The Voice of European Railways

BACKGROUND

Title	**SOCIAL DIALOGUE IN THE RAILWAYS** The CER – ETF Agreement on working conditions
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Date	September 2005 Update October 2009

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SOCIAL DIALOGUE IN THE RAILWAYS

THE CER[1] – ETF[2] AGREEMENT ON CERTAIN ASPECTS OF THE WORKING CONDITIONS OF MOBILE WORKERS ENGAGED IN INTEROPERABLE CROSS-BORDER SERVICES

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The creation of an integrated and competitive railway area in Europe calls for a gradual development of uniform interoperability rules and technical standards. Meant to govern international transport, those common standards must promote the development of a railway area without technical boundaries and ensure a high level of safety. They are essential to the implementation of interoperability and must in particular allow for railway undertakings and their staff to move freely inside an open network.

If common standards need to be defined, these must also cover the working conditions of staff in order to overcome differences that might otherwise prevent or check exchanges. In addition, the development of the competitiveness of undertakings on a market where a fierce competition is prevailing must not be detrimental to the fundamental rights to safety and health workers are entitled to. This is why it was time to think the enforcement over of minimum social rules that would apply to all operators and help to reduce the risk of competition to the debit of workers health and safety, the so called "social dumping" effect our social partners are afraid of.

1. ANTECEDENTS

In 1990 the Commission published a draft directive whose purpose was to define a basic set of provisions on certain aspects of the working time concerning the health of workers and the safety at work. The aim was to devise minimum rules below which national laws must not be allowed to fall.

[1] Community of European Railways and Infrastructure Companies.
[2] European Transport worker's Federation.

Transport modes were excluded from the scope of application thereof and the European Commission asked the Joint Committees gathering the two sides of industry of the various sectors together to provide it with proposals of alternative rules that would apply to transport in general or to each separate mode in particular.

There is no need to enlarge on the countless events which dotted the discussions. Be that as it may, it took several years of discussion at the Joint Committee for Railway to reach a common position indicating which provisions ought not to be applied to the railway sector and what rules these could be replaced with.

European Directive 93/104/EC defined the minimum safety and health requirements of certain aspects of the organisation of working time, excluding thereof the staff involved in transport.

On 30 September 1998 the two sides of industry of the rail signed an agreement requiring the use of the general directive for desk-bound staff and the application of the principle of subsidiarity for the rules to apply to staff spending their working time on board trains or whose activities are linked to transport timetables and to ensuring the continuity and regularity of traffic.

Later on Directive 2000/34/EC extended Directive 93/104/EC to transport modes including therein the agreement for the railway sector. It makes the General Directive applicable to almost all land transport sectors, except some staff categories (among which mobile staff) entitled to particular rules defined by collective agreements or laws. Each country having the right to make exceptions as far as mobile railway staff is concerned, its transformation into national law led to the introduction of differing provisions.

2. NEED TO DEFINE RULES FOR INTERNATIONAL TRANSPORT

If the problem cannot be sorted out by means of the laws developed by each Member State, it seems better to make a co-ordinated effort at Community level is appropriate and to rely on social dialogue as regards the application. As stipulated in the European Treaty, regulations regarding working conditions may only be proposed by the European Commission or by the two sides of industry. Those regulations can rest on the Commission's (article 137 of the Treaty establishing the European Community) or management and workforce's (article 139 of that same Treaty) right of initiative. One of the possible solutions is thus for the two sides of industry to come to an agreement at European level, which would then be made into European law by the Council on a proposal from the Commission.

The Social partners of the European Social Dialogue, the ETF and the CER, decided in 2002 to try out this opportunity – for the first ever time !

The agreement contemplated was to define common provisions on various aspects of working time, relying for that purpose on the following principles:

- the essential balance between flexibility and safety;
- the ensured appropriate level of protection for the safety and health of workers;
- the definition of the requirements for the safety certificate;
- and, finally, the precaution in order to avoid competition being based on working conditions and thus rule out the risk of social dumping that is prevailing in road transport.

Needless to say those goals had to be pursued whilst avoiding any negative impact on the competitiveness of the railway sector with regard to the other transport modes.

3. NEGOCIATIONS

At the General Assembly, in Madrid, in October 2002, the CER mandated its Executive Director, Johannes Ludewig, to conduct the negotiations bearing on working conditions in international transport. Norbert Hansen head of ETF Railway Section, was nominated to lead the negotiations for the union side. The CER and ETF informed the Commission thereof in December 2002 and approved the negotiation calendar which started in February 2003. Debates were translated in five languages (English, French, German, Italian and Spanish) and delegations were made up of 8 representatives on either side. Groups of experts were also set up inside both organisations.

