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REPORT FROM THE COMMISSION TO THE EUROPEAN PARLIAMENT AND THE COUNCIL

Implementation by Member States of Council Directive 2005/47/EC of 18 July 2005 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 engaged in interoperable cross-border services in the railway sector

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1. INTRODUCTION

1.1. The Directive

Council Directive 2005/47/EC of 18 July 2005 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 engaged in interoperable cross-border services in the railway sector (henceforth 'the Directive')[1] was adopted by the Council on the basis of Article 155 of the Treaty on the Functioning of the European Union (ex Article 139 of the EC Treaty), which provides that -

'Article 155 (ex Article 139 TEC)

1. Should management and labour so desire, the dialogue between them at Union level may lead to contractual relations, including agreements.

2. Agreements concluded at Union level shall be implemented either in accordance with the procedures and practices specific to management and labour and the Member States or, in matters covered by Article 153, at the joint request of the signatory parties, by a Council decision on a proposal from the Commission. The European Parliament shall be informed.

The Council shall act unanimously where the agreement in question contains one or more provisions relating to one of the areas for which unanimity is required pursuant to Article 153(2).'

Since the term 'decision' in Article 155 of the Treaty is used in its general sense so that the legislative instrument can be selected in accordance with Article 288 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 case the Commission concluded that the most suitable instrument would be a Council directive, given the type and content of the social partners' agreement and that it would be best to apply it indirectly through provisions to be transposed by the Member States or the social partners into the Member States' national law.
Indeed, the purpose of the Directive is 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 engaged in interoperable cross-border services.

1.2. Formal Transposition of the Directive

Member States had either to transpose the Directive, after consultation with the social partners, by 27 July 2008 or to ensure that the social partners adopted the necessary provisions by means of an agreement by that date (Article 5).
All the Member States have transposed the Directive, with the exception of those Member States with no railway sector (Malta and Cyprus) or no cross-border service with other EU Member States (Finland). In two cases, transposition occurred very late and only after the Commission had launched infringement proceedings (procedures C-291/10 and C-305/10).
All the Member States, except Lithuania, consulted the social partners in this process. Nevertheless, the social partners of Lithuania did have some influence on the implementation of the transposition, because a collective agreement was updated once the Directive had been implemented.

[1] *OJ L 195, 27.7.2005, p. 15.*

For the substance of the transposition and the conformity thereof with the Directive, a clause-by-clause description of the situation is contained in sections 2 and 3. The Commission intends to take appropriate measures regarding the issues and problems identified there.

1.3. Monitoring and assessing the Directive

In order to monitor the economic and social impact of the Agreement, and Clause 4 thereof in particular, the Commission undertook to submit a report to the Council, which it did on 15 December 2008 in the Communication from the Commission to the Council on the 'Economic and social impact of the Agreement appended to Directive 2005/47/EC concluded on 27 January 2004 between the social partners on certain aspects of the working conditions of mobile workers engaged in interoperable cross-border services in the railway sector'[2].

Article 3 of the Directive provides that the Commission shall, after consulting management and labour at European level, report to the European Parliament and the Council on the implementation of this Directive in the context of the development of the railways sector.

As a backup to this report, the Commission launched a study on the implementation of the Directive. The Social Partners were closely associated and were consulted on the findings of this study.

2. SCOPE AND OBJECT OF THE AGREEMENT ANNEXED TO THE DIRECTIVE

*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 no further 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 engaged in interoperable cross-border services, Directive 93/104/EC shall not apply to those aspects for which this Agreement contains more specific provisions.

In five Member States (Estonia, Latvia, Slovenia, Denmark and Greece) the legislation (apart from Clause 5) applies only to drivers. In the other Member States the legislation applies not only to drivers, but usually to the whole international train crew (not every Member State goes into greater detail).

None of the Member States has special clauses for employees who work both internationally and nationally.

Member States' use of the optional exclusions

[2] COM(2008) 855 final, 15.12.2008.

