



COMMISSION OF THE EUROPEAN COMMUNITIES

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Proposal for a

DIRECTIVE OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL

**amending Council Directive 91/440/EEC on the development of the Community's
railways**

(presented by the Commission)

{SEC(2004) 236}

EXPLANATORY MEMORANDUM

As announced in the White Paper *European transport policy for 2010: time to decide*¹, the Commission hereby presents a proposal for the amendment of Directive 91/440/EEC with a view to opening up international rail passenger services to competition.

A survey carried out in the 15 Member States in 2003² showed that 70% of those interviewed agreed: "If safety standards are met, competition is the best way to make the railways more efficient". In the same survey, 74% of respondents considered that: "As with air transport, low-cost carriers should be able to operate international train services, if they comply with strict rules". These results show two things: firstly, the introduction of competition is viewed favourably on the whole, and, secondly, competition must be backed up by strict safety rules and passenger rights.

The European Parliament has advocated such an approach on several occasions, e.g. during the votes in 1999 on the first railway package and in 2003 on the second package. In October 2003, Parliament adopted an amendment calling for the opening up to competition of all national and international rail passenger services by 1 January 2008³. In its opinion on these amendments⁴, the Commission stated that this issue should be addressed in a specific proposal to take account of existing legislation on public service contracts in order to avoid any inconsistencies. The Commission therefore confirmed its intention of putting forward a specific proposal for opening up the passenger transport market together with measures to protect passenger rights.

1. A STEP TOWARDS ESTABLISHING AN INTERNAL MARKET IN RAIL SERVICES

1.1. A framework to allow competition

With the transposition of Directives 2001/12/EC, 2001/13/EC and 2001/14/EC already at a very advanced stage, the framework for international rail services, which applies initially to freight, is being put in place. It is already established in more than half the Member States and should be in place everywhere in the course of 2004.

This framework lays down precise rules on the licensing of railway undertakings, the transparent and non-discriminatory allocation of infrastructure capacity and charging for infrastructure use. In addition, it calls on the Member States to establish a "regulatory authority" to control access to the market.

This framework, which will be in place from 2003-2004 in the context of the opening up of the rail freight market, will provide a sound, practical basis for the opening up of international passenger services to competition in 2010.

¹ COM(2001) 370, 12.09.2001.

² Eurobarometer 59.2, spring 2003.

³ European Parliament legislative resolution on the Council common position with a view to adopting a directive of the European Parliament and of the Council amending Council Directive 91/440/EEC on the development of the Community's railways (8011/3/2003 – C5-0295/2003 – 2002/0025(COD)).

⁴ COM(2003) 719, 26.11.2003.

1.2. A strict framework for safety rules

The legislator has also seen a need to establish clear rules on railway safety which are line with the European dimension of the railway industry. Directive 2004/... on the safety of railways⁵ lays down rules on safety certification of railway undertakings, safety management and regulation, and accident investigation. It also provides for the gradual development of European safety rules which are to be drawn up by the European Railway Agency.

Directive 2004/... must be transposed by ... and will thus be fully operational by the date scheduled for the opening up of international passenger services.

European safety rules are not a precondition for opening up the market to competition as the national safety rules are fully applicable. Furthermore, before being able to offer services, every licensed railway undertaking must have:

- rolling stock and drivers authorised to operate in the Member States in which they plan to operate;
- a safety certificate issued by the national safety authority of each of the Member States they plan to cross.

This framework will be supplemented by the proposal presented concurrently on the certification of drivers of locomotives and trains for the carriage of passengers and freight in the Community.

1.3. The protection of passengers' rights

It is important to lay down basic rules for the protection of passengers' rights, as has already been done in the field of air transport. In several Member States, passengers' rights are specifically regulated either in statutory measures or by the railway undertakings themselves. The Commission is therefore presenting, together with this proposal on market opening, a proposal for a regulation on passengers' rights and obligations in international rail transport. These rules will not interfere with the commercial freedom of railway undertakings, which will be free to offer more attractive guarantees to their customers, but they will constitute a minimum standard to be respected by all parties.