Negotiations at European level can by no means be compared with negotiations at national level. It must be borne in mind that the working conditions applied to a sector or particular undertaking make a coherent whole, any element of which can only be isolated or removed with difficulty and at the risk of throwing the whole structure off balance. The various concepts developed by the two sides of industry of the countries member of the European Union are sometimes very different from one another. And so are the priorities. And if priorities vary, so do outcomes, and the balances resulting thereof can in consequence be very different too. This is all the more so that a negotiation at national level gives an opportunity to include other elements in the debates on working conditions. In the negotiations ahead, only some parameters of the working time were allowed to be mentioned and had, in addition, to bear on minimum conditions only, which risked making the debate very unpopular in some countries. It was forbidden to even start discussing the elements of salary or other aspects which are sometimes part of negotiations at national level. This explains, by the way,

why it proved impossible to come to an agreement on all subject matters: for instance no agreement on maximum weekly working time was achieved.

Here we must point out we received significant logistic support on the part of the General Direction for Employment and Social Affairs of the European Commission all along this process. The practical organisation of meetings was its work and its dedication added quality to the work performed. Let us also mention the flexibility it displayed whenever discussions went on into the night, and interpreters nevertheless pressed on with their assistance.

Negotiations finished in the night of 17 October 2003[3]. The delegations of CER and ETF submitted the agreement to their respective bodies in order to have official recognition to the negotiation outcome.

As said, debates had taken place in 5 languages and between representatives of different nationalities and cultures, thus there was always the danger that concepts and notions proposed did have neither the same meaning or context nor the same consequences. It was a real challenge for every participant. And, although delegations had all meetings on tape, discussions on proper wording regarding several issues had to be resumed and finalised afterwards, before all representatives accept entirely a common text.

The General Assembly of the CER unanimously approved the agreement in Brussels on October 30th, 2003. As for the railway section of the ETF, a vast majority of its Assembly approved the text at their meeting in Rome on January 12th, 2004.

The agreement was officially signed in Brussels on January 27th 2004, in the presence of Mrs. Anna Diamantopoulou, European Commissioner for Employment and Social Affairs, who described it as *'a building block for a safe and interoperable European railway system and an excellent example of agreement which strike the balance between flexibility and safety'*. Mr. Johannes Ludewig, Executive Director of the Community of European Railways, glad about the success, declared: *"In just eight months of negotiations we were able to define common rules which will be applied to all the European railway companies. They represent a decisive step toward the railway transport common market and the full interoperability of our human resources"*. As for Mr. Norbert Hansen, Chairman the ETF Railway section and chief negotiator for the Trade Unions: *"the liberalized European railway market needs common standards to protect health and safety of workers and avoid social dumping. These agreements are an indispensable condition for a social, fair and safe European railway environment. They are as well a proof that the European social partners in the railway sector have the capacity to determine social minimum standards for their sector on their own".*

[3] Overall, the negotiation process lasted over a period of three years.

Not only does this first real agreement between the European management and workforce of the sector lay down minimum standards, which meets the general principle for protection of the health and safety of workers at European level, but it also contributes to the setting-up of a Common European Transport Market.

Both partners officially asked the Commission to transform this agreement into a Community instrument in application of article 139, paragraph 2 of the EC Treaty which provides that the implementation of the agreements concluded at Community level can take place, in matters covered by article 137, at the joint request of the signatory parties by a Council decision on a proposal from the Commission.

4. CONTENTS OF THE AGREEMENT[4]

a) Having regards

The having regards have no contractual value but define the principles on which the text is based and refer to instruments that are important for follow-up and interpretation. They describe first of all the advantages of an agreement, in that it enables to develop interoperability services, protect the health and safety of mobile workers and avoid a competition based only on the differences in working conditions.

They also refer to various articles of the Treaty (138[5] and 139, paragraph 2, to the General Directive as well as to the Convention on the law applicable to contractual obligations[6].

Transforming directives into national laws, each Member State may choose among different standards of worker's protection. Moreover, Members States have the authority to enforce higher standards at national level but these will not automatically apply to the cross-border staff of another Member State (whose individual working contracts are governed by the working time system applied in the country they are originating from). A Belgian train driver working under the Belgian working time regime, can operate under these conditions on the French network, without being subject to the French working time regime, under the prerequisite that the requirements of the European health and safety

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[4] The original text of the Agreement (in French) is on the CER web site: http://www.cer.be/content/listpublication.asp?level1=952&level0=928.
The other versions of the agreement can be consulted on http://europa.eu.int/eur-lex/lex/JOHtml.do?uri=OJ:L:2005:195:SOM:EN:HTML.

[5] This article is dealing with the consultation of management and labour at Community level as well as with the task entrusted to the Commission, which consists in taking any relevant measure to facilitate their dialogue.

