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To all Members of the European Parliament  
Brussels

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Dear Members,

#### **4th Railway Package - Governance A wrecking attempt?**

According to available information, the Community of European Railways (CER) will submit last minute amendments this week to prevent the governance proposal of the 4th Railway Package being proposed for voting in the First Reading programmed for next week, thereby destroying the compromise voted in TRAN on 17 December 2013.

The objective of CER is the same as with its previous proposals: prevent any innovation in the governance and return the railway as far as possible to history when the state railways had the overall power over infrastructure and operations.

This failed in the UK 20 years ago. Since then, passenger and freight traffic in the UK has grown by more than 60% and is expected to double in 20 years, with full and open competition above tracks and an infrastructure manager (IM) fully independent of Railway Undertakings (RU). Compare this with France, controlled by an incumbent, where rail freight volumes have reduced by 50%. This is generally ascribed to a lack of competition, poor service and uncompetitive prices compared with road transport. RFG therefore supports the compromise voted in TRAN and is very concerned about any attempt to wreck this before the Plenary vote next week.

Our main concerns are :

**- Separate financing of IM and RU.** According to the new amendments of CER, the IM shall be entitled to contract loans and pass them on to the holding company. The same applies for RUs contracting loans for IMs. Both proposals are meant to make the IM fully dependent on the holding company and its associated RUs. In addition, the CER proposal to form alliances within integrated companies opens all doors to the illegal cross-financing between the IM and RU. These issues have been the subject of several EC infraction proceedings against Germany and other Member States and are one of the main obstacles to fair competition and opening the market to new entrants and private finance.

**Separation of staff of IM and RU.** CER do not only want to prevent the financial independence of the IM but also of its staff, as it proposes to keep the management and the supervisory board of the IM under the control of the holding company. This means that those not being part of the integrated group, such as new entrants (incl subsidiaries of state railways in other countries) will be

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clearly disadvantaged when running on a network de jure belonging to a holding which protects the interests of its operational subsidiaries.

**-Capacity allocation and sensitive information.** Worse still, the rail regulator would not have any say when it comes to staff of the different subsidiaries sitting on the board of the RU, holding and IM. It is obvious that this creates clear conflicts of interests of the IM when it comes to allowing or not allowing an independent RU on its own network. This would also mean that commercially sensitive information will be transmitted within an integrated group. With the proposals of CER, integrated groups can use and abuse the infrastructure manager for their own purposes, even though they are publicly financed and should be impartial to all, and not only to the holding and its operational subsidiaries.

**-IM dividends.** CER goes one step further by trying to indirectly limit the powers of the Member States in determining whether an IM shall pay a dividend or not. However, it is surely up to the member states to determine whether an IM shall pay a dividend or not.

**-Railway policy,** CER propose that the Holding Company should have the competence on railway policy. Surely railway policy is a matter for the member state and not the railway companies.

**-Powers and the mandate of the IM.** CER want these reduced to an absolute minimum, of train path allocation and charging. However, it is obvious that other functions, such as network planning, investments, maintenance, etc., which are essential for the quality and performance of the infrastructure manager, should be performed by the IM and not by others such as incumbent RUs. Where this already happens, such as in France, the effect on performance of other RUs can be little short of disastrous.

**This proposal is not a way forward but a huge step backwards into the past. Infrastructure managers will be no more able to have a say on corridors or TEN-T networks or provide reliable services to all their customers as they are not in control of their overall business.**

**In the interest of an efficient, fair, open and innovative rail market, we strongly urge you not to follow the suggestions of the CER.**

Yours sincerely,



Tony Berkeley  
Chairman

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## **Appendix – more detailed comments on CER proposals :**

### **All to be rejected because they completely destroy the compromises reached in TRAN Committee on last 17th December.**

#### **Art.7a(4) – The CER proposal takes out the crucial word "only" **TO BE REJECTED****

« The IM shall raise funds on the capital market only independently and not via ... »

Reason : If the CER amendment is accepted, vertically integrated undertakings (VIU) would be allowed to raise funds on the capital market via the holding. Once this happens, no one would be able to trace back where the money actually goes. The Holding could claim "interest" on such loans which it claim to have given. This means the IM would have to use its revenues to pay for this "interest". This is precisely one of the problems the 4th RP aims to address.