2. NEED FOR COORDINATION WITH THE COMMUNITY LEGISLATION ON PUBLIC SERVICE CONTRACTS

2.1. Application of Regulation No 1191/69 to international services

Member States and local authorities may choose to establish public service contracts for the provision of certain rail passenger services. In this case, and in conformity with the recent ruling by the Court of Justice⁶, they must apply the provisions of Regulation No 1191/69⁷. According to these provisions, public service contracts may include exclusive rights to provide certain services.

⁵ Directive ...

⁶ Altmark Trans ruling of 24 July 2003, case C-280/00.

⁷ Council Regulation (EEC) No 1191/69 of 26 June 1969 on action by Member States concerning the obligations inherent in the concept of a public service in transport by rail, road and inland waterway.

The scope of Regulation No 1191/69 has been extended to international services. Two Member States, or two local authorities straddling a border, may together define and award a public contract service for the provision of an international service or a cross-border regional service. It is possible in such case to define exclusive rights for the service in question.

Opening all international services to competition purely on a free-access basis could therefore conflict with the provisions of Regulation No 1191/69 and deny Member States the possibility of establishing exclusive rights in a public service contract. It is therefore necessary to clarify the relationship between these two areas, particularly in cases where international services coexist on the same line with local services provided under a public service contract.

2.2. Commission proposal to replace Regulation No 1191/69

On 21 February 2002 the Commission presented an amended proposal⁸ for a Regulation of the European Parliament and of the Council on action by Member States concerning public service requirements and the award of public service contracts in passenger transport by rail, road and inland waterway to replace Regulation No 1191/69. The principal aim of this proposal is to introduce a system of controlled competition to ensure that the award of public service contracts on a competitive basis is underpinned by rules that protect the general interest, by ensuring the availability in all regions of high-quality public transport services at affordable prices catering to all social requirements. The proposal is currently being examined by the Council and the European Parliament. The reference in the text of the proposal to the Community legislation in force enables account to be taken both of the existing regulation and of the future regulation once adopted.

The Commission calls on the European Parliament and the Council to proceed as soon as possible with the examination of its revised proposal substituting Regulation N° 1191/69 and to start quickly the examination of the present proposal, in order to take into account the complementarities between these two texts, which aim at an effective opening of the rail passenger market and at regulated competition for the award of public service contracts in this sector.

2.3. Need to take account of cabotage

International trains pick up passengers and set them down in the same Member State (cabotage). While the share of this traffic varies, it is often very high. For example, trains on the Brussels-Cologne line are very full between Brussels and Liège, but much less so from Liège to Cologne. The number of international trains not making intermediate stops in a given Member State is very small and limited to some high-speed services, such as the Brussels to Paris service.

The profitability threshold of an international service, which is directly linked to the number of passengers carried, depends on the possibility of picking up and setting down passengers along the route. Not allowing this facility is tantamount to denying a new entrant the possibility of introducing a commercially viable service. It would also be discriminatory, as the incumbent would continue to be able to pick up passengers and set them down along the route while its competitor would be denied this right.

This is why opening the market while excluding cabotage on international services would not have any real impact on the market. The proposal presented therefore includes the right for

⁸ COM(2002) 107, 21.2.2002, OJ C 151 E, 25.06.2002, p. 146–183.

undertakings offering international services to pick up passengers at any station located on the route of the international service and to set them down at another, including stations located in the same Member State.

This aspect underscores the importance of ensuring that the proposed opening up of the market on the basis of free access is consistent with the scope of Regulation No 1191/69.

2.4. The solution chosen

Needs differ depending on market segments (regional cross-border, international long-distance, high-speed, etc.) and on the profitability or otherwise of the service in question. This calls for a flexible approach allowing both competition on the basis of free access and the award of public service contracts that may include exclusive rights for certain services.

It is therefore proposed that the general principle should be one of opening up the market on the basis of free access, while allowing Member States the option of limiting such access if they conclude a public service contract for a specific service, subject to strict compliance with the provisions of Regulation No 1191/69 or the regulation which will replace it, or if the economic equilibrium of the public service is at risk.

