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 IV

LEVYING OF CHARGES FOR THE USE OF RAILWAY INFRASTRUCTURE AND ALLOCATION OF RAILWAY INFRASTRUCTURE CAPACITY

SECTION 1

General principles

Article 26

Effective use of infrastructure capacity

Member States shall ensure that charging and capacity-allocation schemes for railway infrastructure follow the principles set down in this Directive and thus allow the infrastructure manager to market and make optimum effective use of the available infrastructure capacity.

Article 27

Network statement

1 The infrastructure manager shall, after consultation with the interested parties, develop and publish a network statement which shall be obtainable against payment of a fee which shall not exceed the cost of publication of that statement. The network statement shall be published in at least two official languages of the Union. The content of the network statement shall be made available free of charge in electronic format on the web portal of the infrastructure manager and accessible through a common web portal. That web portal shall be set up by the infrastructure managers in the framework of their cooperation in accordance with Articles 37 and 40.

2 The network statement shall set out the nature of the infrastructure which is available to railway undertakings, and contain information setting out the conditions for access to the relevant railway infrastructure. The network statement shall also contain information setting out the conditions for access to service facilities connected to the network of the infrastructure manager and for supply of services in these facilities or indicate a website where such information is made available free of charge in electronic format. The content of the network statement is laid down in Annex IV.

3 The network statement shall be kept up to date and amended as necessary.

4 The network statement shall be published no less than four months in advance of the deadline for requests for infrastructure capacity.

Article 28

Agreements between railway undertakings and infrastructure managers

Any railway undertaking engaged in rail transport services shall conclude the necessary agreements under public or private law with the infrastructure managers of the railway infrastructure used. The conditions governing such agreements shall be non-discriminatory and transparent, in accordance with this Directive.

SECTION 2

Infrastructure and services charges

Article 29

Establishing, determining and collecting charges

1 Member States shall establish a charging framework while respecting the management independence laid down in Article 4.

Subject to that condition, Member States shall also establish specific charging rules or delegate such powers to the infrastructure manager.

Member States shall ensure that the network statement contains the charging framework and charging rules or indicates a website where the charging framework and charging rules are published.

The infrastructure manager shall determine and collect the charge for the use of infrastructure in accordance with the established charging framework and charging rules.

Without prejudice to the management independence laid down in Article 4 and provided that the right has been directly conferred by constitutional law before 15 December 2010, the national parliament may have the right to scrutinise and, where appropriate, review the level of charges determined by the infrastructure manager. Any such review shall ensure that charges comply with this Directive, the established charging framework and charging rules.

2 Except where specific arrangements are made under Article 32(3), infrastructure managers shall ensure that the charging scheme in use is based on the same principles over the whole of their network.

3 Infrastructure managers shall ensure that the application of the charging scheme results in equivalent and non-discriminatory charges for different railway undertakings that perform services of an 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.

4 An infrastructure manager shall respect the commercial confidentiality of information provided to it by applicants.

Article 30

Infrastructure cost and accounts

1 Infrastructure managers shall, with due regard to safety and to maintaining and improving the quality of the infrastructure service, be given incentives to reduce the costs of providing infrastructure and the level of access charges.

2 Without prejudice to their competence regarding railway infrastructure planning and financing, and to the budgetary principle of annuality, where applicable, Member States shall ensure that a contractual agreement, fulfilling the basic principles and parameters set out in Annex V, is concluded between the competent authority and the infrastructure manager covering a period of not less than five years.

Member States shall ensure that contractual agreements in force on 15 December 2012 are modified, if necessary, to align them with this Directive upon their renewal, or at the latest by 16 June 2015.

3 Member States shall implement the incentives referred to in paragraph 1 through the contractual agreement referred to in paragraph 2 or through regulatory measures or through a combination of incentives to reduce costs in the contractual agreement and the level of charges through regulatory measures.

4 If a Member State decides to implement the incentives referred to in paragraph 1 through regulatory measures, this shall be based on an analysis of the achievable cost reductions. This shall be without prejudice to the powers of the regulatory body to review the charges referred to in Article 56.

5 The terms of the contractual agreement referred to in paragraph 2 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 contractual period.

6 Member States shall ensure that applicants and, upon their request, potential applicants are informed by the competent authority and the infrastructure manager and are given the opportunity to express their views on the content of the contractual agreement before it is signed. The contractual agreement shall be published within one month of concluding it.

The infrastructure manager shall ensure consistency between the provisions of the contractual agreement and the business plan.

7 Infrastructure managers shall develop and maintain a register of their assets and the assets they are responsible for managing which would be used to assess the financing needed to repair or replace them. This shall be accompanied by details of expenditure on renewal and upgrading of the infrastructure.

8 Infrastructure managers shall establish a method for apportioning costs to the different categories of services offered to railway undertakings. Member States may require prior approval. That method shall be updated from time to time on the basis of the best international practice.

Article 31

Principles of charging

1 Charges for the use of railway infrastructure and of service facilities shall be paid to the infrastructure manager and to the operator of service facility respectively and used to fund their business.

