POSITION (EU) No 8/2012 OF THE COUNCIL AT FIRST READING

with a view to the adoption of a Directive of the European Parliament and of the Council establishing a single European railway area (recast)

Adopted by the Council on 8 March 2012

(Text with EEA relevance)

(2012/C 108 E/02)

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 accordance with the company law of the Member States regarding supervisory bodies of private joint-stock companies, shareholders of railway undertakings should be able to require prior approval for major business management decisions such as on acquisitions, investments and strategy. The powers of supervisory bodies under the company law of the Member States such as the appointment of board members, should not be affected by this Directive.

(7) 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 this 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.

(8) The principle of freedom to provide services should be applied to the railway sector, taking into account that sector's specific characteristics.

(9) 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.

[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 … (not yet published in the Official Journal) and Position of the Council at first reading of 8 March 2012. Position of the European Parliament of … (not yet published in the Official Journal) and decision of the Council of … (not yet published in the Official Journal).
[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.

(10) 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.

(11) 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 aids. This is without prejudice to the competence of the Member States regarding infrastructure planning and financing.

(12) 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.

(13) 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.

(14) Member States should be able to decide to cover infrastructure expenditure through means other than direct State funding, such as Private Public Partnership and private sector financing.

(15) The accounts of an infrastructure manager should be balanced over a reasonable time period which, once established, might be exceeded under exceptional 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.

(16) An efficient freight sector, especially across borders, requires action to open up the market.

(17) 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.

(18) 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.

(19) 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 be focused 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.

(20) 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 [1] 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.

(21) 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 this 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.

(22) The assessment of whether the economic equilibrium of the public service contract could be 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

[1] OJ L 315, 3.12.2007, p. 1.

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.

(23) 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.

(24) 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, the potential economic impact on existing public service contracts.

(25) 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.

(26) The regulatory bodies should exchange information and, where relevant in individual cases, 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.

(27) In order to ensure fair competition between railway undertakings and guarantee full transparency and 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 body or firm for service facilities.

(28) Cross-border agreements between Member States and third countries should facilitate the provision of equal market access for Union railway undertakings and those of third countries on a reciprocal basis.

(29) 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.

(30) For the protection of customers and 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.

(31) 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.

(32) The procedures for granting, maintaining and amending licences for railway undertakings should be transparent and in accordance with the principle of non-discrimination.

(33) 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.

(34) Appropriate capacity-allocation schemes for rail infrastructure coupled with competitive operators will result in a better balance of transport between modes.

(35) Infrastructure managers should be given incentives to reduce the level of access charges and the costs of providing infrastructure, such as bonuses for managing directors.

(36) 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.

(37) Encouraging optimal use of the railway infrastructure will lead to a reduction in the cost of transport to society.

(38) 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.

(39) 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.

(40) 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.

(41) The charging and capacity allocation schemes should permit equal and non-discriminatory access for all undertakings and 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.

(42) Within the framework set out by Member States, charging and capacity-allocation schemes should encourage railway infrastructure managers to optimise use of their infrastructure.

(43) Railway undertakings should receive clear and consistent economic signals from capacity allocation schemes which lead them to make rational decisions.

(44) Any charging scheme will send economic signals to users. It is important that those signals to railway undertakings should be consistent and 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 [1]. When such differentiation results in a loss of revenue for the infrastructure manager, it should be without prejudice to the Union rules on State aids.

(46) In order to accelerate the installation of the European Train Control System (ETCS) onboard locomotives, infrastructure managers may modify the charging system through a temporary differentiation for trains equipped with ETCS. Infrastructure managers should be able to ensure that such a differentiation does not result in a loss of revenue.

(47) In order to take into account the needs 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.

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

(49) Member States should have the option of allowing purchasers of railway services to enter the capacity-allocation process directly.

(50) It is important to have regard to the business requirements of both applicants and the infrastructure manager.

(51) 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.

(52) 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.

(53) 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.

(54) 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.

[1] OJ L 37, 8.2.2006, p. 1.

(55) Services operated under contract to a public authority may require special rules to safeguard their attractiveness to users.

(56) The charging and capacity allocation schemes should take account of the effects of increasing saturation of infrastructure capacity and ultimately the scarcity of capacity.

(57) 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.

(58) 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.

(59) 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.

(60) 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.

(61) 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.

(62) It is important to minimise the distortions of competition which may arise, either between railway infrastructures or between transport modes, from significant differences in charging principles.

(63) 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.

(64) Investment in railway infrastructure is necessary and infrastructure charging schemes should provide incentives for infrastructure managers to make appropriate investments economically attractive.

(65) 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 cost factors in the operation of the infrastructure.

(66) 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.

(67) 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.

(68) 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.

(69) Railway infrastructure is a natural monopoly. It is therefore necessary to provide infrastructure managers with incentives to reduce costs and manage their infrastructure efficiently.

(70) The development of railway transport should be achieved by using *inter alia* the Union instruments available, without prejudice to priorities already established.

(71) 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.

(72) It is desirable for railway undertakings and the infrastructure manager to be provided with incentives to minimise disruption of the network.

(73) The allocation of capacity is associated with a cost to the infrastructure manager, payment for which should be required.

(74) 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, notwithstanding the possibility of judicial review. Such a regulatory body should be able to enforce its information requests and decisions by means of appropriate penalties.

(75) The financing of the regulatory body should guarantee its independence and should be made either from the State budget or from contributions of the sector levied in a compulsory way, while respecting the principles of fairness, transparency, non-discrimination and proportionality.

(76) 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.

(77) 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 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 Council.

(78) 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 ([1]).

(79) 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 dimensions of issuing such licences and operating significant elements of the railway networks, and in view 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.

(80) 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.

(81) 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.

(82) In accordance with point 34 of the Interinstitutional Agreement on better law-making ([2]), Member States are encouraged to draw up, for themselves and in the interests of the Union, their own tables illustrating, as far as possible, the correlation between this Directive and the transposition measures, and to make them public.

(83) 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:

CHAPTER I

GENERAL PROVISIONS

Article 1

Subject matter and scope

1. This Directive lays down:

(a) the rules applicable to the management of railway infrastructure and to rail transport activities of the railway undertakings established or to be established in a Member State as set out in Chapter II.

(b) the criteria applicable to the issuing, renewal or amendment of licences by a Member State intended for railway undertakings which are or will be established in the Union as set out in Chapter III;

(c) the principles and procedures applicable to the setting and collecting of railway infrastructure charges and the allocation of railway infrastructure capacity as set out in Chapter IV.

([1]) OJ L 55, 28.2.2011, p. 13.

([2]) OJ C 321, 31.12.2003, p. 1.

2. This Directive applies to the use of railway infrastructure for domestic and international rail services.

Article 2

Exclusions from the scope

1. Chapter II shall not apply to railway undertakings which only operate urban, suburban or regional services on local and regional stand-alone networks for transport services on railway infrastructure or on networks intended only for the operation of urban or suburban rail services.

Notwithstanding the first subparagraph, when such a railway undertaking is under the direct or indirect control of an undertaking or another entity performing or integrating rail transport services other than urban, suburban or regional services, Articles 4 and 5 shall apply. Article 6 shall also apply to such a railway undertaking with regard to the relationship between the railway undertaking and the undertaking or entity which controls it directly or indirectly.

2. Member States may exclude the following from the application of Chapter III:

(a) undertakings which only operate rail passenger services on local and regional stand-alone railway infrastructure;

(b) undertakings which only operate urban or suburban rail passenger services;

(c) undertakings which only operate regional rail freight services;

(d) undertakings which only operate freight services on privately owned railway infrastructure that exists solely for use by the infrastructure owner for its own freight operations.

3. Member States may exclude the following from the application of Articles 7, 8, 13 and Chapter IV:

(a) local and regional stand-alone networks for passenger services on railway infrastructure;

(b) networks intended only for the operation of urban or suburban rail passenger services;

(c) regional networks which are used for regional freight services solely by a railway undertaking that is not covered under paragraph 1 until capacity on that network is requested by another applicant;

(d) privately owned railway infrastructure that exists solely for use by the infrastructure owner for its own freight operations.

4 Without prejudice to paragraph 3, Member States may exclude local and regional railway infrastructures which do not have any strategic importance for the functioning of the rail market from the application of Article 8(3) and local railway infrastructures which do not have any strategic importance for the functioning of the rail market from the application of Chapter IV. Member States shall notify the Commission of their intention to exclude such railway infrastructures. In accordance with the advisory procedure referred to in Article 62(2), the Commission shall decide whether such railway infrastructure may be considered to be without any strategic importance taking into account the length of railway lines concerned, their level of use and the traffic volume potentially impacted.

5. Member States may exclude from the application of Article 31(5), vehicles operated or intended to be operated from and to third countries, running on a network whose track gauge is different from the main rail network within the Union.

6. Member States may decide time periods and deadlines for the schedule for capacity allocation different from those referred to in Article 43(2), point 2(b) of Annex VI and points 3, 4 and 5 of Annex VII for train paths to be established in cooperation with infrastructure managers of third countries on a network whose track gauge is different from the main rail network within the Union.

