

**IRG-Rail**

**Position Paper**

**on the ongoing negotiations within the European Parliament  
with regard to a Fourth Railway Package**

**14-15 October 2013**

## **Introduction**

1. On 30 January 2013 the European Commission published its 4<sup>th</sup> Railway Package<sup>1</sup>. This comprehensive package addresses the following topics:
  - the opening of the market for domestic passenger transport services by rail,
  - a structural reform and improvements of governance of the railway infrastructure,
  - further harmonisation with regard to interoperability, railway safety and the role of the European Rail Agency.
2. While the Transport Council decided to concentrate its work on the technical pillar of the package (and reached a general approach on 10 June 2013), the European Parliament has been negotiating the complete package, and published first draft reports in June 2013 suggesting amendments to all proposed legislative acts.
3. Building on the position papers that IRG-Rail has already issued with respect to the Commission's proposals, and in particular its paper dated April 2013<sup>2</sup>, this position paper aims to address the amendments currently being discussed with regard to Rapporteur Said El Khadraoui's draft report on the proposal for an amendment of Directive 2012/34/EU and Rapporteur Mathieu Grosch's draft report on the proposal for an amendment of Regulation (EC) 1370/2007.
4. The IRG-Rail paper focuses on the regulatory impact of the proposed amendments on the day-to-day work of IRG-Rail members. The paper presents their views with respect to their individual responsibilities, not necessarily reflecting all individual policy positions at national level.
5. Part A of our analysis deals with Mr El Khadraoui's draft report, and part B comments on Mr Grosch's draft report. Both parts contain general comments, comments on the explanatory statement given by the Rapporteurs and additional comments on the detailed amendments proposed by the draft reports. For the purpose of brevity and clarity, points and arguments that are relevant to both parts A and B have only been developed in the first part of this position paper.

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<sup>1</sup> The Commission proposes to amend the following legal instruments:

- Directive 2012/34/EU of the European Parliament and of the Council of 21 November 2012 establishing a Single European Railway Area (Recast);
- Regulation (EC) No 1370/2007 of the European Parliament and of the Council of 23 October 2007 on public passenger transport services by rail and by road;
- Regulation (EC) No 881/2004 of the European Parliament and of the Council of 29 April 2004 establishing a European Railway Agency;
- Directive 2004/49/EC of the European Parliament and of the Council of 29 April 2004 on safety on the Community's railways;
- Directive 2008/57/EC of the European Parliament and of the Council of 17 June 2008 on the interoperability of the rail system within the Community;
- The Commission suggests further to repeal Regulation (EEC) 1192/69 on common rules for the normalisation of the accounts of railway undertakings.

<sup>2</sup> IRG-Rail (13) 5\_rev2 – Fourth Package Position Paper [http://www.irg-rail.eu/app/download/5799179090/IRG-Rail+%2813%29+5\\_rev2+-+Fourth+Package+position+paper.pdf](http://www.irg-rail.eu/app/download/5799179090/IRG-Rail+%2813%29+5_rev2+-+Fourth+Package+position+paper.pdf)

6. IRG-Rail will continue to monitor the ongoing negotiation process, in particular any further parliamentary amendments.

**Part A: Draft Report on the proposal for a directive amending Directive 2012/34/EU as regards the opening of the market for domestic passenger transport services by rail and the governance of the railway infrastructure.  
Rapporteur: Said El Khadraoui**

**I. General Remarks:**

7. IRG-Rail welcomes the draft report on the proposal for a directive amending Directive 2012/34/EU establishing a single European railway area, as regards the opening of the market for domestic passenger transport services by rail and the governance of the railway infrastructure.
8. IRG-Rail fully supports the aim of establishing a single European railway area by opening the domestic markets and encouraging competition.
9. We agree with many of the proposed amendments, but believe that some of the proposed amendments, in their current form, are not optimal for market liberalisation and increased competition. In some cases, we are concerned that some amendments may affect essential future orientations and may be counter-productive in this respect.

**II. Comments on the Explanatory Statement**

10. IRG-Rail welcomes the Rapporteur's agreement with the **overall aim** of the Commission to create a Single European Railway Area, and the general statement that liberalisation is not a goal in itself but a means of creating a more competitive sector with high quality services to the benefit of customers. IRG-Rail supports the creation of a liberalised domestic passenger market: market opening can contribute to increased efficiency of rail, a better match between services and the wishes of passengers, and can incentivise innovation thereby benefitting passengers, taxpayers and any entity active in the rail market. There may be further beneficial side-effects, including an increase in international rail passenger transport services from domestic rail liberalisation.

