# Report on "4th Rail package"

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**This report does not represent the official views of the Committee of the Regions.**

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# Glossary of terms

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| Art. | Article |
| COTER | CoR Commission for Territorial Cohesion Policy |
| CoR | Committee of the Regions |
| DG | Directorate General |
| DG MOVE | Directorate General for Mobility and Transport |
| EC | European Commission |
| EEC | European Economic Community |
| EP | European Parliament |
| ERA | European Railway Agency |
| EU | European Union |
| IM | (Rail) infrastructure manager |
| LRA | Local and regional authorities |
| MRCE | Mitsui Rail Capital Europe |
| MS | Member States |
| NSA | National Safety Authority |
| PSC | Public Service Contract |
| PSO | Public Service Obligations |
| RO | Railway operator |
| ROSCO | Rolling Stock Operation Company |
| RU | Railway undertaking |
| TSI | Technical Specifications for Inoperability |
| UK | United Kingdom |

# Executive summary

1. Twenty-two years of EU liberalisation process cannot be rated successful when compared with other utility sectors. Although Regulation (EC) No 1370/2007 has been the most effective EU railway legislation as it is not subject to any interpretation by the MS, local passenger transport has not increased in competition, service quality and reduction of fares in most Member States. The incumbent railways still receive the largest share of PSO payments. There seems to be a propensity that LRA reward long-lasting contracts to the incumbent state railways.

2. The directives on the rail market, safety and interoperability, subject to transposition into national legislation, contain the risk of not being totally transposed or remaining "law on the books" in order to protect the incumbent state-owned, often vertically integrated railways. The directives do not seem to be an efficient legal instrument to attain the overall objective of the EU railway policy.

3. The Fourth Railway Package has given more, but not enough, attention to the concerns of the regions in PSO (Regulation (EC) No 1370/2007), market access and separation of infrastructure and operations (Directive 2012/34/EU), interoperability (Directive 2008/57/EC) and safety (Directive 2004/49).

4. The proposed Regulation (EC) No 1370/2007 does not take into account the different positions of LRA. For those wishing to introduce full market access and competition, most of the articles are unnecessary. They only cause additional bureaucracy, neither improving the efficiency nor reducing administrative costs of managing and awarding such services. For those subject to conflicts of interest as stakeholders of vertically integrated railway enterprises, the regulation does not oblige the introduction of competition.

5. Regarding the transposition of the directives into National law, the Committee of the Regions might wish to organise via its members, networks and contacts, sufficient lobbying support to ensure that some MS shall not water down the intentions of the EC in order to protect their incumbents.

6. Implementation of the technical directives on interoperability and safety has cost implications. There is a danger to impose expensive European interoperability and safety measures that can only be financed and invested by the incumbent state-owned railways leading to a gradual long-term increase of overall transport costs without significantly improving the safety and marginalising competitive small and medium-sized RUs, thus

countering competition and gains in efficiency. Long-term cost savings can only be achieved by increasing competition in the European rail industry which at present enjoys an oligopolistic structure with inherent tendencies to cartels.

7. The LRA and their European and national associations will have to build up an intensive training programme for the personnel of LRA in subject matters such as competitive awarding, transport planning, monitoring of public service contracts, and integrated ticketing.

8. The following table summarises in a nutshell the expected impact and effect of the legislative proposal on LRA, as well as the proposed measures.

***Table 1. Assessment results – Fourth Railway Package***

| Legal text | Im-pact | Effect | Recommendations | Best practice |
|---|---|---|---|---|
| **Regulation (EC) No 1370/2007 (public service obligation)** | | | | |
| Art. 2.c, Art. 2.e | low | Threat | Clearer definition | n/a |
| Art. 2a.1 Art 2a.5 | high | Threat (cost relevant), in particular for regions with open market | Recommendation: no application for LRA not owning incumbent operators; for other authorities: if not successful, assistance by CoR/regional associations; clarification on cost bearing | Germany (Federal Transport Masterplan and the regional transport plans of districts)<br>Direct taxation in the region (Switzerland, metro taxation in Vienna) |
| Art 2a.6 | high | Opportunity (increase of real competition in all MS) | Recommendation to reduce the maximum volumes | Values of PSC of passenger rail authorities in Germany, Czech Republic, United Kingdom, … |
| Art. 4.8 | high | Threat (cost relevant, liability) | Include railway undertakings. Supplier of data is liable for accuracy. | |
| Art. 5.6 | high | Opportunity | No action required | Berliner Stadtbahn (split into lots) |
| Art. 5a.1 | high | Opportunity | Recommendation: guarantee level playing field (financing, cost calculation); assistance to local authorities; | ROSCOs (UK), Lower Saxony, private best practice: MRCE Dispolok GmbH |
| Art. 5a.2 | high | Threat | Recommendation: avoid transfer of risk to LRA | |
| Art. 7.3 | mid-dle | Opportunity (data availability) | Recommendation: direct reporting to the Commission, eventually via representative associations of the LRA, implementation act on report structure | Croatian regulatory body reporting directly to Parliament without influence by Government |
| Art. 8.2a | high | Threat | Recommendation: shorten transition periods | Experience of Germany, Netherlands, United Kingdom |