7. Member States may decide to publish the charging framework and charging rules applicable specifically to international freight services from and to third countries operated on a network whose track gauge is different from the main rail network within the Union with different instruments and deadlines than those provided under Article 29(1) where this is required to ensure fair competition.

8. Member States may exclude from the application of Chapter IV railway infrastructure, whose track gauge is different from the main rail network within the Union, and which connects cross-border stations of a Member State to the territory of a third country.

9. This Directive shall not apply to undertakings the train operations of which are limited to providing solely shuttle services for road vehicles through undersea tunnels and transport operations in the form of shuttle services for road vehicles through such tunnels except Articles 6(1), 6(4), 10, 11, 12 and 28.

10. Member States may exclude from the application of Chapter II, with the exception of Article 14, and Chapter IV of this Directive, any railway service carried out in transit through the Union.

Article 3

Definitions

For the purpose of this Directive, the following definitions apply:

(1) 'railway undertaking' means any public or private undertaking licensed according to this Directive, the principal business of which is to provide services for the transport of goods and/or passengers by rail with a requirement that the undertaking ensure traction; this also includes undertakings which provide traction only;

(2) 'infrastructure manager' means any body or firm responsible in particular for establishing, managing and maintaining railway infrastructure, including traffic management and control-command and signalling; the functions of the infrastructure manager on a network or part of a network may be allocated to different bodies or firms;

(3) 'railway infrastructure' means the items listed in Annex I;

(4) 'international freight service' means a transport service where the train crosses at least one border of a Member State; the train may be joined and/or split and the different sections may have different origins and destinations, provided that all wagons cross at least one border;

(5) 'international passenger service' means a passenger service where the train crosses at least one border of a Member State and where the principal purpose of the service is to carry passengers between stations located in different Member States; the train may be joined and/or split, and the different sections may have different origins and destinations, provided that all carriages cross at least one border;

(6) 'urban and suburban services' means transport services whose principal purpose is to meet the transport needs of an urban centre or conurbation, including a cross-border conurbation, together with transport needs between such a centre or conurbation and surrounding areas;

(7) 'regional services' means transport services whose principal purpose is to meet the transport needs of a region, including a cross-border region;

(8) 'transit' means crossing territory of the Union without loading or unloading goods, and/or without picking up passengers or setting them down in territory of the Union;

(9) 'service facility' means the installation, including ground area, building and equipment, which has been specially arranged, as a whole or in part, to allow the supply of one or more services referred to in points 2 to 4 of Annex II;

(10) 'operator of service facility' means any public or private entity responsible for managing one or more service facilities or supplying one or more services to railway undertakings referred to in points 2 to 4 of Annex II;

(11) 'cross-border agreement' means any agreement between two or more Member States or between Member States and third countries intended to facilitate the provision of cross-border rail services;

(12) 'licence' means an authorisation issued by a licensing authority to an undertaking, by which its capacity to provide rail transport services as a railway undertaking is recognised; that capacity may be limited to the provision of specific types of services;

(13) 'licensing authority' means the body responsible for granting licences within a Member State;

(14) 'contractual agreement' means an agreement or, *mutatis mutandis*, an arrangement within the framework of administrative or regulatory measures;

(15) 'reasonable profit' means a rate of return on own capital that takes account of the risk, including that to revenue, or the absence of such risk, incurred by the operator of the service facility and is in line with the average rate for the sector concerned in recent years;

(16) 'allocation' means the allocation of railway infrastructure capacity by an infrastructure manager;

(17) 'applicant' means a railway undertaking or an international grouping of railway undertakings or other persons or legal entities, such as competent authorities under Regulation (EC) No 1370/2007 and shippers, freight forwarders and combined transport operators, with a public-service or commercial interest in procuring infrastructure capacity;

(18) 'congested infrastructure' means an element of infrastructure for which demand for infrastructure capacity cannot be fully satisfied during certain periods even after coordination of the different requests for capacity;

(19) 'capacity enhancement plan' means a measure or series of measures with a calendar for their implementation which aim to alleviate the capacity constraints which led to the declaration of an element of infrastructure as 'congested infrastructure';

(20) 'coordination' means the process through which the infrastructure manager and applicants will attempt to resolve situations in which there are conflicting applications for infrastructure capacity;

(21) 'framework agreement' means a legally binding general agreement under public or private law, setting out the rights and obligations of an applicant and the infrastructure manager in relation to the infrastructure capacity to be allocated and the charges to be levied over a period longer than one working timetable period;

(22) 'infrastructure capacity' means the potential to schedule train paths requested for an element of infrastructure for a certain period;

(23) 'network' means the entire railway infrastructure managed by an infrastructure manager;

(24) 'network statement' means the statement which sets out in detail the general rules, deadlines, procedures and criteria for charging and capacity allocation schemes, including such other information as is required to enable applications for infrastructure capacity;

(25) 'train path' means the infrastructure capacity needed to run a train between two places over a given period;

(26) 'working timetable' means the data defining all planned train and rolling-stock movements which will take place on the relevant infrastructure during the period for which it is in force;

CHAPTER II

DEVELOPMENT OF THE UNION RAILWAYS

SECTION 1

Management independence

Article 4

Independence of railway undertakings and infrastructure managers

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

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

Article 5

Management of the railway undertakings according to commercial principles

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

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

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

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

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

(b) control the supply and marketing of services and fix the pricing thereof;

(c) take decisions on staff, assets and own procurement;

(d) expand their market share, develop new technologies and new services and adopt any innovative management techniques;

(e) establish new activities in fields associated with the railway business.

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

SECTION 2

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

Article 6

Separation of accounts

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

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

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

4. The accounts for the different areas of activity referred to in paragraphs 1 and 3 shall be kept in a way that allows for monitoring of the prohibition on transferring public funds paid to one area of activity to another.

Article 7

Independence of essential functions of an infrastructure manager

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

The essential functions shall be:

(a) decision making on train path allocation, including both the definition and the assessment of availability and the allocation of individual train paths; and

(b) decision making on infrastructure charging, including determination and collection of the charges, without prejudice to Article 29(1).

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

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

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

SECTION 3

Improvement of the financial situation

Article 8

Financing of the infrastructure manager

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

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

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

(*) Two years after the entry into force of this Directive.

conditions for access and use and the nature, provision and development of the infrastructure before its approval by the infrastructure manager.

4. Member States shall ensure that, under normal business conditions and over a reasonable period which shall not exceed the period of application of the contractual agreement referred to in Article 30(2), the accounts of an infrastructure manager shall at least balance income from infrastructure charges, surpluses from other commercial activities and State and private funding on the one hand, including advance payments from the State, where appropriate, and infrastructure expenditure, including for long-term asset renewals and enhancements on the other hand.

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

Article 9

Transparent debt relief

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

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

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

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

SECTION 4

Access to railway infrastructure and services

Article 10

Conditions of access to railway infrastructure

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

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

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

4. Based on the experience of regulatory bodies, competent authorities and railway undertakings and based on the activities of the working group 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 paragraph 3 of this Article. Those implementing acts shall be adopted in accordance with the examination procedure referred to in Article 62(3).

Article 11

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

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

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

(a) the competent authority or competent authorities that awarded the public service contract;

(b) any other interested competent authority with the right to limit access under this Article;

(c) the infrastructure manager;

(d) the railway undertaking performing the public service contract.

The competent authorities and the railway undertakings providing the public services shall provide the relevant regulatory body or bodies with the information reasonably required to reach a decision. The regulatory body shall consider the information provided, consulting all the relevant parties as appropriate, and shall inform the relevant parties of its reasoned decision within a pre-determined, reasonable time, and, in any case, within two months of receipt of all relevant information.

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

(a) the relevant competent authority or competent authorities;

(b) the infrastructure manager;

(c) the railway undertaking performing the public service contract;

(d) the railway undertaking seeking access.

4. Based on the experience of regulatory bodies, competent authorities and railway undertakings and based on the activities of the working group 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 paragraphs 1, 2 and 3 of this Article. Those implementing acts shall be adopted in accordance with the examination procedure referred to in Article 62(3).

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

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

Article 12

Levy on railway undertakings providing passenger services

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

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

2. The levy is intended to compensate the authority for public service obligations laid down in public service contracts awarded in accordance with Union law. The revenue raised from such a levy and paid as compensation shall not exceed what is necessary to cover all or part of the cost incurred in the relevant public service obligations taking into account the relevant receipts and a reasonable profit for discharging those obligations.

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

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

5. Based on the experience of regulatory bodies, competent authorities and railway undertakings and based on the activities of the working group 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 13

Conditions of access to services

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

2. Operators of service facilities shall supply to railway undertakings the services referred to in point 2 of Annex II, in a non-discriminatory manner.

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

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

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

4. Requests by railway undertakings for access to, and supply of services in the service facility may only be refused if there are viable alternatives allowing them to operate the freight or passenger service concerned on the same or alternative routes under economically acceptable conditions. This shall not oblige the operator of the service facility to make investments in resources or facilities in order to accommodate all requests by railway undertakings.

