Position paper

Recast First railway package - Executive summary

The European Commission (EC) has published a revision to the first railway package, which led to a new European railway legislation in 2001. Its declared target is to simplify administration and to clarify and specify in more detail the legal framework with the objective to improve the functionality of the railway market. In addition, the EC has announced further measures, such as the liberalisation of rail transport as a whole but also of national passenger transport. There are also provisions, which have to be considered as a preparation for the complete opening up of the railway network.

Basically, the idea of the EU Commission to combine and therefore simplify the Directives must be welcomed. However, there are a number of regulations where the EC proposals go far beyond a consolidation.

The regulations concerning

- the quasi ban on cross-border agreements;
- the delegated acts, which reduce the importance of European Parliament and Council by changing the "core issues" (services, sight to strike, market analysis) of the Directive;
- the way external costs are taken into account compared to other competing transport modes;
- the admission of other applicants as railway companies, which only results in a shortage of tracks;
- the monitoring of the market without taking the working conditions of the labour force into account;
- the compulsory further fragmentation of railway companies through further outsourcing and challenging of the holding structure;
- the increased intervention into the possibility to dispose of property (services), for example concerning the constraint having to give preference to rival companies;
- the access to tickets without any consideration of consumer rights;
- the pushing back of national regulations (safety, training, operation) in spite of the lack of Europe-wide standards as well as
- the curtailment of workers' rights up to undermining the right to strike

result in the fact that the Austrian Federal Chamber of Labour and the Austrian transport union Vida request massive improvements to be made in the proposed draft.

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Position paper

EU rail policy
Recast "First railway package"

The European Commission (EC) has published a revision to the first railway package, which led to a new European railway legislation in 2001. In future, the central regulatory elements of the European rail policy shall no longer consist of three different Directives - The first railway package included the Directives 2001/12/EC, 2001/13/EC and 2001/14. To simplify matters, the EC proposes a consolidated Directive, which covers the entire regulatory scope of the first railway package. Its declared target is to simplify administration and to clarify and specify in more detail the legal framework with the objective to improve the functionality of the railway market. In addition, the EC has announced further measures, such as the liberalisation of rail transport as a whole but also of national passenger transport. There are also provisions, which have to be considered as a preparation for the complete opening up of the railway network.

Basically, the idea of the EU Commission to combine and therefore simplify the Directives must be welcomed. However, there are a number of regulations where the EC proposals go far beyond a consolidation resulting in far-reaching changes in the railway sector. In addition, the EC has announced further measures, such as the liberalisation of rail transport as a whole but also of national passenger transport. However, the provisions concerning the delegated acts, the quasi ban of cross-border agreements, die compulsory further fragmentation of railway companies, increased intervention into the possibility to dispose of property and the curtailment of workers' rights are a clear indication that the presented draft goes far beyond consolidation and streamlining.

The Austrian transport union vida and the Austrian Federal Chamber of Labour (Gewerkschaft vida / Bundesarbeitskammer BAK) basically welcome that the draft does not contain any further liberalisation of national passenger transport. However, there are provisions, which have to be considered as a preparation for a complete opening up of the network. BAK and vida stress that they are strictly opposed to any further - here "only" announced - opening up of passenger transport. A

complete liberalisation destroys the cross-link between profitable and non-profitable lines, thereby ruining the existing - largely well functioning - network. Only lucrative, already sufficiently serviced lines would be offered at the expense of other connections. Cherry picking would become the norm. Furthermore, as it has been demonstrated with the so far implemented steps, for example in respect of rail freight transport, there is no link between liberalisation and high market shares. The statements made here (compare for example Recital 11) are simply wrong. They show that the EC fundamentally misjudges the role of the railway as an element of a service of general interest.

vida and BAK are equally critical about outsourcing the change of important regulations (such as additional track services, market monitoring, workers' rights) within the scope of the delegated act. Here, the decision-making power on the change of regulations is transferred to the EC, which, from the point of view of the Austrian labour representations requires the intensive input of the European Parliament and the Council.

