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From : Working Party on Transport Questions

No. Cion prop.: 11375/98 TRANS 132 + COR 1 et 2

Subject: - **LAND TRANSPORT : Railways**
= Draft European Parliament and Council Directive relating to the allocation of railway infrastructure capacity and the levying of charges for the use of railway infrastructure and safety certification

Following the discussion of the Working Party on Transport Questions, delegations will find enclosed a modified draft text of this proposal.

Delegations' comments are indicated in the footnotes.

Draft
EUROPEAN PARLIAMENT AND COUNCIL DIRECTIVE
Proposal for a Directive relating to the allocation of railway infrastructure capacity and the
levying of charges for the use of railway infrastructure
and safety certification ¹

CHAPTER I - Introductory provisions

Article 1

Scope

1. This Directive concerns the principles and procedures to be applied with regard to the setting and charging of railway infrastructure charges and the allocation of railway infrastructure capacity. Member States shall ensure that charging and capacity-allocation schemes for railway infrastructure follow the principles set down in this Directive and allow the infrastructure manager to market and make optimum effective use of the available infrastructure capacity.
2. This Directive applies to use of railway infrastructure for domestic and international rail services. ²

¹ L stated that at the Council on 6 October 1999, it was very important for it to listen the Commission confirming that point e) of Council conclusions implies the possibility for Luxembourg to ensure non-discrimination by means other than the creation of independent bodies (see footnote at Article 6(3) of draft Directive amending Directive 91/440/EEC, doc. 13411/99 TRANS 225).

² B and F stated that the scope of this Directive should be limited to the services mentioned in Article 10 of draft Directive amending Directive 91/440/EEC.

3. Member States may exclude from the scope of this Directive:
 - a) stand-alone local and regional networks for passenger services on railway infrastructure;
 - b) networks intended only for the operation of urban or suburban passenger services;
 - c) regional networks which are used for regional freight services solely by a railway undertaking that is not covered by the scope of Directive 91/440, as amended, until capacity on that network is requested by another applicant;
 - d) privately owned railway infrastructure that exists solely for use by the infrastructure owner for its own freight operations.

4. Railway undertakings and international groupings the business of which is limited to providing shuttle services for road vehicles through the Channel Tunnel are excluded from the scope of this Directive.

Article 2

Definitions

For the purpose of this Directive:

- (a) **"allocation"** means the allocation of railway infrastructure capacity by an infrastructure manager ;
- (b) **"applicant"** means a licensed railway undertaking and/or an international grouping of railway undertakings. In addition to these, Member States may regard as applicants also other persons and/or legal entities with public service or commercial interest in procuring infrastructure capacity, such as public authorities under Regulation (EEC) 1191/69 (as amended) and shippers, freight forwarders and combined transport operators, for the operation of railway service on their respective territories;¹
- (c) **"congested infrastructure"** means a section of infrastructure for which demand for infrastructure capacity cannot be fully satisfied during certain periods even after coordination of the different request for capacity;
- (d) **"capacity enhancement plan"** means a measure or series of measures with a timetable for their implementation which are proposed to alleviate the capacity constraints leading to the declaration of a section of infrastructure as "congested infrastructure";

¹ NL, S and UK wanted to keep the notion of "authorised applicants" as originally proposed by the Commission.
B, DK and F on the other hand stated that entities which were not railway undertakings should not be allowed to reserve the use of capacity on railway infrastructure.

- (e) **"coordination"** means the process through which the allocation body and applicants will attempt to resolve situations in which there are conflicting applications for infrastructure capacity;
- (f) **"framework agreement"** means a legally binding general agreement on the basis of public or private law, setting out the rights and obligations of an applicant and the infrastructure manager or the allocation body in relation to the capacity to be allocated and the charges to be levied over a period longer than one timetable period;
- (g) **"infrastructure capacity"** means the potential to schedule train paths requested for an element of infrastructure for a certain period;
- (h) **"infrastructure manager"** means any body or undertaking that is responsible in particular for establishing and maintaining railway infrastructure. This may also include the management of infrastructure control and safety systems. Member States may allocate the functions of the infrastructure manager on a network or part of a network to different bodies or undertakings;
- (i) **"network"** means the entire railway infrastructure owned and/or managed by an infrastructure manager;
- (j) **"network statement"** means the statement which sets out in detail the general rules, deadlines, procedures and criteria concerning the charging and capacity-allocation schemes. It shall also contain such other information as is required to enable application for capacity;

- (k) **"railway undertaking"** means any public or private undertaking, licensed according to applicable Community legislation, the principal business of which is to provide services for the transport of goods and/or passengers by rail with a requirement that the undertaking must ensure traction; this includes also undertakings which provide traction only.¹
- (l) **"train path"** means the infrastructure capacity needed to run a train between two places over a given time-period;
- (m) **"working timetable"** means the data defining all planned train and rolling-stock movements which will take place on the relevant infrastructure during the period for which it is in force.

¹ B and F entered reservations and asked to delete the words: "this includes also undertakings which provide traction only".

Article 3

Network statement

1. The infrastructure manager shall, after consultation with the interested parties, develop and publish a network statement against payment of a duty which may not exceed the cost of publishing that statement.
2. The network statement shall set out the nature of the infrastructure which is available to railway undertakings. It shall contain information setting out the conditions for access to the relevant railway infrastructure. The content of the network statement is laid down in Annex I.
3. The network statement shall be kept up to date, and modified as necessary.
4. The network statement shall be published no less than four months in advance of the deadline for requests for infrastructure capacity.