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| **Directive 2012/34/EU (market opening)** | | | | |
| Directive | high | Threat | Recommendation: EC shall propose Article on closing of lines | No best practice in EU |
| Art. 7 Art. 7a-7c | high | Threat | Recommendation: stronger unbundling (delete Art. 7.5), replace „may" by "shall"; if Art. 7.5 is deleted, logical consequence deletion of Art. 7a-7c- | Unbundled rail sector in EU (e.g. UK, Sweden) |
| Art. 7d.1 | middle | Opportunity | Lobbying of CoR | n/a |
| Art. 11.1 | high | Opportunity | Recommendation: implementation act; training of local authorities | Theoretical term with origin in the United Kingdom; difficult to calculate; so far no stable and widely accepted method |
| Art 11.2 | high | Threat | Recommendation: deadline two months | n/a |
| Art. 13a.1 | high | Opportunity | Recommendation: "shall" instead of "may"; intensive training of those regions that have no experience | Transport association (Verkehrsverbund) Frankfurt |
| Art. 38.4 | low | Opportunity | Recommendation: limitation to commercial transports, change of deadlines | n/a |
| **Directive 2008/57/EC (interoperability)** | | | | |
| Art. 1.3 | high | Threat (cost relevant) | Article to be amended. | n/a |
| Art. 2.8 | high | Threat (cost relevant) | Article to be amended. | n/a |
| Art. 2.25 | middle | Opportunity | No action required | n/a |
| **Regulation (EC) No881/2004 (European Rail Agency)** | | | | |
| Directive | Low | Threat | Monitor fee policy of ERA | Lowest fees of Member State agencies |

| Directive 2004/49/EC (safety) | | | | |
|---|---|---|---|---|
| Art. 1 | low | Opportunity | No action required | Germany: Federal Safety Authority acts as regional safety authority in some federal states |
| Art. 2.2 | high | Threat (cost relevant) | Article to be amended. | n/a |
| Art. 3.g | low | Opportunity | Article to be amended. | Germany as for Art. 1 |
| Art. 3.p | mid-dle | Opportunity | No action required | n/a |
| Art. 11 | high | Threat | Article to be amended. If not successful, action on Member State level | MS with more than one official language (e.g. Belgium; outside EU Switzerland) |

# 1 Methodology

An in-depth literature review was carried out to produce the assessment of the current legal situation, focusing on the questions outlined in the study's Terms of Reference. The literature review used, besides the Commission's proposal for the Fourth Railway Package, a range of existing publically-available EU-level information on railway infrastructure, passenger transport and railway safety, relevant academic literature, and evaluative material at Member State and regional level.

In Part 3 of this report the proposed changes in the Fourth Railway Package were divided into the following four main categories:

- Public service obligations;
- Market access and separation of infrastructure and operations;
- Interoperability;
- Safety.

These categories are basically the main parts of the EU legislation and they are highlighted in Part 3 showing the contentual basis for the assessment in the subsequent parts of the study. Every category is followed by a paragraph with relevant aspects enabling the reader to track and reconstruct the comparative analysis in Part 4 and the recommendations in Part 5 of this paper.

The recommendations on the legislative proposal of the European Commission in Part 5 are based on an extensive literature review, interviews with the Mobility Consultants Vienna experts as well as the expertise of Metis GmbH on the topic of regional policy. In the Executive Summary the recommendations are summed up in a table and additionally there are presented best practice examples for each of them.

These recommendations are drawn on the basis of the scientific view of the authors of this study and do not necessarily represent the view of the Committee of the Regions.

# 2 Assessment of the current legal situation from the perspective of local and regional authorities

EU rail legislations, currently in force, which have a direct effect on local and regional authorities or may have in the future:

**Public service obligations**

*Regulation (EC) No 1370/2007/EC on public passenger transport services by rail and by road*

Regulation (EC) No 1370/2007 is legally binding in all Member States, regulating PSC (Art. 3-4), award of PSC (Art. 5) and public service compensation (Art. 6). Unless prohibited by national law, any competent LRA may decide to provide public passenger transport services itself or to award PSC directly to a legally distinct entity over which the LRA exercises control similar to that exercised over its own departments. The transition period of the Regulation as in force lasts until 2019.

**Market access and separation of infrastructure and operations**

*Directive 2012/34/EU of the European Parliament and of the Council establishing a single European railway area (Recast)*

From a regional perspective, the following Chapters are of importance:

Chapter II (Art. 4-15) on the development of the Union railways aims at facilitating the adaptation of the Community's railways to the needs of the single market and to increase their efficiency, in particular by separating the management of railway infrastructure from the provision of railway transport services. However, Chapter II only applies to the management of railway infrastructure and rail transport activities of the RUs established or to be established in the EU. Nevertheless, the important exception is the activity RUs of which is limited to the provision of solely urban, suburban or regional services (unless the service provider is under the direct or indirect control of an undertaking or another entity performing or integrating rail transport services other than urban, suburban or regional services). MS may exclude from the independence of essential functions, rules on financing of IM and conditions of access to passenger services on stand-alone railway infrastructure and the sole operation of urban and suburban passenger and freight services. RUs are granted access to the infrastructure in all other MS for the operation of all rail freight services and international

passenger services. As a consequence, the national passenger services are excluded. However, Art. 11, dealing with the limitation of the right to pick up and set down passengers (cabotage), is important to the LRA since the regulatory body has to assess whether the economic equilibrium of a PSC is compromised by an international passenger service and to determine the economic equilibrium in particular in PSC comprising more than one national territory.

MS may exclude passenger services on stand-alone railway infrastructure and the sole operation of urban and suburban passenger and freight services from Chapter III (Art. 16-25) on licensing of RUs.