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

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

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

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

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

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

SECTION 5

Cross-border agreements

Article 14

General principles for cross-border agreements

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

2. Member States shall notify the Commission of any cross-border agreement by … (*), for the agreements concluded before this date, and before their conclusion for new or revised agreements between Member States. The Commission shall decide whether such agreements are in compliance with Union law within nine months of notification for agreements concluded before …. (**) and within four months of notification for new or revised agreements between Member States. Those implementing acts shall be adopted in accordance with the advisory procedure referred to in Article 62(2).

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

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

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

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

(*) Six months after the entry into force of this Directive.
(**) The date of entry into force of this Directive.

SECTION 6

Monitoring tasks of the Commission

Article 15

Scope of market monitoring

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

2. In this context, the Commission shall closely involve representatives of the Member States and of the sectors concerned in its work, including users, so that they are better able to monitor the development of the railway sector and the evolution of the market, to assess the effect of the measures adopted and to analyse the impact of the measures planned by the Commission.

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

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

(a) the evolution of the internal market in rail services;

(b) the framework conditions, including for public passenger transport services by rail;

(c) the state of the Union railway network;

(d) the utilisation of access rights;

(e) barriers to more effective rail services;

(f) infrastructure limitations;

(g) the need for legislation.

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

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

CHAPTER III

LICENSING OF RAILWAY UNDERTAKINGS

SECTION 1

Licensing authority

Article 16

Licensing authority

Each Member State shall designate a licensing authority that shall be responsible for issuing licences and for carrying out the obligations imposed by this Chapter.

The licensing authority shall not provide rail transport services itself and shall be independent of firms or entities that do so.

SECTION 2

Conditions for obtaining a licence

Article 17

General requirements

1. A railway undertaking shall be entitled to apply for a licence in the Member State in which it is established.

2. Member States shall not issue licences or extend their validity where the requirements of this Chapter are not complied with.

3. A railway undertaking which fulfils the requirements set out in this Chapter shall be authorised to receive a licence.

4. No railway undertaking shall be permitted to provide the rail transport services covered by this Chapter unless it has been granted the appropriate licence for the services to be provided.

However, such a licence shall not, in itself, entitle the holder to access the railway infrastructure.

5. The Commission may adopt measures setting out the details for the use of a common template for the licence and, if needed to ensure fair and efficient competition in rail transport markets, details on the procedure 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 18

Conditions for obtaining a licence

An undertaking applying for a licence shall be required to be able to demonstrate to the licensing authorities of the Member State concerned before the start of its activities that it will at any time be able to meet the requirements relating to good repute, financial fitness, professional competence and cover for its civil liability listed in Articles 19 to 22.

For those purposes, each undertaking applying for a licence shall provide all relevant information.

Article 19

Requirements relating to good repute

Member States shall define the conditions under which the requirement of good repute is met to ensure that a undertaking applying for a licence or the persons in charge of its management:

(a) have not been convicted of serious criminal offences, including offences of a commercial nature;

(b) have not been declared bankrupt;

(c) have not been convicted of serious offences set out in specific legislation applicable to transport;

(d) have not been convicted of serious or repeated failure to fulfil social or labour law obligations, including obligations under occupational safety and health legislation, and customs law obligations in the case of a company seeking to operate cross-border freight transport subject to customs procedures.

Article 20

Requirements relating to financial fitness

1. The requirements relating to financial fitness shall be met when an undertaking applying for a licence can demonstrate that it will be able to meet its actual and potential obligations, established under realistic assumptions, for a period of 12 months.

2. The licensing authority shall verify financial fitness especially by means of a railway undertaking's annual accounts or, in the case of undertakings applying for a licence which are unable to present annual accounts, a balance sheet. Each undertaking applying for a licence shall provide at least the information listed in Annex III.

3. The licensing authority shall not consider an undertaking applying for a licence as financially fit if considerable or recurrent arrears of taxes or social security are owed as a result of that undertaking's activity.

4. The licensing authority may require the submission of an audit report and suitable documents from a bank, public savings bank, accountant or auditor. Those documents shall include the information listed in Annex III.

5. The Commission shall be empowered to adopt delegated acts in accordance with Article 60 concerning certain amendments to Annex III. Thus, Annex III may be amended to specify the information to be provided by undertakings applying for a licence or supplemented in the light of the experience gained by licensing authorities or the evolution of the rail transport market

Article 21

Requirements relating to professional competence

The requirements relating to professional competence shall be met when a undertaking applying for a licence can demonstrate that it has or will have a management organisation which possesses the knowledge or experience necessary to exercise safe and reliable operational control and supervision of the type of operations specified in the licence.

Article 22

Requirements relating to cover for civil liability

Without prejudice to the Union rules on State aids and in accordance with Articles 93, 107 and 108 of the Treaty, a railway undertaking shall be adequately insured or have guarantees under market conditions for cover, in accordance with national and international law, of its liabilities in the event of accidents, in particular in respect of passengers, luggage, freight, mail and third parties.

SECTION 3

Validity of the licence

Article 23

Spatial and temporal validity

1. A licence shall be valid throughout the territory of the Union.

2. A licence shall be valid as long as the railway undertaking fulfils the obligations laid down in this Chapter. A licensing authority may, however, make provision for a regular review. If so, the review shall be made at least every five years.

3. Specific provisions governing the suspension or revocation of a licence may be incorporated in the licence itself.

Article 24

Temporary licence, approval, suspension and revocation

1. If there is serious doubt that a railway undertaking which it has licensed complies with the requirements of this Chapter, and in particular those of Article 18, the licensing authority may, at any time, check whether that railway undertaking does in fact comply with those requirements.

Where a licensing authority is satisfied that a railway undertaking can no longer meet the requirements, it shall suspend or revoke the licence.

2. Where the licensing authority of a Member State is satisfied that there is serious doubt regarding compliance with the requirements laid down in this Chapter on the part of a railway undertaking to which a licence has been issued by the licensing authority of another Member State, it shall inform the latter authority without delay.

3. Notwithstanding paragraph 1, where a licence is suspended or revoked on grounds of non-compliance with the requirement for financial fitness, the licensing authority may grant a temporary licence pending the re-organisation of the railway undertaking, provided that safety is not jeopardised. A temporary licence shall not, however, be valid for more than six months after its date of issue.

4. Where a railway undertaking has ceased operations for six months or has not started operations within six months of the grant of a licence, the licensing authority may decide that the licence shall be required to be resubmitted for approval or be suspended.

As regards the start of activities, the railway undertaking may ask for a longer period to be fixed, taking account of the specific nature of the services to be provided.

5. In the event of a change affecting the legal situation of an undertaking and, in particular, in the event of a merger or takeover, the licensing authority may decide that the licence shall be resubmitted for approval. The railway undertaking in question may continue operations, unless the licensing authority decides that safety is jeopardised. In that event, the grounds for such a decision shall be given.

6. Where a railway undertaking intends significantly to change or extend its activities, its licence shall be resubmitted to the licensing authority for review.

7. A licensing authority shall not permit a railway undertaking against which bankruptcy or similar proceedings have commenced to retain its licence if that authority is convinced that there is no realistic prospect of satisfactory financial restructuring within a reasonable period of time.

8. Where a licensing authority issues, suspends, revokes or amends a licence, it shall immediately inform the European Railway Agency accordingly. The European Railway Agency shall inform the licensing authorities of other Member States forthwith.

Article 25

Procedure for granting licences

1. The procedures for granting licences shall be made public by the Member State concerned, which shall inform the Commission thereof.

2. The licensing authority shall take a decision on an application as soon as possible, but not more than three months after all relevant information, notably the particulars referred to in Annex III, has been submitted. The licensing authority shall take into account all the available information. The decision shall be communicated to the undertaking applying for a licence without delay. A refusal shall state the grounds on which it is based.

3. Member States shall ensure that the licensing authority's decisions are subject to judicial review.

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 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…. (*), the national parliament may have the right to scrutinize 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.

(*) Two years before the entry into force of this Directive.

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 three years

Member States shall ensure that contractual agreements in force on…. (*) are modified to align them with this Directive upon their renewal, or at the latest by…. (**).

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 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. 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 service facility operator respectively and used to fund their business.

2. Member States shall require the infrastructure manager and the service facility operator 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 service facility operator shall, in this regard, be able to demonstrate 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 paragraphs 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… (***), the Commission shall adopt measures setting out the methodology 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 the methodology referred to in paragraph 4 during a period of no more than five years after …. (***).

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.

(*) The date of entry into force of this Directive.
(**) Three years after the entry into force of this Directive.
(***) Thirty-six months after the entry into force of this Directive.

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 may adopt implementing measures setting out the detailed arrangements 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).

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 in particular of international rail services. 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.

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 may be differentiated to give incentives to equip trains with the European Train Control System (ETCS) compliant with the version adopted by the Commission Decision 2008/386/EC [1] and successive versions.

