IRG-Rail (14) 5

Independent Regulators' Group – Rail

IRG–Rail

Position Paper

on the European Parliament's position (first reading) for a Fourth Railway Package

6 May 2014

Introduction

1. On 26 February 2014 the European Parliament (EP) adopted its first reading[1] on the Commission's proposals forming the so-called Fourth Railway Package[2].The package and the relevant EP resolutions address the following important issues:
   - the liberalisation of domestic passenger transport market,
   - a structural reform and improvements of infrastructure governance and
   - further harmonisation regarding interoperability, safety issues and the role of the European Rail Agency.

2. This paper aims to comment on this first reading adopted by the EP, and builds on previous IRG-Rail[3] position papers. The paper clearly focuses on the main elements of the so-called "market pillar" of the package (amendments of Directive 2012/34/EU and of Regulation 1370/2007) and their impact on the regulatory work of IRG-Rail members. It presents our views in relation to our individual responsibilities, without, however, necessarily reflecting all individual policy positions at national level.

Executive summary

3. IRG-Rail strongly supports the aim of encouraging competition in the rail sector, as a mechanism for promoting efficiency and performance. Opening the domestic passenger market for rail is a vital step in creating a genuine single European rail market. In this respect IRG-Rail welcomes the EP's endorsement of the opening of the domestic passenger services in all Member States from 2019. However, we regret that many of the amendments significantly weaken the objective of developing the Single European Rail Area - in particular by imposing lighter controls on vertically integrated companies, and postponing mandatory competitive tendering procedures for public service contracts to 2023, with very significant exceptions for direct award still allowed.

4. IRG-Rail supports the effort made by the EP in drafting and negotiating amendments, in particular:
   - introducing open access as a general rule,
   - keeping the possibility for Member States to choose their own approach on how to liberalise their domestic passenger markets,
   - extending the role and functions of Regulatory Bodies in areas such as oversight of integrated ticketing and cooperation agreements.

5. On the other hand, we are particularly concerned about the following amendments:
   - extending the possibility for direct awards of public service contracts, allowing very significant exceptions;
   - postponing competitive tendering procedures to 2023;
   - undermining market liberalisation by introducing additional possibilities of limiting open access where public service contracts have been tendered;

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[1] http://www.europarl.europa.eu/sed/acts.do

[2] http://ec.europa.eu/commission_2010-2014/kallas/headlines/news/2013/01/fourth-railway-package_en.htm

[3] IRG-Rail (13) 07 - Fourth package amendments position paper (1), IRG-Rail (13) 5_rev2 - Fourth Package position paper

- weakening the proposals to ensure the effective independence of infrastructure managers, and financial transparency within vertically integrated structures in particular, by softening the so-called Chinese walls;
- assigning new tasks to Regulatory Bodies without ensuring a harmonised minimum legal basis or sufficient instruments to fulfil these;
- introducing an unclear mandatory ticketing scheme without an assessment of the impact on a successful market opening and efficient (price) competition between railway undertakings;
- establishing a European Regulator replacing the newly founded Network of European Rail Regulators, and thereby undermining the competences of national regulators.

6. IRG-Rail's detailed thoughts and concerns regarding both EP resolutions of the market pillar of the package are detailed below.

II. EP Resolution on the proposal for a directive amending Directive 2012/34/EU

Opening of the market for passenger transport services by rail

7. IRG-Rail welcomes the intended liberalisation of the domestic passenger market as a means of creating a more competitive sector with high quality services to the benefit of customers. It can contribute to increased efficiency of rail, a better match between services and passengers wishes, and can incentivise innovation.

8. With regard to the existing different experiences of the process and various approaches to market opening, IRG-Rail welcomes the flexible approach given for Member States in this respect. We support open access as the general rule for market opening, whilst recognising the potential of competitively tendered public service contracts.

9. We support that Member States have the possibility of finding the right balance between these two models by limiting open access in order to protect services operated under a public service contract (PSC) when the economic equilibrium of that PSC would be compromised by open access. We regret that this approach has been watered-down by the first reading of the EP.