Fifteen Member States did not make use of the option to apply the Directive to local and regional cross-border passenger traffic and to freight traffic no further than 15 kilometres beyond the border. Ten Member States (Czech Republic, Estonia, Hungary, Italy, Slovakia, Austria, Luxembourg, Denmark, France and Spain) did take up this option in their legislation and used the wording of the Agreement (second paragraph of Clause 1). Two Member States (Lithuania and Greece) took up this option and used their own formula. In the latter case the Agreement applies to all cross-border transport, including short distances.

Fifteen Member States did not take up the option to apply the Directive to cross-border routes which stop and start in the same Member State. Eight Member States (Czech Republic, Estonia, Hungary, Slovakia, Austria, Denmark, Sweden and Spain) did take up this option and used the description in the EU Directive. Three Member States (Lithuania, Greece and Portugal) took up this option and used their own descriptions.

3. THE MAIN OPERATIVE PROVISIONS OF THE AGREEMENT ANNEXED TO THE DIRECTIVE

3.1. Clause 3 — Daily rest at home

Clause 3 requires that daily rest at home should normally be for a minimum of 12 consecutive hours per 24-hour period. The Agreement permits a reduction up to an absolute minimum of 9 hours, but this reduction may only occur once every seven-day period. Reduced daily rest may not be scheduled between two rests away from home and the hours by which the rest was reduced must be added to the next daily rest at home.

Transposition of the requirements on daily rest at home

Twenty-one Member States apply the provision of 12 consecutive hours per 24-hour period of daily rest at home. Belgium, Luxembourg and France do not use it; normally, they have 14 consecutive hours of daily rest at home. Poland also has a different clause, but the minimum rest at home is also 12 hours.

All Member States, except Latvia, Poland, Slovenia and Slovakia, include in their legislation the possibility of reducing the daily rest in every seven-day period. Latvia, Poland and Slovenia have not included this possibility in their legislation. Slovakia provides for the possibility of reducing daily rest at home on the basis of '*demonstrable objective-technical or organisational reasons*'. Thus, in such a situation, the rules of the Directive are not followed and resting time can be reduced more than once a week.

With the exception of Latvia and Poland, all the Member States have incorporated into their legislation the restriction on shortened daily rest. Latvia's rail staff do not travel beyond the border for more than 110 km, which means that they can return home the same day. Poland did not include this restriction, because it did not include the possibility of reducing the daily rest either.

In twelve Member States (the Czech Republic, Bulgaria, Estonia, Hungary, Lithuania, Romania, Austria, Germany, Netherlands, the United Kingdom, Sweden and Spain), the rules applied to cross-border workers with respect to daily rest at home are not the same as those applied to other staff in the railway sector. In most countries where there is a difference between national and international personnel, the rules for domestic employees are included in the general working-time laws. In some countries (Netherlands and the United Kingdom) there is no specific right to a rest at home, for example. Elsewhere, the rules for cross-border workers are no different from the rules applied to other staff in the railway sector.

3.2. Clause 4 — Daily rest away from home

Clause 4 requires that daily rest away from home must be for at least 8 consecutive hours per 24-hour period and that a rest away from home must be followed by a daily rest at home, unless the social partners of a railway undertaking or at national level have concluded an agreement on a second consecutive rest away from home (with compensation).

The text of this clause contains a footnote to the effect that the question will be renegotiated at European level two years after the Agreement has been signed. So far, however, these negotiations have not borne fruit.

Furthermore, the clause recommends that attention be paid to the level of comfort of the accommodation used by staff during these rests away from home.

Transposition of the requirements for daily rest away from home

Of the countries that have transposed the directive, all have adopted the rules on the daily rest away from home in their legislation, except for Latvia, Poland, Luxembourg and Slovenia. As Latvia does not have international routes longer than 110 km (one way), there would seem to be no need for rests away from home. Slovenia and Luxembourg impose the rule whereby the daily rest away from home should be followed by a rest at home, but have different rules about the duration of those rests. For Slovenia, the rest between two shifts must be twice as long as the shift. Thus, if a shift lasts six hours, the rest has to last twelve hours). Poland has no specific rules on the daily rest away from home. In Luxembourg, the following limits are applied to the maximum time away from home:

- *Twenty-eight hours if the rest lasts nine hours,*
- *Twenty-nine hours if the rest lasts ten hours,*
- *Thirty hours if the rest lasts not less than eleven.*

If for any reason, the limits of twenty-eight, twenty-nine or thirty hours cannot be applied, the employee will receive compensation equal to the excess time.

