

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)

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)

THE EUROPEAN PARLIAMENT AND THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty on the Functioning of the European Union, and in particular Article 91 thereof,

Having regard to the proposal from the European Commission,

After transmission of the draft legislative act to the national parliaments,

Having regard to the opinion of the European Economic and Social Committee⁽¹⁾,

Having regard to the opinion of the Committee of the Regions⁽²⁾,

Acting in accordance with the ordinary legislative procedure⁽³⁾,

Whereas:

- (1) Council Directive 91/440/EEC of 29 July 1991 on the development of the Community's railways⁽⁴⁾, Council Directive 95/18/EC of 19 June 1995 on the licensing of railway undertakings⁽⁵⁾ and Directive 2001/14/EC of the European Parliament and of the Council of 26 February 2001 on the allocation of railway infrastructure capacity and the levying of charges for the use of railway infrastructure⁽⁶⁾ have been substantially amended. Since further amendments are necessary, those Directives should be recast and merged into a single act in the interest of clarity.
- (2) Greater integration of the Union transport sector is an essential element of the completion of the internal market, and the railways are a vital part of the Union transport sector moving towards achieving sustainable mobility.
- (3) The efficiency of the railway system should be improved, in order to integrate it into a competitive market, whilst taking account of the special features of the railways.
- (4) Member States with an important share of rail traffic with third countries which have the same railway gauge which is different from the main rail network within the Union should be able to have specific operational rules ensuring both coordination between their infrastructure managers and those of the third countries concerned and fair competition between railway undertakings.

- (5) In order to render railway transport efficient and competitive with other modes of transport, Member States should ensure that railway undertakings have the status of independent operators behaving in a commercial manner and adapting to market needs.
- (6) In order to ensure the future development and efficient operation of the railway system, a distinction should be made between the provision of transport services and the operation of infrastructure. Given that situation, it is necessary for these two activities to be managed separately and to have separate accounts. Provided that those separation requirements are met, that no conflicts of interest arise and that the confidentiality of commercially sensitive information is guaranteed, infrastructure managers should have the possibility to outsource specific administrative tasks, such as the collection of charges, to entities other than those active in railway transport services markets.
- (7) The principle of freedom to provide services should be applied to the railway sector, taking into account that sector's specific characteristics.
- (8) In order to boost competition in railway service management in terms of improved comfort and the services provided to users, Member States should retain general responsibility for the development of the appropriate railway infrastructure.
- (9) In the absence of common rules on allocation of infrastructure costs, Member States should, after consulting the infrastructure manager, lay down rules providing for railway undertakings to pay for the use of railway infrastructure. Such rules should not discriminate between railway undertakings.
- (10) Member States should ensure that infrastructure managers and existing publicly owned or controlled railway transport undertakings are given a sound financial structure, having due regard to Union rules on State aid. This is without prejudice to the competence of the Member States regarding infrastructure planning and financing.
- (11) Applicants should be given the opportunity to express their views on the content of the business plan as far as the use, provision and development of the infrastructure are concerned. This should not necessarily entail full disclosure of the business plan developed by the infrastructure manager.
- (12) Since private branch lines and sidings, such as sidings and lines in private industrial facilities, are not part of the railway infrastructure as defined by this Directive, managers of those infrastructures should not be subject to the obligations imposed on infrastructure managers under this Directive. However, non-discriminatory access to branch lines and sidings should be guaranteed, irrespective of their ownership, where they are needed to get access to services facilities which are essential for the provision of transport services and where serving or potentially serving more than one final customer.
- (13) Member States should be able to decide to cover infrastructure expenditure through means other than direct State funding, such as public private partnership and private sector financing.
- (14) The profit and loss account of an infrastructure manager should be balanced over a reasonable time period, which, once established, might be exceeded under exceptional

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circumstances, such as a major and sudden deterioration in the economic situation in a Member State affecting substantially the level of traffic on its infrastructure or the level of available public financing. In accordance with international accounting rules, the amount of loans to finance infrastructure projects does not appear in such profit and loss accounts.

