VDV Die Verkehrsunternehmen

Position Paper / September 2014

Full attainment of the European Railway Area and fair arrangement of the regulatory framework

Recommendations by VDV for the ongoing legislative procedure relating to the Fourth EU Railway Package

Publication details

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VDV and its members

The Association of German Transport Companies (VDV) organises companies active in the German passenger transport and rail freight sectors.

In the rail sector, VDV represents approx. 85 undertakings providing passenger rail services, approx. 140 rail freight operators and approx. 140 infrastructure management companies. Approx. 300 of the companies organised in the VDV Association provide local public transport services by bus, tram, as well as by light and metro rail. In addition, the Association represents approx. 50 public transport alliances and public transport authorities (PTAs).

In proportion to the market shares of its members, VDV achieves almost total market coverage in Germany in terms both of the passenger rail and rail freight sectors, as well as local public transport by bus, tram and metro rail.

An overview of the essential positions

VDV strongly requests that the European policy makers **grant priority to the Technical Pillar in ongoing negotiations** as this is urgently expected by the rail sector. In the opinion of VDV, any **amendment of Regulation 1370 prior to expiry of its transitional period would be premature** and, for the purpose of legal clarity, should currently not be undertaken. In view of the requirements imposed on railway and infrastructure management companies in the modified **Directive 2012/34, a sufficient time period for consideration and compromise** should be granted.

Position on Directive 2012/34/EU (Governance Directive)

- VDV calls for a general opening of the networks to national passenger rail transport services without additional bureaucratic framework conditions and therefore recommends that Article 11 be entirely deleted without replacement.
- VDV expressly favours exclusion from the provisions in Article 7 and of 7a to 7e of networks with a track length of less than 500 km insofar as they are of no strategic significance for smooth functioning of the European railway market.
- VDV explicitly rejects any additional centralised structures which take the aim or have the capability of absorbing the ticketing and customer service activities performed by the railway undertakings. When integrated through-ticketing systems are being developed, the corporate interests of railway undertakings in the member states must be respected and existing systems interlinked in a decentralised manner.
- The Association supports the approach adopted by the European Parliament of ensuring the required independence of the infrastructure managers on a pan-European scale in a regulatory manner, and not through strict separation. In this context it welcomes the bundling of regulatory competencies under the auspices of regulatory authorities as proposed by the EP.
- VDV supports improved cooperation between the infrastructure managers. Precisely as to how this cooperation is to be organised, however, must remain a managerial task. The Association therefore rejects both the draft of the Commission and the diluted EP proposals on cooperation between the infrastructure managers.
- Despite its expediency, improved cooperation between the infrastructure managers must remain a managerial task within a framework provided by the political and administrative bodies.

Position on Regulation (EC) 1370/2007 (PSO Regulation)

- VDV and its members remain of the opinion that amendment of Regulation (EC) No 1370/2007 prior to expiry of the transitional period in 2019 would be premature and therefore reject amendment of this regulation.
- In the event of amendment to the regulation, subsequent repercussion on the award of transport services provided by bus and light or metro rail must be excluded.
- The "ban on under-compensation" proposed by the European Parliament (as per Art 4 (1)(b)) could endanger tax approval of municipal or regional cross-subsidising in Germany and is therefore to be deleted without replacement.

Position on Directive 2004/49/EC (Safety Directive)

- On principle, VDV opposes any further bureaucratisation of the rail sector based on the pretext of safety.
- Within the definition of the principle of subsidiarity, rail operators providing regional services of no strategic significance for the European railway area should not inevitably be made subject to European provisions; in such cases the national rules are sufficient. The exemption of networks with track lengths of less than 500 km (insofar as these are not of strategic significance for smooth functioning of the European rail market) proposed in connection with the unbundling regulations set forth in Directive 2012/34/EU would in this case also serve as an appropriate criterion for exemption.
- The definition of "tram and light rail" decided on by the Council requires amendment. VDV concurs with the definition of "light rail" proposed by the EU Commission as it provides undertakings with sufficient flexibility. Moreover, urban and light railway undertakings should as a rule remain exempt from application of the rail safety directive.
- VDV rejects the obligation foreseen in the proposal of the EU Commission (Art 10 (4)) or, respectively, in the proposal of the Council of Ministers (Art 16a (2)), of providing advance notification of new transport services; in the view of the Association, this would obstruct flexible action on the market by rail undertakings and discriminate against such undertakings when these are faced with competition from all other transport modes.

Position on Directive 2008/57/EC (Interoperability Directive)

- In addition to its acceptance of the position adopted by the Council with regard to the derogations affecting the light rail sector, VDV also welcomes other optional exemptions. Furthermore, the interests of smaller and medium sized secondary railways must also be taken into account in the derogations.
- VDV urges that re-homologation procedures be conducted only in explicit conjunction with "major upgrading or renewal of existing subsystems".
- The definition of "tram and light rail" decided on by the Council requires amendment. The VDV Association concurs with the definition of "light rail" proposed by the EU Commission as it provides undertakings with sufficient flexibility. Moreover, as urban and light rail undertakings do not operate cross-border services, they should, as a rule, be exempt from application of the interoperability directive.

Position on Regulation (EU) 881/2004 (ERA Regulation)

- VDV welcomes the fundamental objective underlying the proposal of the Commission that the ERA be further developed into a European railway authority. This must not, however, result in increased expenditure for the rail operators.
- Undertakings operating on an exclusively national basis must be granted the option of selecting between the ERA and a national safety authority.
- On establishment of the ERA as a European authority, the rail sector must not be obliged to incur translation costs. As an initial rule, therefore, we propose that each procedure (in writing or orally) be conducted using the official language in which an application has been submitted unless the applicant agrees to processing of an application in another language.