Following an impact assessment, the Commission may adopt measures setting out the detailed arrangements to be followed for the application of the differentiation of the infrastructure charge including its duration of application. Those implementing acts shall be adopted in accordance with the examination procedure referred to in Article 62(3).

5. To prevent discrimination, it shall be ensured 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 of the Treaty 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 of the Treaty.

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 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.

[1] 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).

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 charge shall provide incentives for efficient use of capacity. 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, 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 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. 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 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 … (*), 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 of the Treaty, 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.

(*) Thirty-six months after the entry into force of this Directive.

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 multi-annual 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 working group 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 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

Application

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 [1].

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.

[1] OJ L 276 20.10.2010, p. 22.

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 existing 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 then 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(6) 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 promote the development of 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 of the Treaty, 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 re-routing services, re-timing services, speed alterations and infrastructure improvements.

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

Article 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.

However, 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 private or public 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. 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 [1], 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 [2] 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.

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, 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, and do not seek or take instructions from any government or other public or private entity when carrying out the functions of the regulatory body.

The persons in charge of decisions to be taken by the regulatory body in accordance with Article 56 shall have full authority over the recruitment and management of the staff of the regulatory body.

[1] OJ L 1, 4.1.2003, p. 1. Editorial note: The title of Council Regulation (EC) N.º 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.

[2] OJ L 164, 30.4.2004, p. 29.

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, 11, 12 and 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. 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.

4. The regulatory body shall have the necessary organisational capacity to carry out its functions.

5. 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.

6. 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 without undue delay. The regulatory body shall be enabled to enforce such requests with the appropriate sanctions, 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.

7. The regulatory body shall be required to decide on any complaints and take action to remedy the situation within a maximum period of two months from receipt of all 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 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 sanctions, 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.

8. 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.

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

10. 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.

11. 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 oversight practices and/or to supplement it with additional elements necessary to verify separation of account.

Article 57

Cooperation between regulatory bodies

1. The regulatory bodies shall exchange information about their work and decision-making principles and practice and otherwise cooperate for the purpose of coordinating their decision-making across the Union. For this purpose they shall participate and work together in a working group that convenes at regular intervals. To ensure active cooperation between the appropriate regulatory bodies, the Commission shall support them in this task.

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 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 legislation. 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. Regulatory bodies shall develop common principles and practices for making decisions for which they are empowered under this Directive. Based on the experience of regulatory bodies and on the activities of the working group 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).

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

CHAPTER V

FINAL PROVISIONS

Article 58

Public procurement rules

The provisions of this Directive shall be without prejudice to Directive 2004/17/EC of the European Parliament and of the Council of 31 March 2004 coordinating the procurement procedures of entities operating in the water, energy, transport and postal services sectors [1].

Article 59

Derogations

1. Until 15 March 2013, Ireland, as a Member State located on an island, with a rail link to only one other Member State, and the United Kingdom, in respect of Northern Ireland, on the same basis:

(a) do not need to entrust to an independent body the functions determining equitable and non-discriminatory access to infrastructure, as provided for in the first

[1] OJ L 134, 30.4.2004, p. 1.

subparagraph of Article 7(1), in so far as that Article obliges Member States to establish independent bodies performing the tasks referred to in Article 7(2);

(b) do not need to apply the requirements set out in Article 27, Article 29(2), Articles 38, 39 and 42, Article 46(4), Article 46(6), Article 47, Article 49(3), Articles 50 to 53, Article 55 and Article 56 on condition that decisions on the allocation of infrastructure capacity or the charging of fees are open to appeal, if so requested in writing by a railway undertaking, before an independent body which shall take its decision within two months of the submission of all relevant information and whose decision shall be subject to judicial review.

2. Where more than one railway undertaking licensed in accordance with Article 17, or, in the case of Ireland and Northern Ireland, a railway company so licensed elsewhere submits an official application to operate competing railway services in, to or from Ireland or Northern Ireland, the continued applicability of this derogation shall be decided upon in accordance with the advisory procedure referred to in Article 62(2).

The derogations referred to in paragraph 1 shall not apply where a railway undertaking operating railway services in Ireland or Northern Ireland submits an official application to operate railway services on, to or from the territory of another Member State, with the exceptions of Ireland for railway undertakings operating in Northern Ireland and the United Kingdom for railway undertakings operating in Ireland.

Within one year from the receipt of either the decision referred to in the first subparagraph of this paragraph or notification of the official application referred to in the second subparagraph of this paragraph, the Member State or States concerned (Ireland or the United Kingdom with respect to Northern Ireland) shall put in place legislation to implement the Articles referred to in paragraph 1.

3. A derogation referred to in paragraph 1 may be renewed for periods not longer than five years. Not later than 12 months before the expiry date of the derogation a Member State availing itself of that derogation may address a request to the Commission for a renewed derogation. Any such request shall be justified. The Commission shall examine such a request and adopt a decision in accordance with the advisory procedure referred to in Article 62(2). That procedure shall apply to any decision related to the request.

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

Article 60

Exercise of the delegation

1. The power to adopt delegated acts is conferred on the Commission subject to the conditions laid down in this Article.

2. The delegation of power referred to in Articles 20, 35 (3), 43 (2) and 56 (11) shall be conferred on the Commission for a period of five years from…… (*). The Commission shall draw up a report in respect of the delegation of power not later than nine months before the end of the five-year period. The delegation of power shall be tacitly extended for periods of an identical duration, unless the European Parliament or the Council opposes such extension not later than three months before the end of each period.

3. The delegation of powers referred to in Articles 20, 35 (3), 43 (2) and 56 (11) may be revoked at any time by the European Parliament or by the Council. A decision to revoke shall put an end to the delegation of the power specified in that decision. It shall take effect the day following the publication of the decision in the *Official Journal of the European Union* or at a later date specified therein. It shall not affect the validity of any delegated acts already in force.

4. As soon as it adopts a delegated act, the Commission shall notify it simultaneously to the European Parliament and to the Council.

5. A delegated act adopted pursuant to Articles 20, 35 (3), 43 (2) and 56 (11) shall enter into force only if no objection has been expressed either by the European Parliament or the Council within a period of two months of notification of that act to the European Parliament and the Council or if, before the expiry of that period, the European Parliament and the Council have both informed the Commission that they will not object. That period shall be extended by two months at the initiative of the European Parliament or of the Council.

Article 61

Measures of application

At the request of a Member State or on its own initiative the Commission shall examine specific measures adopted by national authorities in relation to the application of this Directive, concerning the conditions of access to railway infrastructure and services, the licensing of railway undertakings, infrastructure charging and capacity allocation within 12 months after adoption of those measures. The Commission shall decide in accordance with the procedure referred to in Article 62(2) whether the related measure may continue to be applied within four months of receipt of such a request.

(*) Date of entry into force of this Directive.

Article 62

Committee procedure

1. The Commission shall be assisted by a committee. That committee shall be a committee within the meaning of Regulation (EU) No 182/2011.

2. Where reference is made to this paragraph, Article 4 of Regulation (EU) No 182/2011 shall apply.

3. Where reference is made to this paragraph, Article 5 of Regulation (EU) No 182/2011 shall apply. When the committee delivers no opinion, the Commission shall not adopt the draft implementing act.

Article 63

Report

By 31 December 2012 at the latest, the Commission shall submit to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions a report on the implementation of Chapter II.

This report shall also assess the development of the market, including the state of preparation of a further opening-up of the rail market. In its report the Commission shall also analyse the different models for organising this market and the impact of this Directive on public service contracts and their financing. In so doing, the Commission shall take into account the implementation of Regulation (EC) No 1370/2007 and the intrinsic differences between Member States (density of networks, number of passengers, average travel distance). In its report the Commission shall, if appropriate, propose complementary legislative measures to facilitate any such opening, and shall assess the impact of any such measures.

Article 64

Transposition

1. Member States shall bring into force the laws, regulations and administrative provisions necessary to comply with this Directive including as regards compliance by undertakings, operators, applicants, authorities and other entities concerned by … (*). They shall forthwith communicate to the Commission the text of those provisions.

When Member States adopt those provisions, they shall contain a reference to this Directive or be accompanied by such a reference on the occasion of their official publication. They shall also include a statement that references in existing laws, regulations and administrative provisions to the Directives repealed by this Directive shall be construed as references to this Directive. Member States shall determine how such reference is to be made and how that statement is to be formulated.

2. Member States shall communicate to the Commission the text of the main provisions of national law which they adopt in the field covered by this Directive.

Article 55(1) shall apply from … (**).

The obligations for transposition and implementation of Chapter II and IV of this Directive shall not apply to Cyprus and Malta for as long as no railway system is established within their territory.

Article 65

Repeal

Directives 91/440/EEC, 95/18/EC and 2001/14/EC, as amended by the Directives listed in Annex IX, Part A, are repealed with effect from (***), without prejudice to the obligations of the Member States relating to the time limits for transposition into national law of the Directives set out in Part B of Annex IX.

References to the repealed Directives shall be construed as references to this Directive and shall be read in accordance with the correlation table in Annex X.