10. IRG-Rail welcomes the proposal clarifying that all passenger services that are not part of a public service contract are considered to be open access services.[4]

11. But IRG-Rail has serious concerns about the foreseen additional possibility of limiting open access in cases where a PSC has been allocated by way of a competitive tendering procedure, without having to perform the economic equilibrium test.[5] IRG-Rail fears such an additional possibility could seriously impede and turn back the opening of the market.

12. IRG-Rail supports the rationale of objective criteria for defining economic equilibrium[6], but believes that Regulatory Bodies need discretion in specifying any details of revenue generation. In particular, a requirement for the new service to be 'mainly' generative could act as an impassable barrier to potential open access operators. Any test must take into account the whole PSC, and not just the individual route. Furthermore, Regulatory Bodies should be able to include the potential benefits of competition in their analysis, particularly with regards to ticket price and service levels.

13. To conduct a robust economic equilibrium analysis, Regulatory Bodies will require access to the relevant information from stakeholders concerned. This will include information on revenues and passenger numbers from the operator of the PSC, and the business plan of the new entrant.

14. IRG-Rail would like to point to inconsistencies between the proposed definitions of high speed lines in this directive and in the amended version of the interoperability

[4] EP amendment 68

[5] EP amendment 69 and 114

[6] Ibid.

directive in the Fourth Railway Package[7]. Furthermore we question whether it is useful to insert vague criteria like "most of the journey"[8].

Infrastructure Governance

15. Regarding the amendments to the section on infrastructure governance, IRG-Rail is disappointed by the final EP agreement. It is of particular importance in view of the EP position that allows Member States to continue to choose between an integrated or separated structure. The adopted text fails to ensure the independence of infrastructure managers in the exercise of its core functions, or the necessary financial transparency within vertically integrated structures. We particularly regret the narrowing of the Infrastructure Manager's essential functions which are now limited to capacity allocation and charging.[9] The resulting lack of independence in, for instance, traffic management carries a risk of discrimination.

16. The EP voted for greater flexibility in the granting of loans from the holding company to the infrastructure manager[10]. We understand that if loans may be granted within a vertically integrated undertaking, this should only be possible from the holding company to the infrastructure manager at market price, and under close supervision of the Regulatory Body. We are also concerned that in these circumstances the separation of financial flows will be difficult to monitor, as transparency may be compromised.

17. Nevertheless, we welcome that the burden of proof in demonstrating to the Regulatory Body that the loan is granted at market price lies on the holding company. Regulatory Bodies would require strong supervisory powers, including defining the criteria of a "market price" and assessing the given rate of interest *ex ante* and if necessary ex post, Some Regulatory Bodies already have experience or responsibility in the assessment of 'market price', and this is an area that IRG-Rail intends to explore further. As such, we emphasise the need for outcome-focused principles that Regulatory Bodies can develop and work towards, rather than prescriptive mechanisms.

Cooperation agreements

18. Regarding the proposed cooperation agreements between infrastructure managers and railway undertakings, we acknowledge the rationale of retaining synergy effects and network benefits[11]. However we consider that they must not compromise the principles upon which an open market is built. In this context IRG-Rail welcomes the wording that clearly requires cooperation agreements to be transparent, non-discriminatory and non-exclusive, ensuring that such cooperation agreements must be offered to all interested parties in the same manner. Furthermore, if cooperation

[7] (Annex I, 1 and 2)

[8] EP amendment 54

[9] EP amendments 121, 122, 124/rev

[10] EP amendment 123

[11] EP amendments 120, 56

agreements are allowed then strong regulatory oversight is necessary. IRG-Rail welcomes the relevant provisions in this respect. Regarding the proposal that the incentive given to an applicant shall consist in reductions of track access charges, corresponding to possible cost savings for the infrastructure manager, IRG-Rail believes that the incentives should be left to the discretion of infrastructure managers. They may take the forms of reduction in track access charges but could also consist of, for example, a better coordination of maintenance works.

19. IRG-Rail considers it important that those requirements apply to cooperation agreements between infrastructure managers belonging either to a vertically integrated or a separated undertaking with other applicants. IRG-Rail welcomes the provision[12] which addresses the infrastructure manager of a vertically integrated as well as a separated undertaking, but we question the different treatment applied to vertically integrated and separated infrastructure management structures in relation to those cooperation agreements[13]. We support that such cooperation agreements should provide the necessary incentives, but would recommend referring to a non-exhaustive list of incentives, rather than only to "financial" incentives.

