

COMMISSION OF THE EUROPEAN COMMUNITIES

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Proposal for a

COUNCIL DIRECTIVE

on the agreement between the Community of European Railways (CER) and the European Transport Workers' Federation (ETF) on certain aspects of the working conditions of mobile workers assigned to interoperable cross-border services

(presented by the Commission)

EXPLANATORY MEMORANDUM

I. SUBJECT OF THE PROPOSAL

1. This proposal is intended to give effect to the attached agreement on certain aspects of the working conditions of mobile workers assigned to interoperable cross-border services concluded on 27 January 2004 between the Community of European Railways (CER) and the European Transport Workers' Federation (ETF).

2. In a letter dated 20 December 2002, the social partners in the railways sector, the Community of European Railways (CER) and the European Transport Workers' Federation (ETF), informed the Commission of their intention to start negotiations on the working conditions of personnel assigned to cross-border services.

3. On 27 January 2004, these two organisations concluded an agreement on certain aspects of the working conditions of mobile workers assigned to interoperable cross-border services. They presented the agreement to the European Commission and asked for it to be implemented by a Council decision on a proposal from the Commission in compliance with Article 139(2) of the Treaty.

II. LEGAL CONTEXT

4. In matters of social policy, the Treaty confers a unique and key role upon the social partners at Community level. Article 138(2) provides that any initiative in this area must be subject to prior consultation of the social partners on the possible direction of the action and, subsequently, the content of the envisaged proposal.

5. Article 139(1) of the Treaty goes further and gives the social partners at Community level the possibility, should they so desire, to enter into a dialogue which may lead to contractual relations, including agreements. In this case, the Treaty does not impose any requirement for prior consultation.

6. These agreements are implemented either in accordance with the procedures and practices specific to the social partners and 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 (Article 139(2)).

7. In its Communication "Adapting and promoting the social dialogue at Community level"[1], the Commission emphasised that "before any legislative proposal is presented to the Council, the Commission carries out an assessment involving consideration of the representative status of the contracting parties, their mandate and the legality of each clause in the collective agreement in relation to Community law, and the provisions regarding small and medium-sized enterprises".

8. This assessment is carried out below.

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[1] Communication from the Commission — Adapting and promoting the social dialogue at Community level, document COM(98) 322 final of 20.5.1998. See also the Communication concerning the application of the Protocol on Social Policy presented by the Commission to the Council and the European Parliament, document COM(93) 600 final of 14.12.1993.

III. ANALYSIS OF THE AGREEMENT

Representative status and mandate of the parties to the contract

9. The signatories to the agreement are the Community of European Railways (CER) and the European Transport Workers' Federation (ETF). These two organisations are the members of the Railways Sectoral Dialogue Committee set up in accordance with the Commission Decision of 20 May 1998[2] on the establishment of Sectoral Dialogue Committees promoting the dialogue between the social partners at European level.

10. The information provided by the signatories proves that they belong to a specific sector and that they are organised at European level. Moreover, they are made up of organisations which themselves are acknowledged as forming an integral part of the structures of the Member States' social partners, have the capacity to negotiate agreements and have representative status in virtually all the Member States. Finally, they have the structures required to enable them to participate effectively in the consultation process.

11. The agreement signed by these organisations covers certain aspects of the working conditions of mobile workers assigned to interoperable cross-border services. The signatories have forwarded information on their representative status which indicates that they are sufficiently representative of mobile workers in the railway sector, including those engaged in interoperable cross-border services. They are indisputably the main organisations of the social partners in the sector. The CER represents 24 railways sector enterprises in 22 Member States of the EU. Apart from Malta and Cyprus, which do not have a railway network, Sweden is the only Member State where the CER has no affiliates. In all, its members account for approximately 95% of all jobs in the railways sector. On the trade union side, the agreement was signed by the ETF, whose railways section represents rail workers in 22 Member States. Apart from Malta and Cyprus, Estonia is the only Member State where the ETF has no affiliates. It represents the vast majority of workers belonging to a trade union in the sector.

12. It should be noted that, following the adjustment of the Community legislative framework in the railways sector, new organisations representing the interests of infrastructure managers and railway companies at European level have been set up since March 2001. These are the EIM (European Rail Infrastructure Managers), whose members do not employ mobile workers within the meaning of the agreement and will therefore not be directly affected by its provisions[3], and the ERFA (European Rail Freight Association/Association Européenne du Fret Ferroviaire), which represents new rail freight enterprises and which, at present, cannot be considered a social partner as defined by the criteria of the Commission Decision of 20 May 1998, especially that relating to the capacity for negotiating agreements.