Position on the regulation repealing Regulation (EEC) 1192/69 (Accounts)

— The repeal of Regulation (EEC) No 1192/69 cannot be accepted unless an equivalent obligation based on European legislation and under which the member states agree to grant compensation for financial expenditure incurred by rail undertakings on level crossing facilities is anchored elsewhere.

Position Paper

Current stage of proceedings and further steps

Presented by the Commission on 30 January 2013, the "Fourth Railway Package"[1] comprises a total of six legislative proposals under which existing laws are subject to considerable amendment. The package consists of two "political" components (the Governance Directive 2012/34/EU and the PSO Regulation (EC) 1370/2007), a so-called "Technical Pillar" (consisting of the Safety Directive 2004/49/EC, the Interoperability Directive 2008/57/EC and the ERA Regulation (EC) 881/2004), in addition to a regulation for the repeal of Regulation (EEC) 1192/69.

The Association of German Transport Companies (VDV) supports the central objective of the Fourth Railway Package, i.e. to open the railway networks to all rail undertakings, to further improve the high level of safety achieved in rail operations and to implement operational and technical interoperability.[2] The individual proposals submitted by the Commission unfortunately overstep this objective, however, and thus place a substantial burden not only on the railway undertakings, but also on the infrastructure management companies. Local public transport operators providing urban or regional bus and tram ("light rail") services are also affected, although they should not be any target for reform under a Railway Package! Below we shall express our detailed opinion on these issues.

In the year 2013, both the European Parliament and the Council of the EU entered into deliberations in respect of the Fourth Railway Package. In **the European Parliament (EP)**, all six legislative texts were subject to parallel discussion and voting. On 17 December 2013, the Transport Committee voted on all draft laws; on 26 February 2014, the Plenary Assembly of the European Parliament took the vote and thus concluded the first hearing. On 10 September 2014, the **European Commission** stated its official position on the resolution passed by the Parliament. In **the Council of the EU**, the draft laws have so far been examined consecutively, proceedings beginning with the "technical pillar". On 10 June 2013, the member states took position on the Interoperability Directive; this was followed by the Safety Directive on 10 October 2013 and by the ERA Regulation on 5 June 2014. The Italian Presidency announced the intention of initiating the trilogue in respect of the technical pillar. In addition, the two political dossiers have been subject to discussion by the Council since July 2014.

As regards the ongoing procedure VDV calls for action by the European decision makers as follows:

1. **Priority must be given to the technical pillar in the course of all further negotiations** as this is of utmost urgency for the rail sector. The concluded first reading in the Parliament and the positions now assumed by the Council in terms of the three technical dossiers enable immediate commencement of the trilogue negotiations. With regard to content, particular care must be taken to avoid the inclusion of additional bureaucracy.

2. **Amendments to Regulation 1370 are to be completely rejected in the interests of legal certainty**. Should this not obtain a political majority, amendment of the regulation must at least be strictly limited to provisions relating to rail operations – without consequences for urban and regional public transport services by bus or tram!

3. **Ample time is required for discussion on and further development of the Directive 2012/34**. An optimum basis for compromise on the issue of structures at integrated rail

[1] http://ec.europa.eu/transport/modes/rail/packages/2013_en.htm

[2] http://www.vdv.de/positionensuche.aspx?id=a23719db-847b-47b6-9ec0-61fcacc2f8ad&mode=detail

undertakings is provided by the VDV Position Paper "Requirements set by VDV for the organisation of railway companies in Europe".[3]

[3] http://www.vdv.de/positionensuche.aspx?id=0146ac1e-98f5-4b1c-95f3-dc42dcf6112a&mode=detail

Proposal for amendment of Directive 2012/34/EU relating to establishment of a single European railway area (Governance Directive)

Important passages in the proposals for amendment of the so-called Governance Directive submitted by the European Commission were significantly altered in the course of the first reading before the European Parliament. In the view of the VDV Association, the following aspects in particular must be emphasised during the ongoing consultations:

- **Market opening in the rail sector:**

The intention of opening the networks to all passenger rail operations – one of the key political objectives of the Fourth Railway Package – has been confirmed by the European Parliament. As is already customary for international transport services, restriction of access rights (as per Article 11) should only then be admissible if the economic equilibrium of public transport service contracts were subsequently compromised. In conjunction with its assessment the Parliament has decided on numerous detailed rules. Restriction of access rights is also possible if the transport undertaking concerned is under the direct or indirect control of a third country which denies comparable access rights to European transport undertakings (see Article 10).

VDV is of the opinion that the opening of networks to national passenger rail services is overdue. Although the restrictive conditions decided on by the EP in terms of the possible limitation of track access rights are a step in the right direction, they nonetheless harbour the potential of becoming a major bureaucratic cost driver. In view of experience gained in Germany, the assumption that commercially operated passenger transport services could pose a threat to the economic equilibrium of public service contracts in the passenger rail sector is far from reality. **VDV therefore recommends that Article 11 be entirely deleted without replacement.**

- **Exemption from the unbundling requirements for small integrated railway undertakings:**

Pursuant to the vote of the European Parliament the provisions set forth in Article 7 and in 7a to 7e relating to stricter separation of network and operations – including obligations for infrastructure managers to establish coordination committees for their networks and to participate in a pan-EU network with the purpose of developing and expanding railway infrastructure – are not to apply to networks with track lengths of less than under 500 km insofar as they are not of strategic significance for the smooth functioning of the European rail market.

The VDV Association expressly supports the exemption granted to small and medium-sized undertakings. Due to the required duplication of structures, application of the valid separation provisions alone would necessitate a considerable measure of organisational and operational effort. In view of the mainly precarious economic situation as regards the provision and management of regional rail infrastructures, not only their continuing viability would be under substantial threat, but also, as a consequence, the rail transport services provided in their area. This applies all the more to the tightening of the separation provisions proposed by the Commission.

