EU Directive

RECAST OF 1ST RAILWAY PACKAGE 2ND PART: INFRASTRUCTURE

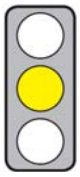
Status: 22 November 2010

Centrum für Europäische Politik

MAIN ISSUES

Objective of the Directive: By revising the regulatory framework the Commission intends to further open the railway sector to competition and to increase its market share.

Parties Affected: All users of railway services, railway undertakings, infrastructure managers and providers of services related to rail traffic.



Pros: Contractual agreements between Member States and infrastructure managers provide for planning certainty regarding the financing of infrastructure.

Cons: (1) The unequal internalisation of noise costs puts rail transport at competitive disadvantages.

(2) The Commission must not regulate central issues of the regulatory frame through delegated acts.

CONTENT

Title

Proposal COM(2010) 475 of 17 September 2010 for a **Directive** of the European Parliament and of the Council **establishing a single European railway area** (Recast).

Brief Summary

- **Background**
  - The first railway package of 2001 consists of three Directives which form the basis for the European railway legislation (see CEP Background Paper, in German only).
  - According to the Commission, the present summary and recast version is to remove any insufficiencies, uncertainties and gaps in the regulatory framework. It further encompasses the removal of barriers to competition and the reform of regulatory oversight (1. Part; cp. CEP Policy Brief), as well as questions regarding the development and operation of the railway infrastructure (2. Part; see here).

- **Definitions: Railway infrastructure, service facilities and railway undertakings**
  - Railway infrastructure, in particular, consists of rail tracks (except for private branch lines), engineering structures (e.g. railway bridges and tunnels) and safety, signalling and telecommunications installations (Annex I).
  - Service facilities are in particular passenger stations, freight terminals, marshalling yards, train formation facilities, storage sidings, port facilities and relief facilities, including towing (Annex III).
  - Railway undertakings are public or private undertakings whose principal business is to transport goods and/or passengers by rail (Art. 3 (1)).

- **Railway infrastructure and service facilities: network statements**
  - Infrastructure managers must now publish their relevant network statements in at least two official EU languages.
  - The network statements of infrastructure managers must comprise:
    - information on the nature of the infrastructure available to railway undertakings;
    - information on the access conditions and the fees charged, as well as
    - in future, additional information on access conditions and fees charged in all service facilities which are affiliated to the railway network of the infrastructure manager. (Art. 27 in conjunction with Annex VI)
  - The operators of service facilities must now inform infrastructure managers about the access conditions to their service facilities and the fees charged (Art. 31 (10)).

- **Railway infrastructure: collecting charges**
  - Member States create a charging scheme which the infrastructure managers use as a basis for setting and collecting infrastructure charges (Art. 29 (1)).
  - Member States must now enter into a contractual agreement, which is valid for five years, with the infrastructure manager. This agreement should regulate public financing and aim to improve the quality of railways and reduce the supply costs and access charges (Art. 30 (1) and (2)). So far, as an alternative, it has been possible to establish "appropriate regulatory measures", which, however, are not specified.
  - In particular, the following now applies:
    - The infrastructure manager must ensure that its business plan "is consistent" with the provisions of the contractual agreement (Art. 30 (3)).
    - The contractual agreement must contain, amongst other things, a "mechanism" that ensures that cost reductions are passed on to users of railway infrastructure (Art. 30 Abs. 3 in conjunction with Annex VII).

Authors: Benedikt Langner and Dr. Thiemo Jeck | langner@cep.eu
CEP | Kaiser-Joseph-Straße 266 | 79098 Freiburg | Germany | Telephone +49 (0)761 38693-105 | www.cep.eu

- The contractual agreement must cover "all aspects" of infrastructure development (incl. maintenance and renewal). The construction of new infrastructure may be included by the contract parties as a "separate item" (Art. 30 (3) in conjunction with Annex VII).
- Before the agreement is signed, the regulatory body assesses whether the medium to long-term income of the infrastructure manager is enough to achieve the performance targets. Thereupon, it submits a recommendation to the competent authority for railway issues. If it intends to deviate from the recommendation, it must justify this to the regulatory body. (Art. 30 (3))

– In principle, when levying infrastructure charges, infrastructure managers may only take into account costs incurred directly through train operations (marginal costs). Now it is specified explicitly which cost categories are not included, e.g. network-wide overhead costs or capital costs. (Art. 31 (3) in conjunction with Annex VIII)
– "[I]f the market can bear this", mark-ups may be levied as an exception from this principle in order to achieve a full coverage of the costs incurred to the infrastructure manager (full costs). However, mark-ups must not lead to a situation in which railway undertakings which can bear the marginal costs and a "rate of return" are excluded from the use of infrastructure. From now on the infrastructure manager must explain to the regulatory body why conditions are given for mark-ups. (Art. 32 (1) in conjunction with Annex VIII)
– In the event of a scarcity of capacity due to congestion, infrastructure managers may increase infrastructure charges (Art. 31 (4)).
– New is that as soon as the internalisation of noise costs from road transport is permitted [COM(2008) 436, cp. CEP Policy Brief and CEP Monitor], the internalisation of noise costs from railway traffic must be carried out (Art. 31 (5)).
– Also new is that trains equipped with the European train control system (ETCS) and which run on lines equipped with national command control and signalling systems receive a temporary reduction of the infrastructure charge to be fixed by the Commission (Art. 32 (3) in conjunction with Annex VIII).
– "Performance schemes" must set incentives which encourage railway undertakings and infrastructure managers to minimise disruption in network operations and to improve the performance of the railway network. This may include penalties and compensation payments. New is the introduction of comprehensive and detailed delay classes. (Art. 35 (1) and (2) in conjunction with Annex VIII)
– If there is more than one applicant for a certain infrastructure capacity when establishing the timetable, a reservation charge may be levied. To date, this was not subject to any regulation. (Art. 36)