13. On the trade union side, there is another European association made up of various independent trade unions for train drivers. This organisation, the ALE (Autonome Lokomotivführer-Gewerkschaften Europas – Independent Train Drivers' Trade Unions

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2 Commission Decision 98/500/EC of 20 May 1998 on the establishment of Sectoral Dialogue Committees promoting the dialogue between the social partners at European level, OJ L 225, 12.8.1998, page 27.

3 This was confirmed by the EIM at a meeting organised with the Commission.

of Europe), founded in 1989, is affiliated to the European Confederation of Independent Trade Unions (CESI). The ALE is highly specific and is confined solely to train drivers. It is not recognised as a partner by the European employers and therefore does not participate in the social dialogue. Had the ALE been present at the negotiations this would not, moreover, have affected the representative status of the signatories. The occupational category of train drivers is already covered by the ETF, which also covers the other mobile workers (see the tables below).

EU25 / *Employers*	Average numbers of workers	As a % of the total workforce in the sector	Train drivers	Train drivers assigned to interoperable cross-border services	Other mobile workers	Other mobile workers assigned to interoperable cross-border services
Total for the sector	1 046 400 (1)	100	133 021 (4)		79 125 (5)	
CER	991 700 (1)	94.7 (1)				
	1 083 524 (2)		125 971 (2)	13 261 (2)	74 931 (2)	11 105 (2)
Other European organisations representing railway companies	25 000 (3)		2 280 (6)	298 (6)	-	

EU25 / *Workers*	Affiliates	As a % of the known number of workers who are members of a trade union organisation	Affiliated train drivers	Other affiliated mobile workers
Total for the sector	889 440 (7)	100		
ETF	711 552 (8)	80 (8)		
	752 078 (9)		72 380 (9)	73 599 (9)
Other European organisations representing workers in the railways sector	73 080 (10)		73 080 (10)	

Sources:

(1) International Railways Union (IRU), Railways statistics — summary — provisional figures for 2002 (figures incomplete for the United Kingdom).

(2) Figures communicated by the CER for the year 2004.

(3) European Commission, Directorate-General Energy and Transport, European Union Energy & Transport in Figures 2003. These figures for 2001 and for the EU of 15 Member States do not refer to a European organisation but to the total workforce of enterprises not affiliated to the CER).

(4) An estimate which is calculated on the assumption that the CER represents 94.7% of drivers. According to this calculation, the total number of drivers accounts for 12.67% of all jobs in the sector.

(5) An estimate which is calculated on the assumption that the CER represents 94.7% of other mobile workers. According to this calculation the total number of other mobile workers accounts for 7.65% of all jobs in the sector.

(6) Figure communicated by the ERFA for the year 2004.

(7) Estimate based on a trade union affiliation density of 85% based on the figures from the IRU (see 1). The study published by the EIRO (European Industrial Relations Observatory) in March 2000 on industrial relations in the railways sector confirms a density of 90% or higher in nine of the 15 Member States (http://www.eiro.eurofound.ie/2000/03/study/tn0003402s.html). The trade union affiliation density in the sector in the ten new Member States is also estimated to be very high, given the proximity of their railway companies to the public sector.

(8) According to the report on "Employers' and workers' organisations in the railways sector in the EU" presented in December 2000 by the Catholic University of Louvain (research conducted for the European Commission, DG Employment and Social Affairs), the ETF represents 80% of the known number of workers who are members of a trade union organisation. This figure is also regarded as a realistic basis for the EU of 25 Member States.

(9) Figures forwarded by the ETF for the year 2004 which relate exclusively to active workers.

(10) Figures forwarded by the ALE (Autonome Lokomotivführer-Gewerkschaften Europas) for the year 2004. The ALE is established in only ten Member States. 34 000 drivers represented by the ALE come from a single Member State.

14. The Commission informed the three organisations of the content of the agreement and of its intention to submit it to the Council for a decision.

15. The three organisations regretted that they were not present at the negotiating table.

16. As the Court of First Instance ruled in its judgment of 17 June 1998 in the UEAPME[4] case, Community law does not confer "on any representative of management and labour, whatever the interests purportedly represented, a general right to take part in any negotiations entered into (…) The mere fact that the applicant contacted the Commission on several occasions asking to participate in the negotiations between other representatives of management and labour does not affect that position, since it is the representatives of management and labour concerned, and not the Commission, which have charge of the negotiation stage properly so called".

