Position Paper

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Proposal for a Regulation of the European Parliament and of the Council setting out the conditions and procedure by which the Commission may request undertakings and associations of undertakings to provide information in relation to the internal market and related areas

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1. Introduction

The Community of European Railways and Infrastructure Companies (CER) firmly opposes this Proposal for a Regulation of the European Parliament and of the Council setting out the conditions and procedure by which the Commission may request undertakings and associations of undertakings to provide information in relation to the internal market and related areas.

CER brings together more than 70 railway undertakings, their national associations as well as infrastructure managers and vehicle leasing companies. The membership is made up of long-established bodies, new entrants and both private and public enterprises, representing 73% of the rail network length, 80% of the rail freight business and about 96% of rail passenger operations in EU, EFTA and EU accession countries.

The Rail sector cannot support the imposition of further obligations on railway companies to provide extremely sensitive business and confidential information. CER considers that the European Commission has failed to justify this disproportionate proposal imposing possible penalties and sanctions, and to explain which is the real objective for the use of this information, given the already existing means in sector-specific, as well as in general cartel and state aid law.

2. Remarks

CER members consider that the scope of the proposed Regulation is too broad. It is unclear in what circumstances the European Commission could require undertakings to provide information and the nature of that information. Moreover, the proposal will create an administrative burden for undertakings, which makes the European Commission's strategy to smooth the functioning of the internal market extremely doubtful. CER members are especially concerned about the provisions of Article 9 on fines and penalties.

There are already sector-specific tools for the Commission to gather necessary information. For instance, there is the RMMS within the railway sector. Other sectors certainly have similar schemes. This draft Regulation should not be used by the Commission to request information for which there is already another legal basis, in order to impose e.g. more stringent deadlines or use fines (where the sector-specific legal basis does not foresee any). Moreover, this Regulation doesn't seem compliant with the principle of subsidiarity, cf. Art. 5 (3) of the TEU: there are already national mechanisms in place that ensure the proper implementation and enforcement of the EU law. Concretely, Member States have the task of ensuring the proper application of the Union's law, except if a sector-specific text states otherwise. Normally, the Commission only has investigation powers in specific, well-identified areas, such as competition law. It should not have a general power to request information in such a broad and vague framework.

Overall, the text of the Regulation is not balanced: on the one hand, it contains very few safeguards and is very vague regarding what the Commission can request and how, and on the other hand, it is very precise and strict when it comes to the sanctions. Besides, we fail to understand the necessity to impose sanctions if, as stated in a recital, the text does not create a new investigative power for the Commission.

There is a clear ambiguity regarding the power of the European Commission. Namely, it is unclear whether by adopting this Regulation the European Commission is aiming to "prosecute" or to "find facts". In the recitals of the draft Regulation, it is clearly stated that the Commission should have the power to request information in case of suspected infringements of the European Union law and that the Commission is neither aiming for the "prosecutor's" powers, nor for the new enforcement

powers. However, this statement doesn't appear to be in line with the text of the Regulation itself as the latter doesn't contain a reference to the "proceedings" that lead to the information request. Besides, the conditions and reasons under which the Commission shall "only" use the power to request information from undertakings or associations of undertakings are defined in the Regulation in a very broad way.

Concerning the legal basis used by the European Commission, CER finds problematic the fact that the proposed Regulation is based on two different Articles of TFEU (Articles 114 and Article 337). In accordance with the Articles 114 the proposal would need to be adopted by the ordinary legislative procedure, meaning the full participation of the Parliament together with the subsequent approval of the text by the qualified majority of the Council. At the same time the Article 337 only requires the Regulation to be approved by the simple majority of the Council. Due to the aforementioned diverse adoption procedures imposed by the Articles 114 and 337, it seems incompatible to base the proposal on both of the articles.

The lack of transparency in the imposition of penalties as well as the lack of investigation procedure in case of breaches of the draft Regulation (Art. 10) go against the right of fair and equal treatment. CER is further convinced that substantially high fines imposed on the companies by the draft Regulation in case of failure to provide requested information are disproportionate as policy development purposes of the Regulation cannot justify sanctions. It is also important to mention that in CER's opinion the sanctions are wrongly directed. The proposed Regulation thus leads to the situation when companies that are fully compliant with the EU law will have to pay substantial amounts in fines, while it is Member States who are responsible for the lack of compliance with the EU law.

With the proposed Regulation in place the European Commission would be able to limit or infringe some fundamental rights of the undertakings (e.g. Art 8 or Art. 11, but also Art. 16 or Art. 17 of the Charter of fundamental rights of the EU). Therefore, all actions taken by the European Commission have to be proportionate.

