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Proposal for a

REGULATION OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL

**repealing Regulation (EEC) No 1192/69 of the Council on common rules for the
normalisation of the accounts of railway undertakings**

(Text with EEA relevance)

EXPLANATORY MEMORANDUM

1. CONTEXT OF THE PROPOSAL

Regulation (EEC) No 1192/69 allows Member States to compensate 36 enumerated railway undertakings for the payment of obligations which undertakings of other transport modes do not have to support, such as special family allowances and pensions.

When the rules for normalisation are correctly applied, such State support is considered compatible with the internal market and Member States are exempted from State aid notification obligations, although Member States are required to officially publish their compensation decisions. Today, only a few Member States rely on the Regulation in order to justify payments of compensation.

The Regulation was adopted before the rail market was liberalised and when rail transport in Europe was developing primarily within national borders, with integrated companies both operating rail services and managing rail infrastructure. In the context of this monopolistic market, the objective of the Regulation at the time was to put railway undertakings and undertakings active in other transport modes on an equal competitive footing.

Since the 1990s, a series of legislative measures (known as the railway packages) has been adopted at European level with a view to reviving rail transport by gradually creating a single railway area integrated at a European level. These legal acts have opened up the rail freight and international rail passenger markets to competition and have established, by way of Directive 2012/34/EU of the European Parliament and of the Council of 21 November 2012 establishing a single European railway area (recast)¹, certain fundamental principles which include that railway undertakings shall be managed according to principles that apply to commercial companies, that entities responsible for the allocation of capacity and charging for rail infrastructure shall be separate from entities which operate rail services (separation of essential functions) and that there shall be a separation of accounts (to prevent cross-subsidisation), that any railway undertaking licensed in accordance with EU criteria should have access to railway infrastructure on fair, non-discriminatory terms, and that infrastructure managers may benefit from State financing.

Regulation (EEC) No 1192/69 is inconsistent and incompatible with legislative measures currently in force for a number of reasons.

- i) Since railway undertakings must be managed according to principles that apply to commercial companies, no State compensation for insurance, pensions, or other operating expenditures is permissible (except in the case of compensation for the provision of public services). Not only is this principle established broadly under Treaty State aid rules, but it is more specifically set out in the Guidelines on State aid for railway undertakings (2008/C 184/07).
- ii) The enumerated list of railway undertakings eligible for compensation under the Regulation and the classification in the Regulation of types of compensation that can be paid to railway undertakings presuppose an integration of infrastructure management into the activities of railway undertakings which is inconsistent with the principles of separation of essential functions and separation of accounts.
- iii) Regulation 1192/69 makes only 36 railway undertakings eligible for compensation. The Regulation may have made sense when incumbent railway undertakings competed

¹ OJ L 343, 14.12.2012, p. 32.

exclusively with other modes of transport and not with other railway undertakings, however, in the context of a liberalised market where railway undertakings compete directly with the traditional monopolies, it is not appropriate to discriminate between different undertakings. If financial conditions differ for railway undertakings (as a consequence of the Regulation) new entrants are not ensured non-discriminatory access conditions. For example, new entrants may have difficulties to attract personnel from incumbent railway undertakings since the latter may be able to offer more favourable pension conditions through subsidies received under the Regulation.

Payments of compensation under Class IV of the Regulation (the costs of level crossing facilities) are costs associated with the functions of an infrastructure manager who, under Article 8 of Directive 2012/34/EU, may benefit from State financing. Thus while compensation payments under Class IV of the Regulation would be compatible with existing legislation, Class IV of the Regulation is also redundant.

Therefore, the proposed initiative to repeal the Regulation will eliminate inconsistencies in the EU legal order and will contribute to simplification by eliminating a legal act which is now obsolete.

2. RESULTS OF CONSULTATIONS WITH THE INTERESTED PARTIES AND IMPACT ASSESSMENTS

2.1 Consultation

The Commission requested information from Member States about application of the Regulation in May 2010 and in June 2011. Responses revealed that between 2007 and 2010 a majority of Member States had not received applications from railway undertakings and had not made payments of compensation under the Regulation. A majority of Member States indicated they saw no ongoing need for the Regulation and some explicitly expressed their support for repeal or their opinion that the Regulation is obsolete or out of date. Some Member States were in favour of maintaining relevant classes in the Regulation, however given that compensation payments under all classes except Class IV are incompatible with other legislation, this is an option that cannot be pursued. Other Member States were indifferent or expressed no opinion on the ongoing need for the Regulation. Only three Member States (Belgium, Germany and Ireland) declared that they used the Regulation as a legal basis for payments of compensation during the period 2008-2010.

Compensation payments in 2010 (estimated or actual) under Regulation 1192/69 as reported by MS (€ millions)

	Class I Loss or injury at work	Class III Pensions	Class IV Level Crossings	Total
Belgium	(0.322)	-	-	(0.322)
Germany	-	-	72.8	72.8
Ireland	-	24.1	4.2	28.3
Total	(0.322)	24.1	77.0	100.8

The Commission was also recently informed by Poland of compensation payments to PKP PLK (under Class IV) for the year 2012 in the order of €7.9 million.

Only three classes of compensation are applied by Member States today (I, III and IV). Certain classes of compensation under the Regulation are no longer in force (V through VIII). None of the remaining classes of compensation (II and IX through XV) are applied.

Except in the case of compensation for the provision of public services, payment by the State to railway undertakings of compensation is incompatible with the principles of management of railway undertakings according to principles that apply to commercial companies and EU rules on State aid, separation of accounts, and non-discriminatory access to railway infrastructure. Class IV of the Regulation is redundant given that compensation payments by the State for the functions of infrastructure managers can already be made under Directive 2012/34/EU. Reducing the number of classes in the Regulation to those which are in line with existing legislation would have the same effect as the repeal option – eliminating incompatible classes yet leaving the possibility for Member States to provide the infrastructure manager with financing consistent with its functions, including costs associated with level crossing facilities.