Article 66

Entry into force

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

Article 67

Addressees

This Directive is addressed to the Member States.

Done at …

For the European Parliament	*For the Council*
The President	*The President*
…	…

(*) Thirty-six months after the entry into force of this Directive.

(**) Sixty months after the entry into force of this Directive.

(***) Date of entry into force of this Directive.

ANNEX I

LIST OF RAILWAY INFRASTRUCTURE ITEMS

Railway infrastructure consists of the following items, provided they form part of the permanent way, including sidings, but excluding lines situated within railway repair workshops, depots or locomotive sheds, and private branch lines or sidings:

— Ground area;

— Track and track bed, in particular embankments, cuttings, drainage channels and trenches, masonry trenches, culverts, lining walls, planting for protecting side slopes etc.; passenger and goods platforms, including in passenger stations and freight terminals; four-foot way and walkways; enclosure walls, hedges, fencing; fire protection strips; apparatus for heating points; crossings, etc.; snow protection screens;

— Engineering structures: bridges, culverts and other overpasses, tunnels, covered cuttings and other underpasses; retaining walls, and structures for protection against avalanches, falling stones, etc.;

— Level crossings, including appliances to ensure the safety of road traffic;

— Superstructure, in particular: rails, grooved rails and check rails; sleepers and longitudinal ties, small fittings for the permanent way, ballast including stone chippings and sand; points, crossings, etc.; turntables and traversers (except those reserved exclusively for locomotives);

— Access way for passengers and goods, including access by road;

— Safety, signalling and telecommunications installations on the open track, in stations and in marshalling yards, including plant for generating, transforming and distributing electric current for signalling and telecommunications; buildings for such installations or plant; track brakes;

— Lighting installations for traffic and safety purposes;

— Plant for transforming and carrying electric power for train haulage: sub-stations, supply cables between sub-stations and contact wires, catenaries and supports; third rail with supports;

— Buildings used by the infrastructure department, including a proportion of installations for the collection of transport charges.

ANNEX II

SERVICES TO BE SUPPLIED TO THE RAILWAY UNDERTAKINGS

(referred to in Article 13)

1. The minimum access package shall comprise:

   (a) handling of requests for railway infrastructure capacity;

   (b) the right to utilise capacity which is granted;

   (c) use of the railway infrastructure, including track points and junctions;

   (d) train control including signalling, regulation, dispatching and the communication and provision of information on train movement;

   (e) use of electrical supply equipment for traction current, where available;

   (f) all other information required to implement or operate the service for which capacity has been granted.

2. Access, including track access, shall be given to the following services facilities, when they exist, and to the services supplied in these facilities:

   (a) passenger stations, their buildings and other facilities, including travel information display and location for ticketing services;

   (b) freight terminals;

   (c) marshalling yards and train formation facilities, including shunting facilities;

   (d) storage sidings;

   (e) maintenance facilities, with the exception of heavy maintenance services supplied in maintenance facilities exclusively dedicated to specific types of rolling stock, and other technical facilities, including cleaning and washing facilities;

   (f) maritime and inland port facilities which are linked to rail activities;

   (g) relief facilities;

   (h) refuelling facilities and supply of fuel in these facilities, charges for which shall be shown on the invoices separately.

3. Additional services may comprise:

   (a) traction current, charges for which shall be shown on the invoices separately from charges for using the electrical supply equipment;

   (b) pre-heating of passenger trains;

   (c) tailor-made contracts for:

      — control of transport of dangerous goods,

      — assistance in running abnormal trains.

4. Ancillary services may comprise:

   (a) access to telecommunication networks;

   (b) provision of supplementary information;

   (c) technical inspection of rolling stock;

   (d) ticketing services in passenger stations;

   (e) heavy maintenance services supplied in maintenance facilities exclusively dedicated to specific types of rolling stock.

ANNEX III

FINANCIAL FITNESS

(referred to in Article 20)

The information to be provided by undertakings applying for a licence in accordance with Article 20 covers the following aspects:

(a) available funds, including the bank balance, pledged overdraft provisions and loans;

(b) funds and assets available as security;

(c) working capital;

(d) relevant costs, including purchase costs of payments to account for vehicles, land, buildings, installations and rolling stock;

(e) charges on an undertaking's assets;

(f) taxes and social security contributions.

ANNEX IV

CONTENTS OF THE NETWORK STATEMENT

(referred to in Article 27)

The network statement referred to in Article 27 shall contain the following information:

1. A section setting out the nature of the infrastructure which is available to railway undertakings and the conditions of access to it. The information in this section shall be made consistent, on an annual basis, with or refer to the rail infrastructure registers to be published in accordance with Article 35 of Directive 2008/57/EC.

2. A section on charging principles and tariffs. This shall contain appropriate details of the charging scheme as well as sufficient information on charges as well as other relevant information on access applying to the services listed in Annex II which are provided by only one supplier. It shall detail the methodology, rules and, where applicable, scales used for the application of Articles 31 to 36, as regards both costs and charges. It shall contain information on changes in charges already decided upon or foreseen in the next five years, if available.

3. A section on the principles and criteria for capacity allocation. This shall set out the general capacity characteristics of the infrastructure which is available to railway undertakings and any restrictions relating to its use, including likely capacity requirements for maintenance. It shall also specify the procedures and deadlines which relate to the capacity allocation process. It shall contain specific criteria which are employed during that process, in particular:

   (a) the procedures according to which applicants may request capacity from the infrastructure manager;

   (b) the requirements governing applicants;

   (c) the schedule for the application and allocation processes and the procedures which shall be followed to request information on the scheduling and the procedures for scheduling planned and unforeseen maintenance work;

   (d) the principles governing the coordination process and the dispute resolution system made available as part of this process;

   (e) the procedures which shall be followed and criteria used where infrastructure is congested;

   (f) details of restrictions on the use of infrastructure;

   (g) conditions by which account is taken of previous levels of utilisation of capacity in determining priorities for the allocation process.

   It shall detail the measures taken to ensure adequate treatment of freight services, international services and requests subject to the *ad hoc* procedure. It shall contain a template form for capacity requests. The infrastructure manager shall also publish detailed information about the allocation procedures for international train paths.

4. A section on information relating to the application for a licence referred to in Article 25 of this Directive and rail safety certificates issued in accordance with Directive 2004/49/EC or indicating a website where such information is made available free of charge in electronic format.

5. A section on information about procedures for dispute resolution and appeal relating to matters of access to rail infrastructure and services and to the performance scheme referred to in Article 35.

6. A section on information on access to and charging for service facilities referred to in Annex II. Operators of service facilities which are not controlled by the infrastructure manager shall supply information on charges for gaining access to the facility and for the provision of services, and information on technical access conditions for inclusion in the network statement or shall indicate a website where such information is made available free of charge in electronic format.

7. A model agreement for the conclusion of framework agreements between an infrastructure manager and an applicant in accordance with Article 42.

ANNEX V

BASIC PRINCIPLES AND PARAMETERS OF CONTRACTUAL AGREEMENTS BETWEEN COMPETENT AUTHORITIES AND INFRASTRUCTURE MANAGERS

(referred to in Article 30)

The contractual agreement shall specify the provisions of Article 30 and include at least the following elements:

1. the scope of the agreement as regards infrastructure and service facilities, structured according to Annex II. It shall cover all aspects of infrastructure management, including maintenance and renewal of the infrastructure already in operation;

2. the structure of payments or funds allocated to the infrastructure services listed in Annex II, to maintenance and to dealing with existing maintenance backlogs;

3. user-oriented performance targets, in the form of indicators and quality criteria covering elements such as:

   (a) train performance, such as in terms of line speed and reliability, and customer satisfaction;

   (b) network capacity;

   (c) asset management;

   (d) activity volumes;

   (e) safety levels; and

   (f) environmental protection;

4. the amount of possible maintenance backlog and the assets which will be phased out of use and therefore trigger different financial flows;

5. the incentives referred to in Article 30(1), with the exception of those incentives implemented through regulatory measures in accordance with Article 30(3)

6. minimum reporting obligations for the infrastructure manager in terms of content and frequency of reporting, including information to be published annually;

7. the agreed duration of the agreement, which shall be synchronised and consistent with the duration of the infrastructure manager's business plan, concession or licence, where appropriate, and the charging framework and rules set by the State;

8. rules for dealing with major disruptions of operations and emergency situations, including contingency plans and early termination of the contractual agreement, and information of users;

9. remedial measures to be taken if either of the parties is in breach of its contractual obligations, or in exceptional circumstances affecting the availability of public funding; this includes conditions and procedures for renegotiation and early termination.

ANNEX VI

REQUIREMENTS FOR COSTS AND CHARGES RELATED TO RAILWAY INFRASTRUCTURE

(referred to in Articles 32(1) and 35)

1. The pairs to be considered by infrastructure managers when they define a list of market segments with a view to introducing mark-ups in the charging system according to Article 32(1) include at least the following ones:

   (a) passenger versus freight services;

   (b) trains carrying dangerous goods versus other freight trains;

   (c) domestic versus international services;

   (d) combined transport versus direct trains;

   (e) urban or regional versus interurban passenger services;

   (f) block trains versus single wagon load trains;

   (g) regular versus occasional train services.

