

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 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.

[<sup>F14</sup> Where an applicant intends to request infrastructure capacity with a view to operating a passenger service, in a Member State where the right of access to railway infrastructure is limited in accordance with Article 11, it shall inform the infrastructure managers and the regulatory bodies concerned no less than 18 months before the entry into force of the working timetable to which the request for capacity relates. In order to enable the regulatory bodies concerned to assess the potential economic impact on existing public service contracts, 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 the right to limit access under Article 11 and any railway undertaking performing the public service contract on the route of that passenger service is informed without undue delay and at the latest within 10 days.]

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#### Textual Amendments

- F1** Substituted by Directive (EU) 2016/2370 of the European Parliament and of the Council of 14 December 2016 amending Directive 2012/34/EU as regards the opening of the market for domestic passenger transport services by rail and the governance of the railway infrastructure (Text with EEA relevance).

### 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.

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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<sup>(1)</sup>.

#### *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.

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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.

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## 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.

[<sup>F2</sup>The regulatory body may require the infrastructure manager to make such information available to it, if it deems that this is necessary.]

#### Textual Amendments

- F2** Inserted by [Directive \(EU\) 2016/2370 of the European Parliament and of the Council of 14 December 2016 amending Directive 2012/34/EU as regards the opening of the market for domestic passenger transport services by rail and the governance of the railway infrastructure \(Text with EEA relevance\).](#)

## Article 54

### Special measures to be taken in the event of disturbance

[<sup>F1</sup>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 disturbances to train movements. In the event of a disturbance which has a potential impact on cross-border traffic, the infrastructure manager shall share any relevant information with other infrastructure managers the network and traffic of which may be affected by that disturbance. The infrastructure managers concerned shall cooperate to restore the cross-border traffic to normal.]

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.

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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.

#### **Textual Amendments**

- F1** Substituted by [Directive \(EU\) 2016/2370 of the European Parliament and of the Council of 14 December 2016 amending Directive 2012/34/EU as regards the opening of the market for domestic passenger transport services by rail and the governance of the railway infrastructure \(Text with EEA relevance\)](#).

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(1) [OJ L 276, 20.10.2010, p. 22.](#)