- (15) An efficient freight sector, especially across borders, requires action to open up the market.
- (16) In order to ensure that access rights to railway infrastructure are applied throughout the Union in a uniform and non-discriminatory manner, it is appropriate to introduce a licence for railway undertakings.
- (17) In the case of journeys with intermediate stops, new market entrants should be authorised to pick up and set down passengers along the route in order to ensure that such operations are economically viable and to avoid placing potential competitors at a disadvantage compared to existing operators.
- (18) The introduction of new, open-access, international passenger services with intermediate stops should not be used to open up the market for domestic passenger services, but should merely focus on stops that are ancillary to the international route. The principal purpose of the new services should be to carry passengers travelling on an international journey. When assessing whether that is the service's principal purpose, criteria such as the proportion of turnover, and of volume, derived from transport of domestic or international passengers, and the length of the service should be taken into account. The assessment of the service's principal purpose should be carried out by the respective national regulatory body at the request of an interested party.
- (19) Regulation (EC) No 1370/2007 of the European Parliament and of the Council of 23 October 2007 on public passenger transport services by rail and by road⁽⁷⁾ authorises Member States and local authorities to award public service contracts which may contain exclusive rights to operate certain services. It is therefore necessary to ensure that the provisions of that Regulation are consistent with the principle of opening up international passenger services to competition.
- (20) Opening up international passenger services to competition may have implications for the organisation and financing of rail passenger services provided under a public service contract. Member States should have the option of limiting the right of access to the market where that right would compromise the economic equilibrium of those public service contracts and where approval is given by the relevant regulatory body on the basis of an objective economic analysis, following a request from the competent authorities that awarded the public service contract.
- (21) The assessment of whether the economic equilibrium of the public service contract has been compromised should take into account predetermined criteria such as the impact on the profitability of any services which are included in a public service contract, including the resulting impacts on the net cost to the competent public authority that awarded the contract, passenger demand, ticket pricing, ticketing arrangements, location and number of stops on both sides of the border and timing and frequency of

the proposed new service. In accordance with such an assessment and the decision of the relevant regulatory body, Member States should be able to authorise, modify or deny the right of access for the international passenger service sought, including the levying of a charge on the operator of a new international passenger service, in line with the economic analysis and in accordance with Union law and the principles of equality and non-discrimination.

- (22) In order to contribute to the operation of passenger services on lines fulfilling a public service obligation, Member States should be able to authorise the authorities responsible for those services to impose a levy on passenger services which fall within the jurisdiction of those authorities. That levy should contribute to the financing of public service obligations laid down in public service contracts.
- (23) The regulatory body should function in a way which avoids any conflict of interests and any possible involvement in the award of the public service contract under consideration. The powers of the regulatory body should be extended to allow for an assessment of the purpose of an international service and, where appropriate, of the potential economic impact on existing public service contracts.
- (24) In order to invest in services using specialised infrastructure, such as high-speed railway lines, applicants need legal certainty given the substantial long-term investment involved.
- (25) The regulatory bodies should exchange information and, where relevant in individual cases, should coordinate the principles and practice of assessing whether the economic equilibrium of a public service contract is compromised. They should progressively develop guidelines based on their experience.
- (26) In order to ensure fair competition between railway undertakings and to guarantee full transparency and the non-discriminatory access to and supply of services, a distinction should be made between the provision of transport services and the operation of service facilities. Thus, it is necessary for these two types of activity to be managed independently where the operator of the service facility belongs to a body or firm which is also active and holds a dominant position at national level in at least one of the railway transport markets for the carriage of goods or passengers for which the facility is used. Such independence should not entail the establishment of a separate legal entity for service facilities.
- (27) Non-discriminatory access to service facilities and the supply of rail-related services in these facilities should allow railway undertakings to offer better services to passengers and freight users.
- (28) While Directive 2009/72/EC of the European Parliament and of the Council of 13 July 2009 concerning common rules for the internal market in electricity⁽⁸⁾ provides for the opening of the European electricity market, traction current should be supplied to railway undertakings upon request in a non-discriminatory manner. When there is only one supplier available, the charge imposed for such service should be set under uniform charging principles.