2. The performance scheme as referred to in Article 35 shall be based on the following basic principles:

   (a) In order to achieve an agreed level of performance and not to endanger the economic viability of a service, the infrastructure manager shall agree with applicants the main parameters of the performance scheme, in particular the value of delays, the thresholds for payments due under the performance scheme relative both to individual train runs and to all train runs of a railway undertaking in a given period of time;

   (b) The infrastructure manager shall communicate to the railway undertakings the working timetable, on the basis of which delays will be calculated, at least five days before the train run. The infrastructure manager may apply a shorter notice period in case of force majeure or late alterations of the working timetable;

   (c) All delays shall be attributable to one of the following delay classes and sub-classes:

      1. Operation/planning management attributable to the infrastructure manager

      1.1. Time-table compilation

      1.2. Formation of train

      1.3. Mistakes in operations procedure

      1.4. Wrong application of priority rules

      1.5. Staff

      1.6. Other causes

      2. Infrastructure installations attributable to the infrastructure manager

      2.1. Signalling installations

      2.2. Signalling installations at level crossings

      2.3. Telecommunications installations

      2.4. Power supply equipment

      2.5. Track

2.6. Structures

2.7. Staff

2.8. Other causes

3. Civil engineering causes attributable to the infrastructure manager

3.1. Planned construction work

3.2. Irregularities in execution of construction work

3.3. Speed restriction due to defective track

3.4. Other causes

4. Causes attributable to other infrastructure managers

4.1. Caused by previous infrastructure manager

4.2. Caused by next infrastructure manager

5. Commercial causes attributable to the railway undertaking

5.1. Exceeding the stop time

5.2. Request of the railway undertaking

5.3. Loading operations

5.4. Loading irregularities

5.5. Commercial preparation of train

5.6. Staff

5.7. Other causes

6. Rolling stock attributable to the railway undertaking

6.1. Roster planning/ re-rostering

6.2. Formation of train by railway undertaking

6.3. Problems affecting coaches (passenger transport)

6.4. Problems affecting wagons (freight transport)

6.5. Problems affecting cars, locomotives and rail cars

6.6. Staff

6.7. Other causes

7. Causes attributable to other railway undertakings

7.1. Caused by next railway undertaking

7.2. Caused by previous railway undertaking

8. External causes attributable to neither infrastructure manager nor railway undertaking

8.1. Strike

8.2. Administrative formalities

8.3. Outside influence

8.4. Effects of weather and natural causes

8.5. Delay due to external reasons on the next network

8.6. Other causes

9. Secondary causes attributable to neither infrastructure manager nor railway undertaking

9.1. Dangerous incidents, accidents and hazards

9.2. Track occupation caused by the lateness of the same train

9.3. Track occupation caused by the lateness of another train

9.4. Turn-around

9.5. Connection

9.6. Further investigation needed

(d) Wherever possible, delays shall be attributed to a single organisation, considering both the responsibility for causing the disruption and the ability to re-establish normal traffic conditions.

(e) The calculation of payments shall take into account the average delay of train services of similar punctuality requirements.

(f) The infrastructure manager shall as soon as possible communicate to the railway undertakings a calculation of payments due under the performance scheme. This calculation shall encompass all delayed train runs within a period of at most one month.

(g) Without prejudice to the existing appeal procedures and to the provisions of Article 56, in case of disputes relating to the performance scheme, a dispute resolution system shall be made available in order to settle such matters promptly. This dispute resolution system shall be impartial towards the parties involved. If this system is applied, a decision shall be reached within a time limit of 10 working days.

(h) Once a year, the infrastructure manager shall publish the annual average level of performance achieved by the railway undertakings on the basis of the main parameters agreed in the performance scheme.

ANNEX VII

SCHEDULE FOR THE ALLOCATION PROCESS

(referred to in Article 43)

1. The working timetable shall be established once per calendar year.

2. The change of working timetable shall take place at midnight on the second Saturday in December. Where a change or adjustment is carried out after the winter, in particular to take account, where appropriate, of changes in regional passenger traffic timetables, it shall take place at midnight on the second Saturday in June and at such other intervals between these dates as are required. Infrastructure managers may agree on different dates and in this case they shall inform the Commission if international traffic may be affected.

3. The final date for receipt of requests for capacity to be incorporated into the working timetable shall be no more than 12 months in advance of the entry into force of the working timetable.

4. No later than 11 months before the working timetable comes into force, the infrastructure managers shall ensure that provisional international train paths have been established in cooperation with other relevant infrastructure managers. Infrastructure managers shall ensure that as far as possible these are adhered to during the subsequent processes.

5. No later than four months after the deadline for submission of bids by applicants, the infrastructure manager shall prepare a draft working timetable.

ANNEX VIII

ACCOUNTING INFORMATION TO BE SUPPLIED TO THE REGULATORY BODY UPON REQUEST

(referred to in Article 56(10))

1. Account separation

(a) separate profit and loss accounts and balance sheets for freight, passenger and infrastructure management activities;

(b) detailed information on individual sources and uses of public funds and other forms of compensation in a transparent and detailed manner, including a detailed review of the businesses' cashflows in order to determine in what way these public funds and other forms of compensation have been used;

(c) cost and profit categories making it possible to determine whether cross-subsidies between these different activities occurred, according to the requirements of the regulatory body;

(d) methodology used to allocate costs between different activities;

(e) where the regulated firm is part of a group structure, full details of inter-company payments.

2. Monitoring of track access charges

(a) different cost categories, in particular providing sufficient information on marginal/direct costs of the different services or groups of services so that infrastructure charges can be monitored;

(b) sufficient information to allow monitoring of the individual charges paid for services (or groups of services); if required by the regulatory body, this information shall contain data on volumes of individual services, prices for individual services and total revenues for individual services paid by internal and external customers;

(c) costs and revenues for individual services (or groups of services) using the relevant cost methodology, as required by the regulatory body, to identify potentially anti-competitive pricing (cross-subsidies, predatory pricing and excessive pricing).

3. Indication of financial performance

(a) a statement of financial performance;

(b) a summary expenditure statement;

(c) a maintenance expenditure statement;

(d) an operating expenditure statement;

(e) an income statement;

(f) supporting notes that amplify and explain the statements where appropriate.

ANNEX IX

Part A

REPEALED DIRECTIVES WITH LIST OF SUCCESSIVE AMENDMENTS

(referred to in Article 65)

Council Directive 91/440/EEC (OJ L 237, 24.8.1991, p. 25)	
Directive 2001/12/EC of the European Parliament and of the Council (OJ L 75, 15.3.2001, p. 1)	
Directive 2004/51/EC of the European Parliament and of the Council (OJ L 164, 30.4.2004, p. 164)	
Council Directive 2006/103/EC (OJ L 363, 20.12.2006, p. 344)	only Point B of the Annex
Directive 2007/58/EC of the European Parliament and of the Council (OJ L 315, 3.12.2007, p. 44)	only Article 1
Council Directive 95/18/EC (OJ L 143, 27.6.1995, p. 70)	
Directive 2001/13/EC of the European Parliament and of the Council (OJ L 75, 15.3.2001, p. 26)	
Directive 2004/49/EC of the European Parliament and of the Council (OJ L 164, 30.4.2004, p. 44)	only Article 29
Directive 2001/14/EC of the European Parliament and of the Council (OJ L 75, 15.3.2001, p. 29)	
Commission Decision 2002/844/EC (OJ L 289, 26.10.2002, p. 30)	
Directive 2004/49/EC of the European Parliament and of the Council (OJ L 164, 30.4.2004, p. 44)	only Article 30
Directive 2007/58/EC of the European Parliament and of the Council (OJ L 315, 3.12.2007, p. 44)	only Article 2

Part B

LIST OF TIME LIMITS FOR TRANSPOSITION INTO NATIONAL LAW

(referred to in Article 65)

Directive	Time limit for transposition
91/440/EEC	1 January 1993
95/18/EC	27 June 1997
2001/12/EC	15 March 2003
2001/13/EC	15 March 2003
2001/14/EC	15 March 2003
2004/49/EC	30 April 2006
2004/51/EC	31 December 2005
2006/103/EC	1 January 2007
2007/58/EC	4 June 2009