CHAPTER II – Infrastructure charges

Article 4

Establishing, determining and collecting charges

1. Member States shall establish a charging framework while respecting the managerial independence laid down in Article 4 of Directive 91/440/EEC.

Under the same condition, Member States shall also establish specific charging rules or delegate such powers to the infrastructure manager. The determination of the charge for the use of infrastructure and the collection of this charge shall be performed by the infrastructure manager.

2. Where the infrastructure manager, in its legal form, organisation and decision-making functions, is not independent of any railway undertaking, the functions referred to in paragraph 1 and described in this Chapter shall be performed by a charging body that is independent in its legal form, organisation and decision-making from any railway undertaking.¹

¹ B, L and A entered reservations on the compulsory separation of bodies. L pointed out that the measures proposed by the Commission would result in substantial administrative costs for its country without any advantages, given the small size of its network and wanted to add the following paragraph :
"Where an integrated railway is maintained the Member State must ensure that the functions, such as for example capacity allocation and charging for infrastructure, that govern the utilisation of access rights to infrastructure are separated from the rest of the operations and provide an arbitration procedure (e.g. arbitration procedure foreseen in Article 24, paragraph 6 of the new 95/19) to grant a non discriminatory allocation process."

3. Infrastructure managers shall cooperate to achieve the efficient operation of train services which cross more than one infrastructure network. They shall in particular aim to guarantee the optimum competitiveness of international rail freight and ensure the efficient utilisation of the Trans-European Rail Freight Network. They may establish such joint organisations as are appropriate to enable this to take place. Any cooperation or joint organisation shall be bound by the rules set out in this Directive.¹
4. Except where specific arrangements are made under Article 9(2), infrastructure managers shall ensure that the charging system in use is based on the same principles over the whole of their network.
5. Infrastructure managers shall ensure that the application of the charging system results in equivalent and non-discriminatory charges for different railway undertakings that perform services of equivalent nature in a similar part of the market and that the charges actually applied comply with the rules laid down in the network statement.²
6. An infrastructure manager or charging body shall respect the commercial confidentiality of information provided to it by applicants.

¹ F wanted to replace the second sentence of Article 4(3) with :
"Infrastructure managers shall reach the necessary agreements with a view to harmonising the average levels of charges invoiced pursuant to Articles 8 to 13 of this Directive. The average levels of charges resulting from these agreements must be economically sustainable for railway freight and allow equitable remuneration of each of the infrastructure managers".

² UK entered a scrutiny reservation.

Article 5

Services

1. Railway undertakings shall on a non-discriminatory basis be entitled to the minimum access package and track access to service facilities that are described in Annex II. The supply of the services of Annex II, paragraph 2 shall be provided in a non-discriminatory manner and request by railway undertakings may only be rejected if viable alternatives under market conditions exist. If the services are not offered by one infrastructure manager, the provider of the "main infrastructure" shall use all reasonable endeavours to facilitate the provision of these services.
2. Where the infrastructure manager offers any of the range of services described in Annex II, paragraph 3 as additional services he shall supply them upon request to a railway undertaking.
3. Railway undertakings may request a further range of ancillary services, listed in Annex II, paragraph 4 from the infrastructure manager or from other suppliers. The infrastructure manager is not obliged to supply these services.

Article 6

Infrastructure cost and accounts

1. Member States shall lay down conditions, including where appropriate advance payments, to ensure that, under normal business conditions and over a reasonable time period, the accounts of an infrastructure manager shall at least balance income from infrastructure charges, surpluses from other commercial activities and State funding on the one hand, and infrastructure expenditure on the other.

Within the charging framework of Articles 8 and 9, a Member State may require the infrastructure manager to balance his accounts without State funding.

2. Infrastructure managers shall, due regard being had to safety and to maintaining and improving the quality of the infrastructure service, be provided with incentives to reduce the costs of provision of infrastructure and the level of access charges.
3. Member States shall ensure that the provision set out in paragraph 2 is implemented, either through a contractual agreement between the competent authority and infrastructure manager covering a period of not less than three years which provides for State funding or through the establishment of appropriate regulatory measures with adequate powers.
4. Where a contractual agreement exists, the terms of the contract and the structure of the payments agreed to provide funding to the infrastructure manager shall be agreed in advance to cover the whole of the contract period.
5. A method for apportioning costs shall be established. Member States may require prior approval. This method should be updated from time to time to the best international practice.

[Article 7]

(Article deleted)

Article 8

Principles of charging

1. Charges for the use of railway infrastructure shall be paid to the infrastructure manager and used to fund his business.
2. Member States may require the infrastructure manager to provide all necessary information on the charges imposed. The infrastructure manager must, in this regard, be able to justify that infrastructure charges actually invoiced to each operator, pursuant to Articles 4 to 13 of this Directive, comply with the methodology, rules and scales laid down in the network statement.¹
3. Without prejudice to paragraph 4 or 5 or to Article 9, the charges for the minimum access package and track access to service facilities shall be set at the cost that is directly incurred as a result of operating the train service. The supply of services referred to in Annex II, paragraph 2 shall not be covered by this Article.

¹ UK entered a scrutiny reservation on this sentence.