The possibility for social partners to agree on a second rest away from home has been negotiated in only eight Member States: Germany, Hungary, Romania, Slovenia, the Netherlands, France, Italy and Portugal. With the exception of Slovenia, this has taken place at the level of undertakings. In Germany, only one instance of an agreement has been reported in relation to one of the incumbent's subsidiaries. In Italy, France and the Netherlands there have been no agreements with incumbents. In Slovenia, an agreement was reached at national level. There seem to be agreements about compensation for rests away from home in only six countries (Hungary, Romania, Slovenia, Luxembourg, France and Italy).

The level of comfort offered to staff during rests away from home is included in the legislation of only nine Member States (Hungary, Lithuania, Romania, Slovenia, Belgium, Sweden, Italy and Spain). Denmark has collective agreements on this issue instead.

In some countries (the Czech Republic, Estonia, Hungary, Lithuania, Romania, Austria, Belgium, Germany, Netherlands, the United Kingdom and Sweden), the rules applied to daily rest away from home in the case of interoperable cross-border railway workers are different from the rules applied to railway workers in purely domestic settings.

One point for consideration is the definition of the term ‘home’. This was discussed by the signatories to the agreement, because the negotiations were based on the French text, which uses the term ‘résidence normale du personnel mobile’. In a joint letter of 10 June 2009, they clarified that *‘the French meaning of the expression ‘résidence normale du personnel mobile’ in the railway sector is not related to the private home/domicile of the worker concerned, but*

rather his/her workplace (home depot/Dienstort) at which he/she is based'. On this basis, in Germany the rules equate 'home' not with the private place of residence of the staff in question, but with the place where they are based in relation to their employer ('Dienstort').

3.3. Clause 5 — Breaks

The provisions on breaks distinguish between drivers and other on-board staff.

– Unless there is a second driver, drivers are entitled to a break of at least 45 minutes if the working time is longer than 8 hours and a minimum of 30 minutes for working days of between 6 and 8 hours. During the working day parts of this break should take place between the third and sixth working hour. If there is a second driver, this break must be regulated at national level instead.

– For other on-board staff, there must be a break of at least 30 minutes if the working day lasts longer than 6 hours.

Transposition of the requirements on breaks

The exemption for cases where there is a second driver has been used in 14 countries, but apparently not in the Czech Republic, Bulgaria, Denmark, Hungary, Slovakia, Austria, Belgium, Ireland, Luxembourg or Sweden.

It would seem that only the United Kingdom, Latvia, Poland and the Czech Republic have not used the wording of the clause in their transposition.

In Latvia, international interoperable trains have two drivers. Thus, the rules relating to breaks do not have to be applied. Here, the Czech Republic relies on its national working-time law. However, in the government regulation[3] transposing the Directive, a break for railway personnel working alone for more than six hours continuously is imposed, although the length of that break is not specified. Poland does not have this clause at all. The United Kingdom has a different rule for breaks in the case of international services: *'not less than 30 minutes if the working time of a sole driver is 6 or more hours, subject to train delays and timetable requirements, but adequate in time and duration to allow the 'effective recuperation of the worker', as set out in Regulation 4. For other drivers [domestic drivers] whose working time is more than 6 hours, the break period they are entitled to is 20 minutes or an equivalent period of compensatory rest or other form of health and safety protection where this is not possible'*. They do not have a rule imposing a break of at least 45 minutes if the working time is longer than 8 hours.

Denmark imposes this requirement through collective agreements.

In eight countries (the Czech Republic, Denmark, Hungary, Poland, Austria, Netherlands, Greece and Portugal) breaks cannot be adapted in the event of delays. Latvia works with two drivers, so that this rule does not apply anyway. In France the question is handled differently depending on the system in force: in the case of an incumbent company, breaks cannot be changed as a result of delays, whereas the law governing other railway operators permits this adaptation.

Sixteen Member States have literally copied the provisions relating to the timing of breaks.

[3] No 589/2006 Coll.

