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OUTCOME OF PROCEEDINGS

From:	General Secretariat of the Council
To:	Delegations
No. prev. doc.:	10401/20
No. Cion doc.:	ST 8976/20
Subject:	Proposal for a regulation of the European Parliament and of the Council establishing measures for a sustainable rail market in view of the COVID-19 pandemic – Outcome of proceedings

1. On 19 June 2020 the Commission submitted a proposal for a Regulation of the European Parliament and of the Council establishing measures for a sustainable rail market in view of the COVID-19 pandemic. The proposal aims at providing a temporary discretion for Member States in respect of applying rules on levying charges on railway undertakings under Directive 2012/34/EU establishing a single European railway area.
2. Following the outbreak of the pandemic, rail passenger and rail freight transport have declined significantly due to travel restrictions and lower demand. Many recent new market entrants had to cease their operations, and all rail operators have suffered large decreases in their transport services. The proposal would allow to temporarily, between 1 March and 31 December 2020 and extendable if necessary, waive, reduce or defer track access charges for the use of railway infrastructure and to waive reservation charges. Member States making use of this discretion would have to compensate the infrastructure manager for resulting losses within the following calendar year.

3. The Commission presented the proposal during an informal meeting of the Working Group on Land Transport on 7 July 2020. A written consultation of delegations until 17 July 2020 produced a number of comments and suggestions by Member States. Based on those contributions, the Presidency submitted a compromise proposal to the working party meeting on 1 September 2020.
4. Delegations generally welcomed the proposal as amended by the Presidency note. They underlined the importance to act quickly. Several delegations stressed the need to apply modifications of charges in a strictly neutral, economically justified and transparent way, so to avoid market distortion. Several delegations also requested that reporting obligations related to the Regulation must be applied in a practical and proportionate way. Some delegations referred to the unsolved implications that measures under the Regulation might have under the Union's state aid regime, such as in relation to existing support schemes for combined transport. One delegation noted that the proposal was silent as to the sources of funding that might be employed for putting measures into practice. The Commission representative supported the evolution of the text in the working party. The Presidency concluded the discussion at the working party level.
5. On 9 September 2020, the Permanent Representatives Committee:
 - agreed on the mandate for negotiations with the European Parliament based on the Commission's proposal with the amendments as can be seen highlighted in the Annex (subject to revision by the lawyer-linguists of both institutions);
 - confirmed that should the European Parliament agree with the use of the urgent procedure and approve the Commission's proposal with the amendments as can be seen highlighted in the Annex, the Council would approve the European Parliament's position, resulting in the adoption of the Regulation in the form of the Commission's proposal with the amendments as can be seen highlighted in the Annex (subject to revision by the lawyer-linguists of both institutions);
 - authorised the Presidency to send a letter to the Chair of the TRAN Committee and to inform the European Parliament thereof; and
 - authorised the Presidency to request to the European Parliament the use of the urgent procedure.

Changes to the Commission proposal are highlighted in **bold underline** and ~~striketrough~~.

Changes, which will be addressed through the lawyer-linguist process, are highlighted in addition in **italics**.

Proposal for a

REGULATION OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL

establishing measures for a sustainable rail market in view of the COVID-19 pandemic

(Text with EEA relevance)

THE EUROPEAN PARLIAMENT AND THE COUNCIL OF THE EUROPEAN UNION,

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

Having regard to the proposal from the European Commission,

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

Having regard to the opinion of the European Economic and Social Committee¹,

Having regard to the opinion of the Committee of the Regions²,

Acting in accordance with the ordinary legislative procedure,

¹ OJ C 132, 3.5.2011, p. 99.

² OJ C 104, 2.4.2011, p. 53.

Whereas:

- (1) The COVID-19 pandemic brought about a significant drop in demand **for rail transport services** ~~which in turn has led to a sharp drop in rail transport~~. This has a serious impact on railway undertakings which started as early as 1 March 2020 and is likely to affect the sector until at least 31 December 2020. The circumstances are beyond the control of railway undertakings that are facing considerable liquidity problems, major losses and in some cases may risk insolvency.
- (2) In order to counteract the negative economic effects of the COVID-19 pandemic, railway undertakings may need financial support. It may not be possible for railway undertakings to pay charges for accessing rail infrastructure during the COVID-19 emergency, and, for that reason, infrastructure managers should be enabled to reduce, waive or defer such charges. This possibility should be granted for a period during which the effects of the COVID-19 pandemic on the rail market have been felt and are expected to last, i.e. from 1 March 2020 until 31 December 2020 (the “reference period”).
- (3) Under article 31(3) of Directive 2012/34/EU, track access charges to be paid to the infrastructure manager may not fall below the cost directly incurred as a result of operating the train service. A partial or full waiver of charges or deferral thereof, applied in a transparent, objective and non-discriminatory way to ~~all~~ railway undertakings, active in the freight and /or passenger rail sectors, would alleviate the impact of the COVID-19 pandemic during the reference period. Member States should therefore be provided with the possibility to authorise such measures on the part of infrastructure managers.
- (4) Article 32(1) of Directive 2012/34/EU allows Member States to provide for the levying of mark-ups, if the market can bear them. Due to the impacts of the COVID-19 pandemic the ability of the market segments to bear mark-ups may have decreased. It is therefore appropriate to enable Member States to authorise infrastructure managers to reassess the ability to bear mark-ups of the market segments, for the purposes of a possible reduction of the amounts due in respect of the reference period.

