

Directive 2012/34/EU of the European Parliament and of the Council of 21 November 2012 establishing a single European railway area (recast) (Text with EEA relevance)

CHAPTER II

DEVELOPMENT OF THE UNION RAILWAYS

SECTION 1

Management independence

Article 4

Independence of railway undertakings and infrastructure managers

1 Member States shall ensure that, as regards management, administration and internal control over administrative, economic and accounting matters, railway undertakings directly or indirectly owned or controlled by Member States have independent status in accordance with which they will hold, in particular, assets, budgets and accounts which are separate from those of the State.

2 While respecting the charging and allocation framework and the specific rules established by the Member States, the infrastructure manager shall be responsible for its own management, administration and internal control.

Article 5

Management of the railway undertakings according to commercial principles

1 Member States shall enable railway undertakings to adjust their activities to the market and to manage those activities under the responsibility of their management bodies, in the interests of providing efficient and appropriate services at the lowest possible cost for the quality of service required.

Railway undertakings shall be managed according to the principles which apply to commercial companies, irrespective of their ownership. This shall also apply to the public service obligations imposed on them by Member States and to public service contracts which they conclude with the competent authorities of the State.

2 Railway undertakings shall determine their business plans, including their investment and financing programmes. Such plans shall be designed to achieve the undertakings' financial equilibrium and other technical, commercial and financial management objectives; they shall also indicate the means of attaining those objectives.

3 With reference to the general policy guidelines issued by each Member State and taking into account national plans and contracts (which may be multiannual) including investment and financing plans, railway undertakings shall, in particular, be free to:

- a establish their internal organisation, without prejudice to the provisions of Articles 7, 29 and 39;

- b control the supply and marketing of services and fix the pricing thereof;
- c take decisions on staff, assets and own procurement;
- d expand their market share, develop new technologies and new services and adopt any innovative management techniques;
- e establish new activities in fields associated with the railway business.

This paragraph is without prejudice to Regulation (EC) No 1370/2007.

4 Notwithstanding paragraph 3, shareholders of publicly owned or controlled railway undertakings shall be able to require their own prior approval for major business management decisions in the same way as shareholders of private joint-stock companies under the rules of the company law of Member States. The provisions of this Article shall be without prejudice to the powers of supervisory bodies under the company law of Member States relating to the appointment of board members.

SECTION 2

Separation of infrastructure management and transport operations and of different types of transport operations

Article 6

Separation of accounts

1 Member States shall ensure that separate profit and loss accounts and balance sheets are kept and published, on the one hand, for business relating to the provision of transport services by railway undertakings and, on the other, for business relating to the management of railway infrastructure. Public funds paid to one of these two areas of activity shall not be transferred to the other.

2 Member States may also provide that this separation shall require the organisation of distinct divisions within a single undertaking or that the infrastructure and transport services shall be managed by separate entities.

3 Member States shall ensure that separate profit and loss accounts and balance sheets are kept and published, on the one hand, for business relating to the provision of rail freight transport services and, on the other, for activities relating to the provision of passenger transport services. Public funds paid for activities relating to the provision of transport services as public-service remits shall be shown separately in accordance with Article 7 of Regulation (EC) No 1370/2007 in the relevant accounts and shall not be transferred to activities relating to the provision of other transport services or any other business.

4 The accounts for the different areas of activity referred to in paragraphs 1 and 3 shall be kept in a way that allows for monitoring of the prohibition on transferring public funds paid to one area of activity to another and the monitoring of the use of income from infrastructure charges and surpluses from other commercial activities.

Article 7

Independence of essential functions of an infrastructure manager

1 Member States shall ensure that the essential functions determining equitable and non-discriminatory access to infrastructure, are entrusted to bodies or firms that do not themselves provide any rail transport services. Regardless of organisational structures, this objective shall be shown to have been achieved.

The essential functions shall be:

- a decision-making on train path allocation, including both the definition and the assessment of availability and the allocation of individual train paths; and
- b decision-making on infrastructure charging, including determination and collection of the charges, without prejudice to Article 29(1).