There are three possible scenarios:

- two Member States (or two local authorities on either side of a border) together define and award a public service contract for an international service, complying with Regulation No 1191/69, and include in this contract exclusive rights for the service in question;
- two Member States (or two local authorities on either side of a border) together define and award a public service contract for an international service, complying with Regulation No 1191/69, without exclusive rights or with some exclusive rights;
- the service is deemed to be open to competition on the basis of free access.

In all cases, the international service may run on a line on which certain services are operated under a national public service contract. For example, it would be possible on the future high-speed line between Madrid and Perpignan to conclude a public service contract granting exclusive rights for the section between Madrid and Barcelona. These exclusive rights would prevent any other operator from operating a national service limited to the Madrid-Barcelona section. However, these exclusive rights could not prevent an international operator running a service between Perpignan and Madrid from picking up or setting down passengers in Barcelona, unless it was shown that this could affect the economic equilibrium of the public service contract in question.

However, it should be stressed that the markets served by international services and those served by national services operated under a public service contract are not the same. Services operated under a public service contract are generally regional, with frequent stops, carrying passengers travelling short or medium distances. International services, on the other hand, generally make fewer intermediate stops and their customers travel longer distances.

The solution proposed for market opening is balanced, since it allows national or local authorities who so wish to award public service contracts jointly, while leaving the way open for the development of new initiatives and retaining the cabotage option to enable international services to develop under realistic economic conditions.

When access rights are opened up for international services, there will no longer be any justification for the current obligation to form an international grouping. Furthermore, the Commission decision in the GVG/FS case⁹ has already shown that the obligation to form an international grouping may be a serious barrier to market entry. This is why it is proposed to delete all references to the concept of an international grouping from 1 January 2010.

3. IMPACT OF THE PROPOSAL ON INTERNATIONAL PASSENGER SERVICES

The international carriage of passengers by train, estimated from sales of international tickets, represents approximately 10% of railway undertakings' passenger turnover¹⁰ (€2.4 billion). This concerns international journeys, with each traveller crossing at least one border.

Certain types of international rail services are currently experiencing a severe loss of customers. Night trains in particular, as currently operated, are unprofitable despite their generally high prices. To limit their losses, railway undertakings have recently withdrawn several of these services (e.g. Brussels-Milan and Vienna-Amsterdam).

The market share of international traffic including cabotage, i.e. passengers making national journeys on international trains, can at best be estimated at approximately 20% of the market assuming that one in two passengers on international trains is making a purely national journey.

With regard to the type of services affected, this primarily concerns:

- international high-speed services;
- international night train and motorail services, which are currently in a critical situation and could be revitalised by new initiatives as a result of market opening;
- occasional and seasonal international services, for which new commercial initiatives could be developed.

The doubling of the high-speed network (from 2 600 km now to 6 000 km in 2010) and its interconnection by 2010, together with progress on interoperability, should open up very important new markets for rail transport and provide an opportunity for new commercial initiatives.

The very high competitive pressure from low-cost airlines on routes between the major European cities poses a very serious threat to international rail services. In this context, opening up to competition should enable railway companies to develop new initiatives and to reduce their costs in order to offer competitive international services by 2010.

4. COMMENT ON THE INDIVIDUAL ARTICLES

Article 1

This article defines the concept of "international passenger service".

⁹ Case COMP/37.685.

¹⁰ This share is much higher in small countries: Luxembourg 70%, Belgium 33%, Austria 17%. See attached table.

It establishes the principle of opening up access rights for the provision of international passenger services, including cabotage, by 1 January 2010 at the latest.

The article therefore removes, with effect from 1 January 2010, all references to the obligation to form an “international grouping” in order to benefit from infrastructure access rights.

It specifies that these access rights may be restricted in the case of routes which are the subject of a public service contract pursuant to Regulation No 1191/69. However, it provides that this limitation is possible only if it is shown to be necessary to maintain the economic equilibrium of a public service contract.