Three Member States (the Czech Republic, Luxembourg and the United Kingdom) use a different text, but impose a similar rule. For example, in the United Kingdom: *'At least 15 minutes of the break must be scheduled to be between the third and sixth hour of the working time'*. In Bulgaria, Poland and Austria, neither this nor any similar rule is applicable. In France, this rule only applies to rail freight operators other than the incumbent company. As Latvia works with two drivers, this rule does not apply anyway.

The rule regarding other on-board staff is implemented in almost all Member States.

3.4. Clause 6 — Weekly rest period

Mobile workers (i.e. drivers and others) engaged in cross-border services are entitled to a minimum uninterrupted weekly rest period of 24 hours over and above the daily rest periods per seven-day period. In addition to these 52 24-hour rest periods, there must be another 52 such periods, making a total of 104 24-hour rest periods. These periods must be arranged in such a way that on at least 12 occasions two such 24-hour periods are taken together, that the pair/double-rest period falls on a weekend and that on 12 other occasions two such periods are again paired, although these pairs/double-rest periods do not have to fall on a Saturday or Sunday.

Transposition of the requirements regarding the weekly rest period

Almost all the Member States have incorporated these rules into their national legislation. In Poland, a mobile worker has a rest period of 35 hours (one hour less than the Directive). Luxembourg has a different rule regarding weekly rest periods and makes a distinction between long distances and short distances. The short distances are distances of less than 15 km (where pursuant to Clause 1 the Agreement/Directive is optional). In the case of long distances, the rules are compatible with the directive.

3.5. Clause 7 — Driving Time

Driving time, the period when the driver is in charge although not necessarily moving the train, may not exceed 9 hours for a day shift and 8 hours for a night shift. Over a 2-week period, driving time may not exceed 80 hours.

Transposition of the requirements on driving time

Since one of the major risks is fatigue, working hours are an important aspect of working conditions. In the case of cross-border services, the problem may be heightened when colleagues from the same company are absent, particularly on freight trains where there is only one driver and no other staff. Lack of familiarity and a foreign-language environment may lead to a real or perceived absence of support. This particular context may warrant specific risk assessments and good practice guidance for cross-border services in the framework of Directive 89/391/EEC[4] on the introduction of measures to encourage improvements in the safety and health of workers at work.

Among the countries that have transposed the directive, only two Member States did not use the wording of this clause. Poland does not have any rules on maximum daily or weekly driving time, but does have a rule in its labour code on a maximum working week of 40

[4] Council Directive 89/391/EEC of 12 June 1989 on the introduction of measures to encourage improvements in the safety and health of workers at work (*OJ L 183, 29.6.1989, p. 1).*

hours. This means that driving time will stay below this limit. In Latvia, drivers are involved in both national and international services, and do not have pure cross-border work. For interoperable services, therefore, drivers will not drive for more than 80 hours in two weeks

Seven Member States (Estonia, Slovenia, Austria, Ireland, Denmark, Greece and Italy) copied the directive's definition of night time. Eighteen Member States use a different definition. A large number of countries have adopted a broader interpretation of night time which is in favour of employees. Slovakia, Romania, Hungary, Bulgaria, Latvia and Spain define night time as being between 22h00 and 06h00. For Sweden and Germany it is between 23h00 and 06h00 and for the Netherlands between 00h00 and 07h00. In France, there are differences between the incumbent company (night time between 23h00 and 06h00) and other rail freight operators (night time between 22h00 and 05h00). Luxembourg uses a definition that is less favourable for employees: night time (for drivers) is defined as between 01h00 and 04h00.

Twelve Member States use their own definition of 'night shift': the Czech Republic, Bulgaria, Hungary, Latvia, Poland, Slovakia, Germany, Luxembourg, Netherlands, the United Kingdom including Northern Ireland, France and Spain. In Slovakia, a night shift is any shift of which the greater part falls between 22h00 and 06h00; in Latvia and Germany, a night shift is a shift which includes at least two hours of night time (see above), and in the Netherlands and Bulgaria, at least three hours of night time. In France, under the law for freight operators '*any work between 22 pm and 5 am is considered night work*'; and the same applies in Hungary. This definition is more in favour of employees. There are some countries, such as the United Kingdom, where the night shift is not explicitly mentioned. In Luxembourg, the definition appears to be less favourable for employees: it is any shift which starts between 01h00 and 04h00 (for drivers). This means that traditional night shifts from 23h00 to 7h00 are *not* defined as night shifts. On the other hand, early morning shifts that start before 04h00 *are* included.