17. According to the Court, the Commission and the Council are obliged to ascertain whether, having regard to the content of the agreement in question, the signatories, taken together, are sufficiently representative (point 90). It should be emphasised that the three organisations in question are not, so far, regarded as representative of the sector and are therefore not consulted by the Commission under Article 138 of the Treaty.

18. The two tables above give an overview of employment in the railways sector (railway companies) and, as far as possible, an estimate of the mobile workers (train drivers and other mobile workers). On the basis of the existing figures, it can be estimated that the

[4] Judgment of the Court of First Instance (fourth chamber, extended composition) of 17 June 1998 in case T-135/96, Union Européenne de l'artisanat et petitis et moyennes entreprises (UEAPME) v Council of the European Union, European Court Reports 1998, page II-02335, point 78.

total number of mobile workers in the sector constitutes approximately 20% of the total workforce, i.e. approximately 210 000 persons, of whom about 12% are assigned to interoperable cross-border services (25 000 persons). As regards the employers, the CER employs almost 95% of the entire workforce. The ETF represents some 80% of the workers who are members of trade unions.

19. The total number of train drivers in the EU of 25 Member States is estimated to be around 133 000. Although in the second table the number of drivers affiliated to the ETF and ALE is more than this figure when added together, this can be accounted for by double affiliations or by the fact that trade unions often include pensioners, unemployed persons or other non-active persons amongst their members. The figures for the ETF, by contrast, relate exclusively to active workers.

20. The Commission therefore concludes that the ETF represents a large proportion of the mobile workers assigned to interoperable cross-border services, including over half of the train drivers.

21. The representative status of the ETF is therefore indisputable, given the scope of the agreement concluded by the social partners.

22. The organisation representing the employers (CER) represents the vast majority of enterprises in the sector that employ the majority of the workers in question.

23. On the basis of the information collected, the CER and ETF appear to have had a mandate from their national members to negotiate the agreement on certain aspects of the working conditions of mobile workers assigned to interoperable cross-border services and, moreover, represent a very large proportion of the sector and satisfy the criterion of representativeness.

24. In conclusion, the signatories of the agreement in question have sufficient representative status with regard to the railways sector in general and the workers who may be covered by the agreement's provisions.

Compliance with the provisions on small and medium-sized enterprises

25. Under the terms of Article 137(2) of the Treaty, legislation on social matters must avoid imposing administrative, financial and legal constraints in a way which would hold back the creation and development of small and medium-sized enterprises (SMEs).

26. The agreement does not make any distinction between workers of SMEs and others. However, the provision of the Treaty mentioned above does not require this.

27. As the Court of Justice said in its judgment in *Kirsammer-Hack*[5], this provision of the Treaty indicates that these enterprises may be subject to specific economic measures. Having said that, this provision does not stop these enterprises from being subject to binding measures.

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[5] Judgment of the Court of 30 November 1993, Case C-189/91, *Kirsammer-Hack*, European Court Reports 1993, p. I-06185, point 34.

28. The provision is geared more to imposing only such constraints as are strictly necessary to achieve the essential objective of any action in this field, i.e. to protect the health and safety of workers.

29. The agreement does not introduce additional administrative, financial or legal constraints as compared to Community law in force, i.e., Directive 2003/88/EC of the European Parliament and of the Council of 4 November 2003 concerning certain aspects of the organisation of working time. Railways sector is covered by this Directive.

30. The fact that the agreement makes it possible to adapt certains provisions by collective bargaining at the level of the company (a second daily rest away from home and the compensation for the rest away from home) shows that the applicable rules can be adapted at the level of the enterprise, notably small and medium-sized enterprises.

31. Therefore, the Commission concludes that the agreement complies with the provisions on small and medium-sized enterprises.

The "legality" of the clauses of the agreement

32. The Commission has scrutinised all the clauses of the agreement and has not found any to be contrary to Community law. The obligations imposed on the Member States do not arise directly from the agreement between the social partners but from the arrangements for implementing the agreement in application of the directive. The signatories provide that, for mobile workers assigned to interoperable cross-border services, Directive 2003/88/EC of the European Parliament and the Council of 4 November 2003 concerning certain aspects of the organisation of working time will not apply to the aspects for which this agreement contains more specific provisions. The following paragraphs comprise the Commission's assessment of the content of the agreement.

Assessment of the agreement

33. Directive 93/104/EC[6] of 23 November 1993 was the first Community instrument laying down minimum requirements to encourage improvements in the working environment in order to guarantee a higher level of protection of the health and safety of workers.

34. Directive 93/104/EC applied to all sectors of activity except for air, rail, road, sea, inland waterway and lake transport, sea fishing, other work at sea and the activities of doctors in training. 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.