[6] Referred to as Rome Convention of June 19th, 1980.

provisions are fulfilled and the public order is not violated. Therefore, the agreement has the aim of introducing a minimum common standard applicable to all the operators, independently of the specific legislation applicable in each Member State.

b) Scope

This agreement shall apply to mobile railway workers assigned to interoperable cross-border services carried out by railway undertakings.

The application of this agreement is optional for local and regional cross-border passenger traffic, cross-border freight traffic travelling less than 15 kilometres beyond the border, and for traffic between the official border stations listed in the Annex.

It is also optional for trains on cross-border routes which both start and stop on the infrastructure of the same Member State and use the infrastructure of another Member State without stopping there (and which can therefore be considered national transport operations).

As regards mobile workers assigned to interoperable cross-border services, Directive 93/104/EC shall not apply to those aspects for which this agreement contains more specific provisions.

Comments:

This Agreement applies to mobile railway workers assigned to interoperable cross-border services. To qualify as such, a railway worker has to be assigned to this type of service for more than an hour a day. Hence, the calculation of the hours spent offering such a service is not based on an average hours over a period of time but rather on an absolute number of hours. Consequently, the Agreement also applies to those railway workers carrying out such a service on an irregular basis. The social partners deliberately left it up to Member States to regulate the details under which those working both at the national and cross-border level operate[7].

This clause should be read while keeping the definition of "interoperable cross-border services" in mind. The agreement provides rules only for staff assigned to cross-border operations regarded as being "interoperable" cross border operation. This kind of services are defined as services for which at least two safety certificates, as stipulated by Directive 2001/14/EC, are required of the railway undertakings.

[7] Information given by the European Commission at the Permanent Representatives Committee – 26 May 2005.

The application of the Agreement is optional in certain cases. In fact, the intention of the social partners is not to impose this agreement on already existing agreements at the local level, even if these would be derogating from this agreement. These derogating agreements should stay in force due to the limited nature of interoperable cross-border traffic[8]*.* Local and regional ones, services running not more than 15 kilometres beyond the border and those that both start and stop on the infrastructure of a same Member State without stopping on that of the other Member State they cross (there is such a kind of traffic in Austria where trains have to run on a section of the German infrastructure before reintegrating the Austrian territory) should be excluded from an obligatory application.

There is indeed the problem whether or not the agreement applies to a transport jointly organised by several railway undertakings. In crossing the border, the train becomes a national train of the other partner but the transport itself requires two safety certificates, as each undertaking involved in the transport is itself holder of such a certificate in its own country.

The last paragraph is directly connected to the scope of application in particular regarding the relationship to directive 93/104/EC[9]. As the agreement stipulates more specific requirements for staff included in the scope, the provisions of directive 93/104/EC[10] regarding the same aspects shall not be applicable any more. They will be replaced by the provisions of the agreement as soon as the agreement – changed into a directive by the European Council and transposed into the Member States – will be applied. The Agreement will nevertheless be applicable for the undertakings member of CER from the date of the decision of the Council transforming the Agreement into a European directive. The clause 12 (which concern the revision) precises effectively that the Council decision is putting the agreement into effect.

c) Definitions

For the purposes of this Agreement, the following definitions apply:

1. 'interoperable cross-border services': cross-border services for which at least two safety certificates as stipulated by Directive 2001/14/EC are required from the railway undertakings;

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[8] Ibid.

[9] Directive 2000/34/EC of 22 June 2000 amended the Directive of 23 November 1993 to cover the sectors and activities which had been excluded up to that time. Directive 2003/88/EC of 4 November 2003 consolidated Directive 93/104/EC of 23 November 1993 and Directive 2000/34/EC of 22 June 2000 in the interests of clarity and legal certainty. Directive 2003/88/EC is henceforth the text in force, having repealed the two previous Directives.

[10] Became 2003/88/CE.

2. 'mobile worker engaged in interoperable cross-border services': any worker who is a member of a train crew, who is assigned to interoperable cross-border services for more than one hour on a daily shift basis;
3. 'working time': any period during which the worker is at work, at the employer's disposal and carrying out his or her activities or duties, in accordance with national laws and/or practice;
4. 'rest period': any period which is not working time;
5. 'night time': any period of not less than seven hours, as defined by national law, and which must include in any case the period between midnight and 5 a.m.;
6. 'night shift': any shift of at least three hours' work during the night time;
7. 'rest away from home': daily rest which cannot be taken at the normal place of residence of the mobile worker;
8. 'driver': any worker in charge of operating a traction unit;
9. 'driving time': the duration of the scheduled activity where the driver is in charge of the traction unit, excluding the scheduled time to prepare or shut down that traction unit, but including any scheduled interruptions when the driver remains in charge of the traction unit.