4. The infrastructure charge may be modified by a charge which reflects the scarcity of capacity of the identifiable segment of the infrastructure during periods of congestion.
5. The infrastructure charge may be modified by a charge to take account of the cost of the environmental effects caused by the operation of the train. Such a charge shall be differentiated according to the magnitude of the effect caused. In the absence of any comparable level of charging of environmental costs in other competing modes of transport, no such charges shall result in any overall change in revenue to the infrastructure manager. If a comparable level of charging of environmental costs has been introduced for rail and competing modes of transport and that generates additional revenue, it shall be for Member States to decide how the revenue shall be used.
6. To avoid undesirable disproportionate fluctuations, the charges referred to in paragraphs 3, 4 and 5 may be averaged over a reasonable spread of train services and times. Nevertheless, the relative magnitudes of the infrastructure charges shall be related to the costs attributable to the services.
7. Where services listed in Annex II, paragraphs 3 and 4 as additional and ancillary services are offered only by one supplier the charge imposed for such a service shall relate to the cost of providing it, calculated on the basis of the actual level of use.
8. Charges may be levied for capacity used for the purpose of infrastructure maintenance. Such charges shall not exceed the net revenue loss to the infrastructure manager caused by the maintenance.

Article 9

Exceptions to charging principles¹

1. Where a Member State wishes to allow higher revenue than that produced by the charges permitted by Article 8, the infrastructure manager may, if the market can bear this, levy mark-ups on the basis of efficient, transparent and non-discriminatory principles, while guaranteeing optimum competitiveness in particular of international rail freight. The charging system shall not fully offset productivity increases achieved by railway undertakings.²

Without prejudice to the principles mentioned above the following options for levying mark-ups can only be used : mark-ups for individual market segments, individually negotiated contracts, and a system of fixed and variable charges. However, in market segments which can pay overall at least the cost that is directly incurred as a result of operating the train service, that market segment shall not be prevented from utilising infrastructure capacity.³

¹ F and L pointed out that exceptions to the principle of marginal cost should be as few as possible.

² D entered a reservation and wanted to replace the second sentence by the following : *"However, the charging system shall also take account of the legitimate need of an infrastructure manager to fully recover his costs"*.

³ D entered a reservation, wanted to delete the second sentence of this subparagraph and recalled that point b) of Council conclusions on 6 October 1999 established the possibility of mark-ups on the basis of efficient, transparent and non-discriminatory options with a view, inter alia, to cost recovering. It also recalled that under Art. 6(1), a Member State may require the infrastructure manager to balance his accounts without State funding. While it could accept the general principle of marginal cost charging, D stated that a disproportionate use of this principle would prevent the infrastructure manager to opting for balanced accounts without State funding.

2. For specific investment projects that have been completed not more than fifteen¹ years before the entry into force of this Directive, the infrastructure manager may set or continue to set higher charges on the basis of the long-term costs of such projects if they increase efficiency and/or cost-effectiveness and could not otherwise be or have been undertaken. Such a charging arrangement may also incorporate agreements on the sharing of the risk associated with new investments.
3. To prevent discrimination, it shall be ensured that any given infrastructure manager's average and marginal charges for equivalent uses of his infrastructure are comparable and that comparable services in the same market segment are subject to the same charges. The infrastructure manager shall show in the network statement that the charging system meets these requirements insofar as this can be done without disclosing confidential business information.
4. *(deleted, see Article 4(3))*²

¹ New Presidency suggestion. E could not accept a time-limit.

D and UK could accept a text saying that for specific investment projects the infrastructure manager may set or, in the case of completed project, continue to set higher charges.

² F wanted a higher harmonisation of the charging of international rail freight using the TERFN. Such a harmonisation could be done on the basis of marginal cost charging without any mark-ups in order to guarantee the competitiveness of international rail freight and to ensure the efficient utilisation of the TERFN. It wanted therefore to add a new Article 9(4) as follows : *"The provisions of Article 9(1) shall apply to international combined freight and passenger services that use the TERFN exclusively only in the case of those agreements between infrastructure managers referred to in Article 4(3)".*

Article 10

Discounts ¹

1. Without prejudice to Articles 81, 82, 86 and 87 of the Treaty and notwithstanding Article 8(3) of this Directive, any discount on the charges levied on a railway undertaking by the infrastructure manager, for any service, shall comply with the criteria set out in paragraphs 2 to 5.
2. With the exception of paragraph 3, discounts shall not exceed the actual cost saving to the infrastructure manager from the operation in comparison with a single isolated equivalent journey. In determining the level of discount, no account may be taken of cost savings already internalised in the charge levied.
3. Infrastructure managers may introduce schemes available to all users of the infrastructure, for specified traffic flows, granting time limited discounts to encourage the development of new rail services.²
4. Discounts may relate only to charges levied for a specified infrastructure section.
5. Similar discount schemes shall apply for similar of services.

¹ DK, L, NL and S entered reservations. DK and NL could accept as a compromise discounts for administrative savings of 2 % as a maximum.

² F wanted to add the possibility of introducing discounts as an incentive to use empty routes instead of congested ones. This would allow a more efficient and environmentally friendly utilisation of infrastructure

Article 11

Compensation schemes for unpaid environmental and infrastructure costs

1. Member States may put in place a time-limited scheme to compensate for the use of railway infrastructure for the demonstrably unpaid environmental, accident and infrastructure costs of competing transport modes insofar as these costs exceed the equivalent costs of rail.¹
2. Where an operator receiving compensation enjoys an exclusive right, the compensation must be accompanied by comparable benefits to users.
3. The methodology used and calculations performed must be publicly available. It shall in particular be possible to demonstrate the specific uncharged costs of the competing transport infrastructure that are avoided and to ensure that the scheme is granted on non-discriminatory terms to undertakings.
4. Member States shall ensure that such a scheme is compatible with Articles 73, 87 and 88 of the Treaty.