Member States may, however, assign to railway undertakings or any other body the responsibility for contributing to the development of the railway infrastructure, for example through investment, maintenance and funding.

2 Where the infrastructure manager, in its legal form, organisation or decision-making functions, is not independent of any railway undertaking, the functions referred to in Sections 2 and 3 of Chapter IV shall be performed respectively by a charging body and by an allocation body that are independent in their legal form, organisation and decision-making from any railway undertaking.

3 When the provisions of Sections 2 and 3 of Chapter IV refer to the essential functions of an infrastructure manager, they shall be understood as applying to the charging body or the allocation body for their respective powers.

SECTION 3

Improvement of the financial situation

Article 8

Financing of the infrastructure manager

1 Member States shall develop their national railway infrastructure by taking into account, where necessary, the general needs of the Union, including the need to cooperate with neighbouring third countries. For that purpose, they shall publish by 16 December 2014, after consultation with the interested parties, an indicative rail infrastructure development strategy with a view to meeting future mobility needs in terms of maintenance, renewal and development of the infrastructure based on sustainable financing of the railway system. That strategy shall cover a period of at least five years and be renewable.

2 Having due regard to Articles 93, 107 and 108 TFEU, Member States may also provide the infrastructure manager with financing consistent with its functions as referred to in point (2) of Article 3, the size of the infrastructure and financial requirements, in particular in order to cover new investments. Member States may decide to finance those investments through means other than direct State funding. In any case, Member States shall comply with the requirements referred to in paragraph 4 of this Article.

3 Within the framework of general policy determined by the Member State concerned and taking into account the strategy referred to in paragraph 1 and the financing provided by the Member States referred to in paragraph 2, the infrastructure manager shall adopt a business plan including investment and financial programmes. The plan shall be designed to ensure optimal and efficient use, provision and development of the infrastructure while ensuring financial balance and providing means for these objectives to be achieved. The infrastructure manager shall ensure that known applicants and, upon their request, potential applicants have access to the relevant information and are given the opportunity to express their views on the content of the business plan regarding the conditions for access and use and the nature, provision and development of the infrastructure before its approval by the infrastructure manager.

4 Member States shall ensure that, under normal business conditions and over a reasonable period which shall not exceed a period of five years, the profit and loss account of an infrastructure manager shall at least balance income from infrastructure charges, surpluses from other commercial activities, non-refundable incomes from private sources and State funding, on the one hand, including advance payments from the State, where appropriate, and infrastructure expenditure, on the other hand.

Without prejudice to the possible long-term aim of user cover of infrastructure costs for all modes of transport on the basis of fair, non-discriminatory competition between the various modes, where rail transport is able to compete with other modes of transport, within the charging framework of Articles 31 and 32, a Member State may require the infrastructure manager to balance his accounts without State funding.

Article 9

Transparent debt relief

1 Without prejudice to Union rules on State aid and in accordance with Articles 93, 107 and 108 TFEU, Member States shall set up appropriate mechanisms to help reduce the indebtedness of publicly owned or controlled railway undertakings to a level which does not impede sound financial management and which improves their financial situation.

2 For the purposes referred to in paragraph 1, Member States may require a separate debt amortisation unit to be set up within the accounting departments of such railway undertakings.

The balance sheet of the unit may be charged with all the loans raised by the railway undertaking, both to finance investment and to cover excess operating expenditure resulting from the business of rail transport or from railway infrastructure management, until such time as these loans are extinguished. Debts arising from subsidiaries' operations shall not be taken into account.

3 Paragraphs 1 and 2 shall apply only to debts or interest due on such debts incurred by publicly owned or controlled railway undertakings by the date of market opening for all or part of rail transport services in the Member State concerned and in any case by 15 March 2001 or the date of accession to the Union for the Member States which joined the Union after that date.

SECTION 4

Access to railway infrastructure and services

Article 10

Conditions of access to railway infrastructure

1 Railway undertakings shall be granted, under equitable, non-discriminatory and transparent conditions, the right to access to the railway infrastructure in all Member States for the purpose of operating all types of rail freight services. That right shall include access to infrastructure connecting maritime and inland ports and other service facilities referred to in point 2 of Annex II, and to infrastructure serving or potentially serving more than one final customer.