Comments:

The only really new definitions are those of the *interoperable cross-border services*, the *mobile worker assigned to interoperable cross-border services*, the *rest away from home*, the *driver* and the *driving time*. The other ones (*working time, rest period, night time and night shift*) all come from the General Directive. The definition of *mobile worker assigned to interoperable cross-border services* must be read in order to allow a reasonable application of the provisions of the agreement. There are rules that are applicable on a daily basis (daily rest at home, daily rest away from home, breaks, driving time); other rules that are only applicable on a weekly basis (weekly rest period of 24 hours plus 12 hours); and finally rules which are applicable on a yearly basis (104 rest periods and double rest periods). The text is not precise enough to allow a single interpretation. Then, specific rules must therefore be fixed at national or company level or by the Member States in the framework of subsidiarity.

The Agreement contains a definition of working time which is exactly the same as in the basic directive 93/104/EC. The question could be asked to know whether in case of change of the definition of working time in the general directive, this new definition would be applicable for this agreement or not.

The point was discussed during the Council's meetings and there was a consensus on this position: the new directive (2005/47/EC) being a more specific text, it has precedence on the basic directive and, in the event of difference between the two definitions, one would apply to the items discussed by the new directive

the definition which appears in this one. The Legal Service of the Council as well as the Commission defended this interpretation.

The definition of the driving time demanded extensive discussions. As railway operation is based on timetables in general the planning of working hours for the staff involved must rely upon schedules as well. On the other hand railway practice shows that incidences and other irregularities can cause deviations from planning. Thus, only the scheduled time was for reasons of practicability regarded as possible subject to limitation. The driving time includes the scheduled interruptions during which the driver remains in charge of the traction unit.

With this Agreement, the social partners do not wish to cover personnel working in the cleaning or catering departments. These are normally employed from outside the railway sector[11].

During the transposition period of the Directive into the German legislation, the social partners gave an interpretation of paragraph 2 and 7 of clause 2, by a letter addressed to the European Commission on 10 June 2009:

"The original text of the Agreement concluded by CER and ETF was in French. It is our understanding that the French meaning of the expression "residence normale du personnel mobile" in the railway sector is not related to the private home/domicile of the worker concerned, rather it is his/her workplace (depot) to which he/she is legally assigned as stipulated in his/her workplace (home depotr Dienstort) at which he/she is based.
The worker has the right to freely chose - in compliance with national legislation and labour law provisions - his/her private residence/domicile.

We also understand that problems have arisen surrounding the correct interpretation of the personnel entering into the scope of the Agreement. The Agreement defines the scope as regards the personnel concerned in Clause 1 in combination with clause 2(2).
Clause 2(2) definition of "mobile worker engaged in interoperable cross-border services" and in particular the provision "for more than one hour on a daily shift basis" must not be interpreted so that mobile workers who work everyday for more than one hour in interoperable cross-border services fall in the scope of the agreement.
Such an interpretation would exclude any mobile staff member who works in mixed services (domestic and cross-border services) from the scope of the agreement.

[11] Information given by the European Commission at the Permanent Representatives Committee – 26 May 2005.

We wish to clarify that the reference of "one hour on a& daily shift basis", as well as the geographic limitation of "15 km beyond the border" in Clause 1 both intend to exclude services that end over the border."

d) Daily rest at home

Daily rest at home must be a minimum of 12 consecutive hours per 24-hour period.

However, it may be reduced to a minimum of nine hours once every seven-day period. In that case, the hours corresponding to the difference between the reduced rest and 12 hours will be added to the next daily rest at home.

A significantly reduced daily rest shall not be scheduled between two daily rests away from home.

Comments:

The principle of a 12-hour daily rest was important for the ETF and, on another hand, the CER expected more flexibility and the possibility to reduce that rest period whenever circumstances called for. Representatives agreed on a reduction to 9 hours once a week, with compulsory compensation at the next rest period at home. It was also accepted it must not be allowed to schedule a *significantly* reduced daily rest between two daily rests away from home. The size of the reduction allowed, however, was not stipulated to keep the possibility for flexible solutions agreed on local level.

The social partners stress that "reduced daily rest" means any amount of time which is reduced from the minimum of 12 consecutive hours per 24-hour period: whether it is 3 hours or 5 minutes, it is to be considered as reduced daily rest. The social partners leave it up to the national authorities to establish the meaning of "significantly reduced daily rest", as long as the amount does not go below the "minimum of 9 hours once every 7-day period" established in the clause. They also clearly stated that Clause 3 should be interpreted as allowing for only one reduction per 7-day period, irrespective of the length of this reduction[12].

[12] Ibid.

e) Daily rest away from home

The minimum daily rest away from home shall be eight consecutive hours per 24-hour period.

A daily rest away from home must be followed by a daily rest at home.

