



## EUROPEAN COMMISSION

Brussels, 28.2013  
C(2013) 5190 final

Mr Laurent MOSAR  
President of the  
Chambre des Députés  
19, rue du Marché-aux-Herbes  
L – 1728 LUXEMBOURG

Dear President,

The Commission would like to thank the Chambre des Députés of Luxembourg for its Reasoned Opinion concerning the Proposal for a Regulation of the European Parliament and the Council amending Regulation (EC) No 1370/2007 concerning the opening of the market for domestic passenger transport services by rail {COM(2013) 28 final} and the Proposal for a Directive of the European Parliament and of the Council amending Directive 2012/34/EU of the European Parliament and of the Council of 21 November 2012 establishing a single European railway area, as regards the opening of the market for domestic passenger transport services by rail and the governance of the railway infrastructure {COM(2013)29 final}. It apologises for the delay in replying.

First and foremost, the Commission would like to reassure the Chambre des Députés that the aforementioned proposals have been based on thorough impact assessments in line with the Better Regulation agenda. The Commission agrees with the Chambre des Députés that Article 63 of Directive 2012/34/EU required new proposals on rail market opening and rail infrastructure governance to be supported by solid evidence in the form of a report. The subsidiarity assessment of the proposals (necessity test and test of EU value added) has also been documented in the impact assessment reports accompanying the proposals {SWD(2013) 10 and 12} and their annexes, and that for all options considered.

This was actually the purpose of the three detailed impact assessments on rail domestic market opening, the governance of the railway infrastructure and a common approach to safety and interoperability rules<sup>1</sup>. These impact assessments are based on a thorough analysis of various policy options. They have been supported by external support studies, a Eurobarometer survey with replies from 25,000 citizens and an extensive consultation

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<sup>1</sup> [http://ec.europa.eu/commission\\_2010-2014/kallas/headlines/news/2013/01/fourth-railway-package\\_en.htm](http://ec.europa.eu/commission_2010-2014/kallas/headlines/news/2013/01/fourth-railway-package_en.htm)

*process which involved the European Parliament, as well as nearly 500 stakeholders. Based on this analysis, the Commission adopted six legislative proposals on 30 January 2013.*

*The Commission therefore fulfilled the requirements of Article 63 of Directive 2012/34/EU relating to its obligation to submit a report on the implementation of Chapter II of this Directive, except for the one month delay as compared to the date of 31 December 2012. The Commission believes however that this delay should be seen in light of the fact that Directive 2012/34/EU only entered into force on 21 November 2012 and of the complexity, diversity and sensitivity of the problems addressed.*

*Furthermore, the Commission would like to stress that the six legislative proposals included in the 4<sup>th</sup> railway package either amend, recast or repeal existing EU legislation. Thus the modifications in question concern areas in which the EU co-legislators had already exercised their competence.*

*1. Modification of Directive 2012/34/EU establishing a single European railway area {COM(2013) 29 final}*

*The Commission does not share the assessment of the Chambre des Députés that the proposal on the governance of infrastructure managers and domestic market opening would not be compliant with the principle of subsidiarity.*

*The Commission would like to underline that, in the context of the negotiations of Directive 2012/34/EU, the co-legislators have themselves invited the Commission to envisage legislative measures in relation to the opening of the domestic rail passenger market and to ensure non-discriminatory access to the infrastructure, building on the existing separation requirements between infrastructure management and transport operations. The fourth railway package addresses issues which were deliberately left outside of the scope of Directive 2012/34/EU to constitute a next stage for the completion of the Single European Railway Area.*

*In this context, it is important to underline that the rationale for Union action in the field of railway infrastructure stems from the transnational nature of the Single European Rail Area. Actions by Member States alone cannot ensure the coherence of market access and competition rules needed for the emergence of a genuine internal market for transport.*