2 Member States shall require the infrastructure manager and the operator of service facility to provide the regulatory body with all necessary information on the charges imposed in order to allow the regulatory body to perform its functions as referred to in Article 56. The infrastructure manager and the operator of service facility shall, in this regard, be able to demonstrate to railway undertakings that infrastructure and service charges actually invoiced to the railway undertaking pursuant to Articles 30 to 37 comply with the methodology, rules and, where applicable, scales laid down in the network statement.

3 Without prejudice to paragraph 4 or 5 of this Article or to Article 32, the charges for the minimum access package and for access to infrastructure connecting service facilities shall be set at the cost that is directly incurred as a result of operating the train service.

Before 16 June 2015, the Commission shall adopt measures setting out the modalities for the calculation of the cost that is directly incurred as a result of operating the train. Those implementing acts shall be adopted in accordance with the examination procedure referred to in Article 62(3).

The infrastructure manager may decide to gradually adapt to those modalities during a period of no more than four years after the entry into force of those implementing acts.

4 The infrastructure charges referred to in paragraph 3 may include a charge which reflects the scarcity of capacity of the identifiable section of the infrastructure during periods of congestion.

5 The infrastructure charges referred to in paragraph 3 may be modified to take account of the cost of environmental effects caused by the operation of the train. Any such modification shall be differentiated according to the magnitude of the effect caused.

Based on the experience gained by infrastructure managers, railway undertakings, regulatory bodies and competent authorities, and recognising existing schemes on noise differentiation, the Commission shall adopt implementing measures setting out the modalities to be followed for the application of the charging for the cost of noise effects including its duration of application and enabling the differentiation of infrastructure charges to take into account, where appropriate, the sensitivity of the area affected, in particular in terms of the size of population affected and the train composition with an impact on the level of noise emissions. Those implementing acts shall be adopted in accordance with the examination procedure referred to in Article 62(3). They shall not result in the undue distortion of competition between railway undertakings or affect the overall competitiveness of the rail sector.

Any such modification of infrastructure charges to take account of the cost of noise effects shall support the retrofitting of wagons with the most economically viable low-noise braking technology available.

Charging of environmental costs which results in an increase in the overall revenue accruing to the infrastructure manager shall however be allowed only if such charging is applied to road freight transport in accordance with Union law.

If charging for environmental costs generates additional revenue, it shall be for Member States to decide how the revenue is to be used.

Member States shall ensure that the necessary information is kept and that the origin of the charging of environmental costs and its application can be traced. Member States shall provide the Commission with this information upon request.

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 magnitude of the infrastructure charge shall be related to the costs attributable to the services.

7 The charge imposed for track access within service facilities referred to in point 2 of Annex II, and the supply of services in such facilities, shall not exceed the cost of providing it, plus a reasonable profit.

8 Where services listed in points 3 and 4 of Annex II, as additional and ancillary services are offered by only one supplier, the charge imposed for such a service shall not exceed the cost of providing it, plus a reasonable profit.

9 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.

10 The operator of the facility for supply of the services referred to in points 2, 3 and 4 of Annex II shall provide the infrastructure manager with the information on charges to be included in the network statement or shall indicate a website where such information is made available free of charge in electronic format in accordance with Article 27.

Article 32

Exceptions to charging principles

1 In order to obtain full recovery of the costs incurred by the infrastructure manager a Member State may, if the market can bear this, levy mark-ups on the basis of efficient, transparent and non-discriminatory principles, while guaranteeing optimal competitiveness of rail market segments. The charging system shall respect the productivity increases achieved by railway undertakings.

The level of charges shall not, however, exclude the use of infrastructure by market segments which can pay at least the cost that is directly incurred as a result of operating the railway service, plus a rate of return which the market can bear.

Before approving the levy of such mark-ups, Member States shall ensure that the infrastructure managers evaluate their relevance for specific market segments, considering at least the pairs listed in point 1 of Annex VI and retaining the relevant ones. The list of market segments defined by infrastructure managers shall contain at least the three following segments: freight services, passenger services within the framework of a public service contract and other passenger services.

Infrastructure managers may further distinguish market segments according to commodity or passengers transported.

Market segments in which railway undertakings are not currently operating but may provide services during the period of validity of the charging system shall also be defined. The infrastructure manager shall not include a mark-up in the charging system for those market segments.

The list of market segments shall be published in the network statement and shall be reviewed at least every five years. The regulatory body referred to in Article 55 shall control that list in accordance with Article 56.

2 For the carriage of goods from and to third countries operated on a network whose track gauge is different from the main rail network within the Union, infrastructure managers may set higher charges in order to obtain full costs recovery of the costs incurred.

3 For specific future investment projects, or specific investment projects that have been completed after 1988, 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 or cost-effectiveness or both 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.

4 The infrastructure charges for the use of railway corridors which are specified in Commission Decision 2009/561/EC[(1)] shall be differentiated to give incentives to equip trains with the ETCS compliant with the version adopted by the Commission Decision 2008/386/EC[(2)] and successive versions. Such differentiation shall not result in any overall change in revenue for the infrastructure manager.