20. As such, we are in favour of the wording in the new article 6a, subject to the comments above. However we have some concerns about the exclusion of such cooperation agreements between an infrastructure manager and railway undertaking within the same vertically integrated structure. If such cooperation agreements exist, they should be subject to the same rules and regulatory oversight as those cooperation agreements in the above paragraph.

21. IRG-Rail also notes that the EP's amendment[14] suppresses the provision forbidding delegation of the infrastructure manager's functions to other legal entities within the vertically integrated undertaking. Instead, the EP proposes to allow subcontracting of specific development, renewal and maintenance works.

22. We recognise that subcontracting has valid advantages for the infrastructure manager for some specific functions, but we note that the difference between cooperation agreements foreseen in the new article 6a and subcontracting is not very clear. For instance, maintenance work can be subject to both cooperation agreements and subcontracts.

23. Therefore, IRG-Rail sees the merits in having only one article authorising such cooperation for vertically integrated entities (whether called cooperation agreements or subcontracting) which should be limited to only where an added value can be justified to the Regulatory Body and the agreement is limited in time and scope. Cooperation agreements under the new article 6a are required to be non-exclusive, non-discriminatory and transparent while respecting the appropriate confidentiality of commercially sensitive information. They aim at efficiency incentives, are limited in time and geographical scope and approved by the Regulatory Body. Therefore, IRG-Rail

[12] EP amendment 120, art 6a

[13] It is not clear, why EP amendment 56 (art. 7 4a) becomes necessary, which also has a slightly different wording to art 6a.

[14] EP amendment 124/rev.7(b) para 6

considers subcontracting should follow similar principles and be subject to regulatory oversight.

Chinese Walls

24. IRG-Rail is also very concerned about the amendments watering down the strict 'Chinese wall' safeguards that are necessary to ensure the effective independence of the infrastructure manager, its management and staff within a vertically integrated structure. IRG-Rail has particular concerns about the following amendments:

    - deleting the Commission's proposal that infrastructure managers shall raise funds on the capital markets independently and not via other legal entities within the vertically integrated undertaking, which softens the necessary "Chinese walls" with view to financial transparency.[15]

    - deleting the Commission's proposal that members of the supervisory or management boards and senior staff members of the other legal entities within the vertically integrated undertaking must not be in the management board or be senior staff members of the infrastructure manager. To allow a person to be a member of both management boards would create a serious risk of conflict of interest.[16]

    - deleting the Commission's proposals on the separate location of the infrastructure manager, the protection of access to information systems, and limitation of contacts with the other legal entities of the vertical integrated undertaking. The intended changes allowing for cooperation between the infrastructure manager and the other legal entities may weaken the necessary Chinese walls within a vertically integrated undertaking. This raises concern especially with regards to the development of information systems, a sensitive and important area where there is a serious risk of discrimination.[17]

    - deleting the provision ensuring that members of the supervisory or management board and senior staff of the infrastructure manager must hold no interest in or receive any financial benefit from any other legal entity within a vertically integrated undertaking. The deletion further undermines the necessary safeguards to ensure effective independence of the infrastructure manager.[18]

25. IRG-Rail recognises that the EP is on the one hand softening the "Chinese walls", while on the other hand was seeking, in the amendments voted at the TRAN committee, to reinforce the role of national rail regulators in this respect.

26. IRG-Rail considers it important for the Regulatory Bodies to perform an oversight role in this respect, with the flexibility of adopting a regulatory regime appropriate to the circumstances of different Member States. However, we note that the first reading text

[15] EP amendment 123

[16] EP amendment 124/rev

[17] Ibid.

[18] Ibid.

has moved these regulatory functions to a recital[19] and that at this stage the provisions do not ensure proper harmonisation of minimum standards. We emphasise the importance of clarity with regards to a minimum level of compliance and the necessity to have this regulatory function reflected in a proper article. This will foster legal certainty, and support the role of Regulatory Bodies in Member States where these requirements are not yet in place.