3.6. Clause 8 — Checks

It is necessary to establish a system that keeps records of daily working hours and rest periods for at least 1 year.

Transposition of the requirements on checks

All Member States that have transposed the directive appear to impose this obligation of keeping a record (for at least one year) of daily working time and rest periods for mobile workers. Comments have been received noting problems with the practical implementation of this obligation. It appears that it can be difficult for authorities to have rapid access to records kept in other countries and to obtain a full overview where drivers are working for several operators.

Penalties have been determined by most Member States, but not by Hungary, Poland or France (in the case of the incumbent company). French law relating to other (private) companies in the area of rail freight does impose penalties.

4. ASSESSMENT OF THE PRACTICAL EFFECT OF THE PROVISIONS OF THE DIRECTIVE

4.1. Towards the Single European Railway Area — the importance of interoperable cross-border services

In its White Paper 'Roadmap to a Single European Transport Area — Towards a competitive and resource efficient transport system'[5], the Commission sets out ten goals for a competitive and resource-efficient transport system. One of these goals is that '30 % of road freight over 300 km should shift to other modes such as rail or waterborne transport by 2030, and more than 50 % by 2050'

However, according to the White Paper, the true internal market for rail services, i.e. a Single European *Railway* Area, has not yet been achieved. The objective for the next decade is to create a genuine Single European Transport Area by eliminating all remaining barriers between modes and national systems, easing the process of integration and facilitating the emergence of multinational and multimodal operators. A fourth Railway Package is being considered for this purpose. Railway systems are so divergent that the existence of barriers to such services, other than different requirements on working conditions, has a significant impact on the prevalence of interoperable cross-border services. A railway undertaking wanting to run a transport service that crosses one or more borders comes up against a range of technical, legal and administrative barriers.

Rail freight transport in the EU has been completely liberalised since the start of 2007, for both national and international services. This means that any licensed EU railway company with the necessary safety certification can apply for capacity and offer national and international freight services by rail throughout the EU. This has been accompanied in 2010 by the approval of regulation 913/2010 concerning a European rail network for competitive freight. This regulation lays down rules for the establishment and organisation of international rail freight corridors and sets out an initial list of long-distance freight corridors. The market for international rail passenger services in the EU has been liberalised since 1 January 2010. The market for purely national rail passenger services has not yet been opened up to cross-border competition. Freight services have to share the TEN-T with high speed passenger services as well as with conventional passenger trains. The deployment of ERTMS facilitates the integration of services which are very different in terms of commercial speeds, journey distances and time requirements.

In legal terms, for a railway undertaking to be able to enter the international market and actually cross the border with a locomotive or drivers, the following is needed:

Rolling-stock approval, in particular of locomotives, which is carried out at Member State level;
(Separate) safety certificates per Member State covered by the services; and
Driving licences for train drivers.

Since 27 October 2011 it is compulsory for train drivers to have an international driving licence and certificate (Directive 2007/59).

Moreover, in order to be in a position to provide cross-border services, many technical conditions relating to the operation of international services still need to be met, in both passenger and freight transport (track gauges, electrification, signalling and safety systems). Out of a total of 37 borders between Member States, there are 35 country pairs where railways

[5] COM/2011/0144 final.

meet at the border. However, taking all the technical issues into account, in 2011 there were 19 country pairs where passenger trains crossed the border and 17 country pairs where freight trains crossed the border. EU legislation based on the interoperability and safety directives addresses these technical issues.

While it only takes a few minutes to change drivers, it takes longer to change a train's locomotive. Railway undertakings (especially the private ones) will normally undertake a cost/benefit analysis before establishing a service with cross-border drivers. A cost/benefit analysis will take into account the volume and frequency of trains crossing the border and the length of the routes, the costs and availability of interoperable locomotives (the advantages of using an old locomotive instead of a new one may also be a factor) and labour costs (additional training for licences, salaries and costs of sleeping abroad). However, the decision is not always based on a cost/benefit analysis. Among the more traditional incumbents in passenger transport, agreements may still be valid for train services between two countries that require a change of locomotive and driver at the border.