VDV therefore strongly urges the member states to consolidate such a derogation in the Council.

- **Unbundling requirements:**

In addition, the EU Parliament has substantially lessened the impact of the proposals for unbundling submitted by the Commission which would effectively have led to a complete and comprehensive separation between infrastructure and transport operations at all rail undertakings in the EU. Although the strict-separation model preferred by the Commission is still referred to in the text of the directive, the member states are now to be permitted to waive application of the un-

bundling provisions not only in the case of existing vertically integrated undertakings, but also of vertically integrated undertakings in general.

Moreover, the decisions taken by the Parliament relating to provisions ensuring the independence of the infrastructure manager at vertically integrated undertakings have provided these provisions with a significantly modified scope of application:

- On the one hand this applies to the participatory relationships and financial flows within vertically integrated undertakings. In this case the EP has confirmed that the exchange of services between different legal entities is to be charged and settled on the basis of market prices. Revenue earned by the infrastructure manager is to be used exclusively for the purpose of financing his own corporate segment. Any interest due on capital, which, at an integrated undertaking may only be injected into the infrastructure management division by the respective holding, must be paid in accordance with market conditions. Dividends may only be paid to the "ultimate owner" who is then obliged to reinvest such payments into the infrastructure. In addition, they may not stand in contradiction to a commercially appropriate accumulation of reserves.
- Furthermore, the European Parliament has restricted the "effective decision power" of the infrastructure manager to the fields of capacity allocation and track access charging. The Commission had proposed that the infrastructure manager be granted effective decision power for all functions (further development, operation and maintenance of infrastructure).
- Lastly, the EP has replaced the extremely detailed proposals submitted by the Commission relating to independence for the infrastructure manager in staffing issues (supervisory and administrative boards, senior managers) with regard, for example, to a three-year waiting period prior to the transfer of senior members-of-staff between the infrastructure management division and other legal entities within a vertically integrated undertaking, with more general provisions aiming at safeguarding independence in staffing issues.

VDV has rejected the provisions proposed by the Commission for strict separation of infrastructure and transport operations. In contrast, the Association has formulated a set of requirements with which the independence of infrastructure managers, irrespective of their organisational structures, may be safeguarded in regulatory terms at a pan-European level. This basic approach also forms part of the resolutions of the EP. It is to be pursued in the ongoing stages of the legislative process.

- **Controlling the independence of infrastructure managers by way of the regulatory authorities:**

In deleting Article 7c without replacement the EP has assigned to the regulatory authorities the control function of ensuring compliance with the legal requirements in terms of the independence of infrastructure managers. In its own view, the Commission itself should be entrusted with this task.
VDV supports the proposal presented by the EP of bundling regulatory competencies under the auspices of the regulatory authorities.

- **Cooperation between the infrastructure managers:**

To a wide extent the EP has adopted the proposal submitted by the Commission that the infrastructure managers cooperate with each other in a European network. The measures to be taken in determining the common principles and action procedures should not, however, as originally foreseen, be decided on exclusively by the Commission, which must now take consideration of the opinions of the regulatory network. Moreover, the EP has extended the functional scope for the network, which originally had been focused on expanding and further developing infrastructure within the EU. The network is now also to ensure and alleviate the smooth flow of cross-

border passenger rail services and establish principles relating to the levying of track-access charges and allocation of capacity within the cross-border passenger rail sector.

On principle the VDV Association welcomes an improvement in cooperation between the infrastructure managers. Concrete organisation of this cooperation must, however, remain a managerial task. That of the political and administrative sectors is to define the required framework of regulatory policy, and, if necessary, to exert regulative influence. The existing level of cooperation between the infrastructure managers should be further developed on this basis. VDV therefore rejects both the draft submitted by the Commission and the diluted proposals by the Parliament in terms of such cooperation.

- **Integrated ticketing and information systems:**

The amendment proposals relating to ticketing decided on by the European Parliament in a first reading are formulated in an **imprecise and ambiguous** manner. The exact wording of the draft contains, inter alia, a mixture of plural and singular forms relating to one or more envisaged systems. Although the intention is apparent, questions on the development or organisation of the ticketing systems nevertheless remain unanswered.

The apparent objective of the proposed amendment is to ensure that, on opening of the market, passengers will not suffer any resultant disadvantage when purchasing a ticket and that, in an anti-discriminatory manner, all rail undertakings may participate in the unrestricted processing procedure. Implementing the subsequently required system interoperability is therefore a logical step to take, for interoperability ensures smooth interaction between national and international rail transport providers in various sectors. In contrast to the situation in other member states, **no need for action** on a national level is necessary **as regards German rail services**, since

- unrestricted processing is already regulated in legally binding form in Germany under Section 12 of the General Railways Act (AEG),
- numerous interfaces of a technical and commercial nature currently exist and already regulate the issue of through-tickets in the international passenger rail sector i.e. the Convention internationale concernant le transport des voyageur par chemin de fer (CIV), as well as numerous UIC leaflets which ensure that the various business processes are linked and act in an interoperable manner,
- through-ticketing sales in the passenger rail sector are already both nationally and internationally possible and have in fact become reality,
- the integration of additional transport modes into the information and ticketing systems is confirmed by the numerous projects conducted by railway undertakings and public transport alliances,
- the competence to participate in integrated through- ticketing systems together with the creation and further development of the subsequently required technical, economic and strategic bases are an expression of competitiveness and innovative strength without the need of state support,
- competition-related restriction impeding access to fares and ticketing systems can, in the medium term, be settled in conformity with domestic market rules.

