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## ERFA position ahead of February Trilogue on Governance

11th February 2016

- In view of the heavy dilution of the provisions establishing a much-needed independent and impartial infrastructure manager, ERFA, representing independent operators in the rail market, urges political momentum to achieve financial transparency in the rail sector.
- Loopholes in the financial transparency provisions are not in the public interest or long term strategic interest for a sustainable rail sector.
- Investment in rail infrastructure is under pressure from limited public resources and from competition with highly performing other transportation modes. Available public money for the rail sector should not be diverted away from important investment in rail infrastructure.
- ERFA continues to urge the trilogue negotiators to support rail's transformation from a sector that loses market share to road and aviation and wastes limited public money, into a sector that can positively contribute to jobs, growth and Europe's environmental sustainability.

### Financial Transparency - Latest compromise undermines any chance of financial transparency

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**Financial Transparency:** The current wording would continue to allow the diversion of much-needed public money and other revenue intended for infrastructure investment and to undermine the running of competing rail services. This is not in the public interest or long-term strategic rail interest for a sustainable rail sector.

The on-going ECJ court cases against Germany and Austria for failing to comply with EU financial transparency rules highlight the urgent need for improved legislation to prevent cross-subsidisation.

**Problems with current compromise: Public funds can be diverted to the holding and via the holding to its subsidiaries, including railway undertakings. This maintains the current problems that exist today.**

#### 1. Lack of legal clarity regarding the IM incomes covered by financial transparency

The EP 1<sup>st</sup> reading position refers to all the income of the infrastructure manager.

The latest compromise allows the IM to make a "pre-selection" of the income that is covered.

**Line 234** reads "While respecting national procedures applicable in each Member State, income from *infrastructure network management activities*, including public funds, may be used by the infrastructure manager only to finance its own business, including the servicing of its loans."

ERFA urges for a clear understanding and definition of “infrastructure network management activities” to avoid any leakage and thereby unintended consequences. Or a return to “infrastructure management activities”. Anything less will continue to allow loopholes in any real financial transparency.

## 2. The holding is not clearly covered

Line 234 reads “The infrastructure manager may also use such income to pay dividends to owners of the company, which may include any private shareholders, **but excludes undertakings which are part of a vertically integrated undertaking and which exercise control over a railway undertaking and that infrastructure manager.**”

ERFA highlights the positions of both the European Parliament (1<sup>st</sup> reading) and Council (General Approach) which include the important reference to the dividend payments to the “ultimate owners”.

It is not clear why the reference to ultimate has been deleted, thereby allowing public funds to be diverted to the holding and its subsidiaries.

As an alternative to the reference to “ultimate” ERFA proposes the following wording (in red):

“The infrastructure manager may also use such income to pay dividends to owners of the company, which may include any private shareholders **but excludes other legal entities of the vertically integrated undertaking**”

## 3. Without separate financial circuits there can be no financial transparency

The separation of financial circuits is a pre-condition to ensure a sufficient level of financial transparency and to avoid cross-subsidization and discrimination. Without separate financial flows regulatory control is impossible.

The current wording does not include separate financial circuits, but has been weakened precisely to limit transparency.

**Line 241** - The accounts of the infrastructure manager and of the other legal entities within a vertically integrated undertaking shall be kept in a way that ensures the fulfilment of these provisions and allows for separate accounting and transparent financial circuits within the undertaking.

ERFA strongly supports that the following provision should be included in the final agreement:

**The accounts of the infrastructure manager and of the other legal entities within a vertically integrated undertaking shall be kept in a way that ensures the fulfilment of these provisions and allows for separate accounting and transparent financial circuits within the undertaking.**

## Cooperation agreements must have Regulatory Body prior-approval

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It is vital that the regulatory body maintains prior approval of any cooperation agreements, as proposed by the European Parliament 1<sup>st</sup> reading position.

**Cooperation agreements have the potential to be a tool for creating more discrimination on the rail network. ERFA fears that in many Member States only the incumbents will be in a position to benefit from cooperation agreements, further undermining a level playing field.**

As a minimum ERFA argues for transparency and regulatory oversight as a necessary precondition to avoid any misuse of this tool.

**Line 229** – European Parliament proposal

“Subject to supervision **and to prior approval by the regulatory body** independent competent body determined by the Member States, an infrastructure manager may conclude cooperation agreements with one or more railway undertakings in a non-discriminatory way and with a view to delivering benefits to customers such as reduced costs or improved performance on the part of the network covered by the agreement.”

**There are no clear benefits from cooperation agreement for the customers of the railways or to the taxpayer, based on the UK experience. It is therefore important to ensure full transparency of cooperation agreement to avoid any deals done behind closed doors. With this in mind ERFA proposes the following addition:**

**Article 7c, paragraph 3a (new)**

**“The delivery of benefits to customers from cooperation agreements shall be monitored by the regulatory body and made available in the public domain.”**

**The Infrastructure Manager shall report via the coordination mechanism established in Article on the benefits achieved by the cooperation agreement, evidence of reduced costs to customers and/or evidence of improved performance.**

Reduced costs to customers shall be understood to mean either reduced prices charged to passengers/customers or a reduction in the taxpayers' contribution to the funding of the public service contract or a reduction in the taxpayers contribution to the funding of the infrastructure management.