► **Railway infrastructure: allocation of infrastructure capacities**

– Member States may lay down a framework for the allocation of infrastructure capacity. The exact allocation, however, is carried out by the infrastructure manager. (Art. 39 (1))
– The infrastructure manager is to "ensure" that all applications for the allocation of infrastructure capacity are treated on a fair basis.
– On the request of an applicant, the infrastructure manager must provide free of charge detailed information, notably on train paths requested by third party applicants on the same routes and on the criteria being used in the capacity allocation process. (Art. 45)
– If an infrastructure manager is not able to satisfy all requests, it must declare the section concerned congested. If infrastructure scarcity-based charges do not lead to a solution, an infrastructure manager may apply a priority rule, taking account of the "importance of a service to society". (Art. 47 (1), (3) and (4)).

► **Railway infrastructure: cross-border cooperation of operators**

– Infrastructure managers must cooperate in the capacity allocation process in order to ensure an "efficient" creation and allocation of infrastructure capacities. To this end, they must establish a "joint body", such as a "one-stop-shop" for rail corridors. (Art. 40 and Art. 44 (5))
– New is that infrastructure managers must now also cooperate when levying infrastructure charges in order to "optimise" the competitiveness of cross-border railway services vis-à-vis other transport modes (Art. 37).

► **Railway infrastructure: development**

– New is that at the latest two years after the Directive's entry into force, Member States are obliged to publish a five-year rail infrastructure development strategy. The infrastructure must be consistent with mobility needs and be based on a "sound financing". (Art. 8 (1))
– On the basis of the 5-year strategy, infrastructure managers adopt a business plan containing investment and financial programmes. New is the infrastructure manager's obligation to consult infrastructure users beforehand. (Art. 8 (3))
– The regulatory body then issues a non-binding opinion statement on the business plan (Art. 8 (3)).
– If an infrastructure manager declares a rail section congested, it must:
  - within a period of six months carry out a capacity analysis containing possible medium and long-term measures to ease the congestion;
  - within a further period of six months "produce" a capacity enhancement plan; without such a plan, or if the measures of the plan fail to "make progress", the infrastructure manager must cease to levy any scarcity-based charges on the rail sections concerned. (Art. 50 and 51)

- **Setting out the rules through the EU Commission in the form of delegated acts**
  - In future, the Commission is entitled to complement or amend basic instruments (delegated act; Art. 290 TFEU) (Art. 60 to 62). In particular it may determine:
    - the cost categories which are not related to marginal costs (Art. 31 (3) in conjunction with VIII No. 1),
    - detailed delay classes (Art. 35 in conjunction with Annex VIII No. 4) and
    - basic principles and parameters on the contractual agreements between infrastructure managers and the competent authorities (Art 30 in conjunction with VII).
  - The European Parliament and the Council may object within a period of two months.

Statement on Subsidiarity by the Commission

The problems of the railway sector affect cross-border aspects which require EU action.

Policy Context

See CEP Background Paper, in German only.

Legislative Procedure

17September 2010	Adoption by the Commission
Open	Adoption by the European Parliament and the Council, publication in the Official Journal of the European Union, entry into force.

Options for Influencing the Political Process

Leading Directorate General:	DG Mobility and Transport
Committees of the European Parliament:	Transport and Tourism (in charge), rapporteur: Debora Serracchiani (S&D Group, I)
Committees of the German Bundestag:	Transport, Building and Urban Affairs
Decision mode in the Council:	Qualified majority (approval by a majority of Member States and at least 255 out of 345 votes; Germany: 29 votes)

Formalities

Legal competence:	Art. 91 TFEU (Transport)
Form of legislative competence:	Shared competence (Art. 4 (2) TFEU)
Legislative procedure:	Art. 294 TFEU (ordinary legislative procedure)

ASSESSMENT

Economic Impact Assessment

Ordoliberal Assessment

On the one hand, **the** planned **obligation for a five-year contractual agreement** between Member States and the infrastructure manager **regarding public financing**, quality improvement, cost reduction and charges **provides** all parties with **planning certainty**.