Furthermore, the right of non-self-incrimination should be granted to the undertakings. In principle, there is no obligation of "prosecuted parties" to bring proof against themselves: see Article 6 ECHR on fair trial and its interpretation by the European Court on Human Rights (see among others *Funke v. France* case). The Recital 21 of the draft Regulation explicitly states that the Regulation observes the principles recognized by the Charter of Fundamental Rights of the European Union. Nevertheless, Article 8 allows to disclose collected confidential information to a Member State if it is necessary to substantiate an infringement of the Union law, with the only pre-condition that the undertaking had been heard before the decision was taken and could use judicial remedies. Additionally, the Article 8 enacts that the EC can use all the information collected to address the "difficulties" referred to in Article 4 (e.g. in infringement procedures). CER members do not preclude that the European Commission could use this information for other purposes such as "information fishing".

Last but not least, CER considers, in addition to the above-mentioned, that the following Articles are especially problematic for the following reasons:

Article 4:

The powers that are granted to the European Commission by this Article appear too broad. It is not defined in the Regulation what should be understood as 'a serious difficulty' or as 'an important EU policy objective'. Furthermore, it is not clear how the term 'associations of undertakings' should be interpreted, for instance, whether CER or an equal association is covered by this term. Hence, in the present wording of the Regulation the scope is very vague and should be further clarified, especially considering the fact that the EC's powers introduced by the Regulation are rather broad.

At the same time, the reasoning of the EC' information request is nevertheless formulated extremely wide: the European Commission may request information from undertakings for the purpose of addressing a serious difficulty with the application of the Union law that risks undermining the attainment of an important Union policy objective. The Article refers to very broad notions ("serious difficulty" / "important union policy objective") which are not defined in the Regulation and are subject to interpretation. Especially, the "important union policy objective" notion is dangerous as it is not limited to certain EU texts and is therefore extremely far-reaching and thus very problematic. Overall it may be concluded that Article 4 does not respect the proportionality principle.

Article 5:

CER members consider the new powers of the European Commission imposed by the Article 5 to be disproportionate. It should be underlined that any information may be assessed as 'not sufficient or adequate' by the Commission, no matter on what grounds.

It is not clear from the text of the Article whether the undertakings or associations of undertakings concerned will have to be informed of the decision of the Commission to request information addressed to a Member State. Besides, the Regulation should provide a mechanism for challenging such request for information. Moreover, even though Art. 5 (2) indicates that the decision of the Commission shall be addressed to the Member State(s) concerned, it contains no provisions on the rights of such Member State(s) in regard to the adopted decision.

It must further be noted that the draft Regulation provides no criteria regarding information that could be requested. Art. 5 (1) which states that "the Commission shall only use the power to request information from undertakings and associations of undertakings provided in Article 4" is misleading in this regard, as it refers to Art. 4 which is supposed to describe information which could be requested by the Commission, however, Art. 4 contains no criteria of the information that could be requested and only states the conditions under which such information could be requested. The fact that the proposed Regulation provides that the legal measure should aim at solving existing issues, but at the same time does not contain any clear indication of what kind of information is needed to deal with those issues, is against the principle of proportionality

Article 6:

The provisions of this Article are not clear and ambiguous, as two different measures to deal with information gathering are introduced: request and decision. It is not clear what the difference between Commission's request and decision is and what are the legal consequences of each of them.

Paragraph 1: As Article 4 does not provide any concrete cases, it appears necessary to state precisely what the cases are. It should be further defined when the European Commission should make a simple request and when it should rather adopt a decision, especially keeping in mind that the powers of the EC are very broad. It may be further noted that the draft Regulation suffers from a lack of transparency in selecting the recipients of the information requests.

Paragraph 3: It is advisable that the imposed time limits should be as long as possible, which would give enough time for the undertakings to provide the requested information.

Article 7:

First of all, this Article creates a substantial additional burden for the undertakings. Apart from that, CER members have serious concerns in regard to the 'confidential information' as the provisions of the proposal do not offer sufficient guarantees that the provided information will be duly protected. Furthermore, the lack of safeguards regarding the use of collected information (see also Article 8), as well as no proper protection of such information are very alarming.

It is further necessary that the undertakings or associations of undertakings are explicitly authorized to refuse the communication of requested information to the Commission in cases of professional secrecy. The protection of confidential information provided by the draft Regulation seems not sufficient since the Commission can take a decision finding the information not confidential. Furthermore, the draft Regulation seem to be using terms «professional secrecy» and «confidential information» as synonyms, which is not the case according to national law of the Member States.

Paragraph 2: It is not clear from the text of the Article whether the concept of "professional secrecy" includes commercial/business secrets.

Paragraph 4 (2nd par.): The possibility of disclosing information by the European Commission (after its arbitrary decision that provided information should not be considered as confidential) may pose a serious dangerous for the undertakings as some strategic plans and data could be revealed. In addition, the European Commission can, once it makes a decision to disclose the information, use it 'for a purpose other than the one set out in this Regulation', according to the last sentence of the Article 8.

Article 9:

CER considers that it would be disproportionate that fines and penalties could be imposed on the undertakings in case of failure to provide information within a "simple request" procedure.