4.2. Implications of interoperable cross-border railway services for staff mobility

The functioning of interoperable cross-border services in the railway sector is critically conditioned by work organisation arrangements. Not all imply staff crossing the border with the train. There are, in fact, five options:

Company employs staff in different countries: When an operator has staff based on both sides of the border, the personnel is changed at the border and only the train crosses it.

Company hires staff from other companies or from a temporary work agency: Here, too, it is the train, but not its crew, which crosses the border.

Partnership with another company — staff do not cross the border: This third option involves a partnership with another company to share a specific international route, where each company is responsible for employing personnel in their country, although they work with interoperable locomotives.

Partnership with another company — staff cross the border: Another model involves a partnership between operators of bordering Member States, where both operators exploit the whole route without changing personnel at the border.

Own staff cross the border: In the last option the operator has its own staff crossing the border on an interoperable service for more than 15 kilometres beyond the border. There are two possibilities: staff drive across the border only for as long as it remains possible to return home on the same day, or staff continue further across the border and rest away from home.

In the first three options, the company's own staff do not cross the border and the Directive is not applicable. The company is therefore only bound by domestic rules. As a result, the Directive's restrictions on the number of rests away from home do not apply, although the distances and journeys within some Member States can be long. It then depends on the national rules and collective agreements whether constraints are lower than under the Directive. Another issue that arises in the case of personnel working internationally is the salary supplement/compensation which is standard for international work in many Member States. Moreover, companies do not have to have two safety certificates for their drivers and drivers do not need to speak additional languages.

It is worth underlining the differences between cross-border services and cabotage. For the purposes of this document, cross-border services refer to train services which start in one country and either end in another country or serve stations in another country, before returning home as part of that single service. In the case of cabotage services, a foreign operator runs a service that starts and ends in the same country. In the latter case, the Directive does not apply. Although there is also a cross-border element here, namely the fact that the operator managing the service is located in a different country from the one in which the service occurs, it is not a cross-border service for the purposes of this Directive, because the train itself does not cross the border.

It is only under the last two options that staff members cross borders and it is only then that the rules of the Directive apply. Hence, there are many possibilities for operators to run cross-border services without staff crossing the border with the train, and hence many instances where the Directive does not apply to a cross-border service.

Furthermore, for the Directive to apply to a service, there must be staff capable of manning such a service who can actually work across borders. The total number of locomotive drivers in the EU authorised to operate in at least two countries has been estimated[6] at between 5 000 and 7 000, representing less than 10 % of the total number of train drivers in the European Union, which is approximately 93 000. It is more difficult to estimate how many other cross-border workers there are. The number of conductors[7] is estimated at 6 000, based on the assumption that for every driver in passenger transport there are, on average, two active conductors. However, most of these conductors will only work cross-border for part of their shifts. Apart from the conductors, some passenger trains have other staff on board who serve passengers. Thee are bar staff, on-board catering staff in the restaurant car or night train staff making beds and serving breakfast. There are no estimates relating to the number of such staff.

Forecasts suggest a steady increase in cross-border services, as a result of reductions in technical barriers and an increase in interoperable rolling-stock. This is taking place not just with a view to cross-border services but also as part of the normal process of renewal and replacement of old equipment. However, a key factor for the future level of cross-border railway services will be the extent to which this mode of transport will be able to gain a share of the market from other modes, such as air travel or road transport.

Furthermore, one effect of EU rail policy may be that the European rail market will become increasingly integrated through mergers and acquisitions. This would result in more European-scale operators, competing with each other at a European level.

[6] See the abovementioned study commissioned in support of this report.

[7] The train crew that verifies (and in some cases sells) tickets on board passenger trains.

