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**Independent Regulators' Group – Rail**

**IRG–Rail**

**Position Paper**

**Input to upcoming Fourth Railway Package**

## **I. Overall objectives**

IRG-Rail welcomes the European Commission's upcoming legislative proposal for the Fourth Railway Package as a necessary step towards a competitive and sustainable single rail market in Europe.

To date, the European Commission has indicated that the main topics to be addressed by the Package in order to achieve this overall objective are:

- the opening of the domestic passenger market,
- further separation: defining more clearly the essential functions of infrastructure managers, ensuring proper separation from railway undertakings' functions,
- a more effective approach to interoperability and cross acceptance to create a technical level playing field, and including a reform of the role of the European Rail Agency.

IRG-Rail supports the creation of a liberalised domestic passenger market as market opening can contribute to increased efficiency of rail, a better match between services and the wishes of passengers, and can incentivise innovation. This would benefit 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.

IRG-Rail believes that the objectives of market liberalisation can only be achieved with a set of key framework conditions taking into account the needs of users and the structure of the rail market. In this respect IRG-Rail recognises that liberalisation of the domestic rail passenger market could take several forms and that it is crucial to find a balance between the viability of public service contracts and open access services in order to fulfil the public service obligation, which includes the requirement to cover the whole network and provide passenger services even on non-profitable lines, as well as broader aims such as promoting environmental benefits, safety and society benefits

The main priority is to ensure that access to the market is non-discriminatory and transparent and that customers benefit from more efficient, better performing and more innovative services. A strong and properly resourced Regulatory Body is a prerequisite for any opening of the market and especially for the intended further market separation/or separation of essential functions.

IRG-Rail is in favour of clear measures aimed at harmonising the diverse market conditions faced by users at present, promoting efficiency and creating a level playing field for market players and ensuring a liberalised railway market in all European Member States.

Although opening of the domestic passenger market is an important issue, there are still outstanding issues regarding rail freight that remain as obstacles to competition in some countries, for example access to privately owned industrial sidings. IRG-Rail would also point out that there can be consequences for rail freight in a liberalised domestic passenger market and that rail freight should not be neglected in the Fourth Package. Freight traffic and passenger traffic share the same network and a liberalised domestic passenger market can lead to an increased demand for infrastructure capacity. This will put the focus on a balance between passenger and freight traffic in the capacity allocation process.

## **II. Practical experiences and “lessons learned”**

Liberalisation of the railway market, non-discriminatory and fair access to infrastructure are essential steps towards a well-functioning internal European transport market. Experience shows that strong and independent national Regulatory Bodies, and close cooperation on cross-border issues are of particular importance. They are prerequisites to ensure efficient and non-discriminatory use of rail infrastructure, and the realisation of genuine competition.

The implementation of earlier railway packages has shown that the details of any proposed set of measures must be worked out thoughtfully. To create and preserve a level playing field, national Regulatory Bodies must be provided with appropriate tasks and competences. Furthermore, implementation of earlier railway packages has shown the importance of clearly defined legislation in order to avoid wide differences in transposition, whilst recognising the unique features of individual rail markets.

European efforts to establish structures promoting a dynamic and competitive rail market have been partially successful. However, IRG-Rail recognises that the existing railway packages have not fully achieved the Commission's objectives of opening markets and facilitating market entry. We believe that barriers to entry remain in several areas:

- the different level of implementation of European legislation across EU Member States,
  - insufficient administrative capacity and powers of Regulatory Bodies,
  - lack of technical and operational harmonisation
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- in particular, the failure to provide open access to service and terminal facilities, as well as access to rolling stock.

We recognise that some of these issues have been addressed in the recent first package recast directive.

Opening of domestic passenger markets to competition is already in place in several Members States and there are already some examples of successful opening. Further details on market developments are described in the annex to this paper.

### **III. Specific framework conditions for opening the domestic passenger market**

IRG-Rail considers that for market opening to be successful, it must be accompanied by framework conditions which take into account the needs of users and the structure of the rail market.

#### **1. Synergies**

Some stakeholders are concerned that an open market will risk compromising the system-benefits (e.g. timetabling, planning, planning systems) of railways and that competition will lead to conflict among market players, with higher costs and deteriorating levels of safety and performance.