Improved performance shall be monitored by the regulatory body against the following performance targets:

Punctuality of services

Frequency of train operations

Customer satisfaction

Quality of rolling stock

Transport capacity for passengers/ freight

Efficiency of transport service provision

## **Lack of legal clarity regarding the impartiality of the infrastructure manager and its functions of traffic management and maintenance planning.**

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ERFA requests additional safeguards on traffic management and maintenance planning so that specific situations particularly sensitive to discrimination are covered.

In cases of disruption on the network, where several trains are delayed or blocked, any decision on the prioritisation of trains should be taken impartially.

ERFA proposes the following addition to traffic management:

Article 7b, paragraph 2a ( new)

“The infrastructure manager shall adopt a management plan detailing rules to be applied in cases of disrupted situations with a view to guaranteeing each railway undertaking non-discriminatory, impartial and transparent treatment. The management plan shall be approved by the national regulatory body.”

ERFA proposes the following addition to maintenance planning

### **Article 7b, paragraph 3**

3. As regards the long-term planning of major maintenance and/or renewal of the railway infrastructure, the infrastructure manager shall consult applicants and shall take into account to the best possible extent the concerns expressed. The infrastructure manager shall respond to each applicant having expressed a concern to outline the steps taken to address the concern.

## **Roles and responsibilities of the Infrastructure Manager**

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ERFA believes that infrastructure upgrades should be part of the key tasks of infrastructure management – **Line 152.**

The Council General Approach does not include upgrades as part of the role of the infrastructure manager. The General Approach also unnecessarily restricts the definition of “operation of the railway infrastructure”. See below proposed compromise

Definition of Infrastructure Manager, Article 3, point 2		
Council	EP	ERFA Compromise Proposal
<p>"infrastructure manager" means any body or firm responsible for the operation, maintenance and renewal of railway infrastructure on a network, and for participating in its development as determined by the Member State within the framework of its general policy on development and financing of infrastructure;</p> <p>2a)"development of the railway infrastructure" means network planning, financial and investment planning as well as the building and upgrading of the infrastructure;</p> <p>(2aa)"operation of the railway infrastructure" means train path allocation, traffic management and infrastructure charging;</p> <p>(2b)"maintenance of the railway infrastructure" means works intended to maintain the condition and capability of existing infrastructure;</p> <p>(2c)"renewal of the railway infrastructure" means major substitution works on the existing infrastructure which do not change its overall performance;</p> <p>(2d)"upgrade of the railway infrastructure" means major modification works of the infrastructure which improve its overall performance;</p> <p>(2e)"essential functions" of infrastructure management means decision making on train path allocation, including both the definition and the assessment of availability and the allocation of individual train paths, and decision-making on infrastructure charging, including determination and collection of charges, in accordance with the charging framework and the capacity allocation framework established by the Member States pursuant to Articles 29 and 39.</p>	<p>'infrastructure manager' means any body or firm ensuring the development, operation and maintenance of railway infrastructure on a network; development includes network planning, financial and investment planning as well as building and upgrades of the infrastructure; operation of the infrastructure includes all elements of the process of train path allocation, including both the definition and the assessment of availability and the allocation of individual paths, traffic management and infrastructure charging, including determination and collection of the charges; maintenance includes infrastructure renewals and the other asset management activities';</p>	<p>"infrastructure manager" means any body or firm responsible for the operation, maintenance and renewal of railway infrastructure on a network, and for participating in its development as determined by the Member State within the framework of its general policy on development and financing of infrastructure;</p> <p>2a)"development of the railway infrastructure" means network planning, financial and investment planning as well as the building and upgrading of the infrastructure;</p> <p>(2aa)"operation of the railway infrastructure" means <b>all elements of the process of</b> train path allocation, <b>including both the definition and the assessment of availability and the allocation of individual paths</b>, traffic management and infrastructure charging, <b>including determination and collection of the charges</b>;</p> <p>(2b)"maintenance of the railway infrastructure" means <del>works intended to maintain the condition and capability of existing infrastructure;</del><b>infrastructure renewals and the other asset management activities.</b></p> <p>(2c)"renewal of the railway infrastructure" means major substitution works on the existing infrastructure which do not change its overall performance;</p> <p>(2d)"upgrade of the railway infrastructure" means major modification works of the infrastructure which improve its overall performance;</p> <p>(2e)"essential functions" of infrastructure management means decision making on train path allocation, including both the definition and the assessment of availability and the allocation of individual train paths, and decision-making on infrastructure charging, including determination and collection of charges, in accordance with the charging framework and the capacity allocation framework established by the Member States pursuant to Articles 29 and 39.</p>