Notwithstanding this obligation, Member States may decide that this differentiation of infrastructure charges does not apply to railway lines specified in Decision 2009/561/EC on which only ETCS equipped trains may run.

Member States may decide to extend this differentiation to railway lines not specified in Decision 2009/561/EC.

Before 16 June 2015 and following an impact assessment, the Commission shall adopt measures setting out modalities to be followed in applying the differentiation of the infrastructure charge according to a time-frame consistent with the ERTMS European Deployment Plan established under Decision 2009/561/EC and ensuring that it does not result in any overall change in revenue for the infrastructure manager. Those implementing measures shall adapt the modalities of the differentiation applicable to trains operating local and regional services using a limited section of the railway corridors specified in Decision 2009/561/EC. Those implementing acts shall be adopted in accordance with the examination procedure referred to in Article 62(3). They shall not result in the undue distortion of competition between railway undertakings or affect the overall competitiveness of the rail sector.

5 To prevent discrimination, Member States shall ensure that any given infrastructure manager's average and marginal charges for equivalent use of its 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 in so far as this can be done without disclosing confidential business information.

6 If an infrastructure manager intends to modify the essential elements of the charging system referred to in paragraph 1 of this Article, it shall make them public at least three months in advance of the deadline for the publication of the network statement according to Article 27(4).

Article 33

Discounts

1 Without prejudice to Articles 101, 102, 106 and 107 TFEU and notwithstanding the direct cost principle laid down in Article 31(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 this Article.

2 With the exception of paragraph 3, discounts shall be limited to the actual saving of the administrative cost to the infrastructure manager. 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, or discounts encouraging the use of considerably underutilised lines.

4 Discounts may relate only to charges levied for a specified infrastructure section.

5 Similar discount schemes shall apply for similar services. Discount schemes shall be applied in a non-discriminatory manner to any railway undertaking.

Article 34

Compensation schemes for unpaid environmental, accident and infrastructure costs

1 Member States may put in place a time-limited compensation scheme for the use of railway infrastructure for the demonstrably unpaid environmental, accident and infrastructure costs of competing transport modes in so far as these costs exceed the equivalent costs of rail.

2 Where a railway undertaking receiving compensation enjoys an exclusive right, the compensation shall be accompanied by comparable benefits to users.

3 The methodology used and calculations performed shall 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 the scheme is compatible with Articles 93, 107 and 108 TFEU.

Article 35

Performance scheme

1 Infrastructure charging schemes shall encourage railway undertakings and the infrastructure manager to minimise disruption and improve the performance of the railway network through a performance scheme. This scheme 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 as listed in point 2 of Annex VI shall apply throughout the network.

3 The Commission shall be empowered to adopt delegated acts in accordance with Article 60 concerning amendments to point 2(c) of Annex VI. Thus point 2(c) of Annex VI, may be amended in the light of the evolution of the rail market and experience gained by regulatory bodies referred to in Article 55, infrastructure managers and railway undertakings. Such amendments shall adapt the classes of delay to the best practices developed by industry.

Article 36

Reservation charges

Infrastructure managers may levy an appropriate charge for capacity that is allocated but not used. That non-usage charge shall provide incentives for efficient use of capacity. The levy of such a charge on applicants that were allocated a train path shall be mandatory in the event of their regular failure to use allocated paths or part of them. For the imposition of this charge, the infrastructure managers shall publish in their network statement the criteria to determine such failure to use. The regulatory body referred to in Article 55 shall control such criteria in accordance with Article 56. Payments for this charge shall be made by either the applicant or the railway undertaking appointed in accordance with Article 41(1). The infrastructure manager shall always be able to inform any interested party of the infrastructure capacity which has already been allocated to user railway undertakings.

Article 37

Cooperation in relation to charging systems on more than one network

1 Member States shall ensure that infrastructure managers cooperate to enable the application of efficient charging schemes, and associate to coordinate the charging or to charge for the operation of train services which cross more than one infrastructure network of the rail system within the Union. Infrastructure managers shall, in particular, aim to guarantee the optimal competitiveness of international rail services and ensure the efficient use of the railway networks. To this end they shall establish appropriate procedures, subject to the rules set out in this Directive.

2 For the purpose of paragraph 1 of this Article, Member States shall ensure that infrastructure managers cooperate to enable mark-ups, as referred to in Article 32, and performance schemes, as referred to in Article 35, to be efficiently applied, for traffic crossing more than one network of the rail system within the Union.

SECTION 3

Allocation of infrastructure capacity

Article 38

Capacity rights

1 Infrastructure capacity shall be allocated by an infrastructure manager. Once allocated to an applicant, it shall not be transferred by the recipient to another undertaking or service.

Any trading in infrastructure capacity shall be prohibited and shall lead to exclusion from the further allocation of capacity.

The use of capacity by a railway undertaking when carrying out the business of an applicant which is not a railway undertaking shall not be considered as a transfer.

2 The right to use specific infrastructure capacity in the form of a train path may be granted to applicants for a maximum duration of one working timetable period.