27. With a view to providing legal certainty and a minimum level of harmonisation in all Member States, IRG-Rail recommends reinsertion of the provisions mentioned above in paragraph 24 to ensure effective legislative safeguards. In any case such a new regulatory role of producing legally binding guidelines for the vertically integrated undertaking would be limited to the practical applications of the requirements laid down in the directive and would not be suitable to replace lacking legislative requirements. If however the European legislator felt it necessary, IRG-Rail and its members would be happy to do further work in this area with a view to such guidelines. In any case IRG-Rail recommends introducing the necessary legal provisions to make it clear that Regulatory Bodies are responsible for the compliance with the requirements laid down in the directive, and have the power to intervene not only upon appeal but also *ex officio.*

28. IRG-Rail particularly welcomes the deletion of those parts of the planned procedure for verification of compliance regarding the equivocal role of the Commission to decide whether legislation has been applied correctly in this respect. However, we would recommend reinsertion of the role of Regulatory Bodies being responsible for monitoring and controlling the application of legislation to ensure a level playing field.[20]

Establishment of an integrated through-ticketing scheme

29. IRG-Rail generally agrees that further rules on passenger's rights as regards travel information and ticketing may help to increase the use of rail. IRG-Rail sees the clear benefits passengers can gain from through-ticketing. Furthermore, IRG-Rail welcomes the effort to include definitions of the terms “integrated ticketing scheme” and “through tickets”.[21]

30. As stated in previous papers, IRG-Rail would generally prefer a non-mandatory approach which foresees national discretion in order to take into account the needs and conditions of the national railway market, and allowing for market-driven solutions.

31. In our view an unclear concept of a mandatory “interoperable through-ticketing and information system” could be counter-productive and might have an impact on successful market opening and efficient competition between railway undertakings. Any proposed scheme should be backed by a robust impact assessment. This is of particular importance with view to the possible impact on the variety of offers and price competition, which is crucial to the benefit of customers.

[19] EP amendments 33, 40

[20] EP amendments 101 and 125/rev

[21] EP amendment 52

32. The concrete approach chosen by the EP[22] is still unclear. While obliging *all* railway stakeholders to use an interoperable through-ticketing and information scheme, Member States must require railway undertakings to set up such a common scheme for the supply of tickets, through tickets and reservations for public passenger transport provided under public service contracts only (or must empower relevant competent authorities for public service obligations). Open access services must have non-discriminatory access to the scheme. IRG-Rail sees neither the rationale nor the feasibility of a procedure that foresees the setting up of a common through-ticketing scheme limited to passenger transport provided under public service contracts (PSC) (and thus only by some railway undertakings) which has to be used afterwards by all railway stakeholders. Open access operators should have the opportunity to participate in the design and creation of such a scheme, if they wish to do so.

33. IRG-Rail supports the need to ensure that any through-ticketing system should not create market distortion or discriminate between railway undertakings. We acknowledge the envisaged role of the Regulatory Body in this respect. But we see it as essential that the development and operation of these arrangements are subject to regulatory oversight to prevent discrimination. Appropriate instruments to fulfill this task would be necessary. Therefore IRG-Rail recommends the insertion of a provision fostering the role of national Regulatory Bodies to supervise and monitor, on their own initiative, the ticketing scheme. The Regulatory Body should also be the appeal body for any complaints on methodologies, terms and conditions.

Role of Regulatory Bodies

34. As stated above, IRG-Rail acknowledges and welcomes the trust placed in national Regulatory Bodies to perform their task. However any new competences need clear legislative requirements and a toolbox for implementation as a prerequisite. Furthermore Regulatory Bodies need to be adequately resourced and staffed in order to fulfil these functions.

35. IRG-Rail welcomes the amendments regarding the role of national Regulatory Bodies with respect to access charges[23]. With regard to a smooth functioning of the whole capacity allocation process and given the fact that usually a change of charges is published in the network statements[24], IRG-Rail recommends that the notification to the Regulatory Body should in the first instance be linked to the date of network statement publication[25] and, if not applicable, to the allocation process, two months at the latest prior to path requests, since the date of entry into force may vary among Member States. This would avoid a situation where the proposed change is published without having been checked by the Regulatory Body yet with the uncertainty that it might probably – after the check – be adjusted again.