In Germany at least, the EP demands that through-ticketing systems ensuring interoperability be developed by the rail sector have therefore already been fulfilled, and managerial effort and commitment are being focused on the integration of additional transport modes. Insofar as these or similar fundamental principles for unrestricted ticket processing do not yet exist in the member states, a directive should be created in order that, with passenger interests in mind, equal preconditions may prevail in these states.

The objective formulated in the EP resolution is more extensive, however, and therefore also poses problems in Germany: instead of the assurance of non-discriminatory access to new or existing integrated ticketing systems, **a central pan-EU system in addition to the established systems initiated by the rail undertakings** is to be created (Recital 19 e (new)). Whilst the VDV Association fully supports the intention of further enhancing the attractiveness of passenger rail transport for the citizens of Europe and acknowledges that through-ticketing systems can contribute to such increased attractiveness, the establishment of centralised ticketing systems poses the risk that

- **duplicate structures** may be implemented that will have to be operated at the expense of the railway undertakings,
- ticket sales activities undertaken by rail undertakings will be transferred to **centralised supranational organisations**,
- the value-added chain of the railway undertakings will be reduced with a subsequent **loss of essential competitive elements**,
- the German passenger transport system will be deprived of **monetary funds in the form of commission** which will instead be redirected to the European level, and
- last but not least, an **erosion of sales competencies** will ensue at the transport undertakings.

On development of a centralised pan-EU system, the success already achieved in the establishment of unrestricted through-ticketing systems, the investments already made in their inception and the business models created by the railway undertakings would all henceforth receive scant consideration.

For these reasons the VDV Association explicitly rejects additional centralised structures which take the aim or are capable of absorbing responsibility for ticketing and customer service activities performed by the railway undertakings. When integrated through-ticketing systems are being developed, the corporate interests of railway undertakings in the member states must be respected and existing systems interlinked in a decentralised manner.

Proposal for amendment of Regulation (EC) No 1370/2007 concerning the opening of the market for domestic passenger transport services by rail

Whilst the position on Regulation (EC) No 1370/2007 adopted by the Parliament on 26 February 2014 represents a noticeable improvement on the Commission's proposal, **VDV nevertheless remains of the opinion that amendment of the regulation prior to expiry of the transitional period in 2019 would be premature.** In the event that a further resolution is passed within the framework of the European legislative procedure, particular consideration must focus on the following content:

- **No amendment for bus, tram and metro services:**

Possible amendment of the regulation within the framework of the Fourth Railway Package must not result in any consequences as regards the award of public transport services by bus, tram and metro. Although accepted in principle by the Parliament, this demand, unfortunately, has only partially been met in the concrete amendments passed by the EP. The VDV Association expressly welcomes the newly formulated definition of "public rail passenger transport"; but this alone does not suffice to solve the issue. In the case of various foreseen general provisions, additional amendment and/or rail-sector specific restriction on content are required. This applies, for example, to the definition of "competent local authority", the definition of "public service obligation" as well as Article 2a in its entirety.

- **Ban on under-compensation:**

The European Parliament requires that the regulation set not only a ceiling on public service compensation, but also, in the case of directly awarded public transport services, a minimum level, whereby financial compensation may not drop below the amount required. Such a **ban on under-compensation is to be rejected**, as it would, on the one hand, endanger the proven and tested funding procedure for transport services by municipal utilities in Germany. As a result of such financial "full coverage" the contractual form of service concession might also no longer be possible as this involves market risk for the respective operator. In addition, it would not reflect practical reality that public undertakings could, for example, take court action and compel their own stakeholders to conclude an adequate public service contract. Therefore the desired objective cannot, de facto, be attained by way of the ban on under-compensation proposed by the EP.

- **Transport plans:**

Ideal public transport planning cannot be achieved through extremely detailed requirements at the European level. This is only possible on the basis of sensible action taken by parties involved at the local level. For this reason the amendments passed by the Parliament in terms of the transport plan should be revised from the point of view of subsidiarity. The threat of an even greater level of bureaucracy is otherwise likely. In the view of the VDV Association, the limited public funding available should be used in the interests of passengers, not swallowed by excessive bureaucracy.

- **Public service obligations:**

Although the definition of "public service obligation" proposed by the EP is a marked improvement on that in the Commission proposal, the need for greater clarity nevertheless remains in view of the broad discretion that remains available to the competent authorities. The EP has also proposed improvements to content requirements relating to the public service obligations specified in Article 2a: VDV expressly welcomes and considers as essential the formulation agreed

upon by the Parliament in Article 2a Para 4 ("in a cost-effective manner"), which will not lead to overextended mandatory competitive tendering through the back door beyond the provisions in Article 5. Notwithstanding these issues, the need for amendment and/or clarity still applies, inter alia, to the powers and responsibilities of the competent authorities and regulatory bodies.

- **Competition and direct awarding of rail transport services:**

Neither the complete abolition of directly awarded public service contracts which the Commission has proposed nor, as decided by the Parliament, continued direct awarding on the basis of unclearly defined efficiency criteria provide a convincing response to this problem area. Instead, certain clearly defined preconditions for direct awarding should be implemented, relating, for example, to the harmonisation of contract periods, to certain technical specifications and to tram-train systems. In this manner, the competent authorities would be granted sufficient flexibility without any general negative competition-related impact.

In this connection the position paper "Statement on Direct Award for Rail Passenger Transport Services" or "Statement zur Direktvergabe im Eisenbahnpersonenverkehr" published by the VDV Association submits concrete proposals and presents cases in which direct awarding is advisable.