**Market opening and public service contracts – a more “balanced approach”**

11. Regarding the requirement of a **balanced approach between market opening and the protection of public service obligations (PSO)** IRG-Rail agrees with the statement that Member States have different experiences with the process of market opening, and therefore should be given enough flexibility to choose the approach for market opening. IRG-Rail supports open access as the general rule for market opening which can be limited by Member States in order to protect services operated under a public service contract (PSC) when the economic equilibrium of that PSC would be affected by the open access service. But IRG-Rail has serious concerns regarding the proposed amendment to introduce an additional possibility of limiting open access in cases where a PSC has been allocated by way of a competitive tendering procedure. This, we fear, could seriously impede and turn back the opening of the market.

## Better governance of the rail sector

12. Regarding the proposed amendments to the section on **infrastructure governance**, IRG-Rail adopts a pragmatic rather than dogmatic standpoint. The report states that the stronger the regulatory body, the more flexible the modalities of the structure of vertically integrated companies can be. IRG-Rail wants to stress that independent regulatory bodies need adequate skills and powers whatever degree of separation is chosen by Member States. But we agree that the necessary powers and functions in order to fulfil the proposed tasks will depend on the chosen structural approach and the need to reflect the degree of vertical integration. This is of particular relevance with regard to amendment 17, which intends to allow Member States to continue to choose even in the future between an integrated or separate structure.
13. IRG-Rail has some concerns about the very far-reaching proposals with respect to the provisions on **staff transfers** in particular to the proposed cooling-off period of three years and its possible impact on the sector.
14. Furthermore IRG-Rail has reservations with regard to some aspects of the **proposed cooperation agreements** between infrastructure managers (IMs) and railway undertakings (RUs), in particular regarding the performance of essential functions. We agree with the objective of retaining synergy effects and network benefits, however cooperation agreements must not compromise the principles upon which an open market is built. In any case they should include strong safeguards 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. We support the proposal that cooperation agreements with railway undertakings must be proportionate, transparent and non-discriminatory, and must be subject to regulatory approval and scrutiny.
15. IRG-Rail strongly supports the strengthening of regulatory bodies' functions by the introduction of an **ex-ante regulation of access charges**. With the term "ex-ante price approval" restricting regulatory approaches to a cost-plus or rate of return regulation, IRG-Rail would suggest that it would be better to use the broader term "ex-ante regulation of charges" instead, in order to also allow e.g. for a revenue-cap within an incentive-based regulatory regime. The introduction of such new ex ante control functions should take into account the Regulatory Body's existing functions to act as an appeals body.
16. In light of the strengthening of the role and functions of national regulatory bodies required under the Recast of the First Package<sup>3</sup> IRG-Rail opposes the idea of establishing a **European Regulatory Body**. As stated in IRG-Rail's previous position papers, we believe that the creation of a rail regulatory body at European level would not offer sufficient flexibility and room for manoeuvre at national level, which are essential for taking specific national conditions into account. Rail regulation is most effective and efficient when performed by strong and independent national regulatory bodies. The Recast of the First Package requires the creation of independent national

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<sup>3</sup> Directive 2012/34/EU of the European Parliament and of the Council of 21 November 2012 establishing a single European railway area

regulatory bodies with adequate resource and expertise to fulfil their tasks. Furthermore the Recast foresees a stronger cooperation between regulatory bodies and various new instruments and tools with view to further harmonization, stronger coordination and monitoring of cross border issues. There are already positive results e.g. with regard to the close cooperation among regulatory bodies and also with the Commission in the European Network of Regulatory Bodies e.g. on implementing acts. The need for stronger cooperation and enhanced coordination was also the rationale behind the establishment of IRG-Rail. The creation of a European Regulatory Body could hinder the continuing emergence of independent regulation at a national level and the emerging successful international cooperation and enhanced coordination.