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- (29) In respect of relations with third countries, special consideration should be given to the existence of reciprocal access for Union railway undertakings to the rail market of those third countries and this should be facilitated through the cross-border agreements.
- (30) In order to ensure dependable and adequate services, it is necessary to ensure that, at all times, railway undertakings meet certain requirements in relation to good repute, financial fitness and professional competence.
- (31) For the protection of customers and the third parties concerned it is essential to ensure that railway undertakings are sufficiently insured against liability. Coverage of that liability in the event of accidents through guarantees provided by banks or other undertakings should also be allowed, provided that such coverage is offered under market conditions, does not result in State aid and does not contain elements of discrimination against other railway undertakings.
- (32) A railway undertaking should also be required to comply with national and Union law on the provision of railway services, applied in a non-discriminatory manner, which are intended to ensure that it can carry on its activity in complete safety and with due regard to health, social conditions and the rights of workers and consumers on specific stretches of track.
- (33) The procedures for granting, maintaining and amending licences for railway undertakings should be transparent and in accordance with the principle of non-discrimination.
- (34) To ensure transparency and non-discriminatory access to rail infrastructure, and to services in service facilities, for all railway undertakings, all the information required to use access rights should be published in a network statement. The network statement should be published in at least two official languages of the Union in line with existing international practices.
- (35) Appropriate capacity-allocation schemes for rail infrastructure coupled with competitive operators will result in a better balance of transport between modes.
- (36) Infrastructure managers should be given incentives, such as bonuses for managing directors, to reduce the level of access charges and the costs of providing infrastructure.
- (37) The obligation of Member States to ensure that the infrastructure manager performance targets and medium to long-term incomes are implemented through a contractual agreement between the competent authority and the infrastructure manager should be without prejudice to the competence of the Member States regarding planning of and financing for railway infrastructure.
- (38) Encouraging optimal use of the railway infrastructure will lead to a reduction in the cost of transport to society.
- (39) Methods for apportioning costs established by infrastructure managers should be based on the best available understanding of cost causation and should apportion costs to the different services offered to railway undertakings and, where relevant, to types of rail vehicles.

- (40) Appropriate charging schemes for rail infrastructure coupled with appropriate charging schemes for other transport infrastructures and competitive operators should result in an optimal balance of different transport modes on a sustainable basis.
- (41) When levying mark-ups, distinct market segments should be defined by the infrastructure manager where the costs of providing the transport services, their market prices or their requirements for service quality differ considerably.
- (42) The charging and capacity-allocation schemes should permit equal and non-discriminatory access for all undertakings and should attempt, as far as possible, to meet the needs of all users and traffic types in a fair and non-discriminatory manner. Such schemes should allow fair competition in the provision of railway services.
- (43) Within the framework set out by Member States, charging and capacity-allocation schemes should encourage railway infrastructure managers to optimise use of their infrastructure.
- (44) Railway undertakings should receive clear and consistent economic signals from capacity-allocation schemes and from charging schemes which lead them to make rational decisions.
- (45) Rolling noise caused by brake blocks with cast iron technology, used on freight wagons, is one of the causes of noise emissions that could be reduced with appropriate technical solutions. Noise differentiated infrastructure charges should primarily address the freight wagons that do not fulfil the requirements of Commission Decision 2006/66/EC of 23 December 2005 concerning the technical specification for interoperability relating to the subsystem 'rolling stock — noise' of the trans-European conventional rail system⁽⁹⁾. When such differentiation results in a loss of revenue for the infrastructure manager, it should be without prejudice to Union rules on State aid.
- (46) Noise-differentiated infrastructure charges should complement other measures to reduce noise produced by rail traffic, such as the adoption of technical specifications for interoperability (TSI) setting maximum levels of noise produced by railway vehicles, noise mapping and action plans to reduce noise exposure under Directive 2002/49/EC of the European Parliament and of the Council of 25 June 2002 relating to the assessment and management of environmental noise⁽¹⁰⁾ as well as Union and national public funding for the retrofitting of rail vehicles and for noise-reduction infrastructures.
- (47) Noise-reduction measures equivalent to those adopted for the rail sector should be considered for other modes of transport.
- (48) In order to accelerate the installation of the European Train Control System (ETCS) on board locomotives, infrastructure managers should modify the charging system through a temporary differentiation for trains equipped with ETCS. Such a differentiation should give appropriate incentives to equip trains with ETCS.
- (49) In order to take into account the need of users, or potential users, of railway infrastructure capacity to plan their business, and the needs of customers and funders, it is important that infrastructure managers ensure that infrastructure capacity is allocated in a way which reflects the need to maintain and improve service reliability levels.

