

21<sup>st</sup> January 2005**UNICE COMMENTS ON THE EUROPEAN COMMISSION'S  
PROPOSAL FOR THE THIRD RAILWAY PACKAGE**

On 3 March 2004, the European Commission adopted its *third railway package*. In common with the previous two packages, the third contains a number of proposals, which the Commission believes will contribute towards the revitalisation of Europe's railways. These are:

- ❑ A Directive allowing for the gradual opening-up of the market for international passenger services by rail;
- ❑ A Directive on the certification of train crews operating on the Community's rail network;
- ❑ A Regulation on compensation in cases of non-compliance with contractual quality requirements for rail freight services, and;
- ❑ A Regulation on international passenger rights and obligations.

UNICE is the official voice of more than 20 million small, medium and large companies. We have been active in European affairs since 1958 and our members are 38 central industrial and employers federations from 30 countries, working together to achieve growth and competitiveness in Europe. As such, when commenting on this third set of railway proposals, UNICE will limit its comments to the proposals that will directly affect our constituents the most (i.e. the proposals for a regulation on compensation in cases of non-compliance with contractual quality requirements for rail freight services and the proposal for the gradual opening-up of the market for international passenger services by rail).

**THE COMMISSION'S PROPOSAL FOR INTERNATIONAL PASSENGERS SERVICES**

The Commission's proposal to *open up international passenger services* envisages the opening-up of cross-border rail passenger services, and including international passenger services within a Member State (cabotage), by 2010. While it is pleasing to see such proposals it is necessary to point out that the principle of open markets should be applied to all passenger services. This includes not only – as the draft directive envisages – cabotage services in cross-border services but also purely national services.

Currently, access conditions for purely domestic passenger services are regulated in many different ways in Europe. While some countries – such as Germany and the United Kingdom – allow free infrastructure access, other countries seal off their networks and make market access more difficult for competitors. The European Parliament included complete market opening of passenger services by the year 2008 in its adopted position on the second rail package. In the current proposal the Parliament's position can be found only to a limited extent because domestic services are not included in the text. Free and fair competition is key to improving the performance of Europe's rail industry. If tomorrow's railway operators are to compete with other transport modes in an open Europe, free market access on all rail

markets is essential today. Industry as a result believes that the draft proposal should be extended to include all passenger services.

## THE COMMISSION'S PROPOSAL FOR RAIL FREIGHT SERVICES

With regard to the proposal for a '*regulation on compensation in cases of non-compliance with contractual quality requirements for rail freight services*', UNICE welcomes of any proposals which in theory should result in further steps being taken towards the creation of a fully integrated and liberalised European rail area. It is UNICE's view that if rail is to prove itself as a complementary alternative to road transport, then it has to become a 'reliable' part of the supply chain. In this regard we repeat what we have stated previously "*liberalisation of rail freight transport is crucial to improving the cost and quality of railway services*".

A major contributing factor to full liberalisation is the provision of satisfactory services (i.e. open to competition) and UNICE agrees with the Commission when it says that the "lack of service quality is currently a major barrier to the development of rail freight services"<sup>1</sup>. In particular we are glad to see that these proposals for improving rail freight services are not being made on the back of increased costs for road and air transport. We do however have some reservations about the actual details of the proposals put forward. Our primary reservation has to be whether or not this proposal will actually contribute to improving the quality of reight services on Europe's railways. We are not convinced that it will because a proposal which would have furthered the cause of liberalisation would have been much more appropriate for improving the quality of rail freight services in Europe.

UNICE firmly believes that rail freight services have to meet the requirements of the market and with the anticipated growth in freight transport demand of up to 38% between now and 2010, the quality of the service which rail freight operators offer must be of a standard that shippers and forwarders of freight will opt to use rail to ship freight rather than send it, for example, by road. This can only be achieved if shippers and forwarders can be confident that their products can and will be where they want them to be, when they want them to be there. This reassurance is only possible if the market is fully liberalised, open to free and fair competition (and subject to the scrutiny of European competition authorities). These considerations are key to creating better quality and innovative railway services and any proposals that aims to improve quality requirements for rail services should focus more on these facts.

While we agree with the logic of providing for a compensation system for delays, damage or loss of competitiveness due to the lack of service quality on our railways, we also believe (in keeping with our earlier comments on liberalisation and competition) that in an ideal situation they would not be necessary (because they would not be needed). Unfortunately we do not live in an ideal world and, until we do, 'incentives' such as these (rather than penalties) will be necessary to ensure that rail undertakings act to deliver a service which is genuinely competitive with other modes of transport. Nevertheless we are also not convinced that what is on the table will make a positive contribution to improving the situation. The proposal goes into too much detail by including proposals for the proposed values of compensation, for loss and damage, for lack of information and for consequential damage and as a result risks complicating the situation unreasonably. It would have been more appropriate and workable if the proposeal had suggested a system whereby the amount of compensation, in case of

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<sup>1</sup> Proposal for a regulation of the EP and the Council on compensation in cases of non-compliance with contractual quality requirements for rail freight services, European Commission, Brussels, 3 March 2004, Page 5, recital 2.

delay or cancellation was defined by mutual agreement in the contract. It should also be pointed out that the EU Commission's efforts could be a cause for concern against the background of the planned EU entry to COTIF and the possible changes that such entry would require.