### **Passenger rights – establishing a proper through-ticketing scheme**

17. The provisions aimed at establishing integrated ticketing and through ticketing schemes are closely related to the decision how to organize further market opening. IRG-Rail is uncertain about the precise meaning of 'integrated ticketing scheme' as intended in the directive and sees the need for a clear definition. A full understanding of the concept, of the related conditions and of the impact on the railway market is a prerequisite for introducing such substantial changes. If this term refers to transfers within or between different transport modes, as suggested in the Rapporteur's report, IRG-Rail favours the exclusion of such provisions from the scope of the directive, and recommends focusing on the railway sector. IRG-Rail will follow on-going initiatives at European level, like the "Multimodal European Journey Planner", that are dealing with solutions for cross-modal tickets.
18. IRG-Rail agrees that further rules on passenger's rights as regards travel information and ticketing might be helpful to increase the use of rail as a mode of transport. In this context IRG-Rail sees the benefits passengers can gain from through-ticketing. But the details of what these terms involve still remain unclear, especially the possible impact on the variety of offerings and on price competition, which is also important and to the benefit of customers. Therefore IRG-Rail is in general advocating a flexible, non-mandatory and market-led approach which foresees national discretion in order to take into account needs and conditions of the national railway market and to allow for market-driven solutions.
19. With some IRG-Rail members having positive experience with independent information and ticketing supply platforms, IRG-Rail could support an indicative step towards this direction. In any case IRG-Rail sees it as essential that these arrangements are subject to regulatory oversight to prevent discrimination between (potential) operators and ensure that those solutions do not result in a barrier to market entry.

### **Strengthening social provisions**

20. Rules on **social standards** and the impact on employment conditions during the transfer of staff from one operator to another are undoubtedly important issues to be addressed and are generally dealt with by employment law and social legislation and by the relevant social partners.

### **III. Detailed comments on individual amendments**

#### **Market opening and public service contracts: a more "balanced approach"**

##### ***Possibility of limiting market opening where public services have been tendered - Exception of high speed passenger services (Amendment 28)***

21. IRG-Rail has serious concerns regarding this amendment, which would allow Member States to deny the operation of open access services where a public service has been awarded through competitive tendering and thus give the exclusive right to provide rail services to the operator who has been awarded the contract without having to perform the economic equilibrium test. IRG-Rail understands the intention to create an instrument that gives operating companies legal certainty at a very early stage, with respect to planning of services and investment, but we do also fear that this could impede and turn back the opening of the rail passenger market. This limitation might also disturb the level playing field between countries as Member States could opt for the lowest common denominator and restrict open access in order to protect the home-market for their national operator, while taking advantages of countries with open access.
22. We do not regard open access and tendered PSO contracts as mutually exclusive. On the contrary, IRG-Rail sees advantages in both approaches co-existing on a network. Open access can incentivise the PSO operator to innovate during the PSO contract. The presence of both systems may encourage competent authorities to engage in long-term contractual relationships with PSO operators, benefitting from a longer return on investment on rolling stock, whilst mitigating the costs of long contracts.
23. Furthermore, the proposed exception for high-speed lines is unclear and not included within the Rapporteur's justification. IRG-Rail does not understand the reason behind this amendment. Also the relation between the two subparagraphs in the proposed amendment does not make it clear what applies when a high-speed passenger service is operated on the same route as a service under a PSO-contract awarded through a competitive public tendering procedure.

##### ***Definition of criteria for economic equilibrium test (Amendment 29)***

24. IRG-Rail supports the idea in this amendment: to specify in more detail the criteria that define the economic equilibrium, whilst retaining sufficient flexibility. For instance, IRG-Rail believes that wider customer benefits delivered by open access operators will need to be taken into consideration. In addition clarity is needed on the interface with the implementing act that is currently being prepared by the Commission in respect of international services. There might be an overlap, therefore it is important to keep in mind that the rules of this implementing act will not necessarily be applicable to domestic passenger transport.
25. Furthermore, the text of the proposed amendment is not clear, thereby creating legal uncertainty regarding, in particular, whether the list of predetermined criteria is an exhaustive one and whether it is for the regulatory body or the applicant to demonstrate whether the economic feasibility of operating those public services would be jeopardised ("when it can be demonstrated"). The task of the Member State to decide "in line with Union law and the principles of equality and non-discrimination" seem to



cause confusion and should be in line with the approach taken on the role of regulatory bodies as set in Article 11, Directive 2012/34/EU.

