

## **Position Paper**

Brussels, 1 October 2018

# **“New Deal for Consumers” Package**

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## 1. INTRODUCTION

The Community of European Railways and Infrastructure Companies (CER) would like to express its deep concerns regarding the so-called “New Deal for Consumers” package which includes the Proposal for a Directive of the European Parliament and of the Council on representative actions for the protection of the collective interests of consumers, and repealing Directive 2009/22/EC (hereinafter ‘Directive’) and Proposal for a Directive of the European Parliament and of the Council amending Council Directive 93/13/EEC of 5 April 1993, Directive 98/6/EC of the European Parliament and of the Council, Directive 2005/29/EC of the European Parliament and of the Council and Directive 2011/83/EU of the European Parliament and of the Council as regards better enforcement and modernisation of EU consumer protection rules (hereinafter ‘Directive on consumer protection rules’), both of which would be detrimental for consumers and the rail sector.

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, 77% of the rail freight business and about 93% of rail passenger operations in EU, EFTA and EU accession countries.

It is with great alarm that the European rail sector sees that this proposal of the European Commission is including railways, notably through taking Regulation (EC) No 1371/2007 of the European Parliament and of the Council of 23 October 2007 on rail passengers’ rights and obligations (hereinafter ‘the PRR’) under the scope of the Directive.

CER very well acknowledges the need for the EU legislative acquis to guarantee to all citizens the highest degree of protection against corporate misbehavior: the railway sector strongly supports this line of thought and believes that the right regulatory environment, coupled with joint industry-consumers initiatives, are fundamental to allow markets to grow hand in hand with customer’s protection. However, such regulatory environment should be as well clear and consistent, and we feel that the new proposal on collective redress would threaten this much needed clarity and consistency.

## 2. REMARKS

Under the current regulatory framework, European railway operators provide a high-level of protection for passengers using rail services, as well as quick, fair and efficient complaint handling systems.

Railway passengers’ rights are already set and defended by the PRR which addresses aspects such as the liability of operators for passengers and their luggage, compensations for delays and cancellations, rules to guarantee access for disabled persons and persons with reduced mobility. European Commission studies show that railway companies have taken the implementation of current legislative framework, i.e. the PRR, very seriously and have dedicated significant resources to improve complaint handling process whilst ensuring the quality of the service in timely manner.

Besides, the European Commission put forward a proposal to recast the PRR in order to streamline the provisions regulating the passengers’ redress. CER members are confident that the ongoing work which the European Parliament and the Council are performing, including, among other issues, more streamlined passengers’ redress and enforcement on such matter, will allow rail operators to understand better their obligations and rail passengers to understand better their rights.

On top of the existing passenger rights framework, existing EU instruments such as the Alternative Dispute Resolution (ADR) Directive 2013/11/EU and the Small Claim Procedure Regulation 2015/2421 also provide passengers with possibilities to redress in case of disruptions, including in multimodal journeys.

CER sees no need for a separate formal claims proceeding besides the existing procedures and mechanisms laid down in the PRR. This proposal on collective redress would only create legal

uncertainty, and would create a situation where the EU legislators would work in parallel on two different texts (the recast of PRR and the Directive), with clear possible overlaps and probable inconsistencies and would yet again undermine the competitiveness of railways vis-à-vis road transportation, which is the Commission's own objectives.

The European Commission repeatedly assured in the last years to take care that no US means of collective redress mechanism would be introduced, as those are well known from the class action with its blackmailing moments. Nevertheless, the proposal adopts some of these elements, in addition, in some ways it exceeds these negative points.

The proposal allows court procedures, whereby e.g. compensation for a consumer is claimed without the need to request the consent of this consumer for such action. CER believes that any redress systems should necessary be based on the opt-in principle, otherwise the consumer has no choice whether to be affected by this civil procedure or not. Not only the currently proposed procedures, but also any kind of opt-out procedures (where the consumer has to declare himself to be unwilling to be affected by the proceedings) infringe both, the fundamental right to be heard and the fundamental right of disposition (right to choose to be affected by the proceedings). Moreover, it also violates the principle of equality of arms as it is guaranteed in the fundamental right of due process in several respects. According to this principle, in civil process no party shall be discriminated in regard to the other. Each party has to prove their claim on their own and a privilege of one party, in particular regarding procedural costs, financing, court settlements or publications, is illegal.

Moreover, CER believes that the approach taken in the Directive to allow the claims submitted without any proof of the actual damage suffered by the consumers and/or any misconduct on the side of the company would result in the national courts flooded with the multitudes of otherwise inadmissible claims, which would lay unnecessary substantially heavy burden both on the national judiciaries and the companies, to no real benefit of the consumers.

Over all, the proposal is contrary to European legal traditions and also to fundamental rights regarding civil procedures. A European legal act in the area of collective redress needs to be based on the European legal tradition and needs to guarantee the position of businesses and consumers according to the fundamental rights without any exception. The commitment not to introduce US style class actions needs not only to be made, but also to be seen to be fulfilled.

Furthermore, a definition of who should have the power to appeal on behalf of consumers must be uniform, comprehensive and strict across Europe to prevent a "litigation industry". The current wording of the proposal contains very weak conditions of eligibility for the qualified entities and, on top of that, allows the Members State to designate them on the ad hoc basis, which would result in total lack of transparency and wide possibilities for abuses on the side of qualified entities. Third-party financing is also highly critical if there is a high degree of financial self-interest on the part of the third-party financiers in the outcome of the action, without the latter bearing a corresponding risk of its own. It is also unclear what exactly is meant by the term "collective interests of consumers".

Apart from that, the proposed Directive imposes unrealistic obligations on the companies to individually notify all the consumers, which allegedly suffered damage, about the collective redress action. In the case of the railway sector, the fulfilment of such an obligation would be practically impossible due to the fact that the vast amount of the train tickets are being sold without collecting of the personal data of the consumers.

Additionally, CER wonders why the National Enforcement Bodies (NEB) should not be the competent authorities entitled to decide on passengers' claims. Currently, the NEBs are competent to decide that an RU has to end a particular practice. These orders may concern a single case, but they may well concern a general practice. Thus, the tasks of the decision body should be assigned to the NEB (in case the PRR would be included in the scope of the Directive after an impact assessment) to secure that the legal practice concerning the PRR would be consistent.

Considering all the above reasons, CER is advising against creating a second redress system for the rail passengers in parallel to the existing PRR as currently proposed. In our view, this would disturb the current effective, clear and consistent mechanisms established in the EU Member States through the PRR, and would create legal uncertainty for both railway undertakings and passengers.

In regard to the second proposal of the "New Deal for Consumers" package, namely the Directive on

consumer protection rules, CER believes that the proposal does not take into account the specificities of the railway sector. Passenger transport services are excluded from the scope of the Directive 2011/83/EU. Nevertheless, the Directive on consumer protection rules which broadens the scope of the Directive 2011/83/EU to cover the digital services for which consumers provide their personal data, fails to specify that such ancillary services and accessory programs for passengers as the loyalty programs should also be explicitly excluded from the scope of the Directive 2011/83/EU.

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### **About CER**

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