¹ S and UK entered reservations and wanted to make reference also to unpaid congestion costs.

Article 12

Performance scheme

1. Infrastructure charging schemes shall through a performance scheme encourage railway undertakings and the infrastructure manager to minimise disruption and improve the performance of the railway network. This may include penalties for actions which disrupt the operation of the network, compensation for undertakings which suffer from disruption and bonuses that reward better than planned performance.
2. The basic principles of the performance scheme shall apply throughout the network.

Article 13

Reservation charges

Infrastructure managers may levy an appropriate charge for capacity that is requested but not used. This charge shall provide incentives for efficient use of capacity.

CHAPTER III – Allocation of capacity

Article 14

Capacity rights

1. Capacity shall be allocated by an infrastructure manager and, once allocated to an applicant, may not be transferred by the recipient to another undertaking or service. The use of capacity by a railway undertaking when carrying out the business of an applicant who is not a railway undertaking shall not be considered a transfer.
2. The right to use specific railway infrastructure capacity in the form of a train path may be granted to applicants for a maximum duration of one timetable period.

An infrastructure manager and an applicant may enter into a framework agreement as laid down in Article 20 for the use of capacity on the relevant railway infrastructure for a longer term than one timetable period.

3. The definition of respective rights and obligations between infrastructure managers and applicants in respect of any allocation of capacity shall be laid down in contracts or legislation.

Article 15

Capacity allocation¹

1. Member States may establish a framework for the allocation of railway infrastructure capacity while respecting the managerial independence laid down in Article 4 of Directive 91/440/EEC. Specific capacity allocation rules shall be established. The infrastructure manager shall perform the capacity allocation processes. In particular, the infrastructure manager shall ensure that railway infrastructure capacity is allocated on a fair and non-discriminatory basis and in accordance with Community law.²
2. Where the infrastructure manager, in its legal form, organisation and decision-making functions is not independent of any railway undertaking, the functions referred to in paragraph 1 and described in this Chapter shall be performed by an allocation body that is independent in its legal form, organisation and decision-making from any railway undertaking.³
3. Infrastructure managers and allocation bodies shall respect the commercial confidentiality of information provided to them.

¹ L wanted to add the following paragraph :
"Where an integrated railway is maintained the Member State must ensure that the functions, such as for example capacity allocation and charging for infrastructure, that govern the utilisation of access rights to infrastructure are separated from the rest of the operations and provide an arbitration procedure (e.g. arbitration procedure foreseen in Article 24, paragraph 6 of the new 95/19) to grant a non discriminatory allocation process."

² A new recital will be inserted :
"In order to take into account the needs of users, or potential users, of railway capacity to plan their business, and to the needs of customers and funders, it is important that the infrastructure manager ensures that railway infrastructure capacity is allocated in a way which reflects the need to maintain and improve service reliability levels".

³ L and A entered reservations linked to their reservations to Article 4(2).

Article 16

Cooperation to allocate capacity on more than one network

1. Infrastructure managers shall cooperate to enable the efficient creation and allocation of capacity which crosses more than one network. They shall organise international train paths, in particular within the framework of the Trans-European Rail Freight Network. They shall establish such procedures as are appropriate to enable this to take place. These procedures shall be bound by the rules set out in this Directive.

The procedure established in order to coordinate the allocation of capacity at an international level shall associate representatives of infrastructure managers for all railway infrastructures whose allocation decisions have an impact on more than one other infrastructure manager. Appropriate representatives of infrastructure managers from outside the Community may be associated to these procedures. The Commission shall be informed and shall be invited to attend as an observer.

2. At any meeting or other activity undertaken to permit the allocation of infrastructure capacity for trans-network train services, decisions shall only be taken by representatives of infrastructure managers.

3. The participants in the cooperation referred to paragraph 1 shall ensure that its membership, methods of operation and all relevant criteria which are used for assessing and allocating capacity be made publicly available.
4. Working in cooperation referred to in the first subparagraph of paragraph 1, infrastructure managers may assess the need for, and may where necessary organise and propose international train paths to facilitate the operation of freight trains which are subject to a request undergoing the ad hoc procedure.

Such prearranged international train paths shall be made available to applicants via any of the participating infrastructure managers.

(Article 17)

(Article deleted)

Article 18

Principles of allocation

(Article deleted)

*Its content will be inserted in the recitals)*¹

¹ The recitals concerned could read as follows :

"Recital 40

It is desirable for railway undertakings and the infrastructure manager to be provided with incentives to minimise disruption and improve performance of the network;

New Recital

Charging and capacity allocation schemes should allow for fair competition in the provision of railway services;

New recital

It is important to have regard to the business requirements of both applicants and the infrastructure manager;

New recital

It is important to maximise the flexibility available to the infrastructure managers with regard to the allocation of capacity, but this must be consistent with satisfaction of the applicant's reasonable requirements;

New recital

The capacity allocation process must prevent the imposition of undue constraints on the wishes of other undertakings holding, or intending to hold, rights to use the infrastructure to develop their business."