The main topics of Chapter IV (Art. 26-57) on levying of charges for the use of railway infrastructure and allocation of railway infrastructure capacity are: capacity allocation process (schedule of application), charging principles and charging bodies, network statement, minimum access package and further details of the role of the regulatory body. MS may exclude stand-alone local and regional networks for passenger services on railway infrastructure and networks intended only for the operation of urban or suburban passenger services.

**Interoperability**

*Directive 2008/57/EC on the interoperability of the rail system within the Community (Recast)*

The Directive establishes the conditions to be fulfilled to achieve interoperability within the EU rail system at the design, construction, placing into service, upgrading, renewal, operation and maintenance stages. The gradual implementation of interoperability of the rail system is pursued through the harmonisation of technical standards (TSI). TSI are decisions which are law in MS.

MS may exclude metros, trams and other light rail systems; networks that are functionally separate from the rest of the railway system and intended only for the operation of local, urban or suburban passenger services, as well as railway undertakings operating solely on these networks; infrastructure and vehicles reserved for a strictly local, historical or touristic use. However, regional railways linked to the main lines are subject to TSI.

## Safety

*Directive 2004/49/EC on safety on the Community's railways (Railway Safety Directive)*

The Directive develops a harmonised approach to safety. It covers safety requirements for the system as a whole, including infrastructure and traffic management, and the interaction between RUs and IMs.

In order to be granted access to the railway infrastructure, a RU must hold a safety certificate which may cover the whole railway network of a MS or only a defined part thereof. MS must ensure that train drivers and staff accompanying the trains, as well as IM and their staff performing vital safety tasks have fair and non-discriminatory access to training facilities.

MS may exclude from the Directive metros, trams and other light rail systems; networks that are functionally separate from the rest of the railway system and intended only for the operation of local, urban or suburban passenger services, as well as railway undertakings operating solely on these networks. However, the safety rules apply for the so-called secondary lines, mostly regional lines, which are linked with the main lines.

## Result

Twenty-two years of EU liberalisation process cannot be rated successful when compared with other utility sectors. Although Regulation (EC) No 1370/2007 has been the most effective EU railway legislation as it is not subject to any interpretation by the MS, local passenger transport has not increased in competition, service quality and reduction of fares in most MS. The incumbent railways still receive the largest share of PSO payments. There seems to be a propensity that LRA reward long-lasting contracts to the incumbent state railways.

The directives on rail market, safety and interoperability, subject to transposition into national legislation, contain the risk of not being totally transposed or remaining “law on the books” in order to protect the incumbent state-owned, often vertically integrated railways. The directives do not seem to be an efficient legal instrument to attain the overall objective of the EU railway policy.

Most of the regional and urban traffic that has no direct connection to the main line rail system has been excluded, either mandatorily or optionally, from the liberalisation process, safety and interoperability harmonisation (see Art. 2 of Directive 2012/34/EU, Art. 2 of Directive 2004/49/EC and Art. 2 of Directive

2007/59/EC). It is the experience that only a few MS have used the options to liberalise (e.g. UK, Sweden, Germany, Romania).

The results of the EU rail legislation since the coming into force of Directive 440/91/EEC clearly show the slow process of market opening, the application of a single European railway area and the harmonization of safety and interoperability standards. Their major achievement has been the establishment of new railway bodies in the MS (licensing body, safety body, interoperability bodies, regulatory bodies), which have increased the administrative complexity and costs for the market players. The incumbents still have, in the majority of cases, more than 50 % of the market share in regional passenger transport and up to 100 % in long-distance commercial passenger transport. The IM, in particular of vertically integrated undertakings, still succeed to a large extent in preventing, in a very sophisticated and intelligent manner, the access of third parties. The danger of cross-subsidisation between freight, commercial long-distance passenger traffic and PSO traffic is still existent. The competition authorities and the railway market regulatory bodies have not yet succeeded in proving it. One reason is that the introduction of the ordoliberal concept of market regulation has not been too effective. The national market regulators in many cases depend on the ministry that simultaneously is the capital holder of the incumbent IM and incumbent RUs.

# 3 Breakdown of the proposed changes into categories allowing for a systematic assessment of impact of those proposals from the perspective of local and regional authorities

The proposed changes in the Fourth Railway Package dated 30.01.2013 were assessed according to the following main categories:

**Public service obligations (PSO)**

PSO will undergo the most important changes for LRA in respect to financing of PSO, competition, tendering, protection of existing PSC (mostly of the incumbents).

**Market access and separation of infrastructure and operations**

Market access in urban and suburban networks such as the metro, tramway and light rail, has not been implemented in most EU member states. The same structures still exist as before the issuance of EU legislation in 1991. In regional networks, the existing EU legislation has been partially applied, however, mainly for freight traffic. The proposed changes will deal with market access of passenger traffic. Due to the incomplete unbundling, most of the regional services are operated by the incumbents.

**Interoperability**

For regional transport that does not fall under the exclusions, interoperability will be a major financial and investive challenge when it comes to the transposition of TSI (= technical harmonisation).

**Safety**

Harmonisation of safety requirements is not as important as the above categories as long as regional and local traffic is operated on a stand-alone-network, i.e. most urban railway networks and non-standard gauge (1435 mm) rail networks. There might be a basis for discussion concerning light rail having links with main line or regional railway networks. The Fourth Railway Package deals with an enlargement of competences of the ERA and does not propose major modifications in safety systems. However, the bureaucratic impact might increase. There might also be a tendency to establish local or regional safety authorities which do not deal, as of now, with mainline safety.