*The Commission would like to emphasize that the financial impact of all options concerning the governance issues has been thoroughly evaluated in the impact assessments mentioned above. The Commission analysis showed that potential small transaction costs would be by far offset by the huge benefits from savings in competitive tendering and better use of infrastructures with a direct positive impact on public resources. All these findings are available in annex 5 of the related impact assessment.*

*2. Modification of Regulation (EC) No 1370/2007 concerning the opening of the market for domestic passenger transport services by rail {COM(2013) 28 final}*

*The Chambre des Députés observes that the attribution of the financial risk linked to the residual value of rolling stock to the competent authorities, if rolling stock leasing companies*

*in the Member State do not exist, would not be compliant with the proportionality principle. The opinion refers to the Commission's impact assessment which attributes a negative financial impact on the competent authorities to this option. The Commission considers that the likely financial impacts of such an obligation on the authorities is fully justified and proportional in view of the significant benefits in terms of effectively overcoming the single most important market entry barrier, creating competition and enabling the realisation of significant savings of public funds. The financial consequences of the authorities' obligation to take the residual value risk of rolling stock are rather limited compared to the potential savings through tendering of public services contracts, which have been between 20% and 30% in the Member States that have opened up their market until now. These savings will allow the competent authorities to invest in higher quality and/or more public transport services.*

*The Chambre des Députés further states that the element of subsidy implied with this conditional financing obligation would not be compliant with the principle of a market economy in Art 119(2) TFEU, the principle of sound public finances in Art 119(3) TFEU and would compromise the functioning of services of general economic interest (SGEI) and hence be not compliant with Art 14 TFEU. The Commission recalls that the concept of SGEI, which enable authorities to pay a compensation for the discharge of public service obligations, is compliant with the Treaty under certain conditions. The Commission considers that, if a public service contract includes the obligation of an operator to purchase new rolling stock, the inclusion of an element of a possible subsidy compliant with EU state aid rules to cover the financial risk linked to the residual value of rolling stock would also be compliant with the Treaty. The principle of sound public finances of the Treaty would be complied with as facilitating access to rolling stock and hence fostering competition for public service contracts would enable the authority to realise savings of public funds and ensure the provision of public transport services. It goes without saying that the competent authority, when faced with offers from different operators, including those having requested a financial support for the acquisition of rolling stock and those not having done so, would take account of the aid element in the comparison of price offers submitted.*

*The Chambre des Députés considers that the proposal to make the competitive award of public service contracts in rail mandatory would be not compliant with Art 1 of Protocol N°26 to the TFEU which infers "the essential role and the wide discretion of national, regional and local authorities in providing, commissioning and organising services of general economic interest as closely as possible to the needs of the users". The Commission considers that the relative degree of freedom of competent authorities in choosing the award procedure for public service contracts is limited by the EU case law. The Court of Justice has clearly established, for matters of public procurement, that contracts that do not or only partially fall under the public procurement Directives are subject to the principles arising from Art 49 (right of establishment) and Art 56 (freedom to provide services), at least as far as these contracts are of a "certain cross-border interest"<sup>2</sup>. This means that the award of those contracts has to follow transparent procedures. EU case law has already been taken*

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<sup>2</sup> C-507/03 Commission vs Ireland, judgement of 13.11.2007

*into account by Regulation 1370/2007 for modes other than rail, which are already governed by open tendering provisions. The extension of this principle to rail is thus a logical step to complete the process.*

*Finally, the Commission does not share the opinion of the Chambre des Députés that the Commission proposal neglected the need to deal with the social aspects pursuant to Art 9 TFEU. The proposal does indeed address the social aspect by clarifying in its Art 1(3) (c) the instruments at hand for competent authorities to protect staff, if they deem it adequate based on the principle of subsidiarity.*

*The Commission hopes that these clarifications address the concerns raised by the Chambre des Députés of Luxembourg and looks forward to continuing the political dialogue in the future.*

*Yours faithfully,*

*Maroš Šefčovič  
Vice-President*