Article 19

Applicants

1. Applications for railway infrastructure capacity may in principle be made by railway undertakings and their international groupings. Member States may also allow other applicants to apply for railway infrastructure capacity on their territories.¹
2. The infrastructure manager may set requirements with regard to applicants to ensure that its legitimate expectations about future revenues and utilisation of the infrastructure are safeguarded. Such requirements shall be appropriate, transparent and non-discriminatory. The requirements shall be published as part of the allocation principles in the network statement, and the Commission shall be informed.
3. The requirements in paragraph 2 may only include the provision of a financial guarantee that must not exceed an appropriate level which shall be proportional to the contemplated level of activity of the applicant, and assurance of the capability to prepare compliant bids for capacity.

¹ NL, S and UK preferred the wording of the original Commission proposal.
B, DK and F entered reservations (see also Art. 2(b)).

Article 20

Framework agreements

1. Without prejudice to Articles 81, 82 and 86 of the Treaty, a framework agreement may be concluded with an applicant. Such a framework agreement specifies the characteristics of the railway infrastructure capacity required by and offered to the applicant over a period of time exceeding one timetable period. The framework agreement shall not specify a train path in detail, but should be such as to seek to meet the legitimate commercial needs of the applicant. A Member State may require prior approval by the regulatory body.
2. Framework agreements shall not be such as to preclude the use of the relevant infrastructure by other applicants or services.
3. A framework agreement shall allow for the amendment or limitation of its terms to enable better use to be made of the railway infrastructure.
4. The framework agreement may contain penalties should it be necessary to modify or terminate the agreement.

5. Framework agreements shall in principle be for five years. The infrastructure manager may agree to a shorter or longer period in specific cases. Any period longer than five years shall be justified by the existence of commercial contracts, specialised investments or risks.
6. While respecting commercial confidentiality, the general nature of each framework agreement shall be made available to any interested party.

Article 21

Schedule for the allocation process

1. The infrastructure manager shall adhere to the schedule for capacity allocation set out in Annex III.
2. Infrastructure managers shall agree with the other relevant infrastructure managers concerned that international train paths are to be included in the working timetable, before commencing consultation on the draft timetable. Adjustments shall only be made if absolutely necessary.

Article 22

Application

1. Applicants may apply on the basis of public or private law to the infrastructure manager to request an agreement granting rights to use railway infrastructure against a charge as laid down in Chapter II.
2. Requests relating to the regular timetable must adhere to the deadlines set out in Annex III.
3. An applicant who is a party to a framework agreement shall apply in accordance with that agreement.
4. Applicants may request capacity crossing more than one network by applying to one infrastructure manager. That infrastructure manager shall then be permitted to act on behalf of the applicant to seek capacity with the other relevant infrastructure manager.
5. Infrastructure managers shall ensure that, for capacity crossing more than one network, applicants may apply direct to any joint body which the infrastructure managers may establish.

Article 23

Scheduling

1. The infrastructure manager shall as far as is possible meet all requests for capacity including requests for train paths crossing more than one network, and shall as far as possible take account of all constraints on applicants, including the economic effect on their business.
2. The infrastructure manager may set priority to specific services within the scheduling and coordination process but only as set out in Articles 25 and 27.
3. The infrastructure manager shall consult interested parties about the draft timetable and allow them at least one month to present their views. Interested parties shall include all those who have requested capacity as well as other parties who wish to have the opportunity to comment on how the timetable may affect their ability to procure rail services during the currency of the timetable.
4. The infrastructure manager shall take appropriate measures to deal with any concerns that are expressed.

Article 24

Coordination process

1. During the scheduling process referred to in Article 23, when the infrastructure manager encounters conflicts between different requests then he shall attempt, through coordination of the requests, to ensure the best possible matching of all requirements.
2. When a situation requiring coordination arises, the infrastructure manager shall have the right, within reasonable limits, to propose capacity that differs from that which was requested.
3. The infrastructure manager shall attempt, through consultation with the appropriate applicants, to achieve a resolution of any conflicts.
4. The principles governing the coordination process shall be defined in the network statement. These shall in particular reflect the difficulty of arranging international train paths and the effect that modification may have on other infrastructure managers.
5. When requests for capacity cannot be satisfied without coordination, the infrastructure manager shall attempt to accommodate all requests through coordination.
6. Without prejudice to the existing appeal procedures and to the provisions of Article 33, in case of disputes relating to the allocation of infrastructure capacity, a dispute resolution system shall be made available in order to promptly resolve such disputes. If this system is applied, a decision shall be reached in time limit of ten days.¹

¹ L entered a scrutiny reservation on the ten days delay.

Article 25

Congested infrastructure

1. Where after coordination of the requested paths and consultation with applicants it is not possible to adequately satisfy requests for capacity then the infrastructure manager must immediately declare that element of infrastructure on which this has occurred to be congested. This shall also be done for infrastructure which it can be foreseen will suffer from insufficient capacity in the near future.
2. When infrastructure has been declared to be congested, the infrastructure manager shall carry out a capacity analysis as described in Article 28, unless a capacity enhancement plan as described in Article 29 is already being implemented.
3. When charges according to Article 8(4) have not been levied or have not achieved a satisfactory result and the infrastructure has been declared to be congested, the infrastructure manager may in addition employ priority criteria to allocate capacity.

4. The priority criteria shall take account of the importance of a service to society, relative to any other service which will consequently be excluded. This shall include taking account of the effect in other Member States.
5. The importance of freight services and in particular international freight services shall be given adequate consideration in determining priority criteria.
6. The procedures which shall be followed and criteria used where infrastructure is congested shall be set out in the network statement.