# 4 Comparative analysis and assessment of the proposed changes impacting on local and regional authorities

## 4.1 Public service obligations (Regulation (EC) No 1370/2007)

**Remark: The proposed regulation does not take into account the different positions of the LRA**.
For those wishing to introduce full market access and competition, most of the articles are unnecessary. They only cause additional bureaucracy, neither improving the efficiency nor reducing administrative costs of managing and awarding such services. For those subject to conflicts of interest as stakeholders of vertically integrated railway enterprises, the regulation does not oblige the introduction of competition.

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| **Art. 2.c** ***"competent local authority" means any competent authority whose geographical area of competence is not national and which covers the transport needs of an urban agglomeration or a rural district.*** |
| **Note:** *Not national* may have two meanings: "not covering the whole territory of one Member State" or: a competent local authority can have its territory in two or more MS. This has to be clarified especially since the latter does not exist in the sense of cross-border LRA.<br><br>*Urban agglomeration* and *rural district:* The definition is not sufficient and needs clarification. |
| **Recommendation:** A clarification of the definitions should be requested. |
| **Art. 2.e** ***The scope of public service obligations shall exclude all public transport services that go beyond of what is necessary to reap local, regional or sub-national network effects.*** |
| **Note:** The formulation of "reaping network effects" is not instrumental and therefore unpractical to implement. Furthermore, one new term has been introduced: *sub-national*. Is it a synonym of *not national*, the term used in Art. 2.c? |
| **Recommendation:** A clarification of the definitions should be requested. |
| **Article 2a.1** ***Competent authorities shall establish and regularly update public passenger transport plans covering all relevant transport modes for the territory for which they are responsible.*** **[…]** |
| **Note:** Public transport plans require expert workforce and produce additional cost. They require data and information from the market players which are not easily available if the market player is monopolistic or powerful enough not to provide any data. The article is only practical with a legal requirement that forces previous or existing public service providers to provide the respective data. |

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| **Recommendation:** It is necessary to include a passage on fines according to national legislation in case of non-compliance. |
| **Article 2a.6 […]** ***(b) the maximum annual volume of a public service contract in terms of train-km shall be the higher value of either 10 million train-km or one third of the total national public rail passenger transport volume under public service contract."*** |
| **Note:** The 10 million train kilometers are too high. Only incumbents can achieve it. To increase competition, it is more practical to reduce the threshold by deleting the maximum annual volume of PSC of *10 million train kilometers* since the range of performance in the MS is too different. It is more effective if the threshold remains with one third of the train-kilometer performance since it forces the competent local authority to competitive bidding of more than one lot. If one third of the volume is still too big – as it is the case in the larger MS – the incumbent railway will still be the only one to bid. |
| **Recommendation:** reduction of the annual volume of PSC from 10 million train-km to five million train-km. |
| **Article 4.8** ***Competent authorities shall make available to all interested parties relevant information for the preparation of an offer under a competitive tender procedure.* […]** ***Rail infrastructure managers shall support competent authorities in providing all relevant infrastructure specifications. Non-compliance with the provisions set out above shall be subject to the legal review provided for in Article 5(7).*** |
| **Note:** The data of the IM are not sufficient since they do not contain commercial data of the RU. Previous and/or existing RU have to provide data, in particular the incumbents using them as a competitive advantage. A level playing field has to be guaranteed. Responsibility for data is not regulated. If the data provided by third parties are not correct, the LRA has to be protected. |
| **Recommendation:** In addition to the IM, previous and/or existing RUs should provide data to avoid any competitive advantage of the incumbents. |
| **Article 5.6** ***Competent authorities may decide that, in order to increase competition between railway undertakings, contracts for public passenger transport by rail covering parts of the same network or package of routes shall be awarded to different railway undertakings. To this end the competent authorities may decide before launching the tender procedure to limit the number of contracts to be awarded to the same railway undertaking.*** |
| **Note:** The article gives the option to foster competition. |
| **Recommendation:** The article should not be modified since it enforces the role of the competent authority. |
| ***Article 5a Rolling stock***<br><br>***1. Member States shall in compliance with State aid rules take the necessary measures to ensure effective and non-discriminatory access to suitable rolling stock for public passenger transport by rail for operators wishing to provide*** |

***public passenger transport services by rail under public service contract.***

***2. Where rolling stock leasing companies which provide for the leasing of rolling stock referred to in paragraph 1 under non-discriminatory and commercially viable conditions to all of the public rail passenger transport operators concerned do not exist in the relevant market, Member States shall ensure that the residual value risk of the rolling stock is borne by the competent authority in compliance with State aid rules, when operators intending and able to participate in tendering procedures for public service contracts so request in order to be able to participate in tendering procedures.***

***The competent authority may comply with the requirement set out in the first subparagraph in one of the following ways:*** **[…]**

***4. By 18 months after the date of entry into force of this Regulation the Commission Member States shall adopt measures setting out the details of the procedure to be followed for the application of paragraphs 2 and 3 of this Article. Those implementing acts shall be adopted in accordance with the examination procedure referred to in Article 9a(2).***"

**Note:** Rolling stock ownership is key to competition. The intention of Art. 5a is to create a counterbalance to the present competitive advantage of the incumbents having a better use of their rolling stock. The Article enhances competitive alternatives for the LRA and makes it an obligation on MS to ensure non-discriminatory access to suitable rolling stock for PSC services and introduces two options:

- Leasing (pooling) by LRA or
- Provision by the operator.