ANNEX X

CORRELATION TABLE

Directive 91/440/EEC	Directive 95/18/EC	Directive 2001/14/EC	This Directive
Article 2(1)	Article 1(1)	Article 1(1), first subparagraph	Article 1(1)
		Article 1(2)	Article 1(2)
Article 2(2)			Article 2(1)
	Article 1(2)		Article 2(2)
		Article 1(3)	Article 2(3)
			Article 2(4) to (9)
Article 2(4)			Article 2(10)
Article 3			Article 3, points (1) to (8)
			Article 3, points (9) to (11)
	Article 2(b) and (c)		Article 3, points (12) and (13)
			Article 3, points (14) and (15)
		Article 2	Article 3, points (16) to (26)
Article 4			Article 4
Article 5			Article 5
Article 6(1) and (2)			Article 6(1) and (2)
Article 9(4)			Article 6(3)
Article 6(1) second subparagraph			Article 6(4)
Article 6(3) and Annex II			Article 7(1)
		Articles 4(2) and 14(2)	Article 7(2)
Article 7(1), (3) and (4)			Article 8(1), (2) and (3)
		Article 6(1)	Article 8(4)
Article 9(1) and (2)			Article 9(1) and (2)
Article 10(3) and (3a)			Article 10(1) and (2)
Article 10(3b)			Article 11(1), (2) and (3)
			Article 11(4)
Article 10(3c) and (3e)			Article 11(5) and (6)
Article 10(3f)			Article 12 (1) to (4)
			Article 12 (5)
		Article 5	Article 13
			Article 14

Directive 91/440/EEC	Directive 95/18/EC	Directive 2001/14/EC	This Directive
Article 10b			Article 15
	Article 3		Article 16
	Article 4(1) to (4)		Article 17(1) to (4)
	Article 5		Article 18
	Article 6		Article 19
	Article 7(1)		Article 20(1)
	Annex, Part I, point (1)		Article 20(2)
			Article 20(3)
	Article 8		Article 21
	Article 9		Article 22
	Article 4(5)		Article 23(1)
	Article 10		Article 23(2) and (3)
	Article 11		Article 24
	Article 15		Article 25
		Article 1(1), second subparagraph	Article 26
		Article 3	Article 27
Article 10(5)			Article 28
		Article 4(1) (3), (4), (5) and (6)	Article 29
		Article 6(2) to (5)	Article 30
		Article 7	Article 31
		Article 8	Article 32
		Article 9	Article 33
		Article 10	Article 34
		Article 11	Article 35
		Article 12	Article 36
			Article 37
		Article 13	Article 38
		Article 14(1) and (3)	Article 39
		Article 15	Article 40
		Article 16	Article 41
		Article 17	Article 42
		Article 18	Article 43
		Article 19	Article 44
		Article 20(1), (2) and (3)	Article 45(1), (2) and (3)
			Article 45(4)

Directive 91/440/EEC	Directive 95/18/EC	Directive 2001/14/EC	This Directive
		Article 20(4)	Article 45(5)
		Article 21	Article 46
		Article 22	Article 47
		Article 23	Article 48
		Article 24	Article 49
		Article 25	Article 50
		Article 26	Article 51
		Article 27	Article 52
		Article 28	Article 53
		Article 29	Article 54
		Article 30(1)	Article 55
		Article 30(2)	Article 56(1)
		Article 31	Article 57
Article 12			Article 58
Article 14a		Article 33(1),(2) and (3)	Article 59
			Article 60
		Article 34(2)	Article 61
Article 11a		Article 35(1),(2) and (3)	Article 62
Article 10(9)			Article 63
		Article 38	Article 64
			Article 65
	Article 17	Article 39	Article 66
Article 16	Article 18	Article 40	Article 67
			Annex I
		Annex II	Annex II
	Annex		Annex III
		Annex I	Annex IV
			Annex V
			Annex VI
		Annex III	Annex VII
			Annex VIII

STATEMENT OF THE COUNCIL'S REASONS

I. INTRODUCTION

On 21 September 2010, the Commission presented to the Council its proposal for a Directive of the European Parliament and of the Council establishing a single European railway area (recast) ([1]).

On 16 November 2011, the European Parliament voted its opinion at first reading ([2]).

On 12 December 2011, the Council reached a political agreement on the draft Directive. Following legal/linguistic revision, the Council adopted its position at first reading on 8 March 2012, in accordance with the ordinary legislative procedure laid down in Article 294 of the Treaty on the Functioning of the European Union.

In carrying out its work, the Council took account of the opinion of the European Economic and Social Committee and of the Committee of Regions.

II. ANALYSIS OF THE POSITION AT FIRST READING

1. General

The proposal for a Directive of the European Parliament and the Council establishing a single European railway area (recast) aims to recast the first railway package in order to simplify, clarify and modernise the regulatory environment in Europe's railway sector whilst making progress towards the Europe 2020 strategy. The objective of the recast initiative is to provide legal simplification through consolidating and clarifying the legislation on access to the rail market. Furthermore, the intention is to update the legislation by eliminating outdated provisions and by introducing new provisions which respond more appropriately to the functioning of the railway market today.

The recast proposal presented by the Commission encompasses mainly:

— the financing of and charging for rail infrastructures,

— the conditions of access to and competition on the railway market,

— the regulatory supervision of the railway market.

Although the Council agrees with the Commission as regards the objective of the proposal, the Council's approach involves several modifications of the original proposal. A number of the proposed provisions are not acceptable because they are considered to have a too far-reaching impact, in particular on the conditions for access by railway undertakings to service facilities, on the principles of charging for the use of railway infrastructure and of service facilities as well as on the functions of the regulatory body. Others are redrafted with a view to simplifying and clarifying the existing three Directives.

Resulting from this approach, the Council's first reading position modifies, to a certain extent, the original Commission proposal by redrafting it and deleting several provisions of the text. This implies that the amendments introduced in the European Parliament's first-reading opinion related to these deleted provisions cannot be accepted by the Council.

([1]) Doc. 13789/10
([2]) TA/2011/503/P7

2. **Key policy issues**

(i) Conditions of access by railway undertakings to service facilities and to the services supplied in these facilities (Article 13 and Annex III)

In order to provide proper market access for new railway undertakings and thereby increase competition in the railway sector, the Commission proposes to introduce independence requirements, namely legal, organisational and decision-making independence for the management of service facilities and for rail transport provision to eliminate conflicts of interest between, on the one hand, the rail-related service providers or owners of the service facilities and, on the other hand, incumbent railway undertakings.

The Council considers that the Commission proposal needs to be modified in this respect, in order to replace the reference to 'legal independence' by the requirement of independence 'in organisational and decision-making terms'. More specifically, the Council introduces a distinction between the essential services facilities for which an increased level of competition needs to be guaranteed, on the one hand, and the remaining services facilities, on the other hand. For the latter, the Council provides for the separation of accounts only; for the essential services facilities whose access needs to be improved, the requirement of independence in organisational and decision-making terms is introduced by the Council.

Moreover, the Council adds that such independence shall not imply the requirement of the establishment of a separate body or firm for service facilities and may be fulfilled with the organisation of distinct divisions within a single undertaking.

Besides, in its original text, the Commission proposes the introduction of 'use-it or lease-it' provisions for the management of rail-related service facilities. When a service facility has not been in use for a certain time period, it must be made available by its owner (on a rent or lease basis) to another interested party. The proposed measure aims at increasing the availability of facilities in the market by avoiding problems of artificial saturation.

The Council agrees with the proposed approach but suggests setting the time period of three years against two years in the Commission original proposal. In addition, the Council considers that the railway undertaking will have to express to the operator an interest to use the facility which shall be based on demonstrated needs. Finally, the Council adds that the operator shall have the right to prevent the lease and rent of that facility by demonstrating that a process of reconversion is going on.

The European Parliament suggests imposing a broader scope for the separation requirements in Article 13 paragraph 2, while the Council does not accept to have additional service facilities subject to the separation requirements.

In this context, amendment 62 of the European Parliament was not accepted by the Council.

(ii) Principles of charging and exceptions to charging principles (Articles 31, 32 and Annex VIII)

Direct costs

In its original proposal, the Commission provides that the charges for the 'minimum access package' for services laid down in Annex III. Point 1 shall be set at the cost that is directly incurred as a result of operating the train service, according to Annex VIII. Point 1. The latter includes a list of elements to be excluded when calculating the direct costs of the minimum access package. The Commission proposes to provide the possibility to amend it through delegated acts.

The Council supports the principle that 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 but considers that Annex VIII-Point 1 is to be removed and that the

methodology for the calculation of direct costs incurred as a result of operating the train services is to be adopted through implementing acts in order to ensure the harmonised implementation of this Article. Finally, the Council also introduces the possibility for the infrastructure manager to decide to gradually adapt to the methodology for calculating direct costs during a period of five years after the deadline for transposition of the Directive. This provision aims at giving time to Member States to increase gradually their infrastructure funding to comply with such common methodology.

Noise charging

The Commission proposes that, when charging the cost of noise effects, allowed by Union law applicable to road freight transport, the infrastructure charges shall be modified to take account of the cost of noise effects caused by the operation of the train. The proposed differentiation of track access charges based on the noise emission aims to create a clear incentive to modernise the rolling stocks.

The Council considers that the Commission approach concerning the charging for the cost of noise effects needs to remain an optional system for Member States so as to avoid negative financial implications for infrastructure managers. Furthermore, the possibility for the Commission to adopt implementing measures to set out the modalities to be followed for the application of the charging for the cost of noise effects is introduced, ensuring that differentiation of charges takes into account, where appropriate, the sensitivity of the area affected, in particular in terms of the size of the population affected and the train composition with an impact on the level of noise emissions.