Article 26

Ad hoc requests

1. The infrastructure manager shall respond to ad hoc requests for individual train paths as quickly as possible but in no more than five working days. Information supplied on available spare capacity shall be made available to all applicants who may wish to use this capacity.
2. Infrastructure managers shall where necessary undertake an evaluation of the need for reserve capacity to be kept available within the final scheduled timetable to enable them to rapidly respond to foreseeable ad hoc requests for capacity. This shall apply also in cases of congested infrastructure.

Article 27

Specialised infrastructure

1. Without prejudice to paragraph 2, railway infrastructure capacity shall be considered to be available for the use of all types of service which conform to the characteristics necessary for operation on the train path.
2. Where there are suitable alternative routes, the infrastructure manager may, after consultation with interested parties, designate particular infrastructure for use by specified types of traffic. Without prejudice to Articles 81, 82 and 86 of the Treaty, when such designation has occurred, the infrastructure manager may give priority to this type of traffic when allocating capacity.

Such designation shall not prevent the use of such infrastructure by other types of traffic when capacity is available and when the rolling material conforms to the technical characteristics necessary for operation on the line.

3. When infrastructure has been designated pursuant to paragraph 2, this shall be described in the network statement.

Article 28

Capacity analysis

1. The objective of a capacity analysis is to determine the restrictions on capacity which prevent requests for capacity from being adequately met, and to propose methods of enabling additional requests to be satisfied. This analysis shall identify the reasons for the congestions and what measures might be taken in the short and medium term to ease the congestions.
2. The analysis shall consider the infrastructure, the operating procedures, the nature of the different services operating and the effect of all these factors on capacity. Measures to be considered shall include in particular re-routing of services, re-timing services, speed alterations and infrastructure improvements.
3. A capacity analysis shall be completed within six months of the identification of infrastructure as congested.

Article 29

Capacity enhancement plan

1. Within six months of the completion of a capacity analysis, the infrastructure manager shall produce a capacity enhancement plan.
2. A capacity enhancement plan shall be developed after consultation with users of the relevant congested infrastructure. It will identify
 - the reasons for the congestion,
 - the likely future development of traffic,
 - the constraints on infrastructure development,
 - the options and costs for enhancement, including likely changes to access charges,and on the basis of a cost benefit analysis of the possible measures identified, determine what action shall be taken to enhance capacity, including a timetable for implementation of the measures.

The plan may be subject to prior approval by the Member State.

3. The infrastructure manager shall cease to levy any fees which are levied for the relevant infrastructure under Article 8(4) in cases where
 - he does not produce a capacity enhancement plan, or
 - he does not make progress with the action plan identified in the capacity enhancement plan.

The infrastructure manager may, subject to the approval of the rail regulator, continue to levy those fees if

- the plan cannot be realised for reasons beyond his control, or
- the options available are not economically or financially viable.¹

Article 30

Use of train paths

1. In particular for congested infrastructure the infrastructure manager shall require the surrender of a train path which, over a period of at least one month, has been used less than a threshold quota to be laid down in the network statement, unless this was due to non-economic reasons beyond the operators control.²
2. An infrastructure manager may specify in the network statement conditions by which it will take account of previous levels of utilisation of train paths in determining priorities for the allocation process.

¹ S entered a scrutiny reservation on the words "or financially".

² B entered a reservation on this paragraph. It considered that these situations should be resolved in the framework of the contractual relations between the infrastructure manager and the operators.

Article 31

Infrastructure capacity for scheduled maintenance

1. Requests for infrastructure capacity to enable maintenance to be performed shall be submitted during the scheduling process.
2. Adequate account shall be taken by the infrastructure manager of the effect of capacity reserved for scheduled track maintenance on applicants.

Article 32

Special measures to be taken in the event of disturbance

1. In the event of disturbance to train movements caused by technical failing or accident the infrastructure manager must take all necessary steps to restore the normal situation. To that end the infrastructure manager shall draw up a contingency plan listing the various public bodies to be informed in the event of serious incidents or serious disturbance to train movements.
2. In an emergency and where absolutely necessary on account of a breakdown making the infrastructure temporarily unusable, the paths allocated may be withdrawn without warning for as long as is necessary to repair the system.

The infrastructure manager may, if he deems it necessary, require railway undertakings to make available to him the resources which he feels are the most appropriate to restore the normal situation as soon as possible.

3. Member States may require railway undertakings to be involved in assuring the enforcement and monitoring of their own compliance of the safety standards and rules.

CHAPTER IV – General measures

Article 33

Regulatory body ¹

1. Without prejudice to Article 24(6), Member States shall establish a regulatory body. This body, which can be the Ministry responsible for transport matters or any other body, shall be independent in its organisation, funding decisions, legal structure and decision-making from any infrastructure manager, charging body, allocation body or applicant. The body shall function according to the principles outlined in paragraphs 2 to 8 below, whereby appeal and regulatory functions may be attributed to separate bodies.

¹ B entered a reservation and stated that appeals should continue to be regulated by the existing legislation without need of creating a new instance.

2. An applicant shall have a right to appeal to the regulatory body if it believes that it has been unfairly treated, discriminated against or is in any other way aggrieved, and in particular against decisions adopted by the infrastructure manager concerning:
 - (a) the network statement;
 - (b) criteria contained within it;
 - (c) the allocation process and its result;
 - (d) the charging scheme;
 - (e) level or structure of infrastructure fees which it is, or may be, required to pay.