4.3. The social impact of the Directive

In all, 14 Member States (Bulgaria, Hungary, Romania, Austria, Belgium, Germany, Ireland, the Netherlands, the United Kingdom including Northern Ireland, Sweden, Greece, Italy, Portugal and Spain) have increased the level of protection of workers in the course of the Directive's transposition. The social impact has been higher in situations where the national regulations for cross-border transport which existed before the implementation of the Directive offered less protection for employees. Some companies, for example, have had to decrease driving time from 10/11 hours to 9 hours during the day and 8 during the night, which should reduce health and safety risks. The fact that the Directive limits driving time might prevent pressure by employers pushing for longer working hours in the future and thereby protect employees (and companies) from the risks that come with long working hours and fatigue. There appears to have been no instance of regression.

Most Member States have the same legislation for national and international railway personnel. Some have a different legislation for national railway personnel. For example, there are differences concerning: daily rests at home (the Netherlands and the United Kingdom do not provide for it in the case of domestic services); driving time; breaks (the United Kingdom imposes a shorter period for domestic services); and rest away from home (the Czech Republic, Lithuania, the Netherlands and the United Kingdom do not require it in the case of domestic services).

The most critical issue for the implementation of the Directive has been the number of daily rests away from home. The Agreement provides in Clause 4 that any rest away from home must be followed by a daily rest at home (see 3.2 above). However, social partners at national or enterprise level may agree upon a second rest away from home. This second rest away from home has been negotiated in only eight Member States: Germany, Hungary, Romania, Slovenia, the Netherlands, France, Italy and Portugal. However, as mentioned above in section 3.2, it often only covers some operators in those countries. This issue has proved divisive among social partners in the railway sector and no agreement has been possible at EU level.

The restriction on the number of daily rests away from home is felt in particular by smaller operators wishing to exploit long routes. Larger operators appear to have more staff resources. They often have staff on either side of the border or ‘traditional cooperation agreements’ with other operators in other countries. These alternatives reduce the impact of this constraint. For most employers, any increase in the number of permitted consecutive rests away from home would boost managerial freedom and flexibility. For others, based in countries with lower salaries, it would also make it easier to extend their geographical reach and compete in more regions.

For most employee representatives, the period spent away from home is regarded as having a particularly negative impact on work-life balance. However, in those countries where domestic routes are long and it is common to spend several days away from home for domestic rail services, the impact of any change with respect to this issue would be comparatively lower. In addition, according to some trade union representatives, opportunities to earn higher pay while manning services abroad could increase the attractiveness of working abroad for a longer continuous period of time.

This issue may become more important in the case of Rail Freight Corridors (see Regulation 913/2010 concerning the establishment of a European rail network for competitive freight), which tend to be long cross-border routes.

4.4. The economic impact of the Directive

As mentioned in point 4.2, sending staff across borders is only one way of operating internationally. Hence, the Directive is not applicable to all international rail transport companies or routes. In addition, the number of workers involved is small compared to the rail sector's total workforce. Furthermore, any economic impact of such rules is limited, because, on average, human resources account for an estimated 8.5% of the total operating costs of a cross-border rail freight business. Any increase in staff costs resulting from the Agreement would therefore have a negligible influence compared with other operating costs, such as energy or infrastructure.

Combined with the pre-existing level of protection, this appears to result in a limited economic impact. Relatively speaking, the cost impact of the Directive has been somewhat higher in situations where pre-existing national regulations for cross-border transport were less protective for employees and the entry into force of the Directive meant that an adjustment was needed.

As regards the impact on the further economic development of railway transport, the regulatory changes resulting from the Directive play a much smaller role than factors such as technical developments in the rail sector, the process of liberalising the rail market or the free movement of workers within the EU. There are much more important factors for the organisation of the rail sector and the allocation of personnel on cross-border services than the Directive. However, where technical barriers are removed and markets liberalised, operators, in particular smaller freight railway operators, may feel constrained by the restrictions set out in Clause 4 with respect to rest away from home. This could be an indication that the full impact of the Directive will only manifest itself when technical barriers have been further reduced and more international services actually emerge.

Although the economic impact may therefore be considered to be limited, the Directive has created a minimum standard, established by an agreement of the social partners. The Directive ensures a level playing field, which is an important goal in itself. Finally, by supporting job quality for mobile workers, the Directive also helps improve the quality of service.