We do however agree with the Commission's position that while primary responsibility lies with rail undertakings, a certain degree of responsibility also lies with the customer. If the undertaking is prevented from meeting its contractual obligations due to the actions of the customer, then it is right that it be the customer who should be expected to provide compensation. We do wonder though whether the level of compensation should be set as high as "the market price at the place and at the moment of the takeover of goods"<sup>2</sup>. Might not the cost of manufacture of the goods lost, damaged or destroyed be a more realistic sum?

There are also a number of ambiguities in the proposals. For example, the parties involved in the transport agreement (freight customer and railway undertakings) are obliged to draw up regulations in the agreement on various quality requirements (e.g. delivery deadlines, damages regulation, a quality monitoring scheme etc.)<sup>3</sup>. If the parties have not agreed on these points, the proposal provides for the "invalidity of the contract". A question arises as to how liability is determined in this case? The proposed regulation's liability provisions relate mainly to party agreements (e.g. Articles 4, 5, 8 etc.) and can therefore no longer be considered a basis for liability – at least according to its wording. This would result in an unclear legal situation.

The objective of creating efficient liability conditions presupposes a broad practical area of application. This can scarcely be taken for granted, however, due to the envisaged provision on exclusion of liability<sup>4</sup>. Under this provision, exclusion of liability/non-liability applies in the case of simple negligence is by a railway undertaking. It is difficult to understand why a no-fault warranty obligation is to be created and, at the same time, liability in traditional cases of simple negligence to be excluded. According to the wording of Article 15 liability would be limited to rare and difficult to prove cases of gross negligence and deliberate acts. The new regulations could actually limit and not raise liability in comparison with current national and international transport legislation.

## **AREAS IN WHICH UNICE BELIEVES ACTIONS IS ALSO REQUIRED**

While welcoming these proposals, we would also like to point to the fact that more has to be done to reach the point where we can truly say that liberalised rail freight services operate in Europe. Much more needs to be done to encourage rail operators become more customer-oriented and cost effective and competitive with other modes of transport.

We believe that the third railway package should have put forward proposals to include shippers and forwarders in the definition of 'authorised applicants'. Shippers and forwarders involvement would spur the improvement of service quality to the benefit of all. As is the case with financial penalties, in a well functioning competitive rail market, there would be no need for shippers and forwarders to organise rail transport because liberalisation will lead to more competition and more customer-oriented services. However until this 'ideal' situation is reached their involvement should be encouraged.

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<sup>2</sup> *Ibid.*, page 8, Article 6;

<sup>3</sup> *Ibid.*, page 7, Article 3

<sup>4</sup> *Ibid.*, page 10, Article 15.

On top of the positive impact of competition, we consider an appropriate warranty law to be of great relevance and believe that it would enhance the attractiveness of rail services. This is particularly true as there is currently not enough competition on railways.

It is also clear that to ensure the proper provision of freight services it is important to get more priority for international freight trains in order to make rail a competitive alternative to road, waterborne and air transport. If freight trains continue to be treated as secondary in the slot allocation process it will not become the alternative that it should be. Given the proposals included in the third railway package concerning the liberalisation of passenger rail transport we believe that complementary suggestions regarding priority in timetabling in operations to deal with this issue should also have been forthcoming. At the very least, the appropriate (optional) slot registration law in favour of industrial train users outlined in the first railway package could have been put on a firmer, more binding footing in these proposals.

Industry has high hopes for the agreement reached on the second railway package. Under the package cross-border freight transport networks are to be fully opened up from 2006 onwards and freight transport services within individual Member States liberalised a year later (cabotage). It is our view that there should be no distinction between the two, and to continue with one would be to obstruct free competition.

We also believe that proposals should have been brought forward regarding the dependency, which private rail operators continue to experience on the traditional railway undertakings for the provision of services such as fuel supply, wagon approval and access to specific rail tracks. Measures to address these dependencies need to be forthcoming otherwise normal competition conditions will not exist, to the detriment of contractual quality requirements for rail freight services.

Also clear is the importance of non-discriminatory access for new entrants to the rail infrastructure. In practice it is still the case that free access to the first and/or last mile of certain rail track (e.g. harbour railway infrastructure) is denied to private rail operators, which in turn calls into question the true extent to which rail services are to be liberalised.

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