vida and the BAK comment as follows on the specific points of the Directive:

Section 3 financial rehabilitation

Solid funding of the infrastructure manager (Article 8 (1) and Article 8 (3))

The strategy for developing the railway structure, which has been raised here, should also include measures to improve the infrastructure. The regional lines should also be especially mentioned; after all, they represent valuable and cost-effective feeders and alternatives for partly overloaded main lines.

vida and BAK reject the revaluation of the regulator, aimed at in Article 8, paragraph 3 (see comments further down).

External costs (Article 8 (4) and 31)

Article 8 (4) provides that the Member States have to ensure that the revenue of the infrastructure manager (infrastructure charges, other activities, state funding) and its infrastructure expenditure shall be balanced within three years. vida and BAK point out that such regulations do not exist for other transport modes. Apart from that, we refer to the extremely low cost recovery in respect of road freight transport, the main rival of the affected railway companies of the preset recast. In Austria, this amounts to 39% without external costs for HGV and 17% for busses as well as 21% for HGV with external costs and 10% for busses. We basically welcome this regulation as one can expect a clearer situation in the long run, in particular in respect of state funding assurances. The three-year deadline for Austria appears to be very ambitious.

The regulations of this paragraph must under no circumstances result in an "artificial" increase of the current infrastructure charges. On the contrary, the infrastructure charges should (continue to) be used as an element of transport policy. In the end, a charge, which is only aimed at striking an even balance, denies the relevant authority the opportunity to take comprehensive transport control measures.

Article 31 includes a number of provisions concerning so-called external costs. vida and the Austrian Federal Chamber of Labour basically demand the full inclusion of all external costs. However, the present proposed method of collecting external costs does not do justice to the target of creating

equality of competition between all transport modes (in particular between rail and road). On the one hand, an obligation to charge external costs for rail transport is required. This obligation does not apply to the road. In addition, it is sufficient in case of road freight transport, if union regulations allow charging for the cost of noise effects - without the need of actually doing it - whilst it is compulsory to take these into account for rail freight (Art 31 paragraph 5). On the other hand, in respect of the rail almost the entire network is affected by charging external costs. This obligation too does not exist for road transport.

In addition, in Paragraph 5 reference is made to the fact that charging environmental costs in rail transport shall however be allowed only if such charging is applied to road freight transport. This raises the question why road passenger transport is not mentioned as a direct competitor to passenger rail transport. Also ignored are the external costs of air traffic as direct competitor to high-speed transport. It should also be explained why noise is treated differently from other external costs. All provisions result in the fact that the welcome initiative to offset external costs becomes a white elephant. Here too, the EC, analogue to the harmonisation of the technical and social provisions, has the power to take appropriate measures, in particular for road transport. This requires urgent corrections.

In connection with Annex VIII, Article 31 (3) stipulates that certain costs, such as for interest on capital, depreciations on communication equipment, kindergartens, social services, restaurants, costs related to acts of God etc. may not appear in the direct costs for wear and tear of the infrastructure. This will increase the pressure on the infrastructure manager and the labour force. In the end, here the option of the (mainly state) infrastructure managers to act as socially responsible companies will be curtailed.

Transparent debt relief (Article 9)

The proposed improvement of the financial situation of the railway, has been demanded by the EU Commission for 20 years (compare Directive 91/440/EC) - albight with moderate success. Basically, an improvement of the financial situation of the railway is to be welcomed. The stipulations in Paragraph 3, according to which only debts, which were incurred prior to 15 March 2001, fall under the provision, cannot be understood by either vida or the BAK. We refer to the longevity of rail investments, not only in the infrastructure sector.