- **Competent local authorities:**

The definition of a "competent local authority" proposed by the Commission has been significantly improved by the Parliament. Preference should still be shown to the very broad definition currently applicable, however. The structure and organisation of authorities is and must remain the responsibility of the member states; too restricted a definition would not only adversely impact the distribution of intra-EU responsibilities, but also, contrary to the objective of the legislator of Regulation 1370/2007, unnecessarily pose a risk in Germany to services integrated within public transport alliances.

- **Rolling stock:**

The EP amendments on the issue as to whether or how the competent authorities should ensure access to rolling stock by the undertakings mark a partial improvement on the proposal of the Commission. With regard to actual market conditions and practical applicability, modification is nevertheless required so as not to call into question the status already attained in certain member states including Germany.

It is especially important to ensure that the obligation for the competent authorities to take remedial action be restricted **exclusively to cases in which an overall and objectively verifiable market shortcoming exists**. Moreover, the provisions defining which instruments are to apply must be formulated in an adequately broad manner so as not to call into question the measures already being applied (voluntarily) and to ensure that the main emphasis is not restricted exclusively to economies of scale.

- **Transitional provisions:**

As regards the transitional provisions, the Parliament has fortunately made certain corrections to the proposal submitted by the Commission as this would otherwise have led to extreme legal uncertainty. The question as to which concrete year dates are appropriately to be inserted should not be defined until the final decisions of the legislative procedure.

Proposal for a Directive on Railway Safety (recast)

The VDV Association of German Transport Companies welcomes the so-called "Technical Pillar" defined in the railway package. Many of the legislative proposals contained in this pillar focus on demands being voiced in the rail sector. Now that the three legal acts have been addressed as priorities by the Council and voted on by the European Parliament **a trilogue procedure on this issue should be conducted as soon as possible** and the overall procedure thus brought to a swift conclusion.

In its statement on the proposal of the Commission the VDV Association had already drawn attention to the **burden of norms currently imposed on railway undertakings**. The Association nevertheless fundamentally supports the efforts being taken to improve the high level of safety already attained in the rail sector. Additional provisions negatively impact the competitiveness of the rail undertakings, however, in comparison with other (less safe!) transport modes. In the end result this would lead to an overall decrease in transport safety. There is no indication that amendment of the safety directive will change this situation in any way. In recent years, various cross-border rail transport services previously in operation have been discontinued and not many new services introduced.

Against this background we are of the opinion that, pursuant to the consultations by the Council and the resolutions passed by the EU Parliament, **further need for amendment** is required and recommend that the following aspects be taken into consideration:

- **Definition of "light rail":**

In the safety and interoperability directives the European Commission has for the first time submitted a proposal as to a definition of the term "light rail" (German: "Stadt- und Regionalbahnen"). This objective is hampered by the fact that, in the member states, the term is to apply to rail systems with quite different historical origins and development processes. The European Parliament does not call the generally outlined definition of "light rail" proposed by the Commission into question; this is a far more expedient approach when contrasted with the extremely narrow definition based on technical parameters which the Council is demanding as more room is left for interpretation. **VDV supports the position of the EU Commission and Parliament** as it provides the undertakings with sufficient flexibility and covers all of the light rail systems currently in European operation.

- **Scope for application:**

With over 400 licensed railway undertakings, over 150 managers of regional public transport infrastructure and over 500 service facilities the German rail market provides exemplary evidence on how small and medium-sized undertakings can contribute to the effective functioning of intra-modal competition – without any subsequent drop in the safety level.

VDV is of the opinion that the Fourth Railway Package lacks concepts as to how such undertakings should be supported in order that, despite the enormous bureaucratic requirements, they may operate successfully on the railway market. With this in mind we request that

– harmonisation of the scope for application of the safety and interoperability directives is ensured as a means of establishing a clear legal framework for all parties concerned;

– on principle, exemptions from the scope for application of these directives should be possible for those small and medium sized undertakings or infrastructures which are not of strategic importance for effective functioning of the European rail transport market. In this case the exemption proposed by the European Parliament in connection with the unbundling provisions contained within the framework of Directive 2012/34/EU relating to networks with less

than 500 km (insofar as these are not of strategic importance for effective functioning of the European rail market) would also serve as an appropriate exemption criterion.

The exemptions formulated in Article 2 are essentially a step in the right direction. **In this respect VDV expressly supports the Commission proposal for categorical exemption of certain rail undertakings from the provisions of this directive**. The EP resolution determining that, case by case, the member states could decide on non-application of the provisions would generate additional transaction charges to be assumed by the rail transport sector and not lead to any benefit in terms of safety, especially in consideration of the fact that national safety requirements already apply.

With this in mind the VDV Association proposes the following supplementary amendments: In Article 2(2)(b), the criterion of "functional separation" should be deleted. On the basis of the subsidiarity principle, responsibility for many such infrastructures and undertakings lies at regional or local level – even if no "functional separation" from the rest of the railway network exists.

- **The operating regulations are not to be called into question – clear definition of the term "national rules":**

The safety of German rail operations – also taking into account the risk-oriented approach formulated in Directive 2004/49/EC – is ensured by way of clear and unambiguous operating regulations in alignment with the technology respectively involved. The definition of "national rules" expounded in Article 3(h) of the draft submitted by the Commission is too imprecise as to ensure that the term will also cover these operating instructions. In the view of the VDV Association, only the formulation contained in Art 3(h) of the resolution passed by the EP may be considered acceptable, although room for improvement still exists: it is additionally important to clarify that in this case only laws and regulations on an abstract level are meant.

Similarly, VDV considers the proposal of the Commission in Article 8 to be inexpedient for the overall objective and the proposal of the Council of Ministers as excessively bureaucratic. In particular, we are of the opinion that Annex IA proposed by the Council of Ministers defines the term "national rules" too broadly and thus unnecessarily intensifies bureaucratisation of the railway sector.