An infrastructure manager and an applicant may enter into a framework agreement as laid down in Article 42 for the use of capacity on the relevant railway infrastructure for a longer term than one working timetable period.

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

4 Where an applicant intends to request infrastructure capacity with a view to operating an international passenger service, it shall inform the infrastructure managers and the regulatory bodies concerned. In order to enable them to assess whether the purpose of the international service is to carry passengers on a route between stations located in different Member States, and what the potential economic impact on existing public service contracts is, regulatory bodies shall ensure that any competent authority that has awarded a rail passenger service on that route defined in a public service contract, any other interested competent authority with a right to limit access under Article 11 and any railway undertaking performing the public service contract on the route of that international passenger service is informed.

Article 39

Capacity allocation

1 Member States may lay down a framework for the allocation of infrastructure capacity subject to the condition of management independence laid down in Article 4. Specific capacity-allocation rules shall be laid down. The infrastructure manager shall perform the capacity-allocation processes. In particular, the infrastructure manager shall ensure that infrastructure capacity is allocated in a fair and non-discriminatory manner and in accordance with Union law.

2 Infrastructure managers shall respect the commercial confidentiality of information provided to them.

Article 40

Cooperation in the allocation of infrastructure capacity on more than one network

1 Member States shall ensure that infrastructure managers cooperate to enable the efficient creation and allocation of infrastructure capacity which crosses more than one network of the rail system within the Union, including under framework agreements referred to in Article 42. Infrastructure managers shall establish appropriate procedures, subject to the rules set out in this Directive, and organise train paths crossing more than one network accordingly.

Member States shall ensure that representatives of infrastructure managers whose allocation decisions have an impact on other infrastructure managers associate in order to coordinate the allocation of or to allocate all relevant infrastructure capacity at an international level, without prejudice to the specific rules contained in Union law on rail freight oriented networks. The principles and criteria for capacity allocation established under this cooperation shall be published by infrastructure managers in their network statement in accordance with paragraph 3 of Annex IV. Appropriate representatives of infrastructure managers from third countries may be associated with these procedures.

2 The Commission shall be informed of and invited to attend as an observer at the main meetings at which common principles and practices for the allocation of infrastructure are developed. Regulatory bodies shall receive sufficient information about the development of common principles and practices for the allocation of infrastructure and from IT-based allocation systems, to allow them to perform their regulatory supervision in accordance with Article 56.

3 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.

4 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 infrastructure capacity be made publicly available.

5 Working in cooperation, as referred to in paragraph 1, infrastructure managers shall assess the need for, and may where necessary propose and organise international train paths to facilitate the operation of freight trains which are subject to an ad hoc request as referred to in Article 48.

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

Article 41

Applicants

1 Requests for infrastructure capacity may be made by applicants. In order to use such infrastructure capacity, applicants shall appoint a railway undertaking to conclude an agreement with the infrastructure manager in accordance with Article 28. This is without prejudice to the right of applicants to conclude agreements with infrastructure managers under Article 44(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. They shall be specified in the network statement as referred to in point 3(b) of Annex IV. They may only include the provision of a financial guarantee that shall 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 infrastructure capacity.

3 Before 16 June 2015, the Commission shall adopt implementing measures setting out the details of the criteria to be followed for the application of paragraph 2. Those implementing acts shall be adopted in accordance with the examination procedure referred to in Article 62(3).

Article 42

Framework agreements

1 Without prejudice to Articles 101, 102 and 106 TFEU, a framework agreement may be concluded between an infrastructure manager and an applicant. Such a framework agreement shall specify the characteristics of the infrastructure capacity required by and offered to the applicant over a period of time exceeding one working timetable period.

The framework agreement shall not specify a train path in detail, but shall be such as to meet the legitimate commercial needs of the applicant. A Member State may require prior approval of such a framework agreement by the regulatory body referred to in Article 55 of this Directive.

2 Framework agreements shall not be such as to preclude the use of the relevant infrastructure by other applicants or services.

3 Framework agreements shall allow for the amendment or limitation of its terms to enable better use to be made of the railway infrastructure.

4 Framework agreements may contain penalties should it be necessary to modify or terminate the agreement.

5 Framework agreements shall, in principle, cover a period of five years, renewable for periods equal to their original duration. 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 For services using specialised infrastructure referred to in Article 49 which requires substantial and long-term investment, duly justified by the applicant, framework agreements may be for a period of 15 years. Any period longer than 15 years shall be permissible only in exceptional cases, in particular where there is large-scale, long-term investment, and particularly where such investment is covered by contractual commitments including a multiannual amortisation plan.

In such exceptional cases, the framework agreement may set out the detailed characteristics of the capacity which is to be provided to the applicant for the duration of the framework agreement. Those characteristics may include the frequency, volume and quality of train paths. The infrastructure manager may reduce reserved capacity which, over a period of at least one month, has been used less than the threshold quota provided for in Article 52.