2 Railway undertakings shall be granted the right of access to railway infrastructure in all Member States for the purpose of operating an international passenger service. Railway undertakings shall, in the course of an international passenger service, have the right to pick up passengers at any station located along the international route and set them down at another, including stations located in the same Member State. That right shall include access to infrastructure connecting service facilities referred to in point 2 of Annex II.

3 Following the request from the relevant competent authorities or interested railway undertakings, the relevant regulatory body or bodies referred to in Article 55 shall determine whether the principal purpose of the service is to carry passengers between stations located in different Member States.

4 Based on the experience of regulatory bodies, competent authorities and railway undertakings and based on the activities of the network referred to in Article 57(1), the Commission shall adopt by 16 December 2016 measures setting out the details of the procedure and criteria to be followed for the application of paragraph 3 of this Article. Those implementing acts shall be adopted in accordance with the examination procedure referred to in Article 62(3).

Article 11

Limitation of the right of access and of the right to pick up and set down passengers

1 Member States may limit the right of access provided for in Article 10 on services between a place of departure and a destination which are covered by one or more public service contracts which are in accordance with Union law. Such limitation shall not have the effect of restricting the right to pick up passengers at any station located along the route of an international service and to set them down at another, including stations located in the same Member State, except where the exercise of that right would compromise the economic equilibrium of a public service contract.

2 Whether the economic equilibrium of a public service contract would be compromised shall be determined by the relevant regulatory body or bodies referred to in Article 55 on the basis of an objective economic analysis and based on pre-determined criteria, after a request from any of the following:

- a the competent authority or competent authorities that awarded the public service contract;
- b any other interested competent authority with the right to limit access under this Article;
- c the infrastructure manager;

- d the railway undertaking performing the public service contract.

The competent authorities and the railway undertakings providing the public services shall provide the relevant regulatory body or bodies with the information reasonably required to reach a decision. The regulatory body shall consider the information provided by these parties, and, as appropriate, shall ask for relevant information from, and initiate consultation with, all relevant parties, within one month of receipt of the request. The regulatory body shall consult all the relevant parties as appropriate, and shall inform the relevant parties of its reasoned decision within a pre-determined, reasonable time, and, in any case, within six weeks of receipt of all relevant information.

3 The regulatory body shall give the grounds for its decision and specify the time period within which, and the conditions under which, any of the following may request a reconsideration of the decision:

- a the relevant competent authority or competent authorities;
- b the infrastructure manager;
- c the railway undertaking performing the public service contract;
- d the railway undertaking seeking access.

4 Based on the experience of regulatory bodies, competent authorities and railway undertakings and based on the activities of the network referred to in Article 57(1), the Commission shall adopt by 16 December 2016 measures setting out the details of the procedure and criteria to be followed for the application of paragraphs 1, 2 and 3 of this Article. Those implementing acts shall be adopted in accordance with the examination procedure referred to in Article 62(3).

5 Member States may also limit the right to pick up and set down passengers at stations within the same Member State along the route of an international passenger service where an exclusive right to convey passengers between those stations has been granted under a concession contract awarded before 4 December 2007 on the basis of a fair competitive tendering procedure and in accordance with the relevant principles of Union law. Such a limitation may continue for the original duration of the contract, or 15 years, whichever is shorter.

6 Member States shall ensure that the decisions referred to in paragraphs 1, 2, 3 and 5 are subject to judicial review.

Article 12

Levy on railway undertakings providing passenger services

1 Without prejudice to Article 11(2), Member States may, under the conditions laid down in this Article, authorise the authority responsible for rail passenger transport to impose a levy on railway undertakings providing passenger services for the operation of routes which fall within the jurisdiction of that authority and which are operated between two stations in that Member State.

In that case, railway undertakings providing domestic or international rail passenger transport services shall be subject to the same levy on the operation of routes which fall within the jurisdiction of that authority.

2 The levy is intended to compensate the authority for public service obligations laid down in public service contracts awarded in accordance with Union law. The revenue raised from such a levy and paid as compensation shall not exceed what is necessary to cover all or part

of the cost incurred in the relevant public service obligations taking into account the relevant receipts and a reasonable profit for discharging those obligations.