Note : The parties agree that negotiations on a second consecutive rest away from home as well as compensation for rest away from home could take place between the social partners at railway undertaking or national level as appropriate. At European level, the question of the number of consecutive rests away from home as well as compensation for the rest away from home will be renegotiated two years after signature of this Agreement.

It is recommended that attention should be paid to the level of comfort of the accommodation offered to staff resting away from home.

Comments:

This Agreement allows for a minimum daily rest away from home of 8 hours per 24-hour period. The social partners explained that, whilst this provision does not impose compensatory rest, it does not exclude the possibility of its inclusion either. It is at the discretion of national authorities transposing the Agreement whether to include compensatory rest or not[13].

A rest away from home of 8 consecutive hours per 24-hour period is accepted as a principle. Two problems then arise: must that reduced period be compensated regarding the normal daily 12-hour period and, on another hand, is it necessary to forbid having two consecutive days away from home ? The discussion about these points was very difficult and representatives finally agreed about a note providing for the negotiations on a second consecutive rest away from home and on the compensation of rests away from home to be held between the two sides of industry at undertaking or national level.

Consequently:

- Two consecutive rests away from home are allowed only on basis of an agreement of the two sides of industry at national or company level;
- The compensation for the reduced hours of rest compared to the 12 hours of rest at home is not obligatory.

Those two issues should also be negotiated again at European level two years after the agreement is signed, i.e. in 2006.

[13] Information given by the European Commission at the Permanent Representatives Committee – 26 May 2005.

The social partners explained that the word "negotiations" in the footnote means that the parties involved enter into negotiations leading to an agreement. This Agreement could be a collective agreement or an agreement reached with the enterprise. In the same footnote, the term "compensation" should be interpreted as covering financial as well as temporal compensation depending on the outcome of negotiations. Nevertheless the social partners stressed that the aim of the Agreement is to protect the workers' health and safety and that this objective is important for the interpretation of this notion[14].

The social partners made it clear that their objective was not to be more restrictive than the working time Directive and the term 'social partners' in this footnote should be interpreted in the meaning of the 'two sides of industry' as is in this Directive[15].

As for the level of comfort of the accommodation offered to the worker, on rest away from home, it is still but a wish. It is clear an accurate definition of compulsory comfort standards does not belong in an agreement on working time.

In application of the footnote, the social partners started a renegotiation of clause 4 in spring 2006. They discussed during 3 years of the maximum period allowed for drivers away from home as well as of the compensation given for. Despite what was considered as adequate compensations by the railway undertakings, it became clear in March 2009 that no any new agreement was possible on this issue, ETF refusing to accept more than 2 rests away from home.

f) **Breaks**

(a) Drivers

If the working time of a driver is longer than eight hours, a break of at least 45 minutes shall be taken during the working day.
Or
When the working time is between six and eight hours, this break shall be at least 30 minutes long and shall be taken during the working day.

The time of day and the duration of the break shall be sufficient to ensure an effective recuperation of the worker.

Breaks may be adapted during the working day in the event of train delays.

A part of the break should be given between the third and the sixth working hour.

[14] Ibid.
[15] Ibid.

Clause 5(a) shall not apply if there is a second driver. In that case, the conditions for granting the breaks shall be regulated at national level.

(b) Other on-board staff

For other on-board staff, a break of at least 30 minutes shall be taken if the working time is longer than six hours.

Comments:

For the drivers, the break is at least 45 minutes long if the working day is longer than 8 hours and 30 minutes long when the duration of the working time is between 6 and 8 hours. The "*or*" was inserted to avoid people asking for those provisions to be combined with each other or even contemplate asking for this. The provision about time and duration of the break is meant to avoid the latter being put at the beginning or end of the working period or else split up in several shorter periods not allowing an effective recuperation of the driver. Discussions on trying to be more concrete in terms of the possibilities of splitting up the break took place but failed to lead further agreement. However, there is no doubt that some flexibility in case of train delay is needed. *According to this Agreement, a break can be split into several parts. The number and length of the parts is not specified in the Agreement and can therefore be decided at the national level. Naturally this would have to respect the objective of "an effective recuperation of the worker"*[16]. The paragraph indicating the break ought normally to take place between the 3rd and 6th hour was written in the conditional to prevent a rule, by far too strict, potentially becoming an obstacle to a smooth service development. *The word "devrait" (in the French version) means that, in the case of unforeseen events that would affect the planning of the breaks, the train would not stop for the staff to have a break*[17].

To conclude, the paragraph making it clear that this clause applies only if there is one driver on board the traction unit relates to the specific case of having two drivers on board (Italy and Greece). Under such circumstances, the provisions about the break shall be defined at national level.

The other on-board staff, as far as it is concerned, will be granted a 30-minute break if working time is longer than 6 hours.