3. The regulatory body shall ensure that charges set by the infrastructure manager comply with Chapter II and are non-discriminatory. Negotiation between applicants and an infrastructure manager concerning the level of infrastructure charges as provided for in Article 9(1) shall only be permitted if these are carried out under the supervision of the regulatory body. The regulatory body shall intervene if negotiations are likely to contravene the requirements of this Directive.

4. The regulatory body shall have the power to request relevant information from the infrastructure manager, applicants and any third party involved within the Member State concerned, which must be supplied without undue delay.
5. The regulatory body shall be required to determine any complaints and take action to remedy the situation within a maximum period of two months from receipt of all information.
6. Notwithstanding paragraph 8, a decision of the regulatory body shall be binding on all parties covered by that decision.
7. In the event of an appeal on a refusal to grant capacity, or on the terms of an offer of capacity, the regulatory body shall either confirm that no modification of the infrastructure manager's decision is required, or it shall require modification of that decision in accordance with directions specified by the regulatory body.
8. Member States shall take the measures necessary to ensure that decisions taken by the regulatory body are subject to judicial review.

Article 34

Safety certification

1. The arrangements for safety certification for railway undertakings which are or will be established in the Community and the international groupings which they form shall be in accordance with paragraphs 2 and 3 of this Article.¹
2. The Member States shall provide for their respective territories that a safety certificate in which the railway undertakings' safety requirements are set out be submitted in order to ensure safe service on the routes concerned.
3. In order to obtain the safety certificate, the railway undertaking shall comply with the regulations under national law, compatible with Community law and applied in a non-discriminatory manner, laying down the technical and operational requirements specific to rail services and the safety requirements applying to staff, rolling stock and the undertaking's internal organisation.

In particular, it shall provide proof that the staff whom it employs to operate and accompany the trains¹ has the necessary training to comply with the traffic rules applied by the infrastructure manager and to meet the safety requirements imposed on it in the interests of train movement.

The railway undertaking shall also prove that the rolling stock making up the trains has been approved by the public authority or by the infrastructure manager and checked in accordance with the operating rules applicable to the infrastructure used. The safety certificate shall be issued by whichever body is designated for the purpose by the Member State in which the infrastructure used is situated.

¹ F entered a reservation and B a scrutiny reservation on the deletion of the reference to Article 10 of Directive 91/440/EEC.

Article 35

Report

The Commission shall at the latest two years after the date of implementation of this Directive submit to the European Parliament and to the Council a report on the implementation of this Directive, accompanied if necessary by proposals for further Community action.

Article 35a

Cooperation of regulatory bodies

The national regulatory bodies shall conduct an active exchange of views and experience for the purposes of coordinating their decision-making principles across the Community. The Commission shall support them in this task.

Article 35b

Derogations

1. Ireland, as a Member State located on an island, with a rail link to only one other Member State; the United Kingdom, in respect of Northern Ireland, on the same basis; and Greece, as a Member State that does not have any direct rail link to any other Member State, do not need to apply the requirements set out in Articles 3, 4 (2), 14, 15, 20, 24 (4), 24(6), 25, 27 (3), 28, 29, 30, 31, 33 under the condition that decisions on the allocation of infrastructure capacity or the charging of fees are open to appeal, when so requested in writing by a railway undertaking, before an independent body which shall take its decision within two months of the submission of all relevant information and whose decision shall be subject to judicial review, and Article 34 in so far as rail transport services outside the scope of Article 10 of Directive 91/440/EEC, as amended by European Parliament and Council Directive 2000/.../EC are concerned, for a period of 5 years from the date by which Member States had to comply with Directive 2000/.../EC, unless

- more than one railway undertaking licensed according to Article 4 of Directive 95/18/EC, as amended, in the case of Ireland and Northern Ireland, a railway company so licensed elsewhere enters an official application to operate competing railway services in, to or from either Ireland, Northern Ireland and Greece, in which case the continued applicability of this derogation will be decided upon according to the advisory procedure set out in Article 11a (2) of Directive 91/440/EEC, as amended, or
- a railway undertaking operating railway services in Ireland, Northern Ireland or Greece enters an official application to operate railway services on, to or from the territory of another Member State (in the case of Ireland, or the United Kingdom, in respect of Northern Ireland, or both, another Member State outside their territories), in which case the Member State licensing the railway undertaking shall put in place necessary legislation to implement the Articles of this directive as listed above.

Within one year from the receipt of either the decision adopted according to Article 11a (2) of Directive 91/440/EEC, as amended, as referred to in the first indent above, or the notification of the official application referred to in the second indent above, the Member State or States concerned (Ireland, the United Kingdom with respect to Northern Ireland, or Greece) shall put in place legislation to implement all Articles of this Directive.

2. A derogation referred to in paragraph 1, subparagraph 1 may be renewed for periods not longer than 5 years. Not later than 12 months before the expiring date of the derogation a Member State availing of such derogation may address itself to the Commission requesting a prolongation. Any such request must be substantiated. The Commission shall examine such a request and adopt a decision following the advisory procedure set out in Article 11a (2) of Directive 91/440/EEC, as amended. The procedure set out in this paragraph shall apply to any decision related to the request.