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- (50) It is desirable for railway undertakings and the infrastructure manager to be provided with incentives to minimise disruption and improve performance of the network.
- (51) Member States should have the option of allowing purchasers of railway services to enter the capacity-allocation process directly.
- (52) It is important to have regard to the business requirements of both applicants and the infrastructure manager.
- (53) It is important to maximise the flexibility available to infrastructure managers with regard to the allocation of infrastructure capacity, but this should be consistent with satisfying the applicant's reasonable requirements.
- (54) The capacity-allocation process should prevent the imposition of undue constraints on the wishes of other undertakings, holding, or intending to hold, rights to use the infrastructure, to develop their business.
- (55) Capacity allocation and charging schemes may need to take account of the fact that different components of the rail infrastructure network may have been designed with different principal users in mind.
- (56) As different users and types of users will frequently have a different impact on infrastructure capacity, the needs of different services need to be properly balanced.
- (57) Services operated under contract to a public authority may require special rules to safeguard their attractiveness to users.
- (58) The charging and capacity-allocation schemes should take account of the effects of increasing saturation of infrastructure capacity and, ultimately, the scarcity of capacity.
- (59) The different time-frames for planning traffic types should ensure that requests for infrastructure capacity which are made after the completion of the process for establishing the annual working timetable can be satisfied.
- (60) To ensure the optimum outcome for railway undertakings, it is desirable to require an examination of the use of infrastructure capacity when the coordination of requests for capacity is required to meet the needs of users.
- (61) In view of their monopolistic position, infrastructure managers should be required to examine the available infrastructure capacity, and methods of enhancing it when the capacity-allocation process is unable to meet the requirements of users.
- (62) A lack of information about other railway undertakings' requests and about the constraints within the system may make it difficult for railway undertakings to seek to optimise their infrastructure capacity requests.
- (63) It is important to ensure better coordination of allocation schemes in order to improve the attractiveness of rail for traffic which uses the network of more than one infrastructure manager, in particular for international traffic.
- (64) It is important to minimise the distortions of competition which may arise, either between railway infrastructures or transport modes, from significant differences in charging principles.

- (65) It is desirable to define those components of the infrastructure service which are essential to enable an operator to provide a service and which should be provided in return for minimum access charges.
- (66) Investment in railway infrastructure is necessary and infrastructure charging schemes should provide incentives for infrastructure managers to make appropriate investments economically attractive.
- (67) To enable the establishment of appropriate and fair levels of infrastructure charges, infrastructure managers need to record and establish the value of their assets and develop a clear understanding of the factors which determine the cost of operating the infrastructure.
- (68) It is desirable to ensure that account is taken of external costs when making transport decisions and that rail infrastructure charging can contribute to the internalisation of external costs in a coherent and balanced way across all modes of transport.
- (69) It is important to ensure that charges for domestic and international traffic are such as to permit rail to meet the needs of the market. Consequently, infrastructure charging should be set at the cost that is directly incurred as a result of operating the train service.
- (70) The overall level of cost recovery through infrastructure charges affects the necessary level of government contribution. Member States may require different levels of overall cost recovery. However, any infrastructure charging scheme should allow traffic which can at least pay for the additional cost which it imposes to use the rail network.
- (71) Railway infrastructure is a natural monopoly and it is therefore necessary to provide infrastructure managers with incentives to reduce costs and to manage their infrastructure efficiently.
- (72) The development of railway transport should be achieved by using, inter alia, the Union instruments available, without prejudice to priorities already established.
- (73) Discounts which are granted to railway undertakings should relate to actual administrative cost savings made, in particular transaction costs savings. Discounts may also be granted to promote the efficient use of infrastructure.
- (74) It is desirable for railway undertakings and the infrastructure manager to be provided with incentives to minimise disruption of the network.
- (75) The allocation of capacity is associated with a cost to the infrastructure manager, payment for which should be required.
- (76) The efficient management and fair and non-discriminatory use of rail infrastructure require the establishment of a regulatory body that oversees the application of the rules set out in this Directive and acts as an appeal body, without prejudice to the possibility of judicial review. Such a regulatory body should be able to enforce its information requests and decisions by means of appropriate penalties.
- (77) The financing of the regulatory body should guarantee its independence and should come either from the State budget or from contributions of the sector levied in

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a compulsory way, while respecting the principles of fairness, transparency, non-discrimination and proportionality.