European Train Control System

The proposal presented by the Commission provides that trains equipped with the European Train Control System (ETCS) shall enjoy a temporary reduction of the infrastructure charge. The Council supports an optional approach and is opposed to any compulsory measure in this respect.

In general terms, the European Parliament follows the Commission approach as regards the basic rules for infrastructure charging. It even suggests reinforcing the Commission proposal regarding the conditions for noise charging, and in particular to make it compulsory independently of measures in the road sector. The Parliament also insists to make the reduction of charges for trains equipped with ETCS a compulsory measure. Furthermore, the Parliament proposes to restrict the possibility to charge for other environmental costs only if such charging is applied by Union legislation for road freight transport and insists to earmark potential revenues to the benefit of transport systems.

In this context, the Council could not take into consideration amendments 78, 79, 80 and 132.

(iii) Financing of the infrastructure manager and infrastructure cost and accounts (Articles 8, 30 and Annex VII)

In its original proposal, the Commission lays down that infrastructure managers shall be given incentives to reduce the costs of providing infrastructure and the level of access charges. It is proposed that the implementation of these incentives can only be done through a contractual agreement between the national competent authority and the infrastructure manager on infrastructure costs and access charges. The Commission proposal also provides that the contractual agreements between the national authorities and infrastructure managers are concluded for a period of not less than five years. The overall objective of the Commission on this issue is to stimulate the introduction of long-term strategies for the development of railways.

The Council agrees in principle with the Commission approach on this issue but prefers to retain the possibility to apply regulatory measures for the implementation of the above incentives, as an alternative to the above mentioned contractual agreements, as well as to reduce the minimum duration of contractual agreements to three years. In addition, the Council proposes to clarify that it is the responsibility of Member States to determine the level of public funding to be provided for infrastructure financing.

The Council shares the Commission objective to establish a development strategy for railway infrastructure managers provided that the publication of this strategy remains indicative. Moreover, the Council is not in favour of introducing a fixed deadline to guarantee the balance of infrastructure managers' accounts and prefers to refer to a reasonable period which shall not exceed the period of the contractual agreement referred to in Article 30 (2).

The European Parliament suggests increasing the duration of national infrastructure development strategies, to extend the consultation of the interested parties on the development strategies, to reinforce Member States' obligation to provide public financing and to reduce the deadline proposed by the Commission in its original text to guarantee the balance of infrastructure managers' accounts. In this context, amendments 55 and 78 of the European Parliament were not accepted by the Council.

(iv) Separation between infrastructure managers and railway undertakings (Article 6 and 7)

The Council shares the Commission approach not to tackle the separation between infrastructure managers and railway undertakings in the context of the recast proposal establishing a single European railway area.

The European Parliament however suggests introducing specific requirements in relation with IT services and staff policies. Moreover, the Parliament modifies the existing requirements concerning the separation of accounts between infrastructure managers and railway undertakings. Finally, the Parliament invites the Commission to present a new legislative proposal on this issue before the end of 2012 to ensure a complete separation of infrastructure management from transport operations; the Parliament insists that the new proposal should also provide for the opening of the domestic rail passenger market.

The Council could therefore not take into consideration amendments 51, 52, 53 and 54.

(v) Functions of the Regulatory Body (Articles 55-57)

The Commission proposal contains several new provisions, which aim to ensure that regulatory bodies are in a position to carry out their duties effectively, building on reinforced independence, extended competences and additional means at their disposal.

It is therefore proposed to modernise the provisions on regulatory bodies' independence by stipulating that they must be independent from any public or private authority. The proposed measure aims to reduce the potential for conflict of interest and thereby enhance the oversight capacity of regulatory bodies.

Furthermore, the Commission proposal includes the extension of the competencies of regulatory bodies to the following functions: (1) decisions related to access to and charging for rail-related services which are essential to allow market entry and ensure fair competition; (2) preventing State funds devoted to unprofitable activities from being shifted to finance commercial activities; it is also proposed that regulatory bodies will have the power to carry out audits or to initiate external audits with the railway undertakings and infrastructure managers to verify compliance with accounting separation provisions laid down in Article 6. Finally, in its recast initiative, the Commission proposes that cost-accounting data are to be provided by infrastructure managers in an aggregated and standardised format as 'regulatory accounts' in order to allow regulatory bodies to operate more effectively.

Although the Council generally follows the Commission approach as far as the reinforcement of the regulatory bodies is concerned, it however considers it necessary to review the proposed provisions regarding independence requirements for regulators' staff. Moreover, the Council makes optional the possibility for the regulator to intervene on financing issues and the publication of regulatory accounts is not accepted by the Council.

The Council also decides to give the regulatory body the power to monitor the competitive situation in the rail services markets and to adopt appropriate measures to correct undesirable developments in these markets, without prejudice to the competences of the national competition authorities for securing competition. The Council also agrees on the principle to create a coordinated cooperation framework between the national regulatory bodies.

The European Parliament intends to give extensive power to national regulatory bodies in supervising the implementation of the Directive and suggests further reinforcing the independence and means of the national regulators, while limiting at the same time their existing power to the correction of undesirable developments of the market. Finally, the European Parliament also supports the formalisation of the cooperation between national regulators through the creation of a network and introduces a request to the Commission to issue a legislative proposal concerning the establishment of a European regulatory body.

In this context, the Council did not take on board amendments 48, 96, 97, 98, 99 and 100.

(vi) Delegated acts and implementing acts

In the initial Commission proposal, delegated acts are proposed as an instrument to amend various annexes, including their sections.

The Council considers however that the annexes and sections for which the Commission should be empowered to adopt delegated acts have to be reduced and be limited to certain amendments to Annexes V, VIII point 4c, IX and X. The Council removes therefore the possibility for the Commission to adopt amendments to Annex I (railway infrastructure items), II (essential functions of an infrastructure manager), III (services to be supplied to the railway undertakings), VI (network statement), VII (contractual agreement), part of Annex VIII (charges) by delegated acts on the grounds that these annexes contain essential elements.

In addition, the Council introduces implementing measures for the adoption of uniform conditions of application of certain elements in the annexes and sections, such as Article 13 on the conditions of access to rail-related services, Article 31(3) to establish a method for the calculation of direct costs, Article 31(5) to establish a common method for noise charging, Article 32 to establish a common method for ETCS modulation.

In general terms, the European Parliament suggests either restricting further or removing powers from the Commission to adopt delegated acts; in addition, the Parliament rejects the use of implementing acts for the adoption of uniform conditions of application of certain elements in the annexes and sections.

In this context, amendments 62, 65, 68, 69, 70, 71, 72, 76, 78, 80, 81-82, 87 were not accepted by the Council.

3. **Other policy issues**

In general terms, the Council rejects those EP amendments which do not respect the provisions of the Inter-Institutional Agreement on a more structured use of the recasting technique for legal acts (2002/C 77/01). In point 8 of this Inter-Institutional Agreement, it is stated that *'where, in the course of the legislative procedure, it appears necessary to introduce substantive amendments in the recasting act to those provisions which remain unchanged in the Commission proposal, such amendments shall be made to that act in compliance with the procedure laid down by the Treaty according to the applicable legal basis.'*

The Council considers that the EP amendments that concern provisions not included in the Commission recast proposal are not indispensable for reasons of coherence and clarity. Consequently, the Council could not take into consideration amendments 16, 17, 27, 29-30, 33, 36, 38, 39, 40, 51, 52, 53, 57, 59, 67, 73, 85, 88, 89, 90, 94 and 95.

4. **Other amendments adopted by the European Parliament**

Further EP amendments not included in the Council's first-reading position concern the:

— inclusion of additional requirements relating to information and ticketing for passengers (amendment 57),

— provisions governing the deadlines for the decisions of national regulatory bodies (amendment 59),

— extension of the scope of market monitoring to employment and working conditions as well as to the investments in railway infrastructure (amendment 65),

— requirement according to which the applicant railway undertaking shall also demonstrate at the time of the application that it holds a safety certificate (amendment 73),

— obligation to publish the network statement in English (amendment 75),

— restrictive deadline imposed to the infrastructure manager to inform interested parties about unscheduled maintenance work (amendment 93),

— transposition deadline of 12 months (amendment 112),

— reinforced provisions concerning services available to passengers at station (amendment 115),

— inclusion of a reference to Directive 2009/72/EC as far as the supply of traction current is concerned (amendment 115),

— extension of the information for Rail Market Monitoring as referred to in Annex IV. Point 1 to the collection of data on incidents, accidents and serious accidents (amendment 116),

— additional requirements relating to cover for civil liability (amendment 140).

III. **CONCLUSION**

In establishing its position at first reading, the Council has taken full account of the proposal of the Commission and of the European Parliament's opinion at first reading. With respect to the amendments proposed by the European Parliament, the Council observes that a certain number of amendments have — in spirit, partially or fully — already been included in its first-reading position.