26. With respect to the proposed definition of economic equilibrium, IRG-Rail would recommend, as outlined in its position paper published in November 2011 to evaluate the profitability of the whole contract and not just the specific line.

## **Better governance of the rail sector / Independence and role of IM**

### ***Cooling off period with regard to positions with RU (Amendments 7, 15, 19)***

27. IRG-Rail agrees that it is vital to protect commercial confidentiality and minimise the potential for conflicts of interest. However the proposed amendments regarding the cooling-off period seem to be a disproportionate response to the risk involved. A cooling off period of three years for board members of a vertically separated infrastructure manager is not considered appropriate. Furthermore the application of such a cooling off period to all RUs operating on the IM's network seems to be too far reaching even for board members of an IM coming from a vertically integrated company. The proposed amendments are likely to lead to significant disadvantages for the recruitment of employees and the freedom to carry out professional duties. Freedom of labour is an important right that should only be constrained where a clear risk can be demonstrated. By imposing catch-all measures there is a risk of alienating valuable expertise from the sector, and restricting the acquisition of "whole industry" experience. With regard to the objective of minimising the potential for conflicts of interest IRG-Rail suggests to restrict the cooling-off period to movements within the vertically integrated undertaking capturing both the transfer from the IM to RU and vice-versa.

### ***Regulatory bodies' approval on staff transfer (Amendments 7, 15 and 19)***

28. Whereas the proposed recital 19c (amendment 7) suggests that all arrangements for the transfer of staff should be subject to regulatory approval, with the regulatory body also having the option ("may") of approving or requesting changes to the application of a cooling off period, amendments 15 and 19 propose a mandatory three year cooling off period, and do not provide any corresponding rules for regulatory approval. Furthermore it is not clear whether the staff referred to in amendment 7 include only supervisory staff or all employees, and whether the intended regulatory approval shall apply only to a vertically integrated structure.
29. IRG-Rail notes to date regulatory bodies do not have the resource or expertise to approve all staff transfers. However, where there is a risk of commercial confidentiality being compromised, or a conflict of interest arising, IRG-Rail recognises that regulatory bodies may have a legitimate interest for intervening at a very early stage. Thus IRG-Rail recommends a provision that requires the transfer of board members to be publicised, with stakeholders having the opportunity to request such transfers to be approved by the regulatory body. In any case IRG Rail stresses that the regulatory body will need appropriate enforcement tools to fulfil its new role to monitor the ongoing compliance with the requirements for the transfer of staff including ex officio powers.



**Clarification that independent IM should not unduly favour big clients in case of competing requests (Amendment 33)**

30. IRG-Rail welcomes the clarification that in the event of conflicting requests to operate a rail service in the same market segment, an independent IM should not unduly favour large railway undertakings over smaller ones. This will protect small operators from structural disadvantages compared to large competitors and help to ensure non-discriminatory access. In particular it seems to be useful to focus on the specific tracks for which a conflict has arisen.
31. However, in IRG-Rail's view this amendment should not be stated in Article 46 (4), as priority rules are not applied during the coordination process, but rather in Article 47 on congested infrastructure.

**Cooperation agreements between separated IM and RUs permitted (Amendments 1 and 16)**

32. IRG-Rail understands the intention behind these amendments giving Member States the possibility of authorising the IM to engage in cooperation agreements with RUs, provided that the provisions concerning the institutional separation of the IM are complied with and the IM's independence is not compromised. We see the importance of synergies in order to ensure that benefits of a whole system approach to operations are retained, but do also have some reservations, especially as regards the essential functions. Cooperation agreements should include strong safeguards 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. As provided by the Commission's proposal IM's should have the flexibility to deliver their functions efficiently and cost effectively and criteria for subcontracting to another party should not be undermined by cooperation agreements.
33. Cooperation agreements should substantiate the potential benefits, that may consist of cost reductions, performance or service improvements etc. The scope and duration of these cooperation agreements should be adequately justified to the regulatory body, and should not present a barrier to market entry. Cooperation agreements must be justified on the basis of improvements in efficiency, performance or service to the end-user or taxpayer. This justification, should be published, alongside information on the nature, scope and anticipated duration of the agreement. In addition it should be required that the main elements of these cooperation agreements are described in the network statement.
34. As benefits may accrue to either IMs or RUs through cooperation agreements, IRG-Rail has reservations about limiting the realisation or incentivisation of these benefits to the reduction of track-access charges as proposed in amendment 16.
35. It is important that cooperation agreements do not compromise the principles upon which an open market is built. IRG-Rail wants to stress that any cooperation agreement with RUs must be appropriate, non-discriminatory and published. They must be pre-approved by the regulatory body and subject to regulatory scrutiny. Therefore the regulatory body needs to be formally "notified" instead of "informed". As mentioned previously the introduction of such new functions should take into account the Regulatory Body's existing functions to act as an appeals body