Management of railway companies, holding structure (Recitals 5, 6 and Articles 5, 6 und 7)

The entire Article 5 is problematic as macro-economic objectives are not sufficiently taken into account. BAK and vida would like to point out that rail transport and rail infrastructure services form part of the service of general interest. To dictate to the state - quasi the main actor in the service of general interest - to manage railway companies only in accordance with principles, which apply to commercial companies, does not make sense, in particular in view of a possible liberalisation of rail passenger transport. We propose a formulation pursuant to Austrian Stock Corporation Act, according to which "The management board shall have sole responsibility for managing the enterprise and shall endeavour to take into account the interests of the shareholders, of the employees and the public interests"(§ 70(1) Stock Corporation Act).

That a holding structure, which currently quite rightly exists in the Federal Republic of Germany and in Austria, is also permitted in future, should be clarified in Article 7, which should be supplemented as follows: "An association within a group does not contradict the stipulations of this Article,

provided it is ensured that the companies are independent under company law". This is the only way to reduce the currently comprehensive interpretation variants.

The proposal provides for the abolition of the option to transfer the collection of railway infrastructure charges to railway companies. This measure would be beneficial to fair competition as certain (established) railway companies would no longer have the opportunity to gain access to economically sensible information on rail tracks via invoices, which are issued to (new) rival companies. Furthermore, an additional incentive is created for discrimination-free infrastructure operations, which complies with the principles of sound financial management.

From the viewpoint of vida, this increases the potential to threaten non-independent infrastructure managers. What kind of tasks will remain is difficult to say.

The separation of profit and loss accounts shall now also apply to freight and passenger transport, independent of the fact, whether public services will be retained or not. This Regulation far exceeds a consolidation of the Directives and appears to be superfluous from the point of view of Austrian labour representations.

Access to infrastructure and to services, applicants

Contrary to the announcements of the EC only to consolidate individual Directives, comprehensive new regulations for access rights are quasi added to the package. This is criticised by both vida and the BAK in the strongest possible terms.

Applicants (Article 3, 12, 41)

The chosen formulation does not comply with the stipulations of Article 15 of the EU Regulation 913/2010 to establish a European Rail network for competitive freight and should, within the sense of consequent consolidation, at least be adapted.

From the point of view of vida and the BAK, the extension of possible applicants for infrastructure capacities to other legal entities apart from railway companies (e.g. freight forwarders, parcel services etc.) is to be basically rejected not only because of its incorrect transcription from Regulation 913/2010. Here, an optimal track allocation is jeopardized, tracks are artificially made more expensive and railway companies are degraded to petitioners pleading with freight forwarders and shippers. The protective clause, according to which track trading is prohibited, is already being undermined and has no effect. Furthermore, the provision, according to which "the use of capacity by a railway undertaking when carrying out the business of an applicant who is not a railway undertaking shall not be considered a transfer", makes a mockery of the track trading ban if "subcontracting" opens the door to all kinds of misuse.

Access to ports (Article 1 and 10 in connection with Annex III, Clause 2, lit. g)

The trade union and the Austrian Federal Chamber of Labour reject the provisions on access to ports; after all, any delimitation between port infrastructure and rail infrastructure - in particular concerning services - is impossible. In accordance with the overall optimisation of the port, it should remain the responsibility of the port to decide on the disposition of the port facilities.

Restriction of rights (Art. 11 paragraph 2)

Here, it would be in the interest of the appointing (public) corporations to extend the analysis to economic aspects, as particular passenger transport plays an important role in respect of services of general interest.

Services (Recital 22, Article 13)

Here, services such as maintenance, freight terminals, passenger stations, ticket sales and travel information services, train formation facilities etc. may only be rendered by companies, which do not provide rail transport services themselves or are completely independent from them (Article 13). The supply of services and applications by railway companies may only be rejected if viable alternatives exist, whereby the burden of proof of a "viable alternative" lies with the service facility. In case of doubt, the regulator will take appropriate measures to ensure that a part of the capacities will be allocated to railway companies other than those, which belong to the same undertaking resp. the same facility as the operator of the service facility. This is significantly stricter than the current provision of the Directive 2001/14 Art 5, which itself is problematic enough.