On the other hand, simultaneously deleting the option to take "appropriate supervisory measures" in these fields makes it more difficult to implement quality improvements and to reduce costs and charges, for many infrastructure managers are fully or partly state-owned. Where this is the case, a Member State has a vested interest in high profits and therefore is possibly not really interested in contractual agreements, which induce quality improvements as well as cost and charge reductions. Therefore, it is absolutely necessary that the regulatory body, as an independent third party, be in charge of reviewing contractual agreements. Even if the recommendations of the regulatory body have no legally binding effect, they at least create pressure to provide justification.

However, it is problematic that the regulatory body may gain influence on decisions regarding infrastructure development, as the agreement it is supposed to review must cover "all aspects of infrastructure development". In fact, this should remain the exclusive domain of Member States and infrastructure managers. The monitoring competence of the regulatory body should therefore be clearly restricted to cost and charge regulation.

The recast version maintains the **principle that infrastructure managers may only take into account marginal costs** when levying infrastructure charges. This is one the one hand appropriate with regard to the existing infrastructure, as it can lead to an optimal use of infrastructure, but it also **slows down the necessary infrastructure development financed through infrastructure charges**. This is particularly problematic as Member States cannot finance such a development on their own due to their tight budget situation.

The Commission claims that full cost coverage is possible if "the market can bear it". However, this is merely an exemption from the principle which now must be explicitly explained by the infrastructure manager if applied and therefore can be optionally refused.

That the Commission is somewhat critical of the full cost coverage approach, as pursued in Germany, is evident from the ongoing contract infringement proceedings, in which its application is one of the main objections. This is inconsistent with the fact that the Commission itself, in key documents on the future of transport

[see e.g. COM(2009) 279; cp. CEP Policy Brief] is calling for – and rightly so – the increased financing of infrastructure through users.

The rule that the internalisation of noise costs in railway transport *must* be implemented as soon as it is even *permitted* in road transport does not ensure that the internalisation will be introduced in parallel. Hence, this rule **distorts competition between transport modes**.

The Commission should refrain from prescribing infrastructure charges for ETCS-compatible trains because not all compatibility problems in the European train control system have been solved yet. The planned incentives towards a conversion could lead to bad investments.

Impact on Efficiency and Individual Freedom of Choice

The scarcity-based infrastructure charges, which are also permitted in the new version, allow for an efficient use of existing infrastructure. However, this should not create incentives for infrastructure managers to forego the development of congested railway sections. It is therefore reasonable that scarcity-based infrastructure charges are levied only if plans for a development of the concerned sections are submitted. Unfortunately, the Commission fails to clarify to whom exactly such plans should be submitted and who decides on their appropriateness.

The proposed **detailed delay classes** in the "general principles of performance regimes" **will** lead to conflicts between railway undertakings and infrastructure managers on the relevant class and thus possibly entail a massive **increase** in **administrative costs**.

The infrastructure manager's disclosure obligation vis-à-vis railway undertakings in the infrastructure capacity allocation process goes too far: on the one hand, an obligation to disclose the allocation criteria helps prevent misuse and therefore is appropriate; the obligation to disclose the train paths applied for by competing railway undertakings, on the other hand, affects business secrets. This information should be disclosed to the regulatory body only, as is the case at present.

Impact on Growth and Employment

Maintaining the marginal cost principle slows down the necessary development of railway infrastructure and decreases the overall growth and employment potential.

Impact on Europe as a Business Location

Not evident.

Legal Assessment

Legislative Competence

The proposed innovations can be based on Art. 91 (1) TFEU, empowering the EU to adopt measures relating to international transport and other "common rules".

Subsidiarity

Unproblematic.

Proportionality

The infrastructure manager's obligation to incorporate data on all service facilities into their network statement leads to an inappropriately high administrative burden. For the data on service facilities normally change more often than the infrastructure managers' network statements. The same level of transparency can be achieved with significantly less effort, namely if each operator of service facilities publishes such data itself on a central online platform (e.g. with the national regulatory body or the European Railway Agency).

Compatibility with EU Law

The Commission may be delegated the power to adopt legal acts which complement or amend "non-essential provisions" of a basic instrument (Art. 290 (1) TFEU). Rules which are indispensable for achieving core targets, however, are not subject to that scope. **Rules regarding the infrastructure charge level and contractual agreements between the competent authorities and infrastructure managers** are central subjects of railway liberalisation and therefore **must not be complemented or amended through delegated acts by the Commission.**

Compatibility with German Law

Pursuant to German law, infrastructure managers are obliged to cover the full costs through infrastructure charges (§ 14 (4) p. 1 General Railway Act, AEG). This contradicts the rule that the infrastructure manager must provide the regulatory body with justification in order to be allowed to levy mark-ups for full cost coverage.

Conclusion

The obligation regarding five-year contractual agreements between national authorities and the infrastructure manager on public financing creates planning certainty. The retained principle that infrastructure managers may only take into account marginal costs when levying railway charges impedes the necessary development of infrastructure. The rule that an internalisation of noise costs must be introduced into the railway transport sector as soon as it is even permitted in road transport distorts competition between the different modes of transport. The infrastructure manager's obligation to incorporate information on all service facilities into the network statements should be rejected, due to the high administrative burden it creates. The Commission is not empowered to amend key issues of railway liberalisation through delegated acts.