4.5. Conclusions regarding the impact of the Directive

Generally speaking, the social and economic impact appears to be limited. The most important clause in this regard is clause 4 on rest away from home. However, even here the impact on employers is mitigated by the availability of alternative ways of organising international rail transport which do not require staff to cross a border on board the train they are manning. Most employee representatives are not in favour of increasing the number of rests away from home, as it is considered to have a negative effect on the balance between work and family life. However, in a few cases (Hungary, Romania, Slovenia, the Netherlands, France, Italy and Portugal) there has been a collective agreement on a second consecutive rest away from home.

5. ASSESSMENT OF POTENTIAL ADMINISTRATIVE BURDENS

In view of the nature of the regulations already in force when the Directive was adopted, the Directive has not really increased existing levels of administrative burdens.

Most of the provisions limit the availability of staff, thus constraining managerial freedom and flexibility. They are not administrative burdens, since they do not require administrative formalities. Only those provisions regarding records could be considered to imply administrative burdens, to the extent that employers are obliged to take additional measures involving formalities that would not be necessary if there were no such requirements.

The benefits to society as a whole resulting from these obligations outweigh the disadvantages, considering the catastrophic consequences that railway accidents caused by fatigue can bring about.

6. ISSUES RAISED BY MEMBER STATES AND SOCIAL PARTNERS DURING THE CONSULTATIONS RELATING TO THIS REPORT

Member States have not reported problems, nor raised issues nor made particular requests.

The social partners were formally consulted on the draft report. Two of them provided feedback in July 2012. As far as they are concerned, the only controversial issue involving comments is Clause 4 on daily rest away from home.

CER, the *Community of European Railway and Infrastructure Companies,* notes the legal certainty that the Directive has brought about. It points out that most employers want to increase the number of rests away from home and highlights the obvious limitations that this clause imposes on the flexibility of operators, in particular smaller ones. It seeks to re-open negotiations on Clause 4, although it acknowledges that the official position of the European-level social partners on the employees' side is to oppose such a change, even if some national employee representatives seem to have fewer problems with an increase in the consecutive number of daily rests away from home. The CER also notes the need for a level-playing field for competing modes of transport and that no other mode of transport has such binding social regulation.

The ETF, the *European Transport Workers' Federation,* welcomes the fact that implementation of the agreement has increased the level of protection of workers in a significant number of Member States. It notes that, currently, it is only in cabotage operations (with triangular or polygonal routes) that a continuous stay abroad for more than 48 hours might be necessary. The ETF does not see Clause 4 as a barrier to cross-border services and therefore sees no need to change it. The ETF is concerned that 5 Member States implemented the rules for drivers only and not for other on-board staff. It also believes that action is needed on the issue of checks to clarify the tasks and responsibilities of authorities and to improve cross-border administrative cooperation. The use of tachographs is suggested.

7. CONCLUSIONS

The main impact of Directive 2005/47/EC lies in its role as a safety net. It prevents a race-to-the-bottom on working conditions, particularly working time, by imposing a harmonised floor below which no operator may go. It ensures a level playing field and prevents unfair competition.

There is no evidence to show that interoperable cross-border services in the railway sector are significantly hampered by the rules established by the Directive. This may partly be explained by the limited incidence of situations where such rules (staff crossing a border with the train) actually apply at the moment. The expected increase in such services, in particular by smaller operators, may give these rules more prominence in the future.

The Commission intends to take appropriate measures regarding the issues and problems identified in relation to the implementation of the Directive as well as the suggestions made to improve the application of the Directive in practice.

On the specific issue of Clause 4 on daily rest away from home, the Commission is of the view that the existing margins for flexibility have not been fully exploited by both sides of industry, as there have been fewer collective agreements than expected. The Directive allows for such agreements to specify more flexible conditions with regard to the number of rests away from home, which may contribute to enhance the interoperability of cross-border services in the railway sector and create market opportunities in particular for SMEs. The Commission therefore urges the social partners at national and EU level to make full use of this possibility where required and to resume the negotiation process at EU level which is laid down in the footnote in Clause 4 of the Agreement. In this respect, the Commission invites the social partners to take into account in their negotiations the different conditions under which the passenger and freight railways operate, notably in terms of commercial speeds, journey distances and time requirements. The Commission will closely follow the evolution of such negotiations and reassess the situation in two years' time.