due to unscheduled maintenance to all interested parties and as soon as possible. In particular, this information should be provided to the users of the network in order to enable them to put contingency plans in place and inform customers of any delay if necessary. We welcome the agreed wording concerning the supervisory role of the regulatory body (Article 56).
9. Regulatory bodies' decision-making on joint matters. IRG-Rail fully recognises that it is vital to provide the necessary certainty and transparency to industry parties when there is a matter concerning and requiring the decision of two or more regulatory bodies. In this situation, regulatory bodies must cooperate when investigating the complaint and preparing their decision. The objective must be to reach a decision that has an aligned legal and practical effect across all relevant networks. However, the adopted text contains certain provisions that lack clarity and practical applicability, as well as raising legal concerns. For example, when referring to the cooperation of regulatory bodies “*in preparing their respective decisions in order to bring about a resolution of the matter*”, the term “resolution” is unclear, both in terms of what is meant and who will decide on the matter. The wording should not be misunderstood in such a way that it calls for an obligation on all regulatory bodies to ensure “identical decisions” on cross-border issues. This cannot be the objective of the law as it would encroach upon the principle of subsidiarity, the principle of national sovereignty and the independence of national regulatory bodies. IRG-Rail believes that the requirement should be understood in such a way that it focuses on

aligning the *impact of decisions*, not the respective decisions as such. Moreover, it is not entirely clear how the “arrangements for the resolution of disputes” should be applied. National regimes already include appeal options and/or dispute resolution procedures. The relationship between those national procedures and the envisaged further arrangements is ambiguous (Article 57).

II. Award of public service contracts (PSO)

10. Exemptions for direct award of public service contracts. IRG-Rail regrets the broad variety of exemptions from the general rule of competitive tendering of public service contracts as competition in the provision of rail services can provide a powerful incentive, and valuable benchmark, for improvements in efficiency and quality. Derogations to competitive tendering and exemptions should be strictly limited to clearly-defined and substantiated specific cases. Thus IRG-Rail expresses disappointment at the various exemptions from this rule risking a permanent and broad continuation of direct award, thus impeding market opening.
11. Timescales. Even if the foreseen transitional period has continuously shortened, IRG Rail regrets the extension of timescales, the postponing of competitive tendering obligations up to 2023 and the misalignment to market liberalisation.
12. Direct award validation: In IRG-Rail’s opinion, a transparent process is crucial, including proper oversight and validation of the competent authority’s decision to make direct awards. Therefore IRG-Rail welcomes that the substantiated decision of the competent authority needs to be made public (Article 5). The new text also foresees that the national legal systems should allow for an independent body to assess the substantiated decision of the competent authority to directly award public service contracts on a performance-based approach. According to the agreed text such an assessment could be done as part of a judicial review. The new provisions ensure a sufficient level of legal review and may help competitors to inform and support their case. However, IRG-Rail highlights that an effective assessment by the independent body needs to be based on a clear set of criteria. Furthermore the legal status of such an assessment by the independent body as well as its consequences should be clarified. IRG-Rail recommends that, when taking this into account, national legislation should be clear. Furthermore IRG Rail regrets the absence of independent validation in the course of the procedure for direct awards in other circumstances. (Article 5.7)

III. Rolling Stock

13. Rolling stock availability is in IRG-Rails’ opinion, of the highest importance for non-discriminatory access to public service contracts. Therefore, IRG-Rail appreciates any initiative at EU level facilitating the access to rolling stock, whilst leaving flexibility for the way in which this is done. We also welcome the obligation on competent authorities to publish the results of their assessment of whether measures are necessary to ensure access to rolling stock (Article 5a).