[16] Information given by the European Commission at the Permanent Representatives Committee – 26 May 2005.
[17] Ibid.

g) Weekly rest period

Any mobile worker engaged in interoperable cross-border services is entitled, per seven-day period, to a minimum uninterrupted weekly rest period of 24 hours plus the 12 hours' daily rest period referred to in Clause 3 above.

Each year, every mobile worker shall have 104 rest periods of 24 hours, including the 24-hour periods of the 52 weekly rest periods, including:
— 12 double rest periods (of 48 hours plus a daily rest of 12 hours) including Saturday and Sunday,
and
— 12 double rest periods (of 48 hours plus a daily rest of 12 hours) without the guarantee that this will include a Saturday or Sunday.

Comments:

Under this Agreement, in a given year of 52 working weeks a worker should be awarded an average of 2 rest days per week (over and above the daily rest). This would amount to 104 rest periods of 24 hours each. If a worker has 4 weeks of holidays, he would then work 48 weeks and therefore be entitled to 96 rest periods.

Over a 52 working week, these should include:
- 12 weeks a year, where a worker is entitled to have 60 consecutive hours of rest including the week-end (Saturday and Sunday);
- 12 weeks a year where a worker is entitled to another 60 consecutive hours of rest in which the inclusion of the week-end is not guaranteed.

In the remaining weeks, the worker should benefit from at least 36 hours of consecutive rest (one weekly rest and one daily rest). Overall, the average rest should be of 36 + 24 hours per week[18].

Even though each worker has the right to an average of 2 rest days per week over a period of one year, this Agreement only guarantees, for any specific week, a minimum rest period of 24 hours and a daily rest period of 12 hours amounting to 36 hours per week[19].

These rules are only applicable on a weekly basis (weekly rest period of 24 hours plus 12 hours) or on a yearly basis (104 rest periods and double rest periods). As

[18] Information given by the European Commission at the Permanent Representatives Committee – 26 May 2005.
[19] Ibid.

the text of the definition of the *mobile workers assigned to interoperable cross-border services* is not precise enough to decide when the rule begins to be applicable (is it only when the staff concerned is assigned to interoperable cross-border services for more than one hour a day throughout the week or the year ?), it is necessary to fix more specific application rules whether at company level or by the Member States in order to make a correspondence between the regular use of the worker in international service and the working organization of staff in the framework of series including equally scheduled rests. *In the case of contracts of less than a year, the Agreement would apply on a pro-rata basis. The details of a worker performing on an interoperable service for less than a year are regulated at the national level*[20].

h) Driving time

The driving time, as defined in Clause 2, shall not exceed nine hours for a day shift and eight hours for a night shift between two daily rest periods.

The maximum driving time over a two-week period is limited to 80 hours.

Comments:

Driving time in this clause is to be understood as scheduled driving time. It is possible to combine driving time with other tasks up to the admissible limit of working time. In the event that driving time is extended due to unscheduled events or in case of a combination of driving time with other tasks, it is to be noted that the maximum weekly working time is regulated by the working time Directive and not by this Agreement [21].

Driving time has two limits: it must not exceed 9 hours for a day and 8 hours for a night shift. The maximum driving time over a 2-week period must not exceed 80 hours. Let's repeat we have it here about the scheduled driving time, i.e. that during which the driver is in charge of driving a traction unit, with the exception of the scheduled time to prepare or shut it down, but including any scheduled interruptions when the driver remains in charge of it.

[20] Ibid.
[21] Information given by the European Commission at the Permanent Representatives Committee – 26 May 2005.

i) Check

A record of daily working hours and rest periods for the mobile workers shall be kept to allow monitoring of compliance with the provisions of this Agreement. Information on actual working hours must be available. This record shall be kept in the undertaking for at least one year.

Comments:

The social partners consider that the records kept must be made available to the workers and the national authorities. It is up to the national authorities to decide where to keep the records. These records must ensure that all the clauses of the Agreement are respected, including driving time [22]. This provision makes it possible to actually check the agreement on working time and scheduled driving time has been applied.

j) Non-regression clause

The implementation of this Agreement shall not constitute in any case valid grounds for reducing the general level of protection afforded to mobile workers engaged in interoperable cross-border services.

Comments:

This non-regression clause is identical to that standing in Directive 93/104/EC (article 18) and is one of the basic principles of the social policy of the European Union (it stands on another hand in article 137 of the Treaty establishing the European Community). The same clause is included into the article 2 of the directive implemented the agreement.

[22] Ibid.

k) Follow-up of the agreement – Evaluation

The signatories shall follow up the implementation and application of this Agreement in the framework of the Sectoral Dialogue Committee for the railways sector, established in accordance with Commission Decision 98/500/EC.

The parties shall evaluate the provisions of this Agreement two years after its signing in the light of initial experience in the development of interoperable cross-border transport.