On the one hand, the present draft excessively interferes with the structure of companies and entrepreneurial freedom. On the other hand, services (also) by railway companies were established in good faith that they could use them themselves and partly also in good faith that they would have a strategic advantage over other transport companies. After all, the respective railway companies bear the sole entrepreneurial risk for their establishment and operation. According to this, services are primarily oriented towards the own requirements of those companies (e.g. vehicle type or their size and capacity) that operate them. The planned tightening of the regulation will result in the fact that investing companies, which because of the economic obligation of the management (compare Art 5) are urged only to establish for their own requirement, can no longer be certain that they can indeed use their own investment (workshop etc.). The provision is simply anti-investment because it punishes those companies that invest. In addition, those companies are rewarded that do not invest as they receive services to the same conditions from rival companies without having to bear the entrepreneurial risk. In combination with the provisions of Art 31(7) to use the quasi ban to be allowed to achieve extensive profits from an compulsory independent facility any incentive to establish or operate a service facility in case of bottlenecks will be suffocated. Here, competition between two companies is created at the expense of third parties. This is unacceptable.

In addition, such separations subsequently promote outsourcing and privatisation. As a result, railway personnel will be plunged into uncertainty. Hence, the EC promotes a development, which replaces high-quality employment with worse working conditions and uncertain employment contracts.

Conditions of providing rail-related services (Article 27)

Each provider of rail-related transport services must have so-called conditions of providing rail-related services. The intention to make access as simple and central as positive, for example on the website of the European Rail Agency, is certainly worthy of support. However, we reject the proposal of the Commission to make the conditions of providing rail-related services part of the Rail NetworkStatement, as the services are - sensibly enough - not only provided by the infrastructure manager. In order to be able to exclude liability issues, it should be distinguished and shown separately between minimum access packages and access to services.

Charges for the use of railway infrastructure, cooperation (Articles 30 and 40)

The stipulation of Article 30 extends the period of financing agreements to five years. In future, their conclusion will be mandatory. vida and the BAK raise concerns that the mandatory introduction of five-year agreements might also result in the fact that the track allocation might become more inflexible than before, in particular if the market changes. The same applies to the provisions of Article 40. It must be ensured under (1) that cross-border rail tracks must only be established "if required". This would make it more flexible to comply with Article 42 (3), which fundamentally provides for an amendment of the framework agreements.

Access to tickets (Annex III Clause 2)

It is a matter of course to make access to travel information and ticketing themselves as easy as possible for passengers. However, from the point of view of the trade union and the Chamber of Labour, it is not sufficient to just state that access to tickets and travel information had to be provided. This requires a customer-friendly framework; after all, this concerns liability issues (for example in case of complaints), taking social tariffs (advantage cards, reductions, specific tariffs for certain user groups etc.), ensuring the "best" (cheapest, most comfortable etc.) provider and the guarantee to minimize administrative costs. The current provision is not sufficient. Apart from that, a regulation in the specific "International Passenger Transport Directive" (expected 2011) seems to be more target-oriented (compare EC Communication, Chapter 3.2).

Main purpose of passenger transport (Recital 13, Articles 3 and 10)

Pursuant to current law and in accordance with the definition of Article 3 an (already opened) cross-border passenger transport service requires that the main purpose of the transport is the transport of passengers between Member States. This provision, which is important for the sustainable development of rail passenger transport, has been "forgotten" in the subsequent articles and in the Recitals. For reasons of clarification this should be detailed in Recital 13 and in Article 10.

Role of the regulator

vida and the BAK note that the Austria rail regulator under its current management and within the scope of its current structure are carrying out all tasks assigned to them with great care, paired with the necessary decisiveness and clarity, in particular in respect of securing discrimination-free competition. Furthermore, we would like to point out that other control organs (Audit Court, SCHIG) already exist and that additional control structures are therefore not required.

