

Input Paper

4th Railway Package governance proposal

ERFA reaction to the Council Working document for the Land Transport Working Party on 9th July 2015

8th July 2015

ERFA is alarmed at developments away from growth-orientated reform: Do Member States want competition and private investment in the railways or do they prefer to protect the national incumbents and their monopolies?

The latest text being discussed in Council this week firmly indicates the latter.

Despite national governments failing to invest in rail infrastructure to the extent needed to enable growth in the sector, the opportunity for providing the right conditions to attract private investment and competition to rail are all but being eroded. And along with it efforts to shift more goods from road onto rail.

In France private infrastructure managers are providing over 13 billion euros to finance rail infrastructure. The business case they see to recuperating the costs of the investments that have been made is based on a governance model that is transparent, clear and non-discriminatory. The guarantee of such a model was a key element in their decision to invest in rail projects.

Let there be no doubt that the watering down of key provisions, as included in the new version of the governance text, will be responsible for rail's continued stagnation and decline across Europe.

Main ERFA concerns:

1. Cooperation agreements: a new tool for old discriminatory practices (Article 7c, paragraph 3)

In surprising, new developments the latest text suggests that bilateral arrangements between an IM and an RU, even within vertically integrated structures, are the answer to rail's current problems. (Article 7c, paragraph 3)

ERFA stresses the fact that such a provision would simply allow vertically integrated structures, such as in Germany, France and Austria, to continue monopolistic arrangements that stifle fair competition.

Particularly as the new text specifically states that there is no need for regulatory body oversight or the need for regulatory bodies to be able to put an end to such agreements, even if the agreements are found to be discriminatory. (Article 7c, paragraph 3)

ERFA also highlights that the one example the text gives of where cooperation agreements can be used, the leasing of a service facility to a railway undertaking (Article 7c, paragraph 3), is an arrangement that is (or should already be) in place in Member States. The Recast Directive already provides for an infrastructure manager to lease a service facility to a railway undertaking. ERFA does not understand why an already existing legal arrangement is being used to justify cooperation agreements.

The one concrete example of cooperation agreements that exists in today's current context, in the UK, has just been abandoned after the UK Government acknowledged that there were in fact no benefits to any party involved in the so-called alliancing, let alone to customers.

Efficiency savings, such as those sought by cooperation agreements, should be promoted on the rail network, but not via obscure and privileged partnerships, with uncertain results. See better ways of enhancing efficiencies and improving performance that are compatible with a competitive rail market under points 2, 3 and 4 of this paper.

To conclude: ERFA argues that cooperation agreements are the wrong tool to fix the wrong problem – coordination committees are the right platform for much-needed collaboration on the network.

2. Coordination committees – working together by talking (Article 7f)

ERFA advocates coordination committees over cooperation agreements. More listening and working together with all users and stakeholders can improve the performance of the rail network.

The new text heavily dilutes coordination committees (Article 7f).

ERFA stresses that responding to the needs of customers depends on the infrastructure manager being an interlocutor of all its users, hence the need for a platform bringing the rail actors together. ERFA does not believe that exclusive relationships between an infrastructure manager and an incumbent operator result in more customer-orientation.

ERFA wishes to see reinstated the reference to “coordination committees” and all the stakeholders who should be involved in such a dialogue with the infrastructure manager, that is representatives of both freight and passenger users and local/regional authorities. These references have been deleted from Article 7f, paragraph 1.

ERFA also believes that the important role of the rail stakeholders in “making proposals or advising the IM” should be reinstated. This reference is deleted in Article 7f, paragraph 2.

To conclude: ERFA advocates the reinstatement of coordination committees which include the following basic framework: they involve all users and stakeholders, they have the ability to advise the IM, they hold meetings on a regular basis, they have the power to request relevant information from the IM in order to carry out their tasks effectively and the ability to draw up an annual report.

3. Users of the rail network need an infrastructure manager that promotes efficiency and customer-orientation

ERFA considers it to be the infrastructure manager’s fundamental job to ensure an efficient and well-managed infrastructure enabling RUs to run quality services for customers. Strong and independent infrastructure managers who are able to effectively and efficiently manage the tracks on behalf of their users, are the right approach. Any weakening of the independence of the IM in performing its functions creates market barriers, which in turn hamper growth.