Opting for the first alternative implies obligatory use of the LRA rolling stock by the operator. Pooling has the advantage that non-incumbent operators do not need to invest in costly rolling stock with long commercial depreciation periods, avoid the financial risk of later non-use and are on a level playing field with the incumbent. For LRA, the advantage is to considerably decrease the duration of PSC with higher flexibility to change the operator in case of bad service.

Opting for the second alternative implies residual value risk-taking for the LRA. To minimise the risks, LRA will prefer long-term contracts with the incumbents which, at present and in the next 20 to 30 years, may offer the lowest residual value due to their high market share, giving them the opportunity to use it otherwise. Moreover, the MS as stakeholders of the incumbents also decrease their risk as capital owner by ensuring that the state-owned companies can use the rolling stock paid by the taxpayer in a more efficient way.

*Conclusion*: Paragraph 2 is counterproductive to Paragraph 1!

*Reasoning*: Leasing of rolling stock – Article 5a does not prohibit that more than one local authority shall establish a pool or lease rolling stock from privately-owned pools (which already exist) – is the opportunity while residual value risks are the threats. Therefore, LRAs should opt for pooling. If this option is not possible, they are forced to opt for the incumbents to minimise their risks.

If this reasoning is not acceptable, the solution is to retransfer the residual value risks to the MS which are, anyway, the main funders of PSO services and, indirectly, the capital owner of the rolling stock.

The weakness of Paragraph 2 is that the EC and the MS have passed on the risk-bearing to the weakest authority in the chain of PSO funding, the LRA. Since most LRA are mainly funded by MS budgets, the MS shall take over the residual value risk. It is the MS that have to implement Art. 5a.

A sustainable solution is to create a demand for funding pools supported by certainty of long-term returns for the financier ultimately bearing the capital investment risk. This also implies a need for easier movement of second-hand stock anywhere in the EU. It requires a common approval process, part of the interoperability.

**Recommendation:** Member States shall ensure that the residual value risk of the rolling stock is included in the budgetary allocations for PSO in order to avoid potential budget constraints of the regions.

An implementation act shall clarify and detailed procedures for the calculation of the residual values.

A level playing field with respect to financing and cost calculation should be guaranteed.

**Article 7.1** ***Each competent authority shall make public once a year an aggregated report on the public service obligations for which it is responsible,*** **[…]** ***Member States shall facilitate central access to these reports, for instance through a common web portal.***

**(b) In paragraph 2, the following point is added:**

***"(d) the envisaged starting date and duration of the public service contract."***

**Note:** The question arises whether a central body, e.g. DG MOVE, shall not centralise and publish the data since it is of paramount importance to monitor the development of public services in a "single" European railway market and receive information on the state-aid granted to the railway sector. In particular,

the starting date and duration of PSC is of paramount importance to potential bidders and helps to foster competition. In this case, the aggregated report should have a harmonized structure. At first sight, it might be more effective to ask the MS to carry out the task. However, three arguments are against it:

**1**. MS might reformulate the reports of the LRA in a way that the message to the EU is biased - a big problem at the moment for other reports. Governments, as stakeholders of the incumbent, have a tendency to protect them, even in the reporting.

**2**. A regulation is EU law; it is the intention of the EU to strengthen the ties between EC and the regions.

**3**. Formalised reports do not require high amount of work; as an alternative the representative associations of the LRA take over the task of collecting and submitting the reports. It is of paramount importance that the real market-relevant information is reported to the EC.

**Recommendation:** The EC shall receive a report from each competent authority once a year, but not later than the 31st of March.

An implementation act shall detail the structure and contents of the aggregated report.

**Article 8.2** ***Without prejudice to paragraph 3, the award of public service contracts by rail with the exception of other track-based modes such as metro or tramways shall comply with Article 5(3) as from 3 December 2019. All public service contracts by other track-based modes and by road must have been awarded in compliance with Article 5(3) by 3 December 2019 at the latest. During the transitional period running until 3 December 2019, Member States shall take measures to gradually comply with Article 5(3) in order to avoid serious structural problems in particular relating to transport capacity.***

***2a. Public service contracts for public passenger transport by rail directly awarded between 1 January 2013 and 2 December 2019 may continue until their expiry date.***

***However they shall, in any event, not continue after 31 December 2022.***

**(c) In paragraph 3, the last sentence of the second subparagraph is replaced by the following:**

***"The contracts referred to in (d) may continue until they expire, provided they are of limited duration similar to the durations specified in Article 4."***

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| **Note:** The new Article 8 has the following dangers:<br><br>LRA are entitled to award directly till 2019. This is too long a transitional period to implement the single market railway policy of the EU, in particular in the rail sector which is characterised by high degree of market dominance of the state owned railways. Since the 4th railway package wishes to decrease the market dominance of state owned railways, the Regulation should support it by reducing the transitional periods. Before the present regulation came into force, LRA awarded contracts to the incumbents for periods of more than 10 years. This legal "trick" shall be avoided. |
| **Amendment:** Direct awarding shall only be possible till 2 December 2015; but shall not continue after 31 December 2020. |

## 4.2 Market access and separation of infrastructure and operations - Directive 2012/34/EU)

**Remark**: The proposal to amend the 2012/34 is mainly concentrated on the classical railway systems excluding the types of railways mentioned in Art. 2.1.1. of Directive 2012/34 (RUs which only operate urban, suburban or regional services on local and regional stand-alone networks for transport services on railway infrastructure or on networks intended only for the operation of urban or suburban rail services). As a consequence, all lines commonly called secondary and tertiary lines serving regions are regulated in this Directive. Such lines are the first on the agenda for closure. The Directive should mention explicitly that the regions have a right of participation in the closing-down process, in particular when such regional lines cover more than one national territory. **It is therefore recommendable to include an article on closing down lines which shall stipulate a coordination procedure and a closing-down procedure**. This topic should not be left alone to the MS and the incumbent IMs.