[22] EP amendment 72

[23] EP amendment 79

[24] Directive 2012/34/EU Annex IV, 2

[25] Directive 2012/34/EU Article 27 (4)

36. Furthermore IRG-Rail welcomes the amendments specifying the role of the Regulatory Body in approving and overseeing framework agreements and the proposed clarifications with regard to appeals in this respect.

37. We question the requirement for Infrastructure Managers to comply with the decision of a Regulatory Body at the latest one month after receiving notification of that decision[26]. The decisions of Regulatory Bodies include, where necessary, timescales and deadlines for compliance, as outlined in the current legislation. These timescales may vary on a case-by-case basis. The time limit of one month that is proposed by the EP may not be feasible in practice, and risks the creation of unnecessary administrative burdens.

38. Regarding the cooperation between Regulatory Bodies[27], IRG-Rail points out that the Recast already foresees reciprocal assistance in market monitoring tasks, complaint handling or investigations. We have already seen this begin to have results e.g. with the close cooperation in the European Network of Regulatory Bodies or within IRG-Rail.

39. The Network of European Regulators already has the possibility of giving an opinion on specific national matters affecting an international service if it is considered appropriate or on request. However, we strongly believe that neither the Network of European Rail Regulators nor any European Regulator should have supervisory, appeal and arbitrage functions. This could undermine legal certainty, and compromise the independence of the national Regulatory Body. In any case, IRG-Rail sees the Member State judiciary as the most appropriate initial route for appeals against any decision of the national Regulatory Bodies.

40. As stated in IRG-Rail's previous position papers we disagree with the intention to establish a European Regulatory Body. We consider rail regulation to be most effective and efficient when performed by strong and independent national Regulatory Bodies. Furthermore the new instruments foreseen by the Recast to foster consistency and cooperation between Regulatory Bodies begin to have results e.g. with the close cooperation in the European Network of Regulatory Bodies or within IRG-Rail. The creation of a European Regulatory Body at this stage could hinder the continuing emergence of independent regulation at national level and the emerging successful international cooperation.

Transition Periods

41. IRG-Rail welcomes a "quick" implementation of market opening by 2019 as proposed by the EP. However IRG-Rail strongly recommends that this should be ensured for the Fourth Railway Package in general. Thus we strongly recommend that any implementing timelines should be aligned with the implementation periods of the other legislative acts of the package as well.

[26] EP amendment 79

[27] EP amendment 80

III. EP Resolution on the proposal for amending regulation 1370/2007

42. Our comments on the EP's first reading of the 1370/2007 Regulation focus in particular on direct award, the development of public transport plans, and the role foreseen for Regulatory Bodies.

43. IRG-Rail fully supports the opening of the domestic rail passenger market and the objective of reducing the cost of services to consumers whilst maintaining high quality and performance standards. We therefore oppose the EP's proposals to postpone competitive tendering to 2023, and to increase the possibilities for direct award of public service contracts. Both proposed measures will seriously compromise the liberalisation agenda.

Award of Public Service Obligation contracts

44. The EP has agreed fundamental changes to proposals on the award of public service contracts, in particular: allowing competent authorities the possibility to continue with direct award. IRG-Rail opposes these amendments as they hinder competitive market opening.

Direct award

45. As stated in previous position papers, IRG-Rail supports competitive award as the general rule for the award of public service contracts. Such competition is not an end in itself, but provides a measure and guarantee of efficiency in the use of public funds, and performance of transport services.

46. We therefore strongly oppose the significant changes made by the EP to allow direct award of public services contracts, subject to efficiency and performance requirements set out in the transport plans[28].

47. IRG-Rail accepts that direct award may be appropriate in certain circumstances, including for contracts of a small size, or when the degree and level of substantial technical specificity makes it unrealistic to conduct competitive tendering for public service contracts [29]. The direct award of any contract on this basis should be justified to the Regulatory Body.

48. IRG-Rail welcomes the EP's simplification and clarification of the provisions on 'emergency measures' to allow direct award[30]. In some circumstances, these direct awards may need to exceed two years in duration, and IRG-Rail therefore recommends the deletion of this rigid time limit.

49. These provisions on emergency measures should not be open to abuse, and should not be a means of closing the market to competitive entry. There is a risk that competent authorities may invoke an 'inability to launch a tender procedure' without

[28] EP amendment 50, article 5.6

[29] EP amendment 75, article 5.4, subparagraph 1

[30] EP amendment 63, article 5.5

justification. Regulatory Bodies should have due powers to assess the justification and implementation of such suspensions on a case-by-case basis.

