

Brussels, 1st of January 2011

Position Paper
on the
Directive of the European Parliament and of the Council
establishing a single European railway area
(Recast)

The European Shippers' Council (ESC) represents the interests of European industry as users of freight transport services in all modes of freight transport including rail. Shippers are primarily producers, retailers or buyers of goods. Through the network of European national shippers' councils, ESC represents the interests of an estimated 100,000 companies involved in international trade, within, to and from the EU.

CLECAT represents European freight forwarders, logistics service providers and Customs agents. Neutral towards transport modes, logistics service providers are large users of rail freight service both in their role as contractual carriers and consolidator, as well as offering their services as agents. For this reason they are probably the largest homogeneous group of users of rail freight services.

Summary

Aware of the fact that rail can and must play a more substantial role in the supply chain, ESC and CLECAT have said for many years that the drive to full liberalisation of the rail freight sector remains a priority. Through liberalisation comes competition: through competition come the drivers and incentives required to improve efficiency, reduce costs and prices, improve performance; this is the way for rail services to become more attractive to customers and create real customer modal choice.

Following the economic crisis and a slowing process of liberalisation in Europe, customer choice and competition has been greatly reduced in Europe and service quality still remains the main weak point of rail freight transport. Nevertheless there is a growing demand to use rail freight and capture many of the environmental and inherent cost benefits that an efficient and well managed rail freight service could deliver.

ESC and CLECAT have long advocated and supported the Commission's Railway packages which have created the legal framework against which liberalisation can take place; this required the separation of the operation of rail freight services from the infrastructure management and ownership. New initiatives are clearly required to reduce administrative and technical barriers to freight operations and enable more new infrastructure to be developed.

ESC and CLECAT's positions with regard to liberalisation of the rail freight sector are as follows:

- Support for the establishment of independent rail regulators
 - with the requisite skills, knowledge and authority to judge and take action against any unfair competition, anti-competitive practices, unfair allocation of slots and train paths,
 - and to ensure open, fair and non discriminatory access to freight terminals and marshalling yards at true market prices for all users,

- and fair and wise allocation of budgets towards the maintenance, repair and investment in new rail freight infrastructure, and in-keeping with short, medium and long term strategies, clearly set out in network statements by each member state and infrastructure management company
- with their own auditable and transparent accounts, budgets, work programme, decisions and management procedures and practices, all available for public scrutiny and accountability.
- Support for transparency of terms and conditions for all contractual agreements between rail freight undertakings (RUs) and rail freight users must be established
- All infrastructure management companies must be independent of RUs so as not to create bias towards national operators or incumbent operators.
- Network statements to clearly take into account and reflect the needs of RUs and rail freight service customers

ESC and CLECAT generally support the EC's recast of the 1st railway package as we understand it as a sign of the Commission's intention to pursue the goals and objectives that are mentioned above. This being said, we would like to comment on the following problems in order to make the reaction of a large part of the rail freight users available to the Commission and other parties interested in the legislative procedure of this proposal.

Competition

- Insufficient transparency of market conditions
- persistent discriminations in access to the infrastructure
- difficult access to rail-related services

Regulatory Oversight

- Lack of independence
- lack of competencies
- lack of means
- insufficient cooperation with counterparts

Infrastructure financing and charging

- low level of investment in rail infrastructure
- absence of medium to long term development strategies
- inadequate level and structures of charging

I Competition

Eliminating potential conflicts of interest and discriminatory practices:

The Commission has rightly noted that the decline of rail freight has stopped in those countries which have introduced liberalisation. Market shares in those countries with little competition have decreased.

The low level of competition is largely due to market access conditions which are not sufficiently precise and therefore still biased in favour of the incumbent RUs. The difficulties facing new entrants have been well-documented, and although progress is being made, it is occurring far more slowly than the industry would like. There are continuing conflicts of interest in particular for access to rail related services (access to terminals, maintenance and servicing of trains etc...) between different market players.

The greater independence of RUs from their respective Member State (MS) and national infrastructure management (IM) body is fully supported by ESC and CLECAT, but does not go far enough. We have concerns over the intrinsic interest a MS has in "controlling" RUs directly or indirectly. We have been favourably impressed by the work done by the Commission in trying to encourage MS's compliance with

existing rules. These actions have been successful in parts, but it is evident to all that much time has been lost in the intervening years: all the more reason we need to swiftly proceed in the right direction now.

Strengthening of competition between RUs and reducing discriminatory track access conditions is imperative for the development of quality freight services that are responsive to the needs of industry. ESC and CLECAT believe that the objective of the European Commission to strengthen competition and reduce discrimination over access and charges can only be achieved with genuine unbundling of operations from infrastructure. The additional paragraph introduced in Article 5 of the proposal intends to address this issue by limiting the role of the MS in publicly-owned RUs according to commercial principles. We feel that this paragraph will not materialise as long as genuine independence (unbundling) in legal, commercial and especially financial terms is not achieved. These words should not sound oblivious to the good results which have resulted from the implementation of some sensible best practices; it is no coincidence that many best practices have been successfully employed where the legal framework has existed to make these possible. There are however situations where this was not possible, in such cases we believe that the legal framework needs to be modified and the requirement for unbundling made clearer.