IM functions

ERFA strongly opposes the new provisions included in the text that keep the infrastructure manager weak and fragmented. It is now possible for all the functions of the IM, even the essential functions, to be entrusted to different entities. **ERFA members have every right to expect to have to deal with one IM for all the issues related to infrastructure management. Therefore ERFA urges rejection of the following new changes:**

- The outsourcing of all the functions of the IM, even the essential functions, to different entities (Article 7c, paragraph 1, point a)
- The deletion of the responsibility for infrastructure managers to be in charge of traffic management and maintenance planning (Article 7b, paragraph 1)
- The outsourcing of specific development and maintenance works to railway undertakings (Article 7c, paragraph 1, point b)

ERFA strongly believes that the functions of the IM should fully match the responsibilities attributed to the IM in Article 3, point a, paragraph 2 – *The IM means any body or firm responsible for the development, operation and maintenance of railway infrastructure on a network.*

Furthermore ERFA advocates that the full scope of the functions of the IM - **charging, path allocation, traffic management, maintenance and planning** - should be firmly placed in the IM's responsibility, without any fragmentation of these responsibilities between different entities or to RUs, who have a limited interest in ensuring efficient management of the tracks for their competitors.

IM independence

It goes without saying that the IM must be independent in performing these tasks. ERFA regrets the weakening of many of the Chinese walls (Article 7a) put in place to safeguard the independence of the IM within vertically integrated structures. In particular ERFA highlights the "influence" railway undertakings are allowed to have over the appointments and dismissals of managers responsible for essential functions. (Article 7a, paragraph 2).

What is the purpose other to enable intimidation of those responsible for essential functions? It is not the small railway undertakings that will have an impact on who is appointed or dismissed, but rather the big incumbent operators.

To conclude: ERFA urges rejection of the fragmentation of the functions of the IM (particularly Article 7c, paragraph 1, point a and Article 7b, paragraph 1), the reinstatement of the responsibility of the IM to perform all the functions referred to in the EC's original Article 3(2) and guarantees for the independence of IMs within vertically integrated structures.

4. Reduce costs and improve performance in the rail system, not the opposite

ERFA strongly agrees that improved efficiency and better performance should be promoted on the rail network.

However ERFA does not believe that the new proposal to involve railway undertakings in traffic management is the right approach (Article 7b, paragraph 2). ERFA foresees the following problems:

1. How can competing railway undertakings involved with the infrastructure manager in traffic management have efficient decision-making capabilities when deciding which train gets priority when there are disturbances/ delays on the network?
2. More to the point what does it mean if you are a railway undertaking who is not part of this exclusive club? What are the efficiency gains for the market of this type of set-up?

ERFA stresses that there are already existing obligations for infrastructure managers and railway undertakings under the Recast regulation to improve performance via the performance scheme (Article 35).

There is also an obligation on Member States to provide incentives for Infrastructure managers to reduce the costs of providing infrastructure and the level of access charges (Article 30).

These provisions came into effect on 16th June of this year.

To conclude: ERFA stresses the need for existing tools under the Recast Directive to be explored for maximum benefit by the Member States and the need to avoid provisions that create inefficiencies, such as Article 7b, paragraph 2, enabling RUs to be involved in traffic management.

5. More financial transparency, not less, is needed (Article 7d)

The text weakens financial transparency as more loopholes are added:

As the IM is now allowed to outsource specific development and maintenance works to railway undertakings, it can now also grant loans to its subsidiary RU dealing with “infrastructure management and development” (Article 7d, point b)

In another worrying development these loans do not need to be approved by the regulatory body (Article 7d, point c)

The new text also allows infrastructure managers to raise funds on the capital markets on behalf of its subsidiaries dealing with infrastructure management “and development”, (Article 7d, point e) which can of course now be outsourced to RUs. ERFA further questions why this provision is necessary at all? If the loans are granted at commercial rates, they can be obtained from any organisation – and the IM does not need to be involved.

ERFA believes that cross-subsidisation in the use of public funds and other sources of revenue raised by the infrastructure manager endanger the level playing field and the competitiveness of the sector. ERFA therefore opposes any watering down of the strict financial separation provisions contained in the EC proposal.

To conclude: ERFA opposes the weakening of financial transparency and the creation of loopholes within vertically integrated structures. ERFA advocates the original clear language of the EC proposal that:

- **Forbids the use of IM’s incomes to finance other legal entities within the vertically integrated undertaking,**
- **Forbids the IM from granting loans to any other legal entities within the vertically integrated undertaking,**
- **Forbids the IM from raising funds on the capital markets via other legal entities within the vertically integrated structures**
- **Obliges the accounts of the IM and of other legal entities within the vertically integrated undertaking to be kept in a way that ensures the fulfilment of these provisions and allows for separate financial circuits for the infrastructure manager**