An extension of the competences, as suggested here (control of revenue, business and development plans) would mean far-reaching structural changes for the regulator who might be obliged having to make recommendations on democratic legitimized political decisions (e.g. in respect of performance requirements). This appears to be too far-reaching and could probably only be explained by a certain scepticism of the EC towards the Member States. BAK and vida would like to point out that the regulator was above all established for monitoring market and competition and that its content-related and personal orientation is therefore focused on supervising competition.

From the point of view of vida and the Austrian Federal Chamber of Labour, infrastructure policy is part of the service of general interest and therefore falls solely under the agendas of governmental and democratically legitimised institutions. No regulations should be adopted, which restrict the transport political room for manoeuvre of the Federal Ministry for Transport, Innovation and

Technology. Introducing quality control by a judicially structured competition authority is non-comprehensible both factually and as to contents. The trade union and the BAK reject the provision of Article 8, according to which the regulator has to be consulted whether a business plan is suitable for achieving the targets. In connection with Article 55 (see below), in which the regulator is de facto forbidden to recruit managerial staff with current rail know how, BAK and vida have their doubts whether the necessary visions, also in view of the role of the railway within the scope of services of general interest, does really exist.

The same applies to the provisions in Article 30, third paragraph. Here too, the regulator is given opportunities for controlling sectors, which go far beyond its primary function, i.e. to ensure discrimination-free access. The obligation of the authority to justify to the regulator how its revenue and expenditure calculation is structured should be considered and is rejected.

The provisions of Article 55, according to which the positions of President and Board of the regulators may only be filled with persons, who - three years prior to their appointment - had not been with regulated companies, is rejected by both vida and the BAK. This results in the fact that the circle of people with a high degree of knowledge concerning processes in railway companies is excluded from occupying important positions with the regulator from the outset. This is in contrast to any sustainable corporate strategy and is incompatible with a coherent development of the railway.

In Austria, the Rail Network Statement is approved of by the regulator. Now the regulator should be assured in advance in Article 27 of being treated as a party. This requires more defined provisions to exclude any incompatibilities.

Situation of the labour force

Deletion of national provisions (Recital 25, Article 24)

vida and the BAK agree with the EC that national provisions in the transport sector will not be effective in the long term. However, there is an essential requirement for the safety of passengers, transported freight, employees, assets and transport in general for as long as there are no uniform provisions at European level. Uniform and generally applicable provisions only exist in small areas (such as train driving licence, individual technical specifications).

In combination with the already taken place watering down of the qualification criteria during the review of the Directive 1995/18/EC, the intended cancellation of the entire Article without replacement is both irresponsible and unacceptable. Deleting this Article would "get rid" of almost the last provisions in respect of complying with essential national provisions. However, these are necessary as there just none at EU level.

Also unacceptable is the "reasonable" consideration of health protection, social conditions and the rights of employees and consumers mentioned in Recital 25. Only "complete" consideration is acceptable in this case, as under no circumstances it can be left to a railway company, which provisions are "reasonable" and must therefore be complied with.

Instead of recklessly gambling with safety issues, the EC should take the initiative and present a draft in respect of the requirements to the entire safety-relevant personnel. After all, there are still a number of safety-relevant areas, which do not fall under the application of technical specifications of interoperability and have therefore not been standardised Europe-wide. This unsatisfactory state of

affairs is criticised by the EK in the context of the proposal (compare Chapter 1.2 "pending problems"). Here too, the EC should have presented relevant proposals a long time ago. vida, the BAK and the European Transport Workers' Federation (ETF) have urged the EC on several occasions to close this safety gap; all of the above mentioned are available for negotiations and consultations.