2.2 Impacts of the repeal

On the basis of the data provided by Member States, it can be concluded that the impact of a repeal of the Regulation would be very minimal.

Class I

Between 2008 and 2010, Belgium received applications from SNCB Holding under Class I (payments which railway undertakings are obliged to make but which for the rest of the economy are borne by the State, including payments in respect of loss or injury resulting from accidents at work). In 2010, a negative compensation balance of €0.323 million was calculated under the Regulation, to be paid back by SNCB Holding to the Belgian State.

The impact of a repeal of Regulation 1192/69 would be negligible as regards Class I compensation payments. SNCB would have to join the existing private accident insurance system and Belgium has indicated that it is considering this option. Any costs associated with switching systems would be more than offset by the elimination of administrative burdens associated with the annual receipt of applications and calculations of compensation under the Regulation.

Class III

Between 2008 and 2010, Ireland made payments to CIE under Class III (payments in respect of retirement and other pensions borne by railway undertakings on terms different from those applicable to other transport undertakings). In 2010, Class III compensation to CIE amounted to €24.1 million.

The impact of a repeal of Regulation 1192/69 would be minimal as regards Class III compensation payments. Pension payments to CIE related to labour costs associated with infrastructure management can be justified by Article 8 of Directive 2012/34/EU as financing for functions of an infrastructure manager. Pension payments to CIE related to labour costs associated with public service obligations, can be justified as compensation for the discharge of public service obligations defined in accordance with Regulation 1370/2007 and be exempted from the State aid notification requirement. (Currently 100% of all rail passenger operations are under public service obligation). Pension payments to CIE for labour costs associated with rail operations that do not fall under public service obligations (in other words, freight services) would be subject to State aid notification. Freight activities are estimated to represent around 5.2% of CIE's rail operation activities – this translates roughly to 3.4% of its employees. Thus, less than €1 million of pension related payments to CIE are associated with rail freight activities. Only these payments to CIE (and payments to CIE related to rail passenger operations not under PSO – of which there currently are none) would be subject to State aid notification rules.

Class IV

Ireland, Germany and Poland have made payments under Class IV (costs of level crossing facilities). In 2010 Ireland made payments to CIE of € 4.2 million under Class IV. Estimated payments under Class IV from Germany to DB Netz AG and Usedomer Bäderbahn GmbH were in the order of €72.8 million for 2010, of which less than 0.5% went to Usedomer Bäderbahn. For the year 2012 Poland will make compensation payments under Class IV to PKP PLK in the order of € 7.9 million.

The impact of a repeal of Regulation 1192/69 would be negligible as regards Class IV compensation payments. Payments to CIE, DB Netz and PKP PLK would be covered by Article 8 of Directive 2012/34/EU as financing for functions of an infrastructure manager. These payments can continue to be made after a repeal of the Regulation and the administrative formalities related to application of the Regulation, such as handling annual applications for normalisation from undertakings, assessing financial burden or benefit, determining the amount of compensation, adequately preparing decisions taken in pursuance of the provisions of the Regulation and officially publishing those decisions, would be eliminated. Payments to Usedomer Bäderbahn, which are minimal, would be subject to State aid notification rules.

3. LEGAL ELEMENTS OF THE PROPOSAL

The proposal consists of a repeal of Regulation (EEC) No 1192/69.

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(Text with EEA relevance)

THE EUROPEAN PARLIAMENT AND THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty on the Functioning of the European Union, and in particular Articles 91 and 109 thereof,

Having regard to the proposal from the European Commission,

After transmission of the draft legislative act to the national Parliaments,

Having regard to the opinion of the European Economic and Social Committee²,

Having regard to the opinion of the Committee of the Regions³,

Acting in accordance with a ordinary legislative procedure,

Whereas:

- (1) Regulation (EEC) No 1192/69 allows Member States to compensate 36 enumerated railway undertakings for the payment of obligations which undertakings of other transport modes do not have to support. Correct application of the rules for normalisation results in Member States being exempted from State aid notification obligations.
- (2) A series of legislative measures has been adopted at European level, opening up the rail freight and international rail passenger markets to competition and establishing, by way of Directive 2012/34/EU of the European Parliament and of the Council of 21 November 2012 establishing a single European railway area (recast), certain fundamental principles which include that railway undertakings shall be managed according to principles that apply to commercial companies, that entities responsible for the allocation of capacity and charging for rail infrastructure shall be separate from entities which operate rail services and that there shall be a separation of accounts, that any railway undertaking licensed in accordance with EU criteria should have access to railway infrastructure on fair, non-discriminatory terms, and that infrastructure managers may benefit from State financing.
- (3) Regulation (EEC) No 1192/69 is inconsistent and incompatible with legislative measures currently in force. In particular, in the context of a liberalised market where railway undertakings compete directly with the enumerated railway undertakings, it is

² OJ C , , p. .

³ OJ C , , p. .

no longer appropriate to discriminate between these two groups of different undertakings.

- (4) As a consequence, it is appropriate to repeal Regulation (EEC) No 1192/69 to eliminate inconsistencies in the EU legal order and this will contribute to simplification by eliminating a legal act which is now obsolete.

HAVE ADOPTED THIS REGULATION:

Article 1

Regulation (EEC) No 1192/69 is repealed.

Article 2

This Regulation shall enter into force on the day following that of its publication in the *Official Journal of the European Union*.

This Regulation shall be binding in its entirety and directly applicable in all Member States.

Done at Brussels,

For the European Parliament
The President

For the Council
The President