#### **Art. 7a) 4a (new) – Enable infrastructure manager to accept donations/grants from railway undertakings (RUs) – **Amendment to BE REJECTED****

Reason : Because if the RU gives such "donations" it will of course expect something in return. The IM will become dependent on the RU offering such financial donation ... and which RU would be in a position to do so? Only the incumbent will be financially able to give such support, which will create discrimination towards other Rus.

#### **Art. 7da (new) – Allow alliances also in case of integrated structures – **Amendment to BE REJECTED****

Reason : The TRAN text has to be kept. If not, it opens the doors to a lot of possible discriminatory measures to give applicant incentives other than the controlled and transparent reduction of track access charges. Also this amendment does not make sense. Why should there be an increase in revenues of the RU if the IM has savings because of the cooperation agreement? It is the IM, and not the RU which will make savings in the infrastructure, and they may be reflected in the charges. It cannot be allowed that there are non-transparent payments between RU and IM, which can create potential for discrimination with other RUs.

#### **Art.7a (3) (modified) – **Amendment on earmarking of dividends to BE REJECTED****

“The IM incomes .... may only be used in order to finance the business of the IM and to pay dividends to the ultimate owner .... ”

Reason : Because there is no legal possibility to earmark money from dividends to the State for recycling in the infrastructure This would run contrary to the budget prerogatives of Member States. Therefore this amendment does not make sense.

#### **•New recital on the role of the holding – **Amendment to BE REJECTED****

“The holding company .... may contribute to strategic decisions necessary for the good functioning of the railway transport system as a whole ....”

Reason : Because in this amendment the holding is substituting the State (the ultimate owner), which is not acceptable in an open market. It is the State which has to take care of the industrial and transport policies as a whole and not the incumbent.

#### **Art. 7b.1 – **Amendment to BE REJECTED****

“... the infrastructure Manager (IM) shall have effective decision-making powers .... to train path allocation and infrastructure charging”

Reason : Because there was a clear agreement that the IM has to have effective decision-making power on ALL the functions referred to in Art.3(2). All these functions are important to ensure the independence and non-discrimination (e. g. also investment decisions may have an impact on non-discriminatory market access). This is an unacceptable set-back even before the recast of the 1st RP.

#### **•Art. 7b.3 – **Amendment to be REJECTED****

“The IM may have a Supervisory board .... Also including representatives of the staff of the IM ...”

Reason : Because other representatives coming from the IM could not be totally independent

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**•Art. 7b.5 – Amendment to be REJECTED**

“The IM shall have its own management staff. Sensitive information

Reason : Because important items are not mentioned any more: separate premises, ... ensure the independence ... Most importantly, the regulatory body’s role is weakened (may and not shall)....

**•Art.7b.6 – Amendment totally to BE REJECTED**

“The IM shall have the necessary organizational capacity to perform its functions”

Reason : Because it replaces the sentence “ ..... to perform ALL OF ITS FUNCTIONS INDEPENDENTLY”. It is therefore a very clear signal from CER to foresee a strong limitation of the IM’s functions and of course its independency!

**•Art. 7b. 7a (new) and new recitals – Amendment to be REJECTED**

“Member States may request the regulatory body to produce guidelines .... + new recitals to be added: (xa) The regulatory body may produce guidelines on the enhancement of the independence of the staff and management of the IM within a vertically integrated undertaking with respect to train path allocation and infrastructure charging.

Reason : Because “may’ instead of shall!”. Member States have to request the regulatory body to produce binding guidelines, if not, there is no more any protection of independence of IM with ALL its functions. MEMBER STATES WOULD AGAIN BE FREE TO DO WHAT THEY WANT. Member States which want to keep holding structures with full control of the holding over the IM could do this. The initial sentence “The regulatory body should immediately after the entry into force of this directive produce binding guidelines on the enhancement of the independence of the IM” has to be kept! If the guidelines are not binding, or the decision on guidelines is left to Member States, we do not have any progress at all.

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