As from 1 January 2010, an initial framework agreement may be drawn up for a period of five years, renewable once, on the basis of the capacity characteristics used by applicants operating services before 1 January 2010, in order to take account of

specialised investments or the existence of commercial contracts. The regulatory body referred to in Article 55 shall be responsible for authorising the entry into force of such an agreement.

7 While respecting commercial confidentiality, the general nature of each framework agreement shall be made available to any interested party.

8 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 may 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 43

Schedule for the allocation process

1 The infrastructure manager shall adhere to the schedule for capacity allocation set out in Annex VII.

2 The Commission shall be empowered to adopt delegated acts in accordance with Article 60 concerning certain amendments to Annex VII. Thus, after consultation of all infrastructure managers, Annex VII may be amended to take into account operational considerations of the allocation process. Those amendments shall be based on what is necessary in the light of experience in order to ensure an efficient allocation process and to reflect the operational concerns of the infrastructure managers.

3 Infrastructure managers shall agree with the other relevant infrastructure managers concerned which international train paths are to be included in the working timetable, before commencing consultation on the draft working timetable. Adjustments shall only be made if absolutely necessary.

Article 44

Applications

1 Applicants may apply under public or private law to the infrastructure manager to request an agreement granting rights to use railway infrastructure against a charge as provided for in Section 2 of Chapter IV.

2 Requests relating to the regular working timetable shall comply with the deadlines set out in Annex VII.

3 An applicant who is a party to a framework agreement shall apply in accordance with that agreement.

4 For train paths crossing more than one network, infrastructure managers shall ensure that applicants may apply to a one-stop shop that is either a joint body established by the infrastructure managers or one single infrastructure manager involved in the train path. That infrastructure manager shall be permitted to act on behalf of the applicant to seek capacity with other relevant infrastructure managers. This requirement is without prejudice to Regulation (EU) No 913/2010 of the European Parliament and of the Council of 22 September 2010 concerning a European rail network for competitive freight[(3)].

Article 45

Scheduling

1 The infrastructure manager shall, as far as possible, meet all requests for infrastructure 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 give priority to specific services within the scheduling and coordination process but only as set out in Articles 47 and 49.

3 The infrastructure manager shall consult interested parties about the draft working timetable and allow them at least one month to present their views. Interested parties shall include all those who have requested infrastructure capacity and other parties who wish to have the opportunity to comment on how the working timetable may affect their ability to procure rail services during the working timetable period.

4 The infrastructure manager shall take appropriate measures to deal with any concerns that are expressed.

Article 46

Coordination process

1 During the scheduling process referred to in Article 45, where the infrastructure manager encounters conflicts between different requests, it shall attempt, through coordination of the requests, to ensure the best possible matching of all requirements.

2 Where a situation requiring coordination arises, the infrastructure manager shall have the right, within reasonable limits, to propose infrastructure capacity that differs from that which was requested.

3 The infrastructure manager shall attempt, through consultation with the appropriate applicants, to resolve any conflicts. Such consultation shall be based on the disclosure of the following information within a reasonable time, free of charge and in written or electronic form:

a train paths requested by all other applicants on the same routes;

b train paths allocated on a preliminary basis to all other applicants on the same routes;

c alternative train paths proposed on the relevant routes in accordance with paragraph 2;

d full details of the criteria being used in the capacity-allocation process.

In accordance with Article 39(2), that information shall be provided without disclosing the identity of other applicants, unless applicants concerned have agreed to such disclosure.

4 The principles governing the coordination process shall be set out 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 Where requests for infrastructure capacity cannot be satisfied without coordination, the infrastructure manager shall attempt to accommodate all requests through coordination.

6 Without prejudice to the current appeal procedures and to Article 56, in the event of disputes relating to the allocation of infrastructure capacity, a dispute resolution system shall be made available in order to resolve such disputes promptly. This system shall be set out in the network statement. If this system is applied, a decision shall be reached within a time limit of 10 working days.

Article 47

Congested infrastructure

1 Where, after coordination of the requested train paths and consultation with applicants, it is not possible to satisfy requests for infrastructure capacity adequately, the infrastructure manager shall immediately declare that section of infrastructure on which this has occurred to be congested. This shall also be done for infrastructure which can be expected to suffer from insufficient capacity in the near future.

2 Where infrastructure has been declared to be congested, the infrastructure manager shall carry out a capacity analysis as provided for in Article 50, unless a capacity-enhancement plan, as provided for in Article 51, is already being implemented.

3 Where charges in accordance with Article 31(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 infrastructure 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.

In order to guarantee the development of adequate transport services within this framework, in particular to comply with public-service requirements or to promote the development of national and international rail freight, Member States may take any measures necessary, under non-discriminatory conditions, to ensure that such services are given priority when infrastructure capacity is allocated.

Member States may, where appropriate, grant the infrastructure manager compensation corresponding to any loss of revenue related to the need to allocate a given capacity to certain services pursuant to the second subparagraph.

Those measures and that compensation shall include taking account of the effect of this exclusion 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 to be followed and the criteria to be used where infrastructure is congested shall be set out in the network statement.