**Cooperation on IT systems (Amendment 20)**

36. IRG-Rail is reluctant with respect to this amendment. Cooperation between the IM and other entities within a vertically integrated undertaking as regards the development of their information systems bears the risk of an exclusive exchange of data within the integrated company, and the potential for discrimination against third parties. Therefore IRG-Rail suggests opening such cooperation arrangements to all other RUs. The provision should also make it necessary for the cooperation agreements to specify the information systems in question.
37. The effects of such systems on competition and market entrants should be subject to regulatory scrutiny, either on the basis of a complaint or *ex officio* investigation, to ensure that they do not create a barrier to entry.

**Ex ante price control (Amendment 18)**

38. IRG-Rail strongly welcomes this amendment, but, as already stated in our comments on the explanatory statement, we would suggest using the term "ex-ante regulation of access charges" instead of "ex-ante price approval". We support the inclusion of charges for access to service facilities, at the same time we stress that consistency with other provisions of the framework is needed in this respect. The proposed amendment 18 provides the possibility of ex-ante price regulation only in an integrated structure. IRG-Rail believes this measure is also of benefit to vertically separated markets.
39. Implementation would either need further amendments on detailed rules or the establishment of implementing acts.
40. The introduction of such ex ante control functions should not compromise the regulatory body's existing functions to act as an appeal body.

**Passenger rights - establishing a proper through ticketing scheme**

**Definition and clarification of integrated ticketing scheme and through ticketing (Amendment 13, 14, 23, 30)**

41. IRG-Rail welcomes the effort to include definitions of the terms "integrated ticketing scheme" in amendment 13 and "through ticket" in amendment 14, which is already used in regulation 1371/2007. But the proposed definition of the term "integrated ticketing scheme" as transfer within or between transport modes is not compulsory. In our view the concepts of integrated and "through ticketing" still need to be clarified and analysed before taking decisions or adopting recommendations that may have an impact on successful market opening and efficient competition between railway undertakings.

**Availability of all timetabling data/consideration as public data (Amendment 31)**

42. IRG-Rail supports the publication of all relevant timetabling data. Nevertheless the regulation should be more precise. It is not clear which information should be published in which way and also when.

***Mandatory setting up of a common travel and ticketing scheme (Amendment 31)***

43. As stated in our comments to the explanatory statement IRG-Rail is in general advocating a flexible, non-mandatory approach which foresees national discretion in order to take into account needs and conditions of the national railway market and to allow for market-driven solutions.
44. With some IRG-Rail members having positive experience with independent common travel information and ticketing supply platforms, we could support an indicative step towards this direction asking for the establishment of such platforms. Such platforms should not prevent, restrict or distort competition in connection with the supply of travel information, tickets, through-tickets and reservations by railways undertakings or third parties. IRG-Rail sees it as essential that the operation of these arrangements are subject to regulatory oversight to prevent discrimination between (potential) operators. Furthermore the offer and conditions for the use of the ticketing and information platforms should be published in order to increase ex-ante transparency. IRG-Rail recommends that the regulatory body has an oversight over the operation and use of such arrangements.
45. In addition recognizing the experience of some regulatory bodies, it would be helpful to manage the distribution of returns on ticket sales by a body or organisation independent from railway undertakings. This could help fostering transparency and impartiality, and minimizing the risk of discrimination.

***European Regulatory Body (Amendment 8)***

46. As already stated in IRG-Rail's previous position papers<sup>4</sup> and in the comments on the explanatory statement IRG-Rail opposes this amendment as this could hinder the continuing emergence of independent and strong regulatory bodies at national level, which have the knowledge, flexibility and proximity necessary to establish and ensure non-discriminatory access to railways.
47. IRG-Rail recognises the need for coordination and consistency of regulatory approaches with respect to cross-border issues. However, this can be achieved through an appropriate application of the new harmonization and coordination tools foreseen in the Recast of the First Railway Package accompanied by close and effective cooperation between national regulatory bodies. It is this exact reasoning that has led to the creation of IRG-Rail. We are very confident that the cooperation within IRG-Rail coupled with the now formally established European Network of Regulatory Bodies will be successful.
48. IRG-Rail is especially concerned about the proposed task of a European Regulatory Body to act as an appeal body against decisions taken by national regulatory bodies as this goes against the established and well-functioning system of reviewing those decisions by referring matters to national courts.