- (78) Appropriate procedures for appointing staff should contribute to guaranteeing the independence of the regulatory body, ensuring in particular that the appointment of persons in charge of decisions is made by a public authority which does not directly exert ownership rights over regulated undertakings. Provided that that condition is met, such an authority could be, for example, a parliament, a President or a Prime Minister.
- (79) Specific measures are required to take account of the specific geopolitical and geographical situation of certain Member States and the particular organisation of the railway sector in various Member States while ensuring the integrity of the internal market.
- (80) In order to take into account the evolution of the rail market, the power to adopt acts in accordance with Article 290 of the Treaty on the Functioning of the European Union (TFEU) should be delegated to the Commission in respect of the technical amendments to the information to be provided by the undertaking applying for a licence, to the list of classes of delay, to the schedule for the allocation process, and to the accounting information to be supplied to the regulatory bodies. It is of particular importance that the Commission carry out appropriate consultations during its preparatory work, including at expert level. The Commission, when preparing and drawing up delegated acts, should ensure a simultaneous, timely and appropriate transmission of relevant documents to the European Parliament and to the Council.
- (81) In order to ensure uniform conditions for the implementation of this Directive, implementing powers should be conferred on the Commission. Those powers should be exercised in accordance with Regulation (EU) No 182/2011 of the European Parliament and of the Council of 16 February 2011 laying down the rules and general principles concerning mechanisms for control by Member States of the Commission's exercise of implementing powers⁽¹¹⁾.
- (82) Implementing acts related to the principal purpose of rail services, the assessment of impact of new international services on the economic equilibrium of public service contracts, the levies on railway undertakings providing passenger services, access to the services to be supplied in essential service facilities, the details on the procedure to be followed to obtain a licence, the modalities for the calculation of direct cost for the application of the charging for the cost of noise effects and for the application of the differentiation of the infrastructure charge to give incentives to equip trains with ETCS and the common principles and practices for the regulatory bodies decision-making should not be adopted by the Commission where the committee established pursuant to this Directive delivers no opinion on the draft implementing act presented by the Commission.
- (83) Since the objectives of this Directive, namely to foster the development of the Union railways, to set out broad principles for granting licences to railway undertakings and to coordinate arrangements in the Member States governing the allocation of railway infrastructure capacity and the charges made for the use thereof, cannot be sufficiently achieved by the Member States on account of the manifestly international dimension of

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issuing such licences and operating significant elements of the railway networks, and of the need to ensure fair and non-discriminatory terms for access to the infrastructure, and can therefore, by reason of their trans-national implications, be better achieved at Union level, the Union may adopt measures in accordance with the principle of subsidiarity as set out in Article 5 of the Treaty on European Union. In accordance with the principle of proportionality, as set out in that Article, this Directive does not go beyond what is necessary to achieve those objectives.

- (84) The obligation to transpose this Directive into national law should be confined to those provisions which represent a substantive change as compared with the earlier Directives. The obligation to transpose the provisions of this Directive, which are substantively unchanged as compared with the earlier Directives, arises under those Directives.
- (85) The Member States which have no railway system, and no immediate prospect of having one, would be subject to a disproportionate and pointless obligation if they had to transpose and implement Chapters II and IV of this Directive. Therefore, such Member States should be exempted from that obligation.
- (86) In accordance with the Joint Political Declaration of Member States and the Commission of 28 September 2011 on explanatory documents⁽¹²⁾, Member States have undertaken to accompany, in justified cases, the notification of their transposition measures with one or more documents explaining the relationship between the components of a Directive and the corresponding parts of national transposition instruments. With regard to this Directive, the legislator considers the transmission of such documents to be justified.
- (87) This Directive should be without prejudice to the time limits set out in Part B of Annex IX, within which Member States are to comply with the earlier Directives,

HAVE ADOPTED THIS DIRECTIVE:

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- (1) OJ C 132, 3.5.2011, p. 99.
- (2) OJ C 104, 2.4.2011, p. 53.
- (3) Position of the European Parliament of 16 November 2011 (not yet published in the Official Journal) and Position of the Council at first reading of 8 March 2012 (OJ C 108 E, 14.4.2012, p. 8). Position of the European Parliament of 3 July 2012 and decision of the Council of 29 October 2012.
- (4) OJ L 237, 24.8.1991, p. 25.
- (5) OJ L 143, 27.6.1995, p. 70.
- (6) OJ L 75, 15.3.2001, p. 29.
- (7) OJ L 315, 3.12.2007, p. 1.
- (8) OJ L 211, 14.8.2009, p. 55.
- (9) OJ L 37, 8.2.2006, p. 1.
- (10) OJ L 189, 18.7.2002, p. 12.
- (11) OJ L 55, 28.2.2011, p. 13.
- (12) OJ C 369, 17.12 2011, p. 14.