Comments:

In the context of this Agreement "signatories" and "parties" mean the same thing [23].

With this Agreement, the social partners have engaged to follow up on the transposition and application of the Agreement in the Member States and to exchange information on this matter. This exercise is independent of the obligation for the Commission to monitor the transposition of the Council Directive[24]. The Sectoral Dialogue Committee for railways is the very body where such a review should take place.

Furthermore, with regard to evaluation, the signatories undertake to observe the development of the interoperable cross-border sector.

According to the social partners, the evaluation exercise will start in 2006, even though January 2006 might seem too close. The objective of this evaluation is to observe the evolution of the interoperable cross-border market and to evaluate the clauses of the Agreement in light of the first experiences [25]. This applies in particular to the rest away from home, whose clause about forbidding two consecutive rests must be renegotiated in the light of the development of those services.

l) Review

[23] Information given by the European Commission at the Permanent Representatives Committee – 26 May 2005.
[24] Ibid.
[25] Ibid.

The parties shall review the above provisions two years after the end of the implementation period laid down in the Council Decision putting this Agreement into effect.

Comments:

The CER and ETF have to review the provisions of the agreement two years after the end of the transformation into national law, as provided for in the Directive which is making it applicable to the European Union as a whole. That review ought to take place in 2010.

This clause is interesting in the measure where it foresees that the implementation of the agreement will be putted into effect by the decision of the Council. The agreement is thus not applicable for the signatory parties before this date.

Effectively, article 139 (2) of the Treaty says that there are two options for the implementation: either in accordance with the procedures and practices specific to management and labour and the Member States or at the joint request of the signatory parties, by a Council decision The term *"or"* is important. The Treaty does not consider the possibility of doing both ways. The intention of the social partners was to chose the second way and thus to exclude the first.

I) Annex

It contains a list of the four official border stations located beyond the 15 km limit and for which the agreement is optional. Moves to those destinations are thus not subjected to the provisions of this agreement (three stations in Poland and one in Italy).

3. CHANGING THE AGREEMENT INTO A DIRECTIVE

Article 139, paragraph 2 of the Treaty establishing the European Community provides for the implementation of the agreements concluded at Community level are implemented either in accordance with the procedures and practices specific to management and labour and the Member States or, in matters covered by Article 137, at the joint request of the signatory parties, by a Council decision on a proposal from the Commission. The two sides of industry may thus ask the

Commission to propose the Council to make it applicable "*erga omnes*" (i.e. applicable to the whole of the Union). The Council acts by qualified majority, except where the agreement in question contains one or several provisions relating to one of the fields for which unanimity is required under article 137, paragraph 2. In this case, the Council acts unanimously. Let's observe working conditions do not belong to those matters for which unanimity is required under article 137.

The Commission presents a proposal for a Council Decision in areas covered by Article 137. This takes place at the joint request of the signatory parties following examination by the Commission of the following: sufficiently representative contracting parties, lawfulness of all clauses of the agreement under Community law, and compliance with the provisions concerning small and medium-sized enterprises. The social partners' agreement is then presented to the European Parliament for its opinion and transmitted to the Council for its decision. In that case, which is a procedure for extending agreements negotiated and concluded by the social partners, the Council is required to take a decision on the social partners' text without changing the substance. Implementation of the Council decision is monitored in accordance with the nature of the instrument used (directive, regulation or decision). However, the Commission believes that the social partners who triggered the regulatory text hold special responsibility for its implementation [26].

The European Commission proposed the transformation of the agreement into a directive of the Council by its proposal COM (2005) 32 final of the 8th February 2005.

The Commission has scrutinised all the clauses of the agreement and has not found any to be contrary to Community law [27].

The Commission considers that *this agreement constitutes a remarkable achievement by the sectoral social dialogue at Community level, confirms the key role of the European social partners in supplementing, consolidating and adapting national standards on working conditions at Community level and illustrates the role that the social partners are able to play in implementing the strategy of economic and social reforms decided upon in Lisbon and underpinned in Barcelona in March 2002* [28].

The Commission examines the representativeness and the mandate of the signatory parties and concludes that *the signatories of the agreement in question*

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[26] Communication from the Commission : *The European social dialogue, a force for innovation and change*, COM 2002/341 final of June 26th, 2000.
[27] COM(2005) 32 final, paragraph 32.
[28] COM(2005) 32 final, paragraph 43

have sufficient representative status with regard to the railways sector in general and the workers who may be covered by the agreement's provisions [29].