We wish to emphasise that **the option of creating operating regulations – also on a cross-company basis – must remain possible on a national level**. In order that maximum possible consideration be taken of practice-related aspects, it makes most sense, particularly in view of the many years of experience gained in Germany, not to entrust governmental bodies with the creation of operating regulations and instead permit this to proceed through self organisation on the part of railway undertakings and infrastructure managers.

- **Ensuring that the Safety Management System is not overburdened with requirements and that experience gained so far is taken into account:**

The provisions set forth in Directive 2004/49/EU relating to the safety management system are already quite extensive and have proven effective. The obligation of constantly complementing or updating this safety management system is already included in the currently valid directive. VDV considers as counterproductive the fact that, as per Article 9, various additional details relating to the safety management system of the railway undertakings are in future to be officially stipulated by way of "Delegated Acts" drawn up by the EU Commission. The impact on the rail sector of such impractical decisions by the authorities together with a subsequent increase in costs will thus be further intensified.

In addition, the Association of German Transport Companies would like to draw attention to the effectively proven role performed in Germany by the so-called "**Eisenbahnbetriebsleiter", i.e. chief rail operating superintendent**. Well before the idea of a European safety management system (SMS) was conceived, this function had already ensured a high level of safety in the rail sector. Despite the obligation of establishing an SMS, German railway undertakings oppose any future discontinuation of this proven and tested institution which quite clearly specifies the responsibility to be assumed by a specialist at the respective railway undertaking. The VDV Association calls on the decision makers to firmly anchor in Article 9 of the safety directive the requirement of appointing a specialist (e.g. an "Eisenbahnbetriebsleiter") onto the management level of a rail undertaking. Article 9 should therefore include an instruction for the ERA, by 2016 for example, to investigate and determine requirements as to the qualification of the senior management or supervisory staff at rail undertakings and the subsequent interaction with the SMS.

- **Practicable arrangement of the procedure for issuing safety certificates:**

The requirement postulated in the Fourth Railway Package that rail undertakings performing cross-border transport services only once need obtain homologation of their safety management system is at first sight to be welcomed. In the event that competencies are transferred to the jurisdiction of the ERA, however, it is imperative to ensure that the applicant will retain the right of conducting the entire procedure **in the German language** and that the **procedural costs** will not increase. The possible need for translation would considerably increase these procedural costs and can never entirely preclude the risk of mistranslation or inaccuracy.

For railway undertakings performing or intending to perform operations in only one member state or only on a regional level, the integration of a European authority would not be necessary, however, and VDV therefore welcomes the proposal of the Council as regards Article 10(1g) that in such cases the safety certificate be issued by the member state. A further convincing aspect of this proposal is contained in Article 10(1g) and (1ga) which enable the incorporation even of local cross-border services into this option.

- **Bureaucratic demands are not to impede active performance by railway undertakings on the transport market:**

The evident bloating of Article 10 in the proposals submitted by the Commission and Council has given rise to considerable concern on the part of the VDV Association and its members. **The new system under which safety certificates are to be issued by the ERA must on no account result in the creation of new procedures which would complicate the rail system and generate increased costs**. Future additional costs would already arise from the new interfaces between the railway undertakings and the ERA, these over and above costs from continuation of the existing interfaces with the national safety authorities.

Particular critical appraisal is necessary in the case of Article 10(4) in the draft of the Commission and Article 16a(2) in the draft of the Council which include the provision that detailed documentation be submitted to the National Safety Authority prior to each operational start up. This would lead to further costs for the railway system and considerably restrict the flexibility of railway undertakings to swiftly react to the requirements of rail customers (especially in the freight rail sector). The railways of today are a safe transport system - even without official regulatory case-by case assessment prior to an operational start-up. As regards road transport, for example, VDV draws attention to the fact that not all companies active in that sector are regularly examined – and certainly not compelled to undergo an ex-ante examination of their safety precautions prior to commencement of new transport services. No need therefore exists for railway undertakings, in contrast to other transport modes, to be subjected to such intense preliminary scrutiny.

The VDV decision to reject these proposals is underpinned by experience gained in Germany (since 1994, no less) and in many other countries: on the basis of the current legal framework a safety certificate is issued "for the entire network in a member state or only for one specific part". The proposals relating to Article 10(4) (EU COM) and Article 16a (2) (Council of Ministers), however, take consideration of the safety certificate valid on a pan-European basis in obligatory connection with pre-notification of "new transport services" in a member state. This equates very strongly with the current French model under which application for a safety certificate would have to be lodged not only for a member state as a whole, but virtually for every operational start-up on a new line. In Germany, Poland, Austria and other states, such safety certificates are generally issued for the entire network, thus enabling rail undertakings to flexibly offer new transport services on the market within the framework of their SMS. As regards freight transport, rail undertakings directly compete with road- and inland- waterway services; the railways must be in a position to accept orders at short notice. In the German freight transport sector, between 50 and 65% of all orders for such services are placed at short notice. In such cases neither Germany, for example, nor the other above-mentioned states require a new safety certificate, nor is any other official procedure required. No decrease in safety levels subsequently arises. **The obligation defined in the Commission proposal of registering new services with the safety authority three months (or two months in the proposal by the Council) prior to their operational start-up would considerably impede rail undertakings from operating flexibly on the market** (at least on lines along which an undertaking had not previously provided services). This would result in a marked disadvantage for the rail undertakings in comparison with the competition they face from road-haulage and inland-waterway services for which the need of such registration does not apply. Within the rail sector, those undertakings intending to establish services in regions in which they had not previously operated and/or on new lines would be at a disadvantage to undertakings previously active in or on them.