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| **Article 7.5** ***Where on the date of entry into force of this Directive, the infrastructure manager belongs to a vertically integrated undertaking, Member States may decide not to apply paragraphs 2 to 4 of this Article. In such case, the Member State concerned shall ensure that the infrastructure manager performs all the functions referred to in Article 3(2) and has effective organisational and decision-making independence from any railway undertaking in accordance with the requirements set in Articles 7a to 7c.*** |
| **Note:** Art.7.5 shall be deleted. It opens the possibility for MS to resist to the unbundling. The unbundling has been advantageous to the regions, which, in the past, had enormous difficulties to open up the market and were subject to considerable political pressure. The incumbent more or less dictated service quality and PSO amounts in long-term contracts. Experience has shown that the required independence is practically impossible to monitor. If CoR and others succeed in deleting 7.5, it is a logical consequence to delete 7a to 7c, too. |
| **Recommendation:** Delete 7.5; if deletion is successful, delete 7a-7c. If not, amend Art. 7c.3. |
| **Article 7c.3** ***Member States may limit the rights of access provided for in Article 10 to railway undertakings which are part of the vertically integrated undertaking to which the infrastructure manager concerned belongs, if the Commission informs Member States that no request has been made in accordance with paragraph 1 or pending the examination of the request by the Commission or if it decides, in accordance with the procedure referred to in Article 62(2), that:*** **[…]** |
| **Note:** The same argument as presented for Article 7 applies. |

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| **Recommendation:** “May” should be substituted by “shall”. |
| **Article 7d.1** ***Member States shall ensure that infrastructure managers set up and organise Coordination Committees for each network. Membership of this committee shall be open at least to the infrastructure manager, known applicants in the sense of Article 8(3) and, upon their request, potential applicants, their representative organisations, representatives of users of the rail freight and passenger transport services and, where relevant, regional and local authorities.*** **[…]** |
| **Recommendation:** The CoR shall ensure that LRA or their national associations shall be invited to the meetings. |
| **Article 11.1** ***Member States may limit the right of access provided for in Article 10(2) to passenger services between a given place of departure and a given destination when one or more public service contracts cover the same route or an alternative route if the exercise of this right would compromise the economic equilibrium of the public service contract or contracts in question;***<br><br>**Article 11.2** ***'In order to determine whether the economic equilibrium of a public service contract would be compromised, the relevant regulatory body or bodies referred to in Article 55 shall make an objective economic analysis and base its decision on pre-determined criteria. They shall determine this after a request from any of the following, submitted within one month from the information on the intended passenger service referred to in Article 38(4).*** **[…]** |
| **Note:** The economic equilibrium of PSO contracts is of importance for LRA in order to efficiently allocate state aid. Art. 11 gives the LRA the opportunity to closely work together with the regulatory bodies if they think the economic equilibrium to be in danger. In fact, Art. 11 supports them in the efficient allocation of state aid.<br><br>The deadline of one month mentioned in paragraph 2 may be too short. |
| **Recommendation:** Prolongation of the period of one month mentioned in 11.2 |
| **Article 13a.1** ***Without prejudice to Regulation (EC) No 1371/2007 and Directive 2010/40/EU, Member States may require railway undertakings operating domestic passenger services to participate in a common information and integrated ticketing scheme for the supply of tickets, through-tickets and reservations or decide to give the power to competent authorities to establish such a scheme.*** **[…]** |
| **Note:** The new Art. 13a shall be the legal basis for a much-cherished objective of regions to harmonise the ticketing system in a competitive market. It gives them the opportunity to deal with the manifold problems that have arisen in the ticketing systems in stations run by the vertically integrated incumbents. The customer-oriented Art. 13a can help to establish “order” in stations where there is the danger that PSO services managed by various RUs will decrease the transparency of passenger information and ticket selling. The CoR shall support |

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| the competent LRA in this task. However, Article 13a is no obligation. This represents a danger when stations are run by vertically integrated incumbents. Therefore, the Article 13a shall become an obligatory article.<br><br>Concerning integrated timetable and announcement of passengers in stations, the station operator is already obliged to do so in a non-discriminatory and equitable way. If not, the LRA can complain to the regulatory body in the respective MS. The regulatory body can also become active ex officio. This is regulated in the national railway laws. |
| **Recommendation:** Art. 13a.1 shall be transformed into an obligatory paragraph. |
| **Article 38.4** ***Where an applicant intends to request infrastructure capacity with a view to operating a passenger service, it shall inform the infrastructure managers and the regulatory bodies concerned no less than 18 months before the entry into force of the working timetable to which the request for capacity relates. In order to enable regulatory bodies concerned to assess the potential economic impact on existing public service contracts, regulatory bodies shall ensure that any competent authority that has awarded a rail passenger service on that route defined in a public service contract, any other interested competent authority with the right to limit access under Article 11 and any railway undertaking performing the public service contract on the route of that passenger service is informed without undue delay and at the latest within five days.*** |
| **Note:** This rather complex Paragraph 4 of Art. 38 can be interpreted as a protection clause for PSC. Paths requested by a non-PSO passenger service are subject to scrutiny by the regulatory body to find out whether they might influence the economic equilibrium, in other words, enter into competition with PSO services. The new Art. 38.4 requires at least two precisions: At present, PSO services are not excluded; this does not make sense since the paragraph obviously deals with non-PSO passenger services. The deadline of five days is simply too short for the regulatory body, in particular in case of requests coming from the bigger incumbents in the Member States. |
| **Recommendation:** Art. 38.4 should not be valid for public service contracts but only for contracts dealing with commercial services.<br><br>The deadline for the regulatory body should be prolonged to “within ten working days”. |