According to perceptions of the trade union and the BAK, there are even today - hence in respect of the Europe-wide obligation to comply with national stipulations - massive problems when it comes to the state of knowledge and its application in practice.

The intended deletion inevitably opens the competition to bypass safety requirements with the effect that they will fall by the wayside. The combination with the lack of provisions at European level creates an (artificial) safety vacuum that leads to incalculable risks for the rail transport in Europe.

Minimum strike offers (Annex VII Clause 9)

vida and the Austrian Federal Chamber of Labour strongly criticise the intended restriction of a strike or of the right to strike for several reasons and are strictly opposed to it. On the one hand, the European Court of Human Rights has in two current cases (Demir and Baykara and Enerji Yapi-Yol) derived a basic right to strike from Art. 11 of the ECHR (European Convention on Human Rights). However, the respective modalities can only be regulated on the basis of national customs and legal provisions. Here the EC, completely justified, has just no competencies. vida and the BAK are strictly opposed to any form of restriction in respect of the right to strike.

In some EU Member States (for example in Austria) the ECHR is directly valid. The Austrian labour representations point out that there are efforts being made by the EU (compare Art 6 EU-treaty) to join the ECHR. In that case, the ECHR would have to be applied across the entire Union. Apart from that, the right to strike has been embedded in the Charter of Fundamental Rights (Art 28).

However, there are also other international documents (European Social Charter ESC, International Labour Organization (ILO)), which clearly protect the right to strike. Based on this provision, the proposal of the Commission would illegally interfere in the national right to strike and thereby in the National Labour Relations Act. The trade union and the BAK are of the opinion that the freedom of employees to engage in strike action may under no circumstances be questioned in case of a conflict.

This means in summary that a number of international documents clearly work on the assumption of a fundamental right to strike. From the point of view of the trade union and the Austrian Federal Chamber of Labour, restrictions in the public interest can only make an impact if the life or the health of third parties is at risk. This is certainly not the case in connection with the legal acts in question. Therefore Z 9 has to be cancelled without replacement.

Market supervision (Art 15, Annex IV)

Article 15 forgets a significant aspect in respect of opening the rail transport market: the conditions of the labour force working in this sector. Not to record and consider them here, contradicts the objectives of the Lisbon Strategy, where a large number of relevant regulations (such as keeping people longer in employment, creating more and better jobs, reducing the workload etc.) exist. This Article must be improved and Annex IV must be adjusted appropriately by improving the consideration of the labour force (all safety relevant personnel, personnel in outsourced companies, persons in training). Qualitative features of jobs should also be recorded.

Apart from that, there is an imbalance concerning the tasks assigned to the Member States. For example, in respect of infrastructure charging, Member States have to ensure cross-border cooperation of the infrastructure managers and their coordination (Art. 29). The same does not exist with regard to safety in general (mental and physical suitability of the safety-relevant personnel, inspection of the vehicles used etc.). This is completely incomprehensible both for reasons of competition law and safety policy.

Other provisions

Delegation of the legal act

We oppose the delegation of the legal act in the present form. The here delegated act (all Annexes, which de facto form the "core" of track access) go far beyond the extent, which would justify a transfer of competence to the EC. The delegation does not respect the importance of the regulated issues and raises serious political, legal and in particular democratic concerns. This does significantly restrict the Parliamentary control and the diligent consideration of rights, assets and interests by the legislator. Important decisions of rail policy should continue to be taken with the strong involvement of both Council and Parliament.

Cross-border agreements (Article 14)

It is extremely unclear what "cross-border agreements" refer to. If these also include treaties, we firmly reject the Regulation. Where and which Member State can conclude agreements with other states, has been adequately regulated in the EU Treaty, which must not be cancelled or undermined.

vida and the BAK would also like to mention that this Article must under no circumstances be used for questioning sensible agreements, such as RIV and RIC (and their post agreements). The same applies to remaining agreements, which concern the infrastructure (border stations, arrangement of carriages etc.).

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