4th Railway Package

Updated Position Paper

Brussels, 27th August 2014

The market pillar of the 4th Railway Package – progress under the Italian Presidency

ERFA welcomes the Italian Presidency's launch of discussions on the market pillar of the 4th Railway Package and hopes for significant progress during the coming months.

ERFA represents new entrants on the rail market, i.e all those operators who want open access and fair market conditions.

In light of the opening of discussions in the Council[1], we therefore provide our recommendations regarding key issues on the market pillar of the 4th Railway Package. The comments concern both passenger and freight issues, as ERFA is now also home to new entrant passenger operators.

It cannot be stressed strongly enough that the values at stake in the negotiations, ensuring fair competition and open markets, are fundamental – not only to the individual market actors and our members, but to the railway markets as such and to Europe as a whole. Competition in the market fosters a higher quality of services, innovative solutions and increased productivity, thus contributing to the development of the market as whole.

GOVERNANCE

Cooperation and alliancing

ERFA clearly supports initiatives to make infrastructure managers more customer-orientated. An important step in this direction is ***ensuring cooperation*** between infrastructure managers and all railway undertakings so as to regularly assess the needs of the market and the customers.

[1] ERFA supported the Commission's proposals as voted on by the EP TRAN Committee in November 2013, but has major concerns about the changes introduced at the EP First Reading in February 2014. If implemented, these set back the process of liberalisation and might well lead to the end of any competition above tracks and the effective introduction of monopoly providers of passenger and freight rail services across Europe. This will ultimately lead to a lack of incentives to develop the rail sector and lower quality of the railways.

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However, there is a risk that cooperation agreements or alliancing between infrastructure managers and certain undertakings will distort the market and prevent fair competition between undertakings, if one undertaking has a cooperation agreement and the others do not. It must be ensured that such ***agreements are equally accessible to all railway undertakings*** and that all such activities are transparent, so that no unfair alliancing takes place.

Cooperation between the infrastructure manager and a railway undertaking may function successfully in a few, limited cases, but it requires a clear definition of the scope and consequences of the cooperation as well as a strong regulatory oversight. For example, it may sound useful to have co-operation agreements between an infrastructure manager and an undertaking on a specific project, but looking into the detail it may often lead to ***severe distortion of the market***.

Numerous situations come to mind when considering possible market distortions of cooperation agreements - e.g. where an undertaking wishes to upgrade a part of the network, is prepared to contribute financially and then seeks special low access charges to compensate the contribution, to the detriment of other undertakings on the same stretch. The other undertakings may not have wanted or needed the upgrade and will be charged more as a result.

There is clearly a risk that under integrated structures the infrastructure manager could use "co-operation agreements" to continue privileging its own operator.

<u>Recommendation</u>: Ensure clear rules and conditions governing cooperation agreements so as to safeguard equal treatment and fair competition.

Financial Transparency

The key issue in any structure is that there must firstly be ***full transparency of financial flows*** between different parts of a holding company model (specifically between any one part of the holding company, IM and RU) so ***as to ensure that all undertakings have equal opportunities***.

Secondly, there must be a ***clear and fair framework for agreements*** between one undertaking and the infrastructure manager. Substantial conditions must apply so as to ensure that equal conditions are available for other undertakings and that the regulatory bodies have the necessary oversight of such agreements.

In the case of integrated holdings, the role of the regulatory body is to ensure that infrastructure managers behave in a fair and transparent manner with respect to all undertakings and that there are ***no hidden financial flows*** between the various parties in the holding structure.

<u>Recommendation</u>: Ensure full financial transparency and clear rules concerning independence of the parties in integrated holding structures so as to safeguard equal treatment and fair competition.

The role and functioning of the infrastructure manager

Also for railway undertakings, the ***functioning of the infrastructure manager*** is important for the functioning of the market itself. Ensuring that the infrastructure manager works according to the market's expectations is essential for the creation of an open competitive market in the rail sector.

