IRG-rail
Independent Regulators´Group - Rail

3rd Position Paper on the Recast Regulatory questions arising from the ongoing discussion on the Recast

Views on the development of the Recast in the General Approach of the Transport Council adopted on 16th June 2011 and in the European Parliament's first reading of 16th November 2011

28/29 November 2011

I) General comments on the role and competencies of national regulatory bodies, and the intended future balance of powers among institutions

IRG-Rail strongly welcomes the support of the Council and the European Parliament for strengthening and extending the independence, competencies, functions and resources of national regulatory bodies. These provisions lay the basis for strong and effective regulation in all Member States.

In its first position paper on the Commission's Recast proposal published on 9th June 2011, IRG-Rail has already emphasised the particular importance of establishing strong and independent national regulatory bodies as a prerequisite to ensuring efficient and non-discriminatory use of rail infrastructure and the realisation of genuine competition.

1) Balance of powers between European and national level

Although IRG-Rail supports the above approach which is in accordance with the Council's general approach and the first reading of the European Parliament, we have serious concerns with respect to some proposed elements, especially arising from the position of the European Parliament. In particular, shifting regulatory powers and monitoring functions from the national towards the European level would clearly weaken or even undermine the proposed strengthening of the national regulators' independence and competencies.

European Regulatory Body:
As already stated in IRG-Rail's second position paper of 9th September 2011, we believe that the establishment 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. They have the knowledge, flexibility and proximity necessary to establish and ensure non-discriminatory access to railways.

The proposal to create a European regulatory body no later than two years after the publication of this directive would directly contradict the strengthening of national regulatory bodies' independence. In the light of the expected timescales for transposition of the Recast by Member States, this would leave only six months for national regulatory bodies to demonstrate the full potential of their functions and powers, and for the effectiveness of regulation to be measured.

This may discourage those Member States, where national regulatory bodies have not yet reached independence as they may see no reason to strengthen their regulatory powers, if these are only to be superseded by a European regulatory body.

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 legislative framework accompanied by close and effective cooperation between strong and independent 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 a "formally established network" of strong and independent national regulatory bodies will be successful.

Formally established network of Regulatory Bodies (article 57 para. 1, 57 para. 7)
IRG-Rail welcomes the intention of the Council and the European Parliament to increase cooperation between the national regulatory bodies. It is increasingly important to develop best practices and common approaches in order to create consistent regulation in all Member States and a level playing field in the European rail transport market.

IRG-Rail is set up as an informal network of independent regulatory bodies and a platform to facilitate cooperation between its members by sharing experiences and views on key issues relating to the regulation and development in the European rail market. IRG-Rail would also support the establishment of a formal network as proposed by the European Parliament. There are very positive examples of such networks functioning well in other areas. For instance the recently founded European Regulators' Group for Postal Affairs (ERGP) that has been established to advise and assist the Commission in the development of the internal market and to provide an interface between the national regulatory authorities and the Commission. Although the Commission's support is important, it would be more legitimate for such a formal network to be chaired by one of the regulatory bodies in order to guarantee a full engagement and commitment from all regulatory bodies necessary to increase the efficiency of such a formal network. Chairmanship of the regulatory bodies – as it is the case in the networks outlined above – is the best means of ensuring the independence and self-responsibility of the network of national regulatory bodies.

IRG-Rail welcomes the proposed role of the regulatory bodies in developing common principles and practices which will promote and ensure consistent regulation. With regard to the possibility of making the developed principles and practices legally binding, IRG-Rail is concerned that the conduct of a comitology procedure or any delegated act would compromise the independence of regulatory bodies by allowing these common principles and practices to be revised or supplemented by the Commission without any participation of regulatory bodies. We consider it necessary for the Commission to endorse regulatory principles and practices agreed upon by the regulatory bodies within their network. Any implementing acts should be based on the initiative and agreement of rail regulators within their network and should follow the agreed principles and practices set out by regulatory bodies. The Council's general approach is going in the right direction and should even be enhanced with regard to a formal procedural involvement of the planned network of regulatory bodies.

European Commission as appeal body (Article 56a para. 2a)
With regard to cross-border traffic decisions, the European Parliament has proposed that the European Commission should be an appeal body for binding decisions on the compatibility with Union law. This blurs the existing separation of powers not only between the European and the national level, but also among the European institutions themselves. Strong, fully resourced, independent regulators who cooperate with each other in an independent way are the best means of guaranteeing compatible decisions. Verification of conformity with European law is assigned at national level to the ordinary judge who acts as a guardian of the right application of EU law and to the European Court of Justice at European level. In any case, IRG-Rail sees the Member States judiciary as the most appropriate initial route for appeals against any decision of the national regulatory bodies, thus maintaining a strong degree of legal certainty.