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<sup>4</sup> <http://www.irg-rail.eu/public-documents/2011/2011-09-06> IRG-Rail Second Recast Position Paper - European Rail Regulatory Body

***Extension of transition period (Amendment 36)***

49. IRG-Rail favours a quick implementation of market opening and the fourth railway package in general. The proposed postponement of this Directive's transposition in amendment 36 of one year is acceptable and should be aligned with the implementation periods of the other legislative acts of the package as well.

**B. Draft Report on the proposal for a regulation amending Regulation (EC) 1370/2007 concerning the opening of the market for domestic passenger transport services by rail; Rapporteur: Mathieu Grosch**

**I. General Remarks**

50. IRG-Rail 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.
51. IRG-Rail welcomes the Rapporteur's draft report on the proposal for a regulation amending Regulation 1370/2007, concerning the opening of the market for domestic passenger transport services by rail. We agree with the Rapporteur's objective - competition that works for passengers and funders - and we agree with many of the proposed amendments.
52. However, we believe that some of the proposed key amendments, in their current form, are not optimal for realising the potential benefits of effective market opening. In some cases, we are concerned that the proposed amendments may be counter-productive in this respect. Our analysis of the Explanatory Statement is presented below, highlighting where we have concerns.
53. For the purposes of brevity and clarity, we do not repeat points or arguments that have been developed in the first part of this position paper. We also acknowledge that to date Regulatory Bodies have limited roles and competences in the procurement of public service contracts and this is, to a certain extent, reflected in our comments.

**II. Comments on the Explanatory Statement**

**General aspects of competition**

54. IRG-Rail fully supports that it is imperative to increase efficiency in rail transport. We believe that the proposed opening of the domestic rail passenger market combined with the compulsory competitive tendering of PSCs will be one step closer to the creation of a single European railway area that is more responsive to customer needs with improvement in efficiency, performance and growth.
55. We welcome the Rapporteur's emphasis that competition on the railways should not be an end in itself, but should be a means of increasing the quality, volume and efficiency of passenger transport services
56. As outlined in our earlier position paper, IRG-Rail believes that the model to be chosen for liberalisation of the domestic passenger market has to be considered carefully, in particular with regard to any possible impact on existing public services contracts. Competition can provide an effective measure, and guarantee, of this efficiency. IRG-Rail therefore supports **competitive tendering as the general rule** for the award of Public Service Contracts in rail, as required in the Commission's original proposal.

57. IRG Rail believes that where structures are efficient and transparent it should be possible to maintain them. In some Member States-existing contracts may have been awarded either directly or competitively. Contracts that are already in place, might not expire before the proposed implementation date. The legislation should not require such contractual arrangements to be re-opened, nor should it put at risk on-going award procedures.
58. Direct award may be legitimate under certain exceptional circumstances, but IRG-Rail agrees that it is important for such exceptions to be transparently justified. IRG-Rail welcomes the proposed amendment on independent regulatory scrutiny of direct award. However, for this scrutiny to provide a meaningful deterrent to obstructive behaviour in the use of direct awards, Regulatory Bodies will require clear powers of enforcement.
59. Regulatory Bodies currently have limited authority and experience in the tendering and award of public service contracts, however, we welcome the enhanced role envisaged for Regulatory Bodies under the proposal, recognising our important role in ensuring a non-discriminatory access and transparency of rules.
60. Nevertheless we would stress that these new regulatory functions must take into account constitutional and administrative structures that may exist at national level. In some countries, current constitutional arrangements would not permit the Regulatory Body to oversee regional tendering authorities.
61. It is also important that any new functions for Regulatory Bodies do not compromise or prejudice their existing decision-making powers and appellate duties.