IRG-Rail believes that market opening does not mean compromising on cost, service quality, or safety. Appropriate legislation will open markets, but will not prevent stakeholders from working together where appropriate to ensure that the benefits of a whole-system approach to operations are retained. In fact, experience shows that an increase in competition can bring benefits in these areas, in the best interests of passengers, freight customers and taxpayers.

A credible proposal for the Fourth package must therefore recognise the importance of system-benefits. In attempting to open incumbent-dominated rail markets to competition, the Commission must take care not to inhibit stakeholders from working together, where appropriate, for the benefit of customers and funders.

Regulatory Bodies should be involved in overseeing the process, for instance to ensure that if system timetables are constructed they do not favour incumbent operators.

## **2. Regulatory options for market opening**

IRG-Rail supports the creation of a liberalised domestic passenger market, and believes that this can only be achieved with a set of key framework conditions and subject to strong oversight by Regulatory Bodies in order to ensure a fair, transparent and non-discriminatory market.

IRG-Rail is in favour of an approach that enables Member States to choose the model fitting their market situation best. Liberalisation can take different forms, with a differing balance between competitive tendering for public service contracts and open-access arrangements. Member State rail networks are diverse in size, structure, and technical specification. The Fourth Package must therefore allow for these differences, and provide member states sufficient flexibility, whilst maintaining a level playing field on the market, as to how the benefits of competition in the domestic rail market can be most effectively realised.

Therefore we support several market opening options outlined in the impact assessment<sup>1</sup>:

- services provided only by open access (i.e. railway undertakings decide which routes and services they want to operate) but with public funding provided for un-remunerative corridors or services by individual tender
- services provided only by open access on routes that are profitable, with unprofitable service groups being operated under competitively tendered PSC/franchises
- all lines operated under competitively tendered public service contracts/franchises, with open access permitted under regulatory control
- all lines operated under competitively tendered public service contracts/franchises, with open access permitted without restriction on certain lines.

Regulatory Bodies in those Member States that have transposed the provision for an economic equilibrium test into national law have already a role in facilitating the operation

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<sup>1</sup> Study on Regulatory Options on Further Market Opening in Rail Passenger Transport, Final Report 09/09/10, p. 19ff – to be adapted to options of ongoing impact assessment as soon as published

of open-access international services alongside services under public service contracts. A similar role could be envisaged in relation to domestic passenger traffic, with Regulatory Bodies responsible for assessing whether the economic equilibrium of public service contracts is compromised by the introduction of new passenger services by a new operator.

IRG-Rail looks forward to working together with the Commission on proposals that encourage competition and innovation.

### **3. Tendering of public service contracts**

IRG-Rail welcomes competitive tendering as the general rule for awarding public service contracts. We acknowledge that the award of public service contracts does not fall within the competences and duties of rail Regulatory Bodies, but we recognise the important role of Regulatory Bodies in ensuring non-discriminatory access to the market and transparency of rules. Regarding the competent authorities, there is a need for these authorities to be transparent regarding the traffic they intend to tender and furthermore, IRG-Rail supports the need for stakeholder consultations regarding public transport.

A well-designed, competitive bidding process should ensure the participation of different railway undertakings and can help to ensure the optimal value for customers and funders. The Fourth Package must, however, allow flexibility in the specification of public service contracts, recognising that different markets and regions may require different approaches even within the same member state. The Fourth Package should therefore not stipulate the details of public service contracts and tendering, but should focus on outcomes by requiring competent authorities to design PSCs with the objective of stimulating competition.

When conducting competitive tendering, IRG-Rail considers that the 4<sup>th</sup> Package should allow for sufficient flexibility to take into account public procurement and other possible arrangements.