35. The rail transport sector is now covered by Directive 2003/88/EC of 4 November 2003. It should be noted that Article 14 provides that other Community instruments may

[6] Council Directive 93/104/EC 23 November 1993 concerning certain aspects of the organisation of working time, OJ L 307 of 13.12.1993, page 18.

provide for more specific requirements as regards the organisation of working time in certain occupations or activities. Moreover, Article 17(3)(e) provides that derogations can be made under certain conditions for persons working in the railway transport sector from Articles 3, 4, 5, 8 and 16 of the said Directive.

36. National legislation may also provide for specific working conditions for workers working on trains. The only way to prevent differing national measures applicable to cross-border services from being adopted is for Community action to lay down the coordinated and standardised working conditions which the foreseeable development in cross-border rail traffic has made all the more necessary.

37. This is the background against which the agreement covering certain aspects of the working conditions of mobile workers assigned to interoperable cross-border services has been concluded between the CER and the ETF.

38. The Commission has already given its support to the negotiations between the social partners in this field. During the Transport Council's deliberations on the "second railways package" on 28 March 2003, the Commission declared that it "fully supports and encourages the work in progress in the framework of the European Social Dialogue by the social partners, in accordance with Article 139 of the Treaty, concerning the harmonisation of driving times and rest periods for train drivers and staff accompanying trains[7]".

39. The Commission welcomes the social partners' initiative for several reasons.

40. First of all, by establishing minimum requirements with regard to working time, the agreement applies points 7, 8 and 19 of the Community Charter of Fundamental Social Rights of Workers referred to in Article 136 of the Treaty and Article 31 of the Charter of Fundamental Rights of the European Union.

41. Moreover, the agreement strikes a balance between the need to ensure adequate protection of the health and safety of mobile workers in interoperable cross-border services and the need for adequate flexibility in running rail transport enterprises in an integrated European railway network This agreement is entirely consistent with the "first railways package" made up of the directives adopted by the Council and the European Parliament[8] which opened up the international freight market between 2003 and 2008 and which is going to lead to an increase in cross-border traffic.

42. The agreement also complies with all aspects of Directive 2003/88/EC of 4 November 2003 in that it provides for specific provisions for mobile personnel in interoperable cross-border services. It should be noted that with regard to daily working hours, working breaks and weekly rest periods, it provides for arrangements geared to offering greater protection of the workers in question and also greater flexibility than the directive in order to cater more closely for the sector's needs. The agreement establishes the principle of rest periods or breaks longer than the minimum requirements established by the Directive but at the same time provides for flexibility in order to take into account the inherent constraints of the railways sector. In the same vein, the

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7 See document SEC(2003) 754 final, page 8.

8 Directives 2001/12/EC, 2001/13/EC and 2001/14/EC of 26 February 2001, OJ L 75 of 15 March 2001.

agreement introduces two definitions to adapt and clarify the provisions of Directive 2003/88/EC to cater for the peculiarities and needs of the sector, namely the concepts of driving time and mobile workers assigned to interoperable cross-border services.

43. Finally, 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, as set out in the Communication from the Commission on "European social dialogue, a force for innovation and change"[9]. The Commission is convinced, as it emphasised in its recent Communication "Partnership for change"[10], that negotiation is the best way of dealing with issues relating to work organisation and industrial relations at both cross-sectoral and sectoral level.

44. The Commission therefore considers that all the conditions are fulfilled for presenting a proposal for this agreement to be implemented by a Council decision.

IV. THE COMMISSION'S PROPOSAL

45. In its Communication of 14 December 1993, the Commission stated that "implementing an agreement concluded at Community level by means of a Council decision on a proposal from the Commission at the joint request of the social partners would give the Council no opportunity to amend the agreement. For this reason, the Commission will merely propose, following examination of the agreement between the social partners, the adoption of a decision on the agreement as concluded". In this instance, the instrument proposed is a directive. It therefore contains the standard provisions relating to implementing the Directive at national level.

46. Moreover, the Commission also held that "the Council decision must be limited to making binding the provisions of the agreement concluded between the social partners, so the text of the agreement would not form part of the decision, but would be annexed thereto".

47. Finally, the Commission announced that "if the Council decides, in accordance with the procedures set out in the last subparagraph of Article 139(2), not to implement the agreement as concluded by the social partners, the Commission will withdraw its proposal for a decision and will examine, in the light of the work done, whether a legislative instrument in the area in question would be appropriate".

48. The Commission did not therefore include the text of the agreement in the proposal but simply annexed it. It also reiterates that, if the Council amends the agreement concluded between the social partners, it will withdraw its proposal.