Article 2

This article provides that the Commission must report on the application of the above provisions by 31 December 2012.

Proposal for a

DIRECTIVE OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL

amending Council Directive 91/440/EEC on the development of the Community's railways

THE EUROPEAN PARLIAMENT AND THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty establishing the European Community, and in particular Article 71 thereof,

Having regard to the proposal from the Commission¹,

Having regard to the opinion of the European Economic and Social Committee²,

Having regard to the opinion of the Committee of the Regions³,

Acting in accordance with the procedure referred to in Article 251 of the Treaty⁴,

Whereas:

- (1) Council Directive 91/440/EEC of 29 July 1991 on the development of the Community's railways⁵ was designed to facilitate the adaptation of the Community's railways to the requirements of the single market and to improve their efficiency.
- (2) In its White Paper *European transport policy for 2010: time to decide*⁶, the Commission announced its intention to continue building the internal market in rail services by proposing to open up the market in international passenger services.
- (3) In October 2003, the European Parliament adopted an amendment calling for the opening up to competition of all national and international rail passenger services by 1 January 2008. The Commission stated on that occasion that it intended to present a specific proposal which dovetailed with the existing legislation on public service contracts as well as measures to protect the rights of passengers on international services.
- (4) International rail services currently present a very contrasting picture. Long-distance services (night trains) are in difficulty and several of them have recently been

¹ OJ C, , p. .

² OJ C, , p. .

³ OJ C, , p. .

⁴ OJ C, , p. .

⁵ OJ L 237, 24.08.1991, p. 25. Directive as last amended by Directive 2001/12/EC of the European Parliament and of the Council (OJ L 75, 15.03.2001, p. 1).

⁶ COM(2001)370, 12.09.2001.

withdrawn by the railway undertakings concerned to limit losses. The market for international high-speed services, on the other hand, has seen a sharp increase in traffic and will continue its vigorous development with the doubling and interconnection of the trans-European high-speed network by 2010. Nevertheless, there is strong competitive pressure from low-cost airlines in both cases and it is essential to stimulate the new initiatives by promoting competition between railway undertakings.

- (5) It would not be possible to open up the market in international passenger services without detailed provisions on infrastructure access, substantial progress on interoperability and a strict framework for rail safety at national and European level. All of these elements are now in place following the transposition of Directives 2001/12/EC of the European Parliament and of the Council of 26 February 2001 amending Council Directive 91/440/EEC on the development of the Community's railways, 2001/13/EC of the European Parliament and of the Council of 26 February 2001 amending Council Directive 95/18/EC on the licensing of railway undertakings⁷, 2001/14/EC of the European Parliament and of the Council of 26 February 2001 on the allocation of railway infrastructure capacity and the levying of charges for the use of railway infrastructure and safety certification⁸, and Directive 2004/./EC on the safety of the railways⁹. This new institutional framework must be supported by established, consolidated practice by the proposed date for opening the market for international passenger services. The proposed target date is therefore 2010.
- (6) The number of railway services without intermediate stops is very limited. In the case of journeys with intermediate stops, it is essential to authorise new entrants to pick up and set down passengers along the route in order to ensure that such operations have a realistic profitability threshold and to avoid placing potential competitors in an unfavourable situation compared with the existing operators, which have the right to pick up and set down passengers along the route.
- (7) Council Regulation (EEC) No 1191/69 of 26 June 1969 on action by Member States concerning the obligations inherent in the concept of a public service in transport by rail, road and inland waterway¹⁰ authorises Member States and local authorities to award public service contracts. These contracts may contain exclusive rights to operate certain services. It is therefore necessary to ensure that the provisions of this Regulation are consistent with the principle of opening up international passenger services to competition. On 21 February 2002 the Commission presented an amended proposal¹¹ for a regulation of the European Parliament and of the Council on action by Member States concerning public service requirements and the award of public service contracts in passenger transport by rail, road and inland waterway to replace Regulation No 1191/69. The principal aim of this text is to introduce controlled competition in the award of public service contracts.
- (8) The application of this Directive should be evaluated on the basis of a report to be presented by the Commission two years after the date of opening up the market in international passenger services.