Every railway undertaking requires an authorisation and safety certificate. In addition, it must have set up a safety management system (SMS). On obtaining a safety certificate, the undertaking is certified as being capable of collecting all the information required to commence a new service and to make appropriate use thereof. In the view of the VDV Association, it is not acceptable for the EU Commission, by way of the planned obligation of registration, to call into question the officially confirmed competence of a railway undertaking. The resolution passed by the European Parliament on Article 10 (4) is acceptable, however. This states that, prior to starting up transport services not covered by the currently applicable safety certificate, a railway undertaking will be obliged to apply for the revised version. In principle, this corresponds with the current legal framework. In its statement of opinion the Commission has accepted this amendment to its original concept.

- **Harmonisation of the administrative charges imposed by the safety authorities:**

The safety directive delegates various tasks either to the safety authorities or the ERA. It remains unclear as to how the safety authorities are to be financed. In this respect great differences currently exist in Europe. Whilst certain member states such as Germany require that "cost-covering charges" be collected from the applicant (120 € per hour, which in individual cases can result in costs of over 75.000 € per decision), other member states merely charge stamp duty (10 – 30 €) per decision. In the United Kingdom, on the other hand, the safety authority is financed by way of a levy on track access charges. As a result, no harmonised conditions have yet been established in this connection. As regards member states in which charges are imposed by a safety authority, the railway undertakings are at a disadvantage both in comparison with their counterparts in other member states and with other transport modes which are not obliged to assume such charges. The VDV Association subsequently sees the need for urgent action on the part of the EU leading to uniform and fair conditions.

Proposal for a Directive on the Interoperability of the Rail System within the European Union (recast)

The VDV Association welcomes the so-called Technical Package. Many of the legislative proposals contained in this package focus on demands being voiced in the rail sector. In a first reading the European Parliament decided on important improvements to the proposal submitted by the Commission. In its Common Position, the Council also decided on numerous amendments. Now that the three legal acts defined in the Technical Package have been addressed as priorities by the Council a trilogue procedure should be conducted on this issue as soon as possible and the overall procedure thus brought to a swift conclusion.

In the view of the VDV Association account should be taken of the following points relating to the interoperability directive:

- **Definition of "light rail":**

For the first time the European Commission has submitted a proposal as to the definition of the term "light rail"(in German: "Stadt- und Regionalbahnen"). This objective is hampered by the fact that, in the member states, the term is to apply to rail systems with quite different historical origins and development processes. The European Parliament does not call into question the generally outlined definition of "light rail" proposed by the Commission; this is a far more expedient approach when contrasted with the extremely narrow definition based on technical parameters which the Council is demanding as more room is left for interpretation. **The VDV Association supports the position of the EU Commission and Parliament** as it provides the undertakings with sufficient flexibility and covers all of the light rail systems currently in European operation.

- **Scope for application:**

A sufficiently open provision on the scope for application is a key requirement which the VDV Association has set in the interests of the mainly small and medium-sized local and regional undertakings providing services in the German rail sector: under too restricted a definition of the derogations numerous such rail transport services throughout Europe would for the first time be subject to interoperability requirements. Were this to apply, urban and regional passenger rail systems and certain components in the freight rail sector could no longer be performed in a cost-effective manner. Response to surveys among the VDV members has revealed that, on full application of the European interoperability rules, smaller railway undertakings would incur additional costs totalling up to 5% of their annual income without the generation of any resultant added value: The operation of international services on such lines with their extremely limited traffic volume is not typically to be expected. Moreover, as has been customary practice for decades, operations along infrastructure which does not fully conform to the European interoperability rules may generally be performed by rail vehicles which for their part are in full compliance with such standards.

In its resolution the European Parliament has decided on an extremely restricted derogational policy: Whilst the draft submitted by the Commission still provided for automatic exemption in the case of certain local and private railway undertakings, the European Parliament now wishes to revert to the exclusive option of exemption authorized by the member states. In the view of the VDV Association this is a clear deterioration as against the proposal submitted by the European Commission. In its statement of opinion on the results of the first reading held by the European Parliament the Commission has reaffirmed this viewpoint with noteworthy arguments. With the exception of tram-trains, the European Parliament has not endorsed any further proposed derogations. In the opinion of VDV there is an urgent need for improvement in this issue.

For its part the Council endorses automatic exemption of "light rail" from the scope for application of the interoperability directive and, in its Common Position, has excluded further optional

derogations. **Although the VDV Association welcomes the standpoint of the Council, it nevertheless believes that the derogations do not provide for all case groups** for which full implementation of the interoperability rules would give rise to unreasonable hardship. **In this case the interests of the urban and regional railway systems must also be taken into particular consideration.**

- **Re-homologation following upgrading or renewal measures:**

The Parliament - and also the Council in terms only of renewal measures - quite rightly support the view that, as currently the case, only ("major") modification to those existing "sub-systems" (e.g. rail vehicles or infrastructure) considered as of major importance to safety and interoperability should require re-homologation, in the course of which any upgrading or renewal of components must fulfil the stipulations defined in the respectively relevant technical specifications on interoperability (TSI).

In terms of the Commission's proposal the word "major" should be deleted. This rule would otherwise result in quite considerable additional expenditure for railway undertakings as even the slightest modification to existing rolling stock, for example, would require re-homologation and partial fulfilment of TSI specifications without any increase in added value as regards safety and interoperability. The currently applicable provision – homologation only after major modification – has proven its worth – without any subsequent decrease in safety. In its statement of position on the amendments proposed by the Parliament the Commission has now accepted the corresponding EP amendment.

The VDV Association recommends that re-homologation only be conducted in explicit conjunction with "major upgrading or renewal of existing sub-systems".