### **Direct awards**

62. IRG-Rail has some reservations about the proposal to allow direct award on the basis of variance in technical specifications. We believe it will be very difficult to establish and clearly demarcate a consistent threshold of variance. However, there may be good reasons for exemptions, for instance where the degree and level of substantial technical specificity makes it unrealistic to conduct competitive tendering for PSCs. However, competent authorities should not underestimate the potential of competitive tendering even for routes with a variation from "conventional" technical standards. There may also be a risk of creating a perverse incentive: incumbent railway undertakings and infrastructure managers may resist technical harmonisation and interoperability, with the motive of maintaining direct award.
63. IRG-Rail also recognises that an adequate transition period may be required prior to full opening of the market. However, IRG-Rail does not support the proposed lengthy extension of the implementation period. Competitive award for rail services already exists in many Member States, and there is ample experience throughout the industry, both in the design of contracts and the bidding process itself. An extended implementation period will risk delaying the benefits of market opening to users and funders. In any case, the timescales should be consistent and close to those foreseen for the infrastructure governance reform as set out in the Commission's proposal for the amendment to the Recast Directive.



### **Key role of the competent authority**

64. IRG-Rail welcomes the Rapporteur's emphasis on flexibility and discretion for the competent authority in defining public service contracts, according to the public transport plans. The geographic, demographic and economic characteristics of the areas served by different competent authorities will vary widely, and the competent authority must be able to exercise its authority in specifying both public transport plans and public service obligations accordingly.

### **Volume of public service contracts for passenger transport by rail**

65. IRG-Rail supports the Commission's proposal on the maximum volume of a public service contract and we have reservations about the objectives and consequences of the provision proposed by the Rapporteur amending the size thresholds of public sector contracts which are unclear. We recognise the intention to secure flexibility for smaller countries, and a more realistic approach for other markets, but the proposed drafting is open to different interpretations. There does not appear to be any provision for Member States with more than 35 million train km. Furthermore, it does not appear that the statement made in the explanatory statement, (including the footnote) is reflected in the proposed amendment.

### **III. Detailed comments on individual amendments**

66. IRG-Rail's comments on the individual amendment proposals are given below. These comments focus on the amendments to the substantive articles and include reference to recital amendments where relevant.

#### **Clearer definitions**

##### ***Definition of public rail passenger transport (Amendment 12)***

67. IRG-Rail supports the intention to clarify the scope of public rail passenger transport and making it clear that metro systems and tramways are excluded from its scope. This will avoid imposing disproportionate burden and cost upon these transport modes.

##### ***Definition of competent authority (Amendment 13)***

68. IRG-Rail welcomes the widening of the definition proposed in this amendment. Flexibility and clarification in the determination of 'competent local authorities' is necessary, and the amendment will allow competent local authorities to include both rural and urban areas.

#### **Public transport plans**

##### ***Reducing over-specification of public transport plans which should be left to discretion of competent authority (Amendment 15 to 19)***

69. IRG-Rail welcomes the emphasis given by the Rapporteur to the need for public transport plans to be sustainable and the fact that detailed requirements for such transport plans should remain at the discretion of the competent authority. However we



have some reservations about the proposed amendments 16 to 19, which appear to define the content of public transport plans in detail. IRG-Rail believes that the level of detail of each public transport plan is dependent upon the objectives of the competent authority. These details should remain at the discretion of the relevant competent authority, and should not be prescribed in EU legislation.

70. IRG-Rail supports the concept of core requirements for public transport plans. However, legislation should not mandate the level of detail that competent authorities must include in their transport plans, but should allow the necessary flexibility for competent authorities to adapt plans accordingly for different markets.

***Specification of stakeholders that need to be consulted by competent authority (Amendment 20)***

71. IRG-Rail welcomes the proposed transparent process involving all interested parties. IRG-Rail supports this amendment, which clarifies and widens the range of stakeholders to be consulted by the competent authority before adopting public transport plans: it is important that consultations are published, inclusive, and are open to railway undertakings, infrastructure managers and representative organisations.

***Ex officio assurance by regulatory body (Amendment 27)***

72. IRG-Rail has reservation about this amendment which deletes the explicit reference to regulatory bodies conducting *ex officio* assurance of compliance. We believe that it is vital for a regulatory body to be able to assess compliance on its own initiative to ensure the level playing field and that competition in rail markets is introduced properly. We also believe that legislation should provide the appropriate tools for enforcement, which are not addressed in the current proposal.