⁷ OJ L 75, 15.03.2001, p. 26

⁸ OJ L 75, 15.3.2001, p 29.

⁹ OJ L.

¹⁰ OJ L 156, 28.6.1969, p. 1. Regulation as last amended by Regulation (EEC) No 1893/91 (OJ No L 169, 29.6.1991, p. 1).

¹¹ COM (2002) 107, 21.2.2002, OJ C 151 E, 25.06.2002, p. 146.

- (9) The objectives of the proposed action, namely the development of the Community's railways, cannot be sufficiently achieved by the Member States given the need to ensure fair and non-discriminatory conditions of access to infrastructure and to take account of the obviously international dimension of the way in which important parts of the rail networks operate. Because of the need for co-ordinated transnational action, these can be better achieved at Community level, so the Community may adopt measures in accordance with the principle of subsidiarity enshrined in Article 5 of the Treaty. In accordance with the principle of proportionality set out in that Article, this Directive does not go beyond what is necessary to achieve those objectives.
- (10) Directive 91/440/EEC should therefore be amended accordingly,

HAVE ADOPTED THIS DIRECTIVE:

Article 1

Directive 91/440/EEC is hereby amended as follows:

- 1) The fourth indent of Article 3 is deleted.
- 2) The following indent is inserted in Article 3 after the fifth indent:
"- international passenger service shall mean passenger services where the train crosses at least one border of a Member State; the train may be joined and/or split, and the different sections may have different origins and destinations, provided that all wagons cross at least one border".
- 3) The first indent of Article 5(3) is deleted.
- 4) The phrase "and international groupings" is deleted in Article 8(1).
- 5) Paragraph (1) of Article 10 is deleted.
- 6) The provisions referred to in points 1), 3), 4) and 5) above take effect on 1 January 2010.
- 7) The following paragraphs 3(a), 3(b) and 3(c) are inserted in Article 10:
"3(a) Railway undertakings within the scope of Article 2 shall, by 1 January 2010 at the latest, be granted the right of access to the infrastructure in all Member States for the purpose of operating an international passenger service. Railway undertakings shall, in the course of an international passenger service, have the right to pick up passengers at any station located on the international route and set them down at another, including stations located in the same Member State.
3(b) Member States may limit the right of access defined in paragraph 3(b) on services between a place of departure and a destination which are covered by a public service contract conforming to the Community legislation in force. Such limitation may not have the effect of restricting the right to pick up passengers at any station located on the route of an international service and to set them down at another, including stations located in the same Member State, except where this is strictly necessary to maintain the economic equilibrium of the service defined in a public service contract and has

been approved by the regulatory body referred to in Article 30 of Directive 2001/14/EC¹².

3(c) Member States shall take the necessary measures to ensure that the decisions referred to in 3(b) are subject to judicial review."

8) The following subparagraph is added to Article 14:

"By 31 December 2012 at the latest, the Commission shall submit to the European Parliament, the European Economic and Social Committee, the Committee of the Regions and the Council a report on the implementation of the provisions of Article 10(3)(a) and (3)(b)."

Article 2

1. Member States shall bring into force the laws, regulations and administrative provisions necessary to comply with this Directive at the latest by¹³. They shall forthwith communicate to the Commission the text of those provisions and a correlation table between those provisions and this Directive.

When Member States adopt these provisions, these shall contain a reference to this Directive or shall be accompanied by such reference at the time of their official publication. The methods of making such reference shall be laid down by the Member States.

2. Member States shall communicate to the Commission the text of the main provisions of national law which they adopt in the field covered by this Directive.

Article 3

This Directive shall enter into force on the day following its publication in the *Official Journal of the European Union*.

Article 4

This Directive is addressed to the Member States.

Done at Brussels,

For the European Parliament
The President

For the Council
The President

¹² OJ L 75, 15.3.2001, p 29.

¹³ 18 months after the final adoption of the Directive.