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[9] COM(2002) 341 final of 26.6.2002

[10] Communication from the Commission — Partnership for change in an enlarged Europe — enhancing the contribution of European social dialogue, document COM(2004) 557 final of 12.8.2004.

Legal basis

49. Article 139(2) of the Treaty provides that "agreements concluded at Community level shall be implemented…, 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 agreement on certain aspects of the working conditions of mobile workers assigned to interoperable cross-border services covers the conditions of health and safety of the workers, an area which is governed by Article 137(1) of the Treaty. This is one of the fields in which the Council can decide by a qualified majority. Article 139(2) hence constitutes the proper legal basis for the Commission's proposal.

50. This article 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.

Type of instrument

51. 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.

52. The Commission would like to make the following comments on the articles of the proposal.

Article 1

This article is confined to making the agreement between the social partners binding, which is the aim of a Council decision adopted under Article 139(2) of the Treaty.

Article 2

Article 2 states that the directive provides only for minimum requirements, leaving the Member States free to adopt measures which are more favourable to workers in the area concerned.

Article 3

This Article states, in the context of the evolution of the railways sector, that the Commission will report to the Council and the European Parliament on the implementation of the Directive, three years afer the deadline for implementation of the Directives in Member States' legal order. This report is separate in relation to the

monitoring and to the evaluation foreseen by the signatories to the agreement. It will be established after consultation with the social partners at Community level.

Article 4

Article 4 obliges the Member States to provide for penalties which are effective, proportionate and dissuasive. Within the framework for applying Community law, it is important, as in every legal system, that all those on whom the law imposes obligations are dissuaded from infringing Community law and that those who do not comply with it are duly punished.

Article 5 to 7

Articles 5 to 7 contain the usual provisions on transposal into the Member States' national law.

V. JUSTIFICATION OF THE DIRECTIVE WITH REGARD TO SUBSIDIARITY

53. The proposal for a Council directive on the agreement between the Community of European Railways (CER) and the European Transport Workers' Federation (ETF) on certain aspects of the working conditions of mobile workers assigned to interoperable cross-border services complies with both aspects of the principle of subsidiarity, namely necessity and proportionality, set out in Article 5 of the Treaty.

54. The need for Community action is justified not only by the fact that the social partners, in accordance with Article 139(1), are convinced of the need for Community action in this matter, have successfully concluded an agreement at Community level and have asked for this agreement to be implemented by a Council decision on a proposal from the Commission pursuant to Article 139(2) of the Treaty, but also by the need to put the railways sector on a European footing.

55. The proposal for a directive also supplements the Member States' legislation by establishing a flexible Community framework with a view to improving the working conditions of mobile workers assigned to interoperable cross-border services and to promoting cross-border rail traffic. Such a framework, which provides clarity and transparency for the enterprises in the sector, is conducive to fair competition in the internal market.

56. Finally, because of its nature and its transnational scope, the action envisaged can be taken only at Community level.

57. The Council directive fulfils the requirement for proportionality in as much as it is confined to setting the aims to be achieved. The directive on the agreement aims to establish more specific provisions on the organisation of working time for personnel assigned to cross-border services in order to cater more effectively for the workers' need for safety and the enterprises' need for flexibility.

VI. CONCLUSION

58. The Council is asked to adopt the proposal for a Council directive on the agreement between the Community of European Railways (CER) and the European Transport Workers' Federation (ETF) on certain aspects of the working conditions for mobile workers assigned to interoperable cross-border services.

Proposal for a

COUNCIL DIRECTIVE

on the agreement between the Community of European Railways (CER) and the European Transport Workers' Federation (ETF) on certain aspects of the working conditions of mobile workers assigned to interoperable cross-border services

THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty establishing the European Community and, in particular, Article 139(2) thereof,

Having regard to the proposal from the Commission[11],

Whereas:

(1) This instrument complies with the fundamental rights and principles set out in the Charter of Fundamental Rights of the European Union and is designed to ensure full compliance with Article 31 of the Charter of Fundamental Rights of the European Union which provides that all workers have the right to healthy, safe and dignified working conditions, to a limit on their maximum working time and to weekly and daily rest periods and an annual period of paid holidays.

(2) The social partners may, in accordance with Article 139(2) of the Treaty, jointly request that agreements concluded at Community level be implemented by a Council decision on a proposal from the Commission.

(3) The Council adopted Directive 93/104/EC[12] on certain aspects of the organisation of working time. Rail transport was one of the sectors of activity excluded from the scope of that directive. The European Parliament and the Council adopted Directive 2000/34/EC amending Directive 93/104/EC in order to cover the sectors and activities which had previously been excluded.