- **No separation between market approval and the procedure adopted to ensure the conformity of rail vehicles and infrastructure:**

In our view the proposed separation between market approval (Article 20) and the procedure ensuring the conformity of rail vehicles and infrastructure (Article 21) is overcomplicated. **Future continuation of the as yet customary practice enabling the flexible operation of authorized vehicles should be ensured.**

Proposal for a regulation on the European Agency for Railways and repealing of Regulation (EC) No 881/2004

To a large extent the ERA regulation reflects the statements defined in the rail safety and interoperability directives. **The VDV Association welcomes the fundamental objective defined in the proposal submitted by the Commission of further developing the ERA into a European railway agency**. In the concrete implementation of this transfer of competencies it is important to ensure that railway undertakings will not subsequently be burdened with additional bureaucratic requirements. This particularly applies in respect of small rail undertakings exclusively focused on the provision of regional services for which only minimal benefit will result from ERA competency.

- **The option for undertakings operating on a purely national basis of selecting between the ERA and a national safety authority:**

In the view of the VDV Association those undertakings providing rail services exclusively within the confines of one member state should, when applying for a safety certificate and/or homologation for a vehicle, be granted the option of selecting between the ERA in Valenciennes or of applying to the national safety authority. Any future referral of such companies to the ERA in Valenciennes, at which agency only very few staff members are able to communicate in the German language, would result in considerable deterioration of current practice. Granting exclusive competency to the ERA would lead to a significant increase in expenditure (as a consequence of translation requirements and the increased cost of travelling to Valenciennes).

As a matter of precaution we wish to point out that this requirement set by the VDV Association would gain even greater significance were the above mentioned exemptions no longer to apply in the case of undertakings operating on a purely local/regional level. Owing to ongoing extension of the applicational scope for Community law into wide sectors of the railway network then to be expected those undertakings for which the regional authorities are exclusively competent could also be affected. Such subsidiarity has proven its worth, however. **The VDV Association therefore supports the position taken by the Council in calling for continued authorisation on the part of the national safety authorities to issue homologations for vehicles which are to operate exclusively within the national network.**

- **Ensuring the availability of regional contact partners:**

As an additional requirement it must be possible – as is currently the case – for an applicant, if necessary, to meet a contact partner at the respective authority for discussions in person on the basis of a day trip, generally by train. This issue remains unaddressed in the draft directive. In other words: If the ERA is in fact to absorb a large measure of competencies and tasks from the national authorities, the ERA must ensure that regional contact partners are at hand and capable of conducting proceedings in the native language of the applicant so as to ensure that costs remain financially and economically viable. We therefore urge that Article 67 be clarified in such a manner that, at least initially, any proceedings (either in writing or orally) are, on principle, conducted in the official language in which the application has been lodged unless the applicant agrees to management of these proceedings in another language. In this connection we view the proposal submitted by the Council in terms of Article 67 under which the ERA "Management Board" would be entitled to take decisions as to the language of proceedings in an extremely critical light.

Proposal for a Regulation repealing Regulation (EEC) 1192/69 (Accounts)

The European Parliament has adopted the Commission proposal on the repeal of Regulation (EEC) 1192/69 without any major amendment of content. The VDV Association therefore once again wishes to stress that repeal of the regulation could negatively impact the proven and tested procedure currently applicable as regards financial compensation for expenditure incurred both by federally and non-federally owned railway undertakings in terms of level-crossing facilities.

- Taken separately, the federally-owned railway undertakings in Germany affected by Regulation (EEC) No 1192/69 together received financial compensation for such level crossing facilities to the total amount of 72.8 million EUR in 2010. On repeal of Regulation (EEC) No 1192/69, the financial compensation accordingly granted would cease to apply. Immediate negative consequences would first of all be felt by the federally owned railways.
- The proposed repeal of Regulation (EEC) No 1192/69 is justified inter alia on the grounds that, even on repeal of this regulation, financial compensation could still continue to be granted. This would be admissible under Article 8 of Directive 2012/34/EU. Although correct, this advice masks one essential aspect: Article 8 of Directive 2012/34/EU merely justifies the fact that financial compensation to federally owned railways raises no problems in terms of state aid legislation. In contrast to Regulation (EEC) No 1192/69, the directly enforceable Commission legislation which obliges the member states to balance accounts, Article 8 of Directive 2012/34/EU appears not to include any obligation for the member states to reimburse expenditure incurred for level crossing facilities. Furthermore, as Article 8 of 2012/34/EU is yet to be implemented, the member states could meanwhile exploit the existing scope for flexibility and decide on restrictive application as regards financial compensation for such level crossing facilities. Thus consideration of Article 8 in Directive 2012/34/EU also contributes to the direct negative impact on the federally owned railways which would result from repeal of Regulation (EEC) No 1192/69.
- Pursuant to Article 16 (1) Sentence 1 No 3 of the AEG (General Railways Act), non-federally owned railways receive financial compensation for the maintenance and operation of level crossings. Repeal of Regulation (EEC) No 1192/69 would have no immediate impact in this respect. Nevertheless, cancellation of the obligation to pay compensation on the basis of Regulation (EEC) No 1192/69 could also encourage German legislature to reduce compensatory payment granted under Article 16 (1) Sentence 1 No 3 AEG. Similar action was already taken in respect of financial compensation paid in accordance with Article 16 (1) Sentence 1 Nos 1 and 2 AEG (cf. Section 1 Sentences 2 and 3 AEG). In perspective, therefore, negative consequences of a repeal of Regulation (EEC) No 1192/69 also cannot be ruled out in the non-federally owned railway sector.

In the view of the VDV Association any repeal of Regulation (EEC) No 1192/69 cannot therefore be accepted unless an equivalent obligation, based on European legislation and under which the member states agree to pay financial compensation for investment in such level crossing facilities, is anchored elsewhere.