### **4. Access conditions to the market**

#### **4.1 Access to rolling stock**

One of the main problems faced by new market participants, and thus a main obstacle to competition, is access to rolling stock. IRG-Rail recognises the necessity of addressing this problem, and that there are different approaches to solving this issue, for example:

- Rolling stock provided by the competent authority
- Rolling stock provided via rolling stock leasing companies
- Rolling stock transferred automatically to the new operator

IRG-Rail believes that the Fourth Package should not oblige member states to adopt a particular approach on access to rolling stock. Indeed, variety in PSC specifications, service requirements, and existing rolling stock fleets may require different approaches within the same member state. Nevertheless IRG-Rail believes that legislation should require rolling stock availability not to present a barrier to market entry. In addressing the availability of rolling stock, the Fourth Package should therefore focus on outcomes, and avoid over-prescription, allowing member states to seek the most practicable solution, e.g. as a general objective. Regulatory Bodies should be able to exercise their monitoring powers to ensure that such issues are identified.

#### 4.2 Access to station facilities and services

IRG-Rail would welcome provisions with respect to improved access to rail-related services, in particular ticketing and marketing/promotional activities. The First Package recast already requires access to be granted to suitable locations for ticketing services. In particular, it is important that access is provided to station services including travel information systems.

Domestic passenger liberalisation means that there are more domestic passenger operators with tickets to sell. How those tickets are offered to passengers is governed by two sets of interests. On the one hand, customers are interested in paying the lowest possible price for the service that passengers require. The railway undertaking should be able to distinguish themselves from one another in the eyes of the customer in for example a price competition. Railway undertakings need to be allowed to set their own prices, the level of service and sell their own tickets. On the other hand, customers are interested in tickets that are easy to use, e.g. by having a ticket that is inter-available within a group of railway undertakings. Passenger operators need the cooperation of all other operators to make such offers. The same principles of non-discriminatory access and transparency should apply to marketing and promotional activities. New entrants should be able to advertise and promote their services at stations without restrictions.

The precise manner of market liberalisation significantly influences the way these interests of railway undertakings and users are balanced. IRG-Rail strongly recommends allowing for market-specific solutions with the common aim of increasing rail passenger volume.

Operators of ticketing systems may have dominant positions, and depending on their actual policy they can prevent competition by hindering new entrants. Therefore IRG-Rail sees the necessity of an enhanced role for national Regulatory Bodies in this area.

## **5 Staff transfer**

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. But IRG-Rail does not regard rail regulation as the appropriate place to do so.

## **IV. Other issues**

### **1. Separation and independence of infrastructure managers' essential functions**

IRG-Rail is in favour of clearer definition and specification of the essential functions of infrastructure managers and a further separation and independence from railway undertakings' functions. Regulatory Bodies have an essential role in securing transparency and the level-playing field in the market. Therefore they must be able to fully supervise and enforce the separation requirements between the provision of transport services and the operation of infrastructure.

Strong and independent Regulatory Bodies are a prerequisite for any opening of the market. They must have sufficient resources and powers to tackle any barriers to market-entry. A level playing field depends upon transparent financing, impartial infrastructure management, and non-discrimination. It is for the Regulatory Bodies to fully supervise these areas.

### **2. Technical standards and safety rules**

Different European and additional national technical standards and safety rules constitute a barrier to entry in the railway market due to the additional investments they can require as well as the costs and delays for rolling stock homologation. IRG-Rail supports cooperation between national safety authorities, acceleration of cross-acceptance of national legislation and an appropriate harmonisation of safety rules, avoiding over-prescriptive requirements. This is likely to promote further opening of the railway market and an enhanced competitive environment.

The new provisions of the First Railway Package Recast do also foresee a close cooperation of Regulatory Bodies with the national safety and licensing authorities including a mechanism for providing each other with recommendations, recognizing the high interdependence between safety and competition issues.

## **V. Next steps**

IRG-Rail believes it is important that the proposal from the Commission for the Fourth Package proposal is published as planned by the end of this year. Negotiations should proceed rapidly, in order to ensure the full opening of the railway market to competition as soon as possible. Negotiations should not be compromised by debates on other issues, in particular on the potential establishment of a European regulator, which have already been raised during the Recast of the First Railway Package. It is most important that we proceed rapidly to adoption of the new legal framework, and to implement the necessary measures by the competent national Regulatory Bodies.

IRG-Rail will continue to contribute to the discussions and give its input to the upcoming negotiation process.