(4) The Council adopted Directive 2003/88/EC[13] on certain aspects of the organisation of working time which consolidated and repealed Directive 93/104/EC.

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11 OJ C […] […], p. […]

12 Council Directive 93/104/EC of 23 November 1993 on certain aspects of the organisation of working time, OJ L 307 of 13.12.1993, page 18, amended by Directive 2000/34/EC of the European Parliament and the Council of 22 June 2000 amending Council Directive 93/104/EC on certain aspects of the organisation of working time to cover sectors and activities excluded from the said directive, OJ L 195 of 1.8.2000, page 41.

13 Directive 2003/88/EC of the European Parliament and of the Council of 4 November 2003 on certain aspects of the organisation of working time, OJ L 299 of 18.11.2003, page 9.

(5) Article 17(3)(e) of Directive 2003/88/EC provides for derogations from Articles 3, 4, 5, 8 and 16 for persons working in the rail transport sector on board trains.

(6) The Community of European Railways (CER) and the European Transport Workers' Federation (ETF) informed the Commission of their desire to enter into negotiations in accordance with Article 139(1) of the Treaty.

(7) Those organisations concluded an agreement on certain aspects of the working conditions of mobile workers assigned to interoperable cross-border services on 27 January 2004.

(8) The agreement included a joint request for the Commission to implement the agreement by a Council decision on a proposal from the Commission in accordance with Article 139(2) of the Treaty.

(9) Directive 2003/88/EC applies to mobile workers assigned to interoperable cross-border services, notwithstanding more specific provisions contained in the present directive and in the agreement.

(10) For the purposes of Article 249 of the Treaty, the appropriate instrument for implementing this agreement is a directive.

(11) In the light of completion of the internal market in the rail transport sector and the competition in the sector, the aims of this directive, which is intended to protect safety and health, cannot be achieved sufficiently by the Member States and Community action is therefore required, in accordance with the principle of subsidiarity enshrined in Article 5 of the Treaty; this directive does not exceed what is necessary to achieve these aims.

(12) The development of the European railways sector involves a close monitoring of the role of the current and new actors, in order to ensure harmonious development throughout the Community. The European social dialogue in this field should be able to reflect this development and to take it into account as far as possible.

(13) This directive leaves the Member States free to define those terms of the agreement that it does not specify in accordance with national legislation and practice, as is the case for other directives on social policy matters using similar terms, as long as the definitions used are compatible with the agreement.

(14) The Commission has prepared its proposal for a directive in accordance with its Communication of 20 May 1998 entitled "Adapting and promoting social dialogue at Community level" taking into account the representative status of the contracting parties and the legality of each clause of the agreement; the signatories are sufficiently representative of the mobile railway workers assigned to interoperable cross-border services run by the railway companies.

(15) The Commission has drawn up its proposal for a directive in accordance with Article 137(2) of the Treaty which provides that directives in the social domain must avoid "imposing administrative, financial and legal constraints in a way which would hold back the creation and development of small and medium-sized enterprises".

(16) This directive and the agreement lay down minimum standards; the Member States and/or the social partners should be able to maintain or introduce more favourable provisions.

(17) The Commission has informed the European Parliament, the European Economic and Social Committee and the Committee of the Regions by sending them the text of the proposal for a directive on the agreement.

(18) The European Parliament adopted a resolution on the agreement of the social partners on –.

(19) Implementing the agreement will contribute to achieving the aims set out in Article 136 of the Treaty.

HAS ADOPTED THIS DIRECTIVE:

Article 1

This directive is intended to implement the agreement concluded on 27 January 2004 between the Community of European Railways (CER) and the European Transport Workers' Federation (ETF) on certain aspects of the working conditions of mobile workers assigned to interoperable cross-border services.

The text of the agreement is annexed hereto.

Article 2

The Member States may maintain or introduce more favourable provisions than those laid down by this directive.

Article 3

Without prejudice to the provisions of the agreement in annex on the follow-up and evaluation by the signatories, the Commission shall, after consulting management and labour at European level, report to the Council and the European Parliament on the implementation of this directive in the context of the development of the railways sector, before the expiry of a period of three years from the date referred to in Article 5.

Article 4

The Member States shall determine what sanctions are applicable when the national provisions enacted pursuant to this directive are infringed and shall take all necessary measures to ensure that they are implemented. The sanctions must be effective, proportionate and dissuasive. The Member States shall notify these provisions to the Commission by the date mentioned in Article 5 at the latest and any subsequent amendments thereto in good time.