Although it can be argued that outsourcing and contracting out of certain tasks is necessary, ***the essential necessities of infrastructure management must remain under the control of the infrastructure manager***. This concerns not only allocation of capacity and charging of undertakings, but the full life cycle of investment, planning, maintenance and operations. Only with these responsibilities allocated, can the infrastructure manager deliver according to the expectations of its customers and of the national and European authorities. Ultimately, ensuring return of national and European investments in infrastructure depends on the room for manoeuvre and responsibilities of the infrastructure manager, which must be holistic to enable the infrastructure manager to be cost-efficient and effective.

Furthermore, the ***third parties*** involved in contracting must remain independent from the railway undertaking, so as to ensure equal treatment and fair market conditions. This is clearly the case with energy supply, which often comes from a third party, and for which we have no concern unless the tariff structure gives unfair advantage to the largest users; that is after all a competition issue.

<u>Recommendation</u>: Ensure allocation of full life cycle of functions to infrastructure manager so as to support a high-delivering infrastructure and thus a solid foundation for return of national and European investments.

PUBLIC SERVICE OBLIGATIONS

Open markets and fair competition

Firstly, it is essential that ***fair competition*** is introduced in the public service sector with full and effective independent regulation. This will improve the quality of the services as is demonstrated in those Member States where this already happens, and boost the rail market as whole. It will also reduce the costs to member state governments and ensure continued incentives for investments and development of the sector.

Secondly, it has been argued that competitive awards should be limited and the use of direct awards enhanced, as there is ***insufficient interest of market actors*** to submit bids in competitive tendering. In the experience of our members, who represent a variety of actors in the market, this is not correct.

The structure of the bidding procedures and administrative burdens, along with a hesitant national authority when it comes to new market actors, exposes the new railway undertakings to unnecessary or unfair risks in order to ensure that the incumbent railway undertaking wins the contract. It is therefore necessary, in ***order to ensure fair market access and a sound competitive environ-***

ment, to maintain the originally proposed aspects of the PSO proposal - ensuring competitive awards and limiting the use of direct awards to very restricted conditions. We already today see severe challenges, especially at local and regional level, caused by favourable conditions for incumbents, which is ***detrimental to the rail market***. In order to ensure innovation and continued development of the market, it is necessary to enable diversity to raise the quality and improve market attractiveness– benefitting both customers and society at large.

The call voiced by some actors for a longer transitional period on these aspects of market opening appear to have ***little foundation in implementation consideration.*** The main reasoning is more likely to be to protect the current monopoly market status for as long as possible. Market opening should be promoted in a fair and non-discriminatory way as a benefit, as it is in so many other industry sectors, rather than resisted. This is an essential requirement to the market in order for it to deliver to its full potential to the benefit of passengers, authorities, taxpayers and society.

<u>Recommendation</u>: Ensure wide use of tendering procedure and limited use of direct awards so as to safeguard fair competition in the market and prohibit unfair treatment of market actors.

Access to rolling stock

The access to rolling stock is ***a serious barrier to market entry***. Hindering access to unused rolling stock by certain state owned operators is very evident in the passenger sector, but similar comments are made about the freight sector, where for years incumbent operators have broken up or made non-operational both rolling stock and locomotives that could be used by other competing operators. This aspect repeats the ***unfair treatment*** of certain railway undertakings and hinders free competition in the market.

Strictly speaking it could be argued that, as the rolling stock was purchased with state funding, the state ***should ensure that the assets are used for as long as possible*** by other operators if no longer required by the incumbent.

However, if this is considered too difficult to implement, then an easier solution would be for a good functioning leasing market to be created or the existing market expanded, so that ownership of redundant state owned rolling stock be transferred to one or more leasing companies owned independently of the undertaking.

Without such independent access to older rolling stock, new entrants will be forced to buy new, making their bids and operations more costly and therefore ***less likely to succeed***, limiting the market to existing actors.

<u>Recommendation</u>: Ensure access to redundant state owned rolling stock for all undertakings to safeguard equal market access and support maximal financial output of national investments.