Article 48

Ad hoc requests

1 The infrastructure manager shall respond to ad hoc requests for individual train paths as quickly as possible, and in any event within 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 working timetable to enable them to respond rapidly to foreseeable ad hoc requests for capacity. This shall also apply in cases of congested infrastructure.

Article 49

Specialised infrastructure

1 Without prejudice to paragraph 2, 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 101, 102 and 106 TFEU, where such designation has occurred, the infrastructure manager may give priority to this type of traffic when allocating infrastructure capacity.

Such designation shall not prevent the use of such infrastructure by other types of traffic when capacity is available.

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

Article 50

Capacity analysis

1 The objective of capacity analysis is to determine the constraints on infrastructure capacity which prevent requests for capacity from being adequately met, and to propose methods of enabling additional requests to be satisfied. The capacity analysis shall identify the reasons for the congestion and what measures might be taken in the short and medium term to ease the congestion.

2 The capacity analysis shall consider the infrastructure, the operating procedures, the nature of the different services operating and the effect of all these factors on infrastructure capacity. Measures to be considered shall include in particular rerouting services, retiming services, speed alterations and infrastructure improvements.

3 A capacity analysis shall be completed within six months of the identification of infrastructure as congested.

Article 51

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 shall identify:

a the reasons for the congestion;

b the likely future development of traffic;

c the constraints on infrastructure development;

d the options and costs for capacity enhancement, including likely changes to access charges.

On the basis of a cost benefit analysis of the possible measures identified, it shall also determine the action to be taken to enhance infrastructure capacity, including a timetable for implementing the measures.

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

3 The infrastructure manager shall cease to levy any charges for the relevant infrastructure under Article 31(4) in cases where:

a it does not produce a capacity-enhancement plan; or

b it does not make progress with the actions identified in the capacity enhancement plan.

4 Notwithstanding paragraph 3 of this Article, the infrastructure manager may, subject to the approval of the regulatory body referred to in Article 55, continue to levy the charges if:

a the capacity-enhancement plan cannot be realised for reasons beyond its control; or

b the options available are not economically or financially viable.

Article 52

Use of train paths

1 In the network statement, the infrastructure manager shall specify conditions whereby it will take account of previous levels of utilisation of train paths in determining priorities for the allocation process.

2 For congested infrastructure in particular, 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 applicant's control.

Article 53

Infrastructure capacity for maintenance work

1 Requests for infrastructure capacity to enable maintenance work to be performed shall be submitted during the scheduling process.

2 Adequate account shall be taken by the infrastructure manager of the effect of infrastructure capacity reserved for scheduled track maintenance work on applicants.

3 The infrastructure manager shall inform, as soon as possible, interested parties about the unavailability of infrastructure capacity due to unscheduled maintenance work.

Article 54

Special measures to be taken in the event of disturbance

1 In the event of disturbance to train movements caused by technical failure or accident the infrastructure manager shall take all necessary steps to restore the situation to normal. To that end, it shall draw up a contingency plan listing the various 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 train paths allocated may be withdrawn without warning for as long as is necessary to repair the system.

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

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

SECTION 4

Regulatory body

Article 55

Regulatory body

1 Each Member State shall establish a single national regulatory body for the railway sector. Without prejudice to paragraph 2, this body shall be a stand-alone authority which is, in organisational, functional, hierarchical and decision-making terms, legally distinct and independent from any other public or private entity. It shall also be independent in its organisation, funding decisions, legal structure and decision-making from any infrastructure manager, charging body, allocation body or applicant. It shall furthermore be functionally independent from any competent authority involved in the award of a public service contract.

2 Member States may set up regulatory bodies which are competent for several regulated sectors, if these integrated regulatory authorities fulfil the independence requirements set out in paragraph 1 of this Article. The regulatory body for the rail sector may also be joined in organisational term with the national competition authority referred to in Article 11 of Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 101 and 102 of the Treaty[(4)], the safety authority established under Directive 2004/49/EC of the European Parliament and of the Council of 29 April 2004 on safety on the Community's railways[(5)] or the licensing authority referred to in Chapter III of this Directive, if the joint body fulfils the independence requirements set out in paragraph 1 of this Article.

3 Member States shall ensure that the regulatory body is staffed and managed in a way that guarantees its independence. They shall, in particular, ensure that the persons in charge of decisions to be taken by the regulatory body in accordance with Article 56, such as members of its executive board, where relevant, be appointed under clear and transparent rules which

guarantee their independence by the national cabinet or council of ministers or by any other public authority which does not directly exert ownership rights over regulated undertakings.

Member States shall decide whether these persons are appointed for a fixed and renewable term, or on a permanent basis which only allows dismissal for disciplinary reasons not related to their decision-making. They shall be selected in a transparent procedure on the basis of their merit, including appropriate competence and relevant experience, preferably in the field of railways or other network industries.

Member States shall ensure that these persons act independently from any market interest related to the railway sector, and shall therefore not have any interest or business relationship with any of the regulated undertakings or entities. To this effect, these persons shall make annually a declaration of commitment and a declaration of interests, indicating any direct or indirect interests that may be considered prejudicial to their independence and which might influence their performance of any function. These persons shall withdraw from decision-making in cases which concern an undertaking with which they had a direct or indirect connection during the year before the launch of a procedure.