When adopting its decision the Commission shall take into account any development in the geopolitical situation and the development of the rail market in, from and to the Member State having requested the prolongation.

Article 36¹
Implementation

The Member States shall bring into force the laws, regulations and administrative provisions necessary to comply with this Directive within two years of the entry into force of this Directive. They shall forthwith inform the Commission thereof.

When Member States adopt those provisions, they shall contain a reference to this Directive or be accompanied by such reference on the occasion of their official publication. Member States shall determine how such reference is to be made.

Article 36a
Comitology

1. Member States may bring any question concerning the implementation of this Directive to the attention of the Commission. Appropriate decisions shall be adopted by use of the advisory procedure referred to in Article 11a(2) of Directive 91/440/EEC, as amended.

At the request of a Member State or on its own initiative² the Commission shall, in a specific case, examine the application and enforcement of provisions concerning charging, capacity allocation and safety certification, and within two months of receipt of such a request decide by use of the same procedure whether the related measure may continue to be applied. The Commission shall communicate its decision to the European Parliament, the Council and to the Member States.

2. The amendments necessary to adapt the Annexes shall be adopted by use of the regulatory procedure laid down in Article 11a(3) of Directive 91/440/EEC, as amended.

¹ NL wanted a transitional period (i.e. until 2008) for the fixing of the charge at the level of the cost that is directly incurred as a result of operating the train service.

² F wanted to delete the words "or on its own initiative".

Article 37

Repeals

Regulation (EEC) No 2830/77, Regulation (EEC) No 2183/78, Decision 82/529/EEC, Decision 83/418/EEC, and Directive 95/19/EC are hereby repealed.

Article 38

Entry into force

This Directive shall enter into force on the twentieth day following that of its publication in the *Official Journal of the European Communities*.

Article 39

Addressees

This Directive is addressed to the Member States.

Done at Brussels,

For the European Parliament
The President

For the Council
The President

Contents of the network statement¹

The network statement referred to in Article 3 shall contain the following information :

1. A section setting out the nature of the infrastructure which is available to railway undertakings and the conditions of access to it.
2. A section on charging principles and tariffs. This shall contain appropriate details of the charging scheme as well as sufficient information on charges that apply to the services listed in Annex II which are provided by only one supplier. It shall detail the methodology, rules and scales² used for the application of Article 8, paragraphs 4 and 5 and Articles 9 and 10. It shall contain information on changes in charges already decided upon or foreseen.
3. A section on the principles and criteria for capacity allocation. This shall set out the general capacity characteristics of the infrastructure which is available to railway undertakings and any restrictions relating to its use, including likely capacity requirements for maintenance. It shall also specify the procedures and deadlines which relate to the capacity allocation process. It shall contain specific criteria which are employed during that process, in particular :
 - a) the modalities according to which applicants may request capacity from the infrastructure manager;
 - b) the requirements governing applicants;
 - c) the schedule for the application and allocation processes;
 - d) the principles governing the coordination process;
 - e) the procedures which shall be followed and criteria used where infrastructure is congested;
 - f) details of restrictions on the use of infrastructure;
 - g) any conditions by which account is taken of previous levels of utilisation of capacity in determining priorities for the allocation process.

It shall detail the measures taken to ensure the adequate treatment of freight services, international services and requests subject to the ad hoc procedure.

¹ B entered a scrutiny reservation.

² UK entered a scrutiny reservation on the words "rules and scales".

Services to be supplied to the railway undertakings**(1) The minimum access package shall comprise:**

- (a) handling of requests for capacity;
- (b) the right to utilise track capacity which is granted;
- (c) use of running track points and junctions;
- (d) train control including signalling, regulation, dispatching and the communication and provision of information on train movement;
- (e) all other information required to implement or operate the service for which capacity has been granted.

(2) Track access to services facilities and supply of services shall comprise:

- (a) refuelling facilities;
- (b) passenger stations, their buildings and other facilities;
- (c) freight terminals;
- (d) marshalling yards;
- (e) train formation facilities;
- (f) storage sidings;
- (g) maintenance and other technical facilities.

¹ B entered a scrutiny reservation.

(3) Additional services may comprise:

- (a) use of electrical supply equipment for traction current;
- (b) traction current;
- (c) pre-heating of passenger trains;
- (d) supply of fuel, shunting, and all other services provided at the access services facilities mentioned above;
- (e) tailor-made contracts for:
 - control of transport of dangerous goods,
 - assistance in running abnormal trains.

(4) Ancillary services may comprise:

- (a) access to telecommunication network;
- (b) provision of supplementary information;
- (c) technical inspection of rolling stock.

Schedule for the allocation process

1. The working timetable shall be established once per calendar year.
 2. The change of working timetable shall take place at midnight on the last Saturday in May. Where a change or adjustment is carried out after the summer it shall take place at midnight on the last Saturday in September each year and at such other intervals between these dates as are required. Infrastructure managers may agree on different dates and in this case they shall inform the Commission thereof.
 3. The final date for receipt of requests for capacity to be incorporated into the working timetable shall be no more than 12 months in advance of the entry into force of the timetable.
 4. No later than 11 months before the working timetable comes into force, the infrastructure managers shall ensure that provisional international train paths have been established in cooperation with other relevant allocation bodies as set out in Article 16. Infrastructure managers shall ensure that as far as possible these are adhered to during the subsequent processes.
3. No later than four months after the deadline for submission of bids by applicants, the infrastructure manager shall prepare a draft timetable.