## 4.3 Interoperability – Directive 2008/57/EC

**Remark**: Although the Interoperability Directive is a rather technical directive, it contains subject matters that have a direct financial impact for the regions. The interoperability standards are mostly destined to mainline infrastructure with high-speed components. They have already increased the price of vehicles and of infrastructure to such an extent that it is only the incumbent railways that can easily afford the additional costs. Interoperability, irrespective of its main objective of harmonising the technical standards of the diverse European rail systems, therefore, contains a potential for discrimination and exclusion of potential competitors, in particular low-cost competitors to the incumbent state railways. Lastly, it is the unique opportunity of the oligopolistic market of the European rail industry to impose their standards upon European IM and RUs, thus limiting the competition in the international market. **The question arises whether the European regions are prepared to pay such a price for their specific local passenger services**. Would it not be better, in particular for stand-alone systems, to take advantage of the international competition?

**Article 1.3** ***The following systems are excluded from the scope of this Directive:***

***(a) metros, trams and light rail systems;***
***(b) networks that are functionally separate from the rest of the railway system and intended only for the operation of local, urban or suburban passenger services, as well as railway undertakings operating solely on these networks.***

**Note:** The new Art. 1, Paragraph 3 clarifies the old Art. 1.3, that was rather ambiguous and led to misunderstandings. With the exclusion of certain rail systems the EC recognises the will of the operators of urban rail to continue their endeavour to carry out their own system of interoperability.

The CoR should use all its endeavours to convince the EC to exclude the regional lines from the obligation to be in compliance with interoperability. It is necessary to have a very clear definition of a regional rail system since a regional rail system containing heavy rail –subject to interoperability specifications – would not need to comply with the interoperability requirements. There is a danger that regional rail systems on secondary and tertiary lines will experience significant cost increases due to technical adaptation to mainline level. The LRA as the funding institutions should decide on a voluntary basis whether they accept the interoperability on each specific line. However, it is necessary that the exclusion does not become an obstacle if a passenger terminus for a regional line located some kilometers on main line requires interoperability to reach it. For this reason, it should also be possible that for certain passenger services on so-called fully interoperable lines, vehicles

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| which are not in full compliance with the interoperability, can operate on interoperable lines. |
| **Recommendation:** Networks that are not functionally separate from the rest of the railway system and intended only for the operation of local passenger and freight services as well as railway undertakings operating solely on such networks upon decision of the competent local authority shall be excluded from the interoperability obligations. The vehicles using a limited section of an interoperable line to reach the terminus of the local passenger and freight services shall also be excluded from the interoperability requirements. For the exclusion, a notification procedure with the EC is required. |
| **Art. 2.8** ***European specification' means a common technical specification, a European technical approval as defined in Annex XXI to Directive 2004/17/EC or a European standard as defined in Article 2(1)(b) of Regulation (EU)No 1025/2012.*** |
| **Note:** The issuance of European standards is carried out by European standardisation organizations which are organisations according to private law. They demand a fee or price for every standard purchase which can amount to several thousands of Euros. The result is that small and medium sized IM or RUs are exposed to costs of purchasing of such standards which have repercussions on their competitiveness. In order to reduce such costs, it is recommended that all European standards have to be published in the Official Journal which is available free of charge. |
| **Recommendation:** European standards shall be published in the Official Journal to reduce the significant purchasing costs of such standards. |
| **Art 2.25** ***'light rail' means an urban and/or sub-urban rail transport system with lower capacity and lower speeds than heavy rail and metro systems, but higher capacity and higher speeds than tram systems. Light rail systems may have their own right-of-way or share it with road traffic and usually do not exchange vehicles with long-distance passenger or freight traffic;*** |
| **Note:** It is good to have a definition of "light rail" to avoid the linguistic misunderstandings of the past. |
| **Recommendation:** none. |

## European Rail Agency Regulation repealing Regulation (EC) No. 881/2004

The new competences of the ERA imply new **costs**, in particular personnel costs, for the railway sector. It is not assured that the new functions will diminish the costs of the existing national safety authorities (NSA). Concerning the **fees** of ERA (Art. 58.2, 73 and 74), CoR shall demand that the benchmark is the lowest actual fees used in the EU. The argument is that such fees are purely bureaucratic fees for services that do not significantly improve the competitiveness of the rail sector.

The NSA should have an important role of coordination between applicants of their MS, such as LRA as RU, and the ERA with respect to the use of languages. Otherwise, the process of application might become more expensive or discouraging.
Centralisation tendencies, even for the good of European railway harmonisation lead to certain preferences by such centralised agencies to privilege the big market players ("too big to fail" with many potential voters) at the expense of the medium-sized and small market players. They foster, intentionally or unintentionally, concentration of market power and rather listen to the big players when designing safety and interoperability matters.