They shall not seek or take instructions from any government or other public or private entity when carrying out the functions of the regulatory body, and have full authority over the recruitment and management of the staff of the regulatory body.

After their term in the regulatory body, they shall have no professional position or responsibility with any of the regulated undertakings or entities for a period of not less than one year.

Article 56

Functions of the regulatory body

1 Without prejudice to Article 46(6), an applicant shall have the 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 or where appropriate the railway undertaking or the operator of a service facility concerning:

a the network statement in its provisional and final versions;

b the criteria set out in it;

c the allocation process and its result;

d the charging scheme;

e the level or structure of infrastructure charges which it is, or may be, required to pay;

f arrangements for access in accordance with Articles 10 to 13;

g access to and charging for services in accordance with Article 13.

2 Without prejudice to the powers of the national competition authorities for securing competition in the rail services markets, the regulatory body shall have the power to monitor the competitive situation in the rail services markets and shall, in particular, control points (a) to (g) of paragraph 1 on its own initiative and with a view to preventing discrimination against applicants. It shall, in particular, check whether the network statement contains discriminatory clauses or creates discretionary powers for the infrastructure manager that may be used to discriminate against applicants.

3 The regulatory body shall also cooperate closely with the national safety authority within the meaning of Directive 2008/57/EC of the European Parliament and of the Council

of 17 June 2008 on the interoperability of the rail system within the Community[6], and the licensing authority within the meaning of this Directive.

Member States shall ensure that these authorities jointly develop a framework for information-sharing and cooperation aimed at preventing adverse effects on competition or safety in the railway market. This framework shall include a mechanism for the regulatory body to provide the national safety and licensing authorities with recommendations on issues that may affect competition in the railway market and for the national safety authority to provide the regulatory body and licensing authority with recommendations on issues that may affect safety. Without prejudice to the independence of each authority within the field of their respective competences, the relevant authority shall examine any such recommendation before adopting its decisions. If the relevant authority decides to deviate from these recommendations, it shall give reasons in its decisions.

4 Member States may decide that the regulatory body is given the task to adopt non-binding opinions on the provisional versions of the business plan referred to in Article 8(3), the contractual agreement and the capacity-enhancement plan to indicate in particular whether these instruments are consistent with the competitive situation in the rail services markets.

5 The regulatory body shall have the necessary organisational capacity in terms of human and material resources, which shall be proportionate to the importance of the rail sector in the Member State.

6 The regulatory body shall ensure that charges set by the infrastructure manager comply with Section 2 of Chapter IV and are non-discriminatory. Negotiations between applicants and an infrastructure manager concerning the level of infrastructure charges 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 Chapter.

7 The regulatory body shall, regularly and, in any case, at least every two years, consult representatives of users of the rail freight and passenger transport services, to take into account their views on the rail market.

8 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.

Information requested shall be supplied within a reasonable period set by the regulatory body that shall not exceed one month, unless, in exceptional circumstances, the regulatory body agrees to, and authorises, a time-limited extension, which shall not exceed two additional weeks. The regulatory body shall be able to enforce such requests with appropriate penalties, including fines. Information to be supplied to the regulatory body includes all data which the regulatory body requires in the framework of its appeal function and in its function of monitoring the competition in the rail services markets in accordance with paragraph 2. This includes data which are necessary for statistical and market observation purposes.

9 The regulatory body shall consider any complaints and, as appropriate, shall ask for relevant information and initiate consultations with all relevant parties, within one month from the receipt of the complaint. It shall decide on any complaints, take action to remedy the situation and inform the relevant parties of its reasoned decision within a pre-determined, reasonable time, and, in any case, within six weeks from receipt of all relevant information. Without prejudice to the powers of the national competition authorities for securing competition in the rail service markets, the regulatory body shall, where appropriate, decide on its own initiative

on appropriate measures to correct discrimination against applicants, market distortion and any other undesirable developments in these markets, in particular with reference to points (a) to (g) of paragraph 1.

A decision of the regulatory body shall be binding on all parties covered by that decision, and shall not be subject to the control of another administrative instance. The regulatory body shall be able to enforce its decisions with the appropriate penalties, including fines.

In the event of an appeal against a refusal to grant infrastructure capacity, or against 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.

10 Member States shall ensure that decisions taken by the regulatory body are subject to judicial review. The appeal may have suspensive effect on the decision of the regulatory body only when the immediate effect of the regulatory body's decision may cause irretrievable or manifestly excessive damages for the appellant. This provision is without prejudice to the powers of the court hearing the appeal as conferred by constitutional law, where applicable.

11 Member States shall ensure that decisions taken by the regulatory body are published.

12 The regulatory body shall have the power to carry out audits or initiate external audits with infrastructure managers, operators of service facilities and, where relevant, railway undertakings, to verify compliance with accounting separation provisions laid down in Article 6. In this respect, the regulatory body shall be entitled to request any relevant information. In particular the regulatory body shall have the power to request infrastructure manager, operators of service facilities and all undertakings or other entities performing or integrating different types of rail transport or infrastructure management as referred to in Article 6(1) and (2) and Article 13 to provide all or part of the accounting information listed in Annex VIII with a sufficient level of detail as deemed necessary and proportionate.