Article 5

The Member States shall, after consultation with the social partners, adopt the laws, regulations and administrative provisions necessary to comply with this directive by […] at the latest or shall ensure that the social partners have adopted the necessary provisions by means of an agreement by this date at the latest. They shall immediately forward to the Commission the text of the provisions and a table showing how they compare with this directive.

The Member States shall take all the necessary measures to enable them to be able to guarantee at any time the outcome required by this directive and shall inform the Commission thereof immediately.

When the Member States adopt these provisions they shall contain a reference to this directive or shall be accompanied by such a reference when they are published officially. The arrangements for making this reference shall be adopted by the Member States.

Article 6

This directive shall enter into force on the date of its publication in the *Official Journal of the European Union*.

Article 7

This directive is addressed to the Member States.

Done at Brussels,

For the Council
The President

Agreement concluded by the European Transport Workers' Federation (ETF) and the Community of European Railways (CER) on certain aspects of the working conditions of mobile workers assigned to interoperable cross-border services,

HAVING REGARD TO:

- the future of rail transport, which requires the modernisation of the system and the development of trans-European traffic and thus interoperable services;
- the need to develop safe cross-border traffic and protect the health and safety of the mobile workers assigned to interoperable cross-border services;
- the importance of avoiding competition based solely on differences in working conditions;
- the importance of improving rail transport within the European Union;
- the idea that these aims will be met by creating common rules on minimum standard working conditions for mobile workers assigned to interoperable cross-border services;
- the conviction that the number of such workers will increase over the coming years;
- the Treaty establishing the European Community, and in particular Articles 138 and 139 (2) thereof;
- Directive 93/104/EC (amended by Directive 2000/34/EC), and in particular Articles 14 and 17 thereof;
- the Convention on the law applicable to contractual obligations (Rome, 19 June 1980);
- the fact that Article 139(2) of the Treaty provides that agreements concluded at European level may be implemented at the joint request of the signatories by a Council decision on a proposal from the Commission;
- the fact that the signatories hereby make such a request,

THE SIGNATORIES HAVE AGREED AS FOLLOWS:

Clause 1

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.

Clause 2

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;

2. "mobile worker assigned to interoperable cross-border services”: any worker who is a member of a train crew 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 7 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 3 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.

Clause 3

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 9 hours once every 7-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.

Clause 4

Daily rest away from home

The minimum daily rest away from home shall be 8 consecutive hours per 24-hour period.

A daily rest away from home has to be followed by a daily rest at home[14].

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

Clause 5

Breaks

a) Drivers

If the working time of a driver is longer than 8 hours, a break of at least 45 minutes shall be taken during the working day.

or

When the working time is between 6 and 8 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.

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 6 hours.

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[14] 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.

Clause 6

Weekly rest period

Any mobile worker assigned to interoperable cross-border services is entitled, per each 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.

Clause 7

Driving time

The driving time, as defined in clause 2, shall not exceed 9 hours for a day shift and 8 hours for a night shift between two daily rest periods.

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

Clause 8

Checks

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.

Clause 9

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 assigned to interoperable cross-border services.

Clause 10

Follow-up of the agreement

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.

Clause 11

Evaluation

The parties shall evaluate the above provisions two years after the signing of the present agreement, in the light of their initial experience of developing interoperable cross-border services.

Clause 12

Review

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.

Brussels, 27 January 2004

On behalf of the CER	On behalf of the ETF
Giancarlo CIMOLI	Norbert HANSEN
President	Chairman of the Railway Section
Johannes LUDEWIG	Jean-Louis BRASSEUR
Executive Director	Vice-Chairman of the Railway Section
Francesco FORLENZA	Doro ZINKE
Chairman of the Group of Human Resources Directors	General Secretary
Jean-Paul PREUMONT	Sabine TRIER
Social Affairs Adviser	Political Secretary

Annex

LIST OF THE OFFICIAL BORDER STATIONS LOCATED BEYOND THE 15 KM LIMIT AND FOR WHICH THE AGREEMENT IS OPTIONAL

RZEPIN (PL)

TUPLICE (PL)

ZEBRZYDOWICE (PL)

DOMODOSSOLA(I)

FICHE D'ÉVALUATION D'IMPACT

IMPACT DE LA PROPOSITION SUR LES ENTREPRISES ET, EN PARTICULIER, SUR LES PETITES ET MOYENNES ENTREPRISES (PME)

TITRE DE LA PROPOSITION

Directive du Conseil concernant l'accord entre la Communauté européenne du rail (CER) et la Fédération européenne des travailleurs des transports (ETF) sur certains aspects des conditions d'utilisation des travailleurs mobiles effectuant des services d'interopérabilité transfrontalière.