3 The levy shall be imposed in accordance with Union law, and shall respect in particular the principles of fairness, transparency, non-discrimination and proportionality, in particular between the average price of the service to the passenger and the level of the levy. The total levies imposed pursuant to this paragraph shall not endanger the economic viability of the rail passenger transport service on which they are imposed.

4 The relevant authorities shall keep the information necessary to ensure that the origin of the levies and their use can be traced. Member States shall provide the Commission with this information.

5 Based on the experience of regulatory bodies, competent authorities and railway undertakings and based on the activities of the network referred to in Article 57(1), the Commission shall adopt measures setting out the details of the procedure and criteria to be followed for the application of this Article. Those implementing acts shall be adopted in accordance with the examination procedure referred to in Article 62(3).

Article 13

Conditions of access to services

1 Infrastructure managers shall supply to all railway undertakings, in a non-discriminatory manner, the minimum access package laid down in point 1 of Annex II.

2 Operators of service facilities shall supply in a non-discriminatory manner to all railway undertakings access, including track access, to the facilities referred to in point 2 of Annex II, and to the services supplied in these facilities.

3 To guarantee full transparency and non-discrimination of access to the service facilities referred to in points 2(a), (b), (c), (d), (g) and (i) of Annex II, and the supply of services in these facilities where the operator of such a service facility is under direct or indirect control of a body or firm which is also active and holds a dominant position in national railway transport services markets for which the facility is used, the operators of these service facilities shall be organised in such a way that they are independent of this body or firm in organisational and decision-making terms. Such independence shall not imply the requirement of the establishment of a separate legal entity for service facilities and may be fulfilled with the organisation of distinct divisions within a single legal entity.

For all service facilities referred to in point 2 of Annex II, the operator and the body or firm shall have separate accounts, including separate balance sheets and profit and loss accounts.

Where operation of the service facility is ensured by an infrastructure manager or the operator of the service facility is under the direct or indirect control of an infrastructure manager compliance with the requirements set out in this paragraph shall be deemed to be demonstrated by the fulfilment of the requirements set out in Article 7.

4 Requests by railway undertakings for access to, and supply of services in the service facility referred to in point 2 of Annex II shall be answered within a reasonable time limit set by the regulatory body referred to in Article 55. Such requests may only be refused if there are viable alternatives allowing them to operate the freight or passenger service concerned on the same or alternative routes under economically acceptable conditions. This shall not oblige

the operator of the service facility to make investments in resources or facilities in order to accommodate all requests by railway undertakings.

Where requests by railway undertakings concern access to, and supply of services in a service facility managed by an operator of the service facility referred to in paragraph 3, the operator of the service facility shall justify in writing any decision of refusal and indicate viable alternatives in other facilities.

5 Where an operator of the service facility referred to in point 2 of Annex II encounters conflicts between different requests, it shall attempt to meet all requests in so far as possible. If no viable alternative is available, and it is not possible to accommodate all requests for capacity for the relevant facility on the basis of demonstrated needs, the applicant may complain to the regulatory body referred to in Article 55 which shall examine the case and take action, where appropriate, to ensure that an appropriate part of the capacity is granted to that applicant.

6 Where a service facility referred to in point 2 of Annex II has not been in use for at least two consecutive years and interest by railway undertakings for access to this facility has been expressed to the operator of that service facility on the basis of demonstrated needs, its owner shall publicise the operation of the facility as being for lease or rent as a rail service facility, as a whole or in part, unless the operator of that service facility demonstrates that an ongoing process of reconversion prevents its use by any railway undertaking.

7 Where the operator of the service facility provides any of the services referred to in point 3 of Annex II as additional services, it shall supply them upon request to railway undertakings in a non-discriminatory manner.

8 Railway undertakings may request, as ancillary services, further services referred to in point 4 of Annex II from the infrastructure manager or from other operators of the service facility. The operator of the service facility is not obliged to supply these services. Where the operator of the service facility decides to offer to others any of these services, it shall supply them upon request to railway undertakings in a non-discriminatory manner.