2) Impact on practical implementation of regulatory work

Besides the general issues affecting the overall division of powers between the European and national level or among the different European institutions, IRG-Rail is also sceptical with regard to some proposals, which would affect the practical regulatory work and thus hamper robust implementation of this Directive:

Notification procedures (Article 56 para. 3c and Article 57 para. 1 and 3)
The European Parliament's proposal regarding notifications to the Commission (Article 56 para. 3c) causes legal problems. The current wording provides for a notification of complaints against decisions already taken by the regulatory bodies. The Commission is then given the right to demand changes to the decisions. Decisions already taken usually cannot be changed by the regulatory bodies. At this point in time the decision as to the compliance of the regulatory body's decision with national and European law lies with the national courts. Therefore any changes requested by the Commission would severely interfere with existing legal proceedings.

But even disregarding this legal criterion, a procedure requiring the regulatory bodies to submit their decisions to the Commission for review would consequently undermine the concept of strong and independent national regulatory bodies both in theory and in practice. The creation of a notification procedure leads automatically to further centralisation at the European level. Centralisation runs the risk of damaging the market where the specifics of the respective railway networks require a more differentiated approach, which only a strong national regulator can provide. In practical terms, notification procedures represent a huge workload for all parties concerned and add substantial time to the decision-making process. If adopted, such process would mean additional bureaucracy and thus less efficiency, and as already mentioned less room for manoeuvre for location-specific rail regulation with the best interest of competition in mind.

IRG-Rail welcomes the European Parliament's proposal to set up a database containing decisions taken by the regulatory bodies. This database, made available to the regulatory bodies and the Commission, would enhance transparency and simplify cooperation between regulatory bodies. Its content should reflect the aim of sharing information on work already accomplished by the regulatory bodies and should include information on the subject of the complaint and its settlement. It should be limited to final decisions. Accordingly the proposed notification to the Commission (Article 57 para. 3) should not refer to the complaint or start of an own-initiative investigation, but solely to the information about the closure of such proceedings.

Decision taking by regulatory bodies within a period of one month from the receipt of a complaint (Article 56 para. 1a)
The European Parliament's proposal requiring regulatory bodies to decide and take action within one month from the receipt of a complaint is too rigid and inflexible. IRG-Rail agrees that decisions should be timely, but they should also be properly considered and informed. Experience has taught us for instance that all necessary information to take a sound decision may not be available from the parties involved within one month. Hearings and time consuming legal procedural arrangements may be required. Furthermore it is essential that any maximum period does not start from the receipt of the complaint, but – as foreseen in the present framework - from the receipt of all relevant documents. Sound decisions require a stable foundation. The foundation of every regulatory decision is the data gathered from the undertakings concerned. The more complex the complaint, the more likely it becomes that the parties involved will not be able to deliver the required data in the timeframe envisioned

in the European Parliament proposal. This would leave the regulatory bodies with insufficient information affecting the sustainability of the decision and effectively prolonging the markets' legal uncertainty. Therefore based on the experience of the regulatory bodies the current time limit of two months starting from the receipt of all necessary information as foreseen in the current European legislation should be sustained.

Recruitment of board members (Article 55 para. 3)
The aims of the provision concerning the recruitment of board members are quite clear and IRG-Rail understands that the intention is to eliminate the possibility of any conflict of interest. Indeed it is important that board members are not connected professionally with the entities they regulate. However we feel that the imposition of rigid restrictions on board recruitment is a disproportionate means of controlling the transfer of commercially sensitive information and maintaining organisational independence, since it may limit the board experience and knowledge of rail matters. Having experience in that sector is the best way of gaining such expertise and persons with such experience should not be excluded. For regulatory bodies and especially for those regulating more than one sector it would be particularly important not to rule out essential expertise in rail and regulatory matters. Thus IRG-Rail favours the more flexible Council's General Approach in this respect.

IRG-Rail considers the European Parliament's proposal that the "president and governing board of the regulatory body shall be appointed by the national or other competent parliament" to be inflexible. Especially with regard to multi-sectoral regulatory bodies IRG-Rail believes that a more flexible approach such as the recently adopted EU framework in the telecom and energy sector could be appropriate.

II) Specific regulatory issues

Access to rail related facilities and services (Article 13)
IRG-Rail considers that the draft proposals on access to rail-related facilities and services are a significant improvement to the current arrangements. We welcome that access to these facilities and services would be open to new entrants and in particular that the process of capacity allocation would be overseen by an adequately resourced and independent rail regulator, thus ensuring non-discriminatory access.

Concerning the proposed concept of viable alternatives, IRG-Rail reemphasises that, in order to prevent discrimination, national regulatory bodies would need clear criteria and a practicable procedure. Non-discriminatory access to services and facilities is more likely to be achieved through a clear and transparent access and charging regime with clear oversight by regulatory bodies. IRG-Rail welcomes the provision inserted by the European Parliament, which requires the operator of the service facility to justify its refusal in writing.

The European Parliament's proposal states that operators of service facilities shall provide non-discriminatory access to the "services supplied" in these facilities. IRG-Rail considers it important that access is granted to all services necessary for the utilisation of the facilities as intended.