NUMÉRO DE RÉFÉRENCE DU DOCUMENT

LA PROPOSITION

1. Compte tenu du principe de subsidiarité, pourquoi une législation communautaire est-elle nécessaire dans ce domaine et quels sont ses principaux objectifs?

La nécessité de l'action communautaire se justifie du fait que les partenaires sociaux, dans le cadre de la procédure prévue par l'article 139, paragraphe 1, du traité, sont convenus de la nécessité d'une action communautaire en la matière et qu'ils ont demandé la mise en œuvre de leur accord conclu au niveau communautaire par une décision du Conseil sur proposition de la Commission, en vertu de l'article 139, paragraphe 2, du traité. De plus, comme l'énonce le préambule de la Directive 2003/88/EC des normes spécifiques prévues par d'autres instruments communautaires en ce qui concerne par exemple, les périodes de repos, le temps de travail, le congé annuel et le travail de nuit de certaines catégories de travailleurs doivent prévaloir sur les dispositions de cette Directive. Enfin dans une affaire concernant la Directive 93/104/EC, codifiée par la Directive 2003/88/EC, la Cour de Justice a énoncé ce qui suit :"Dès lors que le Conseil a constaté la nécessité d'améliorer le niveau existant de la protection de la sécurité et de la santé des travailleurs et d'harmoniser, dans le progrès, les conditions existant dans ce domaine, la réalisation d'un tel objectif par voie de prescriptions minimales suppose nécessairement une action d'envergure communautaire qui, du reste, laisse, comme en l'occurrence, dans une large mesure aux États membres le soin de prendre les modalités d'application nécessaire[15]."

L'IMPACT SUR LES ENTREPRISES

2. Qui sera touché par la proposition?

La proposition touchera toutes les entreprises ferroviaires effectuant des services de transport transfrontaliers pour lesquels au moins deux certificats de sécurité sont requis conformément à la Directive 2001/14/EC du Parlement européen et du Conseil du 26

15 Affaire C-84/94, Royaume-Uni de Grande Bretagne et d'Irlande du Nord contre le Conseil de l'Union européenne, Recueil de jurisprudence 1996, page I-5755

février 2001. Tous les États membres, à l'exception de Chypre et de Malte, possèdent des entreprises de chemins de fer.

3. *Quelles mesures les entreprises devront-elles prendre pour se conformer à la proposition?*

Les entreprises devront adapter les horaires de travail de leur personnel mobile circulant en service transfrontalier afin que ceux-ci respectent les dispositions de l'accord.

4. *Quels effets économiques la proposition est-elle susceptible d'avoir?*

La proposition définit un cadre commun de normes minimales concernant certains aspects des conditions d'utilisation des travailleurs mobiles effectuant des services d'interopérabilité transfrontalière. Cependant, la législation des États membres et/ou des conventions collectives nationales prévoient souvent un niveau général de protection au moins équivalent pour le personnel mobile. Du point de vue des entreprises, la proposition met en place des conditions équitables pour les entreprises du transport ferroviaire sans contenir aucune disposition pouvant être jugée restrictive au plan de l'accès au marché de nouveaux exploitants. Elle devrait favoriser une amélioration de l'organisation du travail et donc se traduire par des gains de productivité. Enfin, cette proposition fruit d'une démarche négociée au niveau communautaire, devrait renforcer la cohésion du secteur notamment en termes de relations sociales.

5. *La proposition contient-elle des mesures visant à tenir compte de la situation spécifique des petites et moyennes entreprises (exigences réduites ou différentes, etc.)?*

L'accord et la proposition de Directive n'établissent aucune distinction entre les travailleurs des petites ou moyennes entreprises et les autres travailleurs. Cependant, les normes minimales en matière de santé et de sécurité des travailleurs ne devraient pas être subordonnés à la taille de l'entreprise.

Il est à noter que la clause 4 de l'accord prévoit que des adaptations concernant un second repos hors résidence ou la compensation des repos hors résidence, peuvent intervenir à l'issue de négociations ouvertes directement au niveau de l'entreprise ce qui permet un ajustement des règles applicables au plus près encore de l'entreprise directement concernée.

CONSULTATION

6. *Liste des organisations qui ont été consultées sur la proposition, et exposé des éléments essentiels de leur position*

Non applicable, vu qu'il s'agit d'un accord conclu à l'initiative des partenaires sociaux au niveau communautaire.