9 Based on the experience of regulatory bodies and operators of service facilities and based on the activities of the network referred to in Article 57(1), the Commission may adopt measures setting out the details of the procedure and criteria to be followed for access to the services to be supplied in the service facilities referred to in points 2 to 4 of Annex II. Those implementing acts shall be adopted in accordance with the examination procedure referred to in Article 62(3).

SECTION 5

Cross-border agreements

Article 14

General principles for cross-border agreements

1 Member States shall ensure that the provisions contained in cross-border agreements do not discriminate between railway undertakings, or restrict the freedom of railway undertakings to operate cross-border services.

2 Member States shall notify the Commission of any cross-border agreement by 16 June 2013, for the agreements concluded before that date, and before their conclusion for new or revised agreements between Member States. The Commission shall decide whether such

agreements are in compliance with Union law within nine months of notification for agreements concluded before 15 December 2012 and within four months of notification for new or revised agreements between Member States. Those implementing acts shall be adopted in accordance with the advisory procedure referred to in Article 62(2).

3 Without prejudice to the division of competence between the Union and the Member States, in accordance with Union law, Member States shall notify the Commission of their intention to enter into negotiations on, and to conclude, new or revised cross-border agreements between Member States and third countries.

4 If, within two months of the receipt of the notification of a Member State's intention to enter into the negotiations referred to in paragraph 2, the Commission concludes that the negotiations are likely to undermine the objectives of Union negotiations underway with the third countries concerned and/or to lead to an agreement which is incompatible with Union law, it shall inform the Member State accordingly.

Member States shall keep the Commission regularly informed of any such negotiations and, where appropriate, invite the Commission to participate as an observer.

5 Member States shall be authorised to provisionally apply and/or to conclude new or revised cross-border agreements with third countries, provided that they are compatible with Union law and do not harm the object and purpose of the transport policy of the Union. The Commission shall adopt such authorisation decisions. Those implementing acts shall be adopted in accordance with the advisory procedure referred to in Article 62(2).

SECTION 6

Monitoring tasks of the Commission

Article 15

Scope of market monitoring

1 The Commission shall make the necessary arrangements to monitor technical and economic conditions and market developments in Union rail transport.

2 In this context, the Commission shall closely involve representatives of the Member States, including representatives of the regulatory bodies referred to in Article 55, and representatives of the sectors concerned in its work, including, where appropriate, the railway sector's social partners, users and representatives of local and regional authorities, so that they are better able to monitor the development of the railway sector and the evolution of the market, to assess the effect of the measures adopted and to analyse the impact of the measures planned by the Commission. Where appropriate, the Commission shall also involve the European Railway Agency, in accordance with its functions as provided for in Regulation (EC) No 881/2004 of the European Parliament and of the Council of 29 April 2004 establishing a European Railway Agency (Agency Regulation)⁽¹⁾.

3 The Commission shall monitor the use of the networks and the evolution of framework conditions in the rail sector, in particular infrastructure charging, capacity allocation, investments made in railway infrastructure, developments as regards prices and the quality of rail transport services, rail transport services covered by public service contracts, licensing and the degree of market opening and harmonisation between Member States, development of

employment and the related social conditions in the rail sector. These monitoring activities are without prejudice to similar activities in Member States and to the role of social partners.

4 The Commission shall report every two years to the European Parliament and the Council on:

- a the evolution of the internal market in rail services and services to be supplied to railway undertakings, as referred to in Annex II;
- b the framework conditions referred to in paragraph 3, including for public passenger transport services by rail;
- c the state of the Union railway network;
- d the utilisation of access rights;
- e barriers to more effective rail services;
- f infrastructure limitations;
- g the need for legislation.

5 For the purposes of market monitoring by the Commission, Member States shall, while respecting the role of the social partners, supply to the Commission on an annual basis the necessary information on the use of the networks and the evolution of framework conditions in the rail sector.

6 The Commission may adopt measures to ensure consistency in the reporting obligations of Member States. Those implementing acts shall be adopted in accordance with the examination procedure referred to in Article 62(3).

(1) [OJ L 164, 30.4.2004, p. 1.](#)