Therefore, the RUs must be fully independent commercial companies: legally, technically, financially and administratively independent from any holding, grouping, IM or other company in charge of infrastructure issues (timetabling, RRS provider, access to and pricing of slots, allocation bodies, if still in existence, etc.). This applies also to freight RUs contracting essential services and resources (e.g. staff, rolling stock, IT) exclusively from the national incumbent operators.

One further issue remains in respect of the need to ensure transparent open access to shunting yards and related operations. This is an area where it is crucial that the Commission's efforts make it possible, without discouraging investments, for new entrants to compete with the incumbents on a level playing field.

Authorised Applicants

ESC and CLECAT strongly support the mandatory recognition of Authorised Applicants and their rights to acquire paths and slots on the network in their own right (Articles 3 (12) and article 41). This initiative has given very good results and has seriously contributed to increasing the rail share in freight transport in the countries where it is applicable. Making it mandatory would therefore significantly benefit the entire EU rail freight market. It would also significantly contribute to making the EU market more harmonious and not necessarily confined to a corridor approach.

Improved transparency of the rail market

ESC and CLECAT support the clarification of existing rules on account separation in Article 6; with the objective to avoid distortion of competition through cross-subsidisation.

However, the profit generated by IMs must not be returned to the holding company but either be used to help fund infrastructure projects or returned to the owner, i.e. the government (providing public funding for the IM), or given to the customers in the form of a rebate.

ESC and CLECAT support the publication of national network statements on the website of the ERA. It is important that such network statements are available for all to see and to clarify the strategies, business plans and progress on the maintenance, renewal and further development of the network for the benefit of all users, freight and passengers.

ESC and CLECAT support fully proposals for:

- cooperation between IMs for the allocation of network capacity to accommodate international services
- Improved transparency of the scheduling process – Article 45
- Independence of essential functions of an IM: In particular, ESC and CLECAT support:
 - fair competition by avoiding instances whereby an incumbent RU might obtain access to commercially sensitive information from competitors over their train path specifications;
 - independent management, control and delivery of path allocation and infrastructure charging.

Better access to rail-related services (RRS)

There are many examples in the market of discriminatory practices in respect of access to track and rail related services (related to access to terminals, maintenance and servicing of trains etc):

- km-based infrastructure charging or kWh-based charging for electricity that give disproportionate discounts to the largest operator (usually the incumbent)
- insufficient information on requirements for newcomers' access given in "network statements" (i.e. the document setting out the characteristics of the infrastructure and the conditions for its use);
- denied or very limited access to freight terminals when no alternatives are available.

ESC and CLECAT support the elements proposed by the Commission to guarantee better access to rail-related services through:

- Limited re-categorisation of RRS – Article 10 and Annex III
- Management independence – Article 13
- Burden of proof for the existence of viable alternatives – Article 13
- Allocation of capacity to new entrants in cases of conflicting requests – Article 13
- Use-it-or-lose-it clause – Article 13

II Infrastructure financing and charging

As the quality of infrastructure is declining in many MS because of insufficient funding, investment in railway services becomes less attractive both for incumbent and new operators. Underinvestment at national level is partly due to the absence of a clear "financial architecture" (investment plans, long term strategies, transparent and state-aid compatible relations between the state – nearly always the infrastructure owner and often the owner of the incumbent railway company – and IMs and RUs).

The Commission believes that a better understanding of the nature of infrastructure costs and their drivers, in order to improve track access charging regimes, will result in lower charges for train operators.

The new rules will include provision for differential charging based on noise factors, and discounts to encourage investment in interoperability or cleaner technologies, all of which ESC and CLECAT fully support.

The Network Statements, including budgets and strategies will be scrutinised by the independent Regulatory Body (RB) in order to ensure the IMs cannot discriminate against different users in any way: in particular, costs and charges and agreements between the IM and RUs and the state should be closely examined for fairness and equity (Article 30).