**The chances of the regions to use the open competitive market for their tasks of ensuring an effective regional passenger service are therefore in danger as long as they do not have a say in the decision-making process of the ERA**.

## 4.4 Safety – Directive 2004/49/EC

**Remark**: The Safety Directive is a rather technical directive. The amendments mainly deal with modifications that make it consistent with the Interoperability Directive, in particular concerning definitions. The major novelty is the introduction of a single safety certificate issued by the ERA. Major concern of the LRAs is the accessibility to such a central body if LRAs are railway undertakings.

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| ***Art. 1(d) requiring the establishment, for each Member State, of a national safety authority and an accident and incident investigating body.***<br><br>***Art. 3 (g)' national safety authority' means the national body entrusted with the tasks regarding railway safety in accordance with this Directive or any body entrusted by several Member States with these tasks in order to ensure a unified safety regime.*** |
| **Note:** The change of "in every Member State" into "for each Member State" can have interesting implications for the CoR, too. It can be interpreted that the NSA of one MS can also take over the same function of the NSA of another MS. The advantage is for smaller MS to entrust complex tasks such as safety to other MS. It confirms the trend that candidate countries (e.g. former Yugoslavia) already ask the NSA of MS to take over certain functions for cost reasons. |
| **Recommendation:** A clarification should be required. |

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| ***Art. 2.2 The following systems are excluded from the scope of this Directive:***<br><br>***(a) metros, trams and light rail systems;***<br>***(b) networks that are functionally separate from the rest of the railway system and intended only for the operation of local, urban or suburban passenger services, as well as railway undertakings operating solely on these networks;*** |
| **Note:** Similar to the assessment given for Article 1.3 of 2008/57 (30), the regions shall demand the exclusion of regional railway systems in order to avoid that cost-intensive safety-relevant measures have to be applied which in reality are only necessary for mainlines. |
| **Recommendation:** Networks that are not functionally separate from the rest of the railway system and intended only for the operation of local passenger and freight services as well as railway undertakings operating solely on such networks, upon decision of the competent local authority, shall be excluded from the safety obligations. The vehicles using a limited section of an interoperable line to reach the terminus of the local passenger and freight services shall also be excluded from the safety requirements. For the exclusion, a notification procedure with the EC is required. |
| ***Art. 3 (p) 'light rail'* [...]** |
| **Note:** See our comments on the interoperability directive. |
| **Recommendation:** none |
| ***Article 11 Applications for single safety certificates.***<br><br>***1. Applications for single safety certificates shall be submitted to the Agency.* [...]**<br>***2. The Agency shall provide detailed guidance on how to obtain the single safety certificate.* [...]**<br>***3. An application guidance document describing and explaining the requirements for the single safety certificates and listing the required documents shall be made available to applicants free of charge. The national safety authorities shall cooperate with the Agency in disseminating such information***. |
| **Note:** An important modification is the introduction of the single safety certificate which, according to Art. 10.2 shall only be granted by ERA (safety authorisations for IM continue to be granted by the NSA). Although the issuance of safety certificates itself is no concern for the regions, it is the language used for the application process and the certificate. There is no guarantee ensuring that the certificates are issued in the local language of the applicant. The application for and issuance of a single safety certificate should also be possible in the local language of the applicant.<br>From a regional point of view, the NSA should assist any applicant to correctly apply. Furthermore, the NSA should be the official communicator with ERA. |

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| Since there is no point of contact at regional level, Experience has shown that the application of safety certificates requires a close contact with the safety authority. |
| **Recommendation:** Applications for single safety certificates shall be submitted to the Agency in any of the EU languages.<br><br>The Agency shall provide detailed guidance on how to obtain the single safety certificate in all EU languages.<br><br>The national safety authorities shall advise the applicant, if requested, in the drafting of the application for the single safety certificate and in the communication with the Agency. |

# 5 General recommendations

Apart from the detailed recommendations proposed in Chapter 4, the following activities of a general nature but important for the regions have to be mentioned:

1 The CoR might wish to take into account the recommendations given in Part 4 of this study, within the framework of its consultative work on the Fourth Railway Package, if it considers them appropriate.

2 The negotiations of the Fourth Railway Package will not finish with its coming into force since the directives have to be transposed by the MS. The CoR might therefore wish to organise via its members, networks and contacts sufficient lobbying support to ensure that MS with vertically integrated state-owned undertakings and important railway industries shall not water down the intentions of the EC.

3 With respect to the technical directives, interoperability and safety, the region should equally pay close attention to the cost implications. There is an inherent will at EC level and of the European rail industry to use the harmonization to impose expensive European interoperability and safety standards on IM and RUs, that can only be paid by heavily subsidized state enterprises of the rich MS, leading to a gradual long-term increase in overall transport costs without significantly improving the safety but creating a significant safety bureaucracy. **As other transport sectors (air, maritime shipping) and other utility sectors have shown, significant cost decreases do not come from technical solutions but from market opening and increased competition.**

4 The new tasks delegated to the LRA require a significant rethinking and intensive training of its staff to fulfil them. It is therefore suggested that the regions should build up an intensive training programme for its personnel in the following major areas: competitive awarding, transport planning, monitoring of public service contracts, integrated ticketing, and management of infrastructure.

5 For the associations dealing with regional matters, it is suggested to produce templates and recommendations for transport planning and awarding as well as for the other tasks mentioned under Point 4 to assist the local authorities.

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