50. As stated, IRG-Rail opposes the decision of the EP to allow exceptions to competitive tendering on the basis of efficiency criteria. We believe that this has great potential to inhibit the benefits of liberalisation for passengers and funders.

51. However, and without prejudice to IRG-Rail's opposition, ***if*** the Council agrees with a continuation of directly awarded public service contracts, then such contracts must be made subject to rigorous requirements. This must include firm standards on efficiency, performance and cost against which the recipients of directly awarded public service contracts will be held to account, by competent authorities and regulatory bodies.

52. IRG-Rail has significant concerns about the EP's amendment[31] which fails to provide for clear requirements and proper justification of Public Service Contract awards. IRG-Rail believes this should be detailed and published in advance by competent authorities, and be subject to regulatory supervision[32]. Furthermore in the light of the proposed assessment role of regulatory bodies, *ex ante* powers would be necessary to ensure that regulatory bodies' decisions are properly enforced before a Public Service Contract is awarded.[33].

53. The EP acknowledges that greater rigour will be required in the drafting of Public Transport Plans associated with direct award, and proposes the adoption of delegated acts to detail their requirements in terms of growth, service quality, cost-efficiency etc. IRG-Rail emphasises the importance of involving regulatory bodies in the development of any such secondary legislation.

Reciprocity

54. IRG-Rail acknowledges the EP's decision to include provisions on reciprocity[34], with regards to the exclusion of railway undertakings from competitive award procedures. These provisions allow competent authorities to exclude from competitive tendering for public service contracts any railway undertaking if:

    - its controlling holding company is operating domestic rail services in a Member State where there are no competitive tendering procedures for such services, or:

    - it has benefitted from directly awarded public service contract by rail which have a higher value than 50% of market share.

54. If such a measure is required, IRG-Rail agrees that it should be time-limited as any extensive transition period will result in limiting effective competition in the rail sector and delaying true market opening. It is also unclear how such provisions sit alongside the amendments that allow direct award of Public Service Contracts.

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[31] EP amendment 50, article 6.6

[32] EP amendment 50, article 6.6

[33] EP amendment 50, article 6.6

[34] EP amendments 65, recital 9a, and 68, article 5.3 and 5.3a

Public Transport Plans

55. The EP has made a number of improvements to the Commission's original proposal on Public Transport Plans (PTPs). IRG-Rail welcomes :

- Member State discretion on the scope of the directive with regards to tram-train systems, which may be included within the scope of the regulation[35].
- A more flexible definition of 'competent local authority', to allow inclusion of both urban and rural districts, as well as regions[36].
- Provisions that allow competent authorities to avoid duplicating in their public transport plans information that already exists and is available in the public domain[37].
- Better proportionality and more flexibility in the level of detail required in public transport plans, with a focus on quality, social and safety standards[38].

56. However, IRG-Rail has a number of concerns; in particular IRG-Rail regrets the removal of the proposal allowing a Regulatory Body to assess compliance with the public transport plan on its own initiative[39], even if it is more likely that Regulatory Bodies will act on the basis of a complaint. Complaints in the case of moderate violations of the public transport plan may be rare, and having no own-initiative competences to investigate such violations may in the end lead to larger violations of public transport plans.

57. With regard to the timescales proposed by the EP for the evaluation by Regulatory Bodies of public transport plans[40], IRG-Rail considers that such timescales and process for such a procedure should reflect the challenge of gathering sufficient evidence and developing robust conclusions. As provided under other European rail legislation, Regulatory Bodies should be required to publish their decision within six weeks of receipt of all relevant information, rather than the proposed two month evaluation after filing of the complaint proposed by the EP.

58. In a number of instances the EP has agreed amendments that call for multimodal Public Transport Plans[41]. IRG-Rail supports the concept of integrated, inter-modal public transport networks. However, if Public Transport Plans are to be used as firm criteria, against which the operators of public service contracts are to be held to

[35] EP amendment 18, art 2.a

[36] EP amendment 19, art 2.c

[37] EP amendment 22 art 2a.1

[38] EP amendments 25 and 27 art 2.a.1

[39] EP amendment 36 art 2a.6a

[40] EP amendment 50, art 5.6

[41] EP amendment 22, art 2a.1

account, then it may be appropriate for competent authorities to focus primarily, or even exclusively, on rail within the relevant Public Transport Plans. Furthermore, if competent authorities do not have a role in the specification and procurement of non-rail services then their Public Transport Plan should not have to include provisions on other modes.