***Volume thresholds of public service contracts (Amendment 28)***

73. IRG-Rail understands the concept of maximum size for public service contracts, but flexibility and proportionality are required to reflect the different characteristics of each Member State. We also support the Commission's objective and proposal to ensure that the design and award of public service contracts do not diminish the number of operators or bidders, thus limiting competition. Determination of the volume of public service contracts should take into account the best outcome for funders and users.
74. IRG-Rail notes the proposed amendment, which changes the foreseen threshold for maximum size of public service contract from 10 million t/km or one third of the total transport volume (whichever is greater) to a rule applicable for Member states with a maximum of 35 million t/km. The objectives and consequences of the proposed amendment are unclear, and the justification for the amendment does not indicate how the size put forward in the Commission's proposal might lead to an inefficient share-out even for smaller countries.
75. IRG-Rail recognises the intention to secure flexibility for smaller countries, but the proposed amendment is open to different interpretations, as there does not appear to be any provision for Member States with more than 35 million train km. Instead of the proposed amendment, we suggest that the 35m/tkm should be retained, together with the 'one third' provision as stated in the Commission's original statement.

***Determination of open access / PSO routes (Amendment 29)***

76. IRG-Rail has strong reservations about aspects of this proposed amendment, which allows competent authorities to determine the routes for open access. IRG-Rail agrees that the competent authority should determine the routes to be awarded under public service contract. However, the competent authority should not explicitly specify the routes to be served by open access. By definition, open access stands outside the specification of competent authorities, and the creation of PSO routes should not, in and of itself, preclude open access services from operating in parallel.

***Sufficient information to be given to bidders (Amendments 30 to 32)***

77. IRG-Rail supports these amendments, which oblige parties to give all relevant information to the competent authority. We understand the importance of protecting commercial confidentiality, which remains protected under existing practice. Competent authorities must make clear which information is required from operators, which information will then be available to other bidders in the award process, and which information is required from bidders.

***Reciprocity clause for third countries (Amendment 33)***

78. IRG-Rail notes that this proposed amendment, which sets out reciprocity provisions for third countries, might have limited practical impact, since there is the possibility for third country operators to establish a company or cooperation agreements with existing operators in the EU. Furthermore the principle of 'most favoured nation' is already current in many bilateral agreements. However it is important that Member States retain an element of discretion and that third countries with closed rail markets are not automatically excluded from bidding in all EU member states.

***Threshold increased to 500,000 km for direct award (Amendment 34)***

79. IRG-Rail notes the proposed amendment to increase the threshold for directly awarded contracts to 500,000km. IRG-Rail notes such a provision should not lead to disproportionate accumulation of small awards by one railway undertaking, as this may result in anti-competitive behaviour.

***Direct award for variation from conventional technical standards (Amendment 35)***

80. IRG-Rail has some reservations about this amendment, which allows competent authorities to directly award public service contracts where the technical specifications of the rail systems differ significantly from "conventional" standards. There may be good reasons for exemptions. Nevertheless competent authorities should not underestimate the potential of competitive tendering, even for routes with a high level of variation from "conventional" technical standards for the best outcome for funders and users.

81. Moreover we believe that it will be very difficult to establish and clearly define a consistent threshold of technical variance. In any case such networks are likely to be exempt by virtue of their size (see amendment 34).

82. IRG-Rail is of the opinion that the provisions regarding scope exclusion in the Commission's original proposal are sufficient to allow for technical specifications to be taken into account where necessary.

***Justification of direct award (Amendment 36)***

83. IRG-Rail supports this amendment, which requires competent authorities to justify the direct award of public service contracts to the regulatory body, no later than 18 months before the start of the contract. An obligation for competent authorities to justify use of direct awards is a positive step towards transparency and competition. IRG-Rail also welcomes the foreseen role for regulatory bodies, but believes that further detail is necessary on the proposals for enforcement by regulatory bodies.

***Delaying market opening (Amendments 38 and 39)***

84. IRG-Rail strongly opposes this amendment, which envisages allowing the direct award of public service contract up to December 2029. No justification is given for this proposal and, under this amendment, such directly awarded contracts could last until 2043. IRG-Rail believes that this would be a real step backwards towards a competitive, efficient and sustainable single rail market in Europe. In any case, the timescales must be consistent with and close to the timescales proposed for infrastructure governance reform.