Without prejudice to the powers of the national authorities responsible for State aid issues, the regulatory body may also draw conclusions from the accounts concerning State aid issues which it shall report to those authorities.

13 The Commission shall be empowered to adopt delegated acts in accordance with Article 60 concerning certain amendments to Annex VIII. Thus, Annex VIII may be amended to adapt it to the evolution of accounting and control practices and/or to supplement it with additional elements necessary to verify separation of accounts.

Article 57

Cooperation between regulatory bodies

1 The regulatory bodies shall exchange information about their work and decision-making principles and practice and, in particular, exchange information on the main issues of their procedures and on the problems of interpreting transposed Union railway law. They shall otherwise cooperate for the purpose of coordinating their decision-making across the Union. For this purpose, they shall participate and work together in a network that convenes at regular intervals. The Commission shall be a member, coordinate and support the work of the network and make recommendations to the network, as appropriate. It shall ensure active cooperation of the appropriate regulatory bodies.

Subject to the rules on data protection provided for in Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data[(7)] and Regulation (EC) No 45/2001 of the European Parliament and of the Council of 18 December 2000 on the protection of individuals with regard to the processing of personal data by the Community institutions and bodies and on the free movement of such data[(8)], the Commission shall support the exchange of the information referred above among the members of the network, possibly through electronic tools, respecting the confidentiality of business secrets supplied by the relevant undertakings.

2 The regulatory bodies shall cooperate closely, including through working arrangements, for the purposes of mutual assistance in their market monitoring tasks and handling complaints or investigations.

3 In the case of a complaint or an own-initiative investigation on issues of access or charging relating to an international train path, as well as in the framework of monitoring competition on the market related to international rail transport services, the regulatory body concerned shall consult the regulatory bodies of all other Member States through which the international train path concerned runs and, where appropriate, the Commission, and shall request all necessary information from them before taking its decision.

4 The regulatory bodies consulted in accordance with paragraph 3 shall provide all the information that they themselves have the right to request under their national law. This information may only be used for the purpose of handling the complaint or investigation referred to in paragraph 3.

5 The regulatory body receiving the complaint or conducting an investigation on its own initiative shall transfer relevant information to the regulatory body responsible in order for that body to take measures regarding the parties concerned.

6 Member States shall ensure that any associated representatives of infrastructure managers as referred to in Article 40(1) provide, without delay, all the information necessary for the purpose of handling the complaint or investigation referred to in paragraph 3 of this Article and requested by the regulatory body of the Member State in which the associated representative is located. That regulatory body shall be entitled to transfer such information regarding the international train path concerned to the regulatory bodies referred to in paragraph 3.

7 At the request of a regulatory body, the Commission may participate in the activities listed under paragraphs 2 to 6 for the purpose of facilitating the cooperation of regulatory bodies as outlined in those paragraphs.

8 Regulatory bodies shall develop common principles and practices for making the decisions for which they are empowered under this Directive. Based on the experience of regulatory bodies and on the activities of the network referred to in paragraph 1, and, if needed, to ensure efficient cooperation of regulatory bodies, the Commission may adopt measures setting out such common principles and practices. Those implementing acts shall be adopted in accordance with the examination procedure referred to in Article 62(3).

9 Regulatory bodies shall review decisions and practices of associations of infrastructure managers as referred to in Article 37 and Article 40(1) that implement provisions of this Directive or otherwise facilitate international rail transport.

(**1**) Commission Decision 2009/561/EC of 22 July 2009 amending Decision 2006/679/EC as regards the implementation of the technical specification for interoperability relating to the control-command and signalling subsystem of the trans-European conventional rail system (OJ L 194, 25.7.2009, p. 60).

(**2**) Commission Decision 2008/386/EC of 23 April 2008 modifying Annex A to Decision 2006/679/EC concerning the technical specification for interoperability relating to the control-command and signalling subsystem of the trans-European conventional rail system and Annex A to Decision 2006/860/EC concerning the technical specification for interoperability relating to the control-command and signalling subsystem of the trans-European high-speed rail system (OJ L 136, 24.5.2008, p. 11).

(**3**) OJ L 276, 20.10.2010, p. 22.

(**4**) OJ L 1, 4.1.2003, p. 1.
Editorial note: The title of Council Regulation (EC) No 1/2003 has been adjusted to take account of the renumbering of the articles of the Treaty establishing the European Community, in accordance with Article 5 of the Treaty of Lisbon; the original reference was: Articles 81 and 82 of the Treaty.

(**5**) OJ L 164, 30.4.2004, p. 44.

(**6**) OJ L 191, 18.7.2008, p. 1.

(**7**) OJ L 281, 23.11.1995, p. 31.

(**8**) OJ L 8, 12.1.2001, p. 1.