59. With regards to definition and scope, IRG-Rail welcomes the clarification in the design of Public Service Contracts that has been introduced by the EP[42], .in particular the possibility of public service contracts for services that both do and do not break even.

60. IRG-Rail welcomes the general emphasis upon transparency and consultation, including the publication of public transport plans, and information on rail services operated under public service contract. IRG-Rail acknowledges the role of commercial confidentiality, as mentioned in the EP's amendments[43]. There will be instances where commercially sensitive information should not be published, or made available to competing railway undertakings. However, the importance of transparency in the use of public funds is paramount in giving confidence to taxpayers and investors, and the confidentiality of 'business secrets' must be proven before information can be kept from public access by the relevant competent authority or Regulatory Body. The justification should be made by the party wishing to keep information from public access, and assessed by the relevant public authority.

Contract size thresholds

61. The EP has put forward a "staggered" set of thresholds for the size of public service contracts linked to the total tonne/kilometre under public service contract within Member States[44]. IRG-Rail welcomes the EP objective to take into account the varied topographies of domestic networks and transport flows. However it is important that the proposed differentiation in thresholds does not hinder competition, and provide for the best outcome for funders and users.

Compensation

62. IRG-Rail welcomes the EP's emphasis on ensuring that public funding of directly awarded public service contracts neither falls below, nor exceeds the amount required to cover the net financial effect of public service contracts, taking into account the associated costs and revenues[45]. IRG-Rail stresses again the importance of transparency in the allocation of public funds, and reiterates the need to share

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[42] EP amendment 20 art 1.1b

[43] Eg: EP amendment 43 art 1.3d

[44] Our analysis of national market volumes, based on the total passenger train kilometres including open access, shows that the following Members States would fall under the following categories:

- <20m t/km: Croatia, FYROM, Greece, Latvia, Luxembourg, Slovenia
- 20m – 100m t/km: Denmark, Finland, Hungary, Norway, Slovakia
- 100m – 200m t/km: Austria, Netherlands, Poland
- >200m t/km France, Germany, UK

[45] EP amendment 10

information on the disbursement of such funds with competent authorities, Regulatory Bodies and, where appropriate, the public domain.

Availability of rolling stock

63. The EP places the onus on competent authorities, rather than Member States, to ensure the availability of rolling stock[46]. IRG-Rail has concerns regarding this change: Member States are more likely to be able to generate the funds and economies of scale associated with the setting-up of leasing-companies, or the purchase of rolling stock. Rolling stock is a long-term investment and should be able to rely on stable, long-term regulation. This is more likely to be guaranteed at the national level. Different requirements for rolling stock within countries make tender procedures unnecessary complex. In addition, IRG-Rail supports the amendment specifying that acquisition of rolling stock should be at market price.

Reporting obligations

64. IRG-Rail supports transparency and availability of information regarding public transport, and the generation of comparable benchmarking data. However, the reporting obligations envisaged by the EP[47] should not impose a disproportionate burden on competent authorities. It should be possible to use information that is already generated from other sources, where appropriate..

65. IRG-Rail welcomes the EP amendment that requires Member States to submit an interim progress report, halfway through the transition period[48]. This will help to ensure that Member States comply with the eventual implementation deadline, and should take account of the existing reporting mechanisms by which Member States already report to the Commission on their rail markets (eg: RMMS, Eurostat).

Expiry of non-compliant Public Service Contracts

66. IRG-Rail has some concerns regarding the proposal to impose an expiry date on any directly-awarded public service contracts awarded before 2022, of 10 years after the publication of this updated legislative measure[49]. Depending on the progress of negotiations, this could result in an eventual expiry date of 2025 or even 2026.

[46] EP amendments 51-54

[47] EP amendment 58 art 1.7

[48] EP amendment 60 art 8.2.1

[49] EP amendment 61