The European Parliament's proposal introduces a requirement which obliges the regulatory body to take appropriate action in the event of conflicting requests. This would appear to undermine the regulatory body's independent status by pre-judging its investigatory and decision making processes, and appears to imply that capacity should be allocated in any case. Therefore this paragraph should be amended to read "action is taken, where appropriate" rather than saying "take appropriate action".

We are supportive of the amendment in the version of the European Parliament which entitles the regulatory body to act not only on the basis of a complaint, but also “on its own initiative”.

The wording of Article 13 para. 3 and 4 in the version of the Council, which has been deleted by the European Parliament, should be retained. The services explicitly referred to in Annex III should also encompass the additional and ancillary services referred to in these paragraphs. IRG-Rail welcomes a clarification that access requirements for rail facilities and services apply to those that exist already.

Financing and charging (Articles 8, 30, 31, 32, Annex VIII)
With respect to the issue of financing and charging, IRG-Rail again considers that the provisions set out in the proposals are a clear improvement on the current framework. They contain significant improvements for charging principles and cost calculation both for stakeholders and regulatory bodies. IRG-Rail welcomes the need for infrastructure managers to make clear how their costs are calculated and supports in particular the provisions envisaging the detailing of costs. This will improve cost efficiency of infrastructure and service facilities supply, and lead to proper control and possible reduction of access charges. However we would recommend that such an approach ensures that regulatory bodies have the necessary flexibility, for example in defining new types of cost items or alternative market segments.

Strong reconsideration is needed of the provision on contractual agreements between the competent authority and the infrastructure managers as the only means of giving incentives to reduce the cost of providing infrastructure. It clearly falls short of the existing framework and restricts unnecessarily the regulator’s ability to use other methods to improve the cost efficiency of the infrastructure manager. The Recast should offer sufficient flexibility and allow regulatory bodies to use a range of regulatory measures, e.g. by opening possibilities for incentive (i.e. price cap) regulation, as outlined in the Council’s General Approach.

Furthermore IRG-Rail wants to stress that the regulation of charges is a clear regulatory task and should not be subject to any revision by the national parliament, as proposed by the European Parliament in Article 27 para 3a.

Regulatory Accounts (Article 6, 7, 56 para. 3a, 56a para.1)
IRG-Rail welcomes the provisions concerning regulatory accounting. Requiring infrastructure managers and railway undertakings to produce different regulatory accounts will contribute to enhanced transparency of costs and thus preclude discriminatory conduct such as unfair price discrimination. Different regulatory accounts create grounds for a level playing field for all market players, which in turn ensure workable competition. IRG-Rail would recommend that the provision of relevant information by the infrastructure manager and railway undertakings is mandatory and regular and not only done on request as proposed by the European Parliament.

IRG-Rail holds the view that it is necessary to have clear rules on the separation of accounts. It is pivotal that any incentives for the Infrastructure Manager to behave differently to an integrated railway undertaking are removed.

However, Article. 6 para. 4 as amended by the European Parliament contains significant ambiguities that cast doubts on its feasibility. In particular it appears to mix the concept of accounting separation and unbundling. This needs further clarification.

IRG-Rail therefore suggests a clarification of Article 6 specifically to

- make financial flows transparent
- avoid financial flows that would lead to any advantaging integrated railway undertakings over third party railway undertakings.

To ensure compliance with the rules on separation, the relevant provisions should also be revised. In their current form they allow regulatory bodies only to check compliance with accounting rules. As Article 6 now contains not only rules on accounting but also on the usage of funds and the payment on interests, all of those should be within the scope of regulatory supervision.

In addition, compliance with Article 7 should be monitored by the regulatory bodies. The rules on the independence of essential functions of infrastructure managers laid down in Article 7 serve the same purpose as Article 6: a separation of the interests of infrastructure managers and railway undertakings to allow for a level playing field.

Market Monitoring (Article 56 para 3 d; 57 para 1 b; 15 para 2, 15 para 4a, 15 para 5 b)
IRG-Rail strongly supports the heightened importance of market monitoring in the Recast proposal. Market monitoring is fundamental to setting directions for improvement of the internal rail market in Europe. Monitoring gives guidance for the activities of regulatory bodies and stimulates market participants to improve their activities. In particular, IRG-Rail welcomes:

- the qualitative approach to monitoring expressed in the consultation of users of freight and transport services. The views of users and operators provide valuable information about the performance of the rail market and also assist regulatory bodies in identifying problems in that market;
- the explicit competence of regulatory bodies to request data necessary for statistical and market observation purposes;
- the close involvement of regulatory bodies in the Commission's monitoring work.

Equal rules for infrastructure managers and operators of service facilities (Articles 6, 13, 27, 56, 56a)

IRG-Rail welcomes the powers given to regulatory bodies in the Recast and in particular the regulatory powers in respect of access to service facilities. This would require regulatory bodies to have the necessary powers and in particular to be able to obtain the relevant information. The text should be clarified in this respect.