Development of a harmonised 'financial architecture'

ESC and CLECAT support the approach of the Commission to harmonise many of the requirements governing finance, contracting and planning; in particular:

- Rail infrastructure development strategy by MS (for a minimum rolling 5 year period) – Article 8
- Generalisation of contractual agreements between public authorities and IMs - Article 30 and Annex VII
- Business plans, assets inventories, capacity enhancement plans under Regulatory Bodies' review – Art. 8, 51
- Establishing a financial audit review of the IMs (to ensure balancing of the financial accounts) of no more than 3 years – Article 8
- Harmonising the performance regimes covering targets and compensation – Article 35 and Annex VIII

Detailing of existing rules on charging:

ESC and CLECAT also welcome the clarity provided by the Commission's proposals over the rules on charging as the fact of setting up a smart charging with proper explanation of the factors that determine the charges might influence the rail freight market users to avoid ill-informed choices. We support in particular:

- What direct costs cannot be included in charges – Annex VIII
- The requirement to justify calculated direct costs if they exceed 35% of average costs – Annex VIII
- Definition of market segments for the definition of mark-ups – Article 31 and Annex VIII
- The requirement for the Regulatory Bodies to review charges and costs – Articles 30, 31
- Better transparency of costs and charges through publication of the Network Statements – Articles 29 and 31(10)
- Principles applying to charges for rail-related services – Article 31 (7) and (8)
- Co-operation between IMs for international routes – Articles 29, 37

ESC and CLECAT take issue over the use of revenue derived from environmental charges to be used in a manner at the discretion of the MS. ESC and CLECAT would prefer to see such revenue ring-fenced and used solely for the benefit of those that have paid it, improving the network or service which they have used and for which they incurred the charges. Making users pay for the externalities they produce without working on the reduction of these externalities represents an indirect incentive to maintaining such externalities rather than reducing them: this would be counterproductive.

Advisory boards for all corridors should be established and contain a simple and efficient mechanism that would allow customers and users of these corridors to directly influence the decisions and measures taken by such boards. Being included as Board members would represent the best solution in this respect.

The independence of the RBs is a condition *sine qua non* for fair and neutral decision-making. However, we have some concerns about the effective ability of some RBs in the EU often lacking the resources (financial and personnel), at times the skills and knowledge, and almost invariably the authority to take meaningful action against RUs and IMs (see III Regulatory Oversight). With a greater vertical and horizontal scope of tasks re pricing, competition, subsidisation, etc. there is a great risk that these functions will remain difficult to manage unless adequate personnel and resource is provided.

Toward smarter charging schemes:

CLECAT and ESC encourage the noise reduction of rail freight wagons as long as rules regarding noise levels would possibly not constitute immediate obstacles for rail transport. The new charging rules (with the introduction of noise-related modulation) should be pursued in order to make rail transport more appealing and therefore be designed to stimulate private investments in 'greener' and interoperable technologies. ESC and CLECAT support the following proposals

- Noise-related charges, varied according to geography and local circumstances – Article 31(5) and Annex VIII
- Optional charges for other environmental effects, provided it is permitted under EU regulation – Article 31(5)
- Discounts based on the use of the ETCS which could result in greater efficiencies – Article 32 and Annex VIII
- Reservation charges in cases where more than one applicant for the same path(s) exist provided it remains justifiable, transparent, and does not favour the incumbent operator over a new entrant or private competitor – Article 36

III Regulatory Oversight

It is a fact that many RBs and regulatory authorities have inadequate regulatory oversight, insufficient independence, competences and powers. With a small number of exceptions, regulators' offices are understaffed, have limited investigative powers and cannot enforce their decisions with financial penalties. Appeals against decisions by the regulator may, in effect, suspend the decision: in such cases, these

decisions can be challenged through the entire judicial system and it can take years before a decision putting an end to an anti-competitive practice is enforced.

Under present legislation, cases concerning access to services (the most sensitive and frequent cases to arise in relation to competition in the rail market) may not even be brought to the regulator. In several MSs the office of the rail regulator belongs to the ministry of transport, which also owns or controls the incumbent RU – a clear case of conflict of interest.

ESC and CLECAT support proposals to strengthen the independence of RBs; in particular, it is very important that these bodies act in the full interests of competition law and are not influenced by national politics, ideology or incumbent IMs and RUs. In that respect, we particularly support the following proposals made by the Commission concerning RBs:

- Being a single authority independent from any other public authority - Articles 55 and 56
- Having criteria for recruitment of board members and termination of their mandate - Article 55
- Being able to take actions on their own initiative – Article 56
- Having competencies in competition policy, arbitration and conflict resolution – Article 56
- Better able to separate out the function of reviewing the network statements from the IM accounts but nevertheless relating the two – Articles 27 and 56

ESC and CLECAT also support the proposal to strengthen the powers of the national rail regulators and the European Commission through:

- Imposing sanctions, including fines – Article 56
- Undertaking investigation and audits – Article 56
- Forcing the compulsory co-operation between RBs – Article 57
- Mandating the presentation of detailed regulatory accounts – Article 6 and Annex X
- Enhancing the role of RBs to monitor the market conditions and prices
- An extended scope of the Commission to monitor the markets, technology and charges being made – Article 15
- Mandated the submission of relevant data and information to the Commission from and by MSs – Article 15 and Annex IV
- An enhanced role of the ERA.

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