The Commission explain also why it choose to propose the transformation of the Agreement into a directive : *The term "decision" in Article 139(2) of the Treaty is used in its general meaning in order to enable the legislative instrument to be selected in accordance with Article 249 of the Treaty. It is up to the Commission to propose to the Council which of the three binding instruments mentioned in the said article (regulation, directive or decision) would be the most appropriate. In this instance, given the type and content of the social partners' agreement, it is clear that it is best applied indirectly through provisions to be transposed by the Member States and/or the social partners into the Member States' national law. The most suitable instrument is therefore a Council directive. The Commission also considers, in compliance with the undertakings which have been given, that the agreement should not be incorporated in but annexed to the proposal* [30].

The article 139 of the EC Treaty does not provide for consultation of the European Parliament on requests made to the Commission by the social partners. However, the Commission has forwarded its proposal so that it can, if it so desires, communicate its opinion to the Commission and the Council. The same applies to the Economic and Social Committee and the Committee of the Regions.

Only the European Parliament examined the proposal and adopted, on 26 May 2005, a resolution supporting the transformation of the agreement into a directive.

The proposal of the Commission was discussed during April and May 2005. Several Member States were reserved about the transformation into a directive because of clause 4 which preclude more than two periods away from home. On 2nd June 2005, the Employment, Social Policy, Health and Consumer Affairs Council of the European Union reached a political agreement on the draft directive and the directive was formally adopted at the Council Agriculture and Fisheries on the 18th July. Only 3 Member States abstained at the vote.

The directive was published in the Official Journal of the European Union on 27 July 2005. It is now directive 2005/47/EC[31].

At the occasion of the Council's meeting, the Commission published a statement on Article 3 of the directive and on the monitoring of the development of the railway sector :

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[29] COM (2005) 32 final, paragraph 24.
[30] COM (2005) 32 final, paragraph 51.
[31] It can be consulted on http://europa.eu.int/eur-lex/lex/LexUriServ/LexUriServ.do?uri=OJ:L:2005:195:SOM:en:HTML.

"When drawing up the report provided for in Article 3[32], the Commission will take into account the economic and social impact of the agreement on undertakings and workers covered by the Directive.

The Commission attaches great importance to the development of rail transport resulting from the Community Directives adopted to develop European railways, including moves towards opening-up the market. It hopes that the social partners will contribute to this development and that the social dialogue will reflect the evolution of the sector. It intends forthwith to ask the social dialogue committee to widen its representativeness in line with that evolution.
In this context, the Commission proposes to submit to the Council before the date referred to in Article 5 of the Directive[33] a report taking account of the economic and social impact of the social partners' Agreement on undertakings and workers and of the social dialogue talks held under Clauses 10 and 11 of the Agreement on all pertinent issues, including Clause 4.

It intends to take the initiatives necessary, by proposing an amendment to the Directive, should the social partners reach any new agreement, even if it is concluded before the date referred to in Article 5 of the Directive."

It is clear that these agreed upon standards are subject to revision by CER and ETF at regular intervals in order to adjust them to the further development of international cross-border rail traffic in Europe ad that the European Commission intends to propose necessary amendments to the directive in order to follow any new agreement.

The Directive must be transposed into the national laws of all Member States[34] before the end of the period of 3 years after the date of entry in force, i.e. 27 July 2008.

The Directive will also have to be transposed into the Norwegian national law. The agreement on the EEA[35] provides indeed for the transposition of some directives into the national laws of the EFTA[36] member countries (including

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[32] The Commission shall report to the Council and to the European Parliament on the implementation of the directive in the context of the development of the railway sector before the expiry of the period of 3 years following the final date of transposition (2011).
[33] 2008.
[34] In accordance with the case law of the Court of Justice, the non-existence in a Member State of the activity referred to in a Directive does not free that Member State from the obligation to take legislative or regulatory steps to ensure adequate transposition of all the provisions of that Directive. However, geographical impossibility does relieve the Member State concerned from the obligation of transposition. In the current circumstances such would be the case for Cyprus and Malta (statement by the Commission at the Council's meeting of 2 June 2005)
[35] Agreement on the European Economic Area of March 17th, 1993 between the EU member countries and the EFTA member countries. The Swiss Confederation refused to ratify the Agreement by a referendum.
[36] European Free Trade Association or EFTA set up in Stockholm on January 4th, 1960.

Iceland[37] and Liechtenstein[38]). Article 67 of the EEA Agreement refers to the list in annex XVIII and Directive 93/104/EC is mentioned under point 28 of that list. Changes made later on must therefore also be transposed into the concerned national laws. Switzerland only has been excluded from the application of the EEA Agreement. SBB[39] and BLS[40] being members of the CER must nevertheless apply the CER-ETF agreement.

[37] There is no railway and a geographical impossibility for cross-border traffic in Iceland.
[38] [38] The rail system of Liechtenstein is small, consisting of one line connecting Austria and Switzerland through Liechtenstein of 9.5 kilometres . The line is managed by the Austrian railways (ÖBB).
[39] Swiss Federal Railways.
[40] BLS Lötschbergbahn AG.