- (5) Article 36 of Directive 2012/34/EU provides for a regime of reservation charges, intended to incentivise efficient use of capacity. The ~~third~~^{second} sentence of this Article renders the levying of those charges mandatory in case of regular failure by a railway undertaking to use allocated paths or parts of these. Infrastructure managers are to publish in their network statements the criteria to determine such failure to use. The pandemic has provoked severe disruptions to rail traffic that have led to widespread train path cancellations. The underlying events were and are beyond the control of railway undertakings. Moreover, they have given rise to (temporary) overcapacity. It can therefore be assumed that the incentive effect intended by reservation charges in accordance with Article 36 of the Directive 2012/34/EU is not relevant insofar as the reference period is concerned. Therefore, by derogation from the ~~third~~^{second} sentence of Article 36, Member States should be enabled to authorise infrastructure managers not to levy reservation charges for capacity allocated but not used during the reference period, even where such a non use would be considered a regular failure to use allocated paths or part of them according to the criteria currently applicable.
- (6) In respect of each of the items referred to above, any decreases of charges as authorised by Member States in accordance with this Regulation would entail income losses on the part of the infrastructure manager. Those income losses would in principle be compensated in accordance with Article 8(4) of Directive 2012/34/EU. Given the extraordinary character of those losses, infrastructure managers should be refunded within a shorter period namely by 31 December of the year following the year in which the loss was incurred.
- (7) Temporary adjustments of the conditions for the use of rail infrastructure should be made and network statements should be kept up to date and amended as necessary.
- (8) Given the sudden and unforeseeable nature of the COVID-19 pandemic, which made it impossible to adopt timely Union measures, this Regulation should cover the reference period referred to above, even though parts of that period are situated in the past, ~~without however affecting legitimate expectations.~~ **Given the nature of the measures provided for by this Regulation, such an approach does not result in a violation of the legitimate expectations of the entities concerned.**

(8a) The further development of COVID-19 and its further impact on the rail transport sector are difficult to predict. The Commission should continuously analyse the economic impact of COVID-19 on that sector and the Union should be in a position to prolong without undue delay the period during which the measures envisaged by this Regulation apply if the adverse conditions persist.

- (9) Since the objective of this Regulation, namely to respond to the urgent situation created by the COVID-19 pandemic, cannot be sufficiently achieved by the Member States but rather, by reason of the scale or effects of the action, 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 (TEU). In accordance with the principle of proportionality as set out in that Article, this Regulation is not deemed to go beyond what is necessary to achieve that objective.
- (10) ~~*In view of the urgency entailed by the exceptional circumstances caused by the COVID-19 pandemic justifying the proposed measures, and more particularly in order to adopt the necessary measures quickly so as to contribute to the financial sustainability of railway undertakings, it is appropriate to provide for an exception to the eight-week period referred to in Article 4 of Protocol No 1 on the role of national Parliaments in the European Union, annexed to the TEU, to the Treaty on the Functioning of the European Union and to the Treaty establishing the European Atomic Energy Community.*~~
- (11) In order to extend, if necessary and justified, the measures set out in this Regulation, 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 prolonging the period during which the measures envisaged by this Regulation apply. It is of particular importance that the Commission carry out appropriate consultations during its preparatory work, including at expert level, and that those consultations be conducted in accordance with the principles laid down in the Interinstitutional Agreement of 13 April 2016 on Better Law-Making. In particular, to ensure equal participation in the preparation of delegated acts, the European Parliament and the Council receive all documents at the same time as Member States' experts, and their experts systematically have access to meetings of Commission expert groups dealing with the preparation of delegated acts.

- (12) In order to allow for the prompt application of the measures provided for in this Regulation, it should enter into force as a matter of urgency on the date following that of its publication in the *Official Journal of the European Union*,

HAVE ADOPTED THIS REGULATION:

Article 1

Subject matter and scope

This Regulation lays down temporary rules on the levying of charges for the use of railway infrastructure as set out in Chapter IV of Directive 2012/34/EU. It applies to the use of railway infrastructure for domestic and international rail services covered by that Directive, during the period from 1 March 2020 until 31 December 2020 ('the reference period').

Article 2

Reduction, waiver or deferral of charges for the minimum access package and of reservation charges

1. Notwithstanding Articles 27 and 31(3) of Directive 2012/34/EU, and subject to compliance with State aid rules, Member States may authorise infrastructure managers to reduce, waive or defer the payment of the charges for the minimum access package and for access to infrastructure connecting service facilities, **where appropriate according to the market segments identified in their network statements**, in a transparent, objective and non-discriminatory way, **where in the cases in which** such payment has or will become due during the reference period.
2. Notwithstanding Article 27 of Directive 2012/34/EU and subject to compliance with State aid rules, Member States may authorise infrastructure managers to reassess the ability of the market segments to bear mark-ups, within the meaning of Article 32(1) of Directive 2012/34/EU, for the purposes of a possible reduction of the amounts due in respect of the reference period.

3. Notwithstanding Article 27 and the ~~third~~^{second} sentence of Article 36 of Directive 2012/34/EU, and subject to compliance with State aid rules, Member States may authorise infrastructure managers not to levy reservation charges on any ~~applicant's railway undertakings~~ for capacity allocated but not used during the reference period in a transparent, objective and non-discriminatory way.
4. Notwithstanding Article 8(4) of Directive 2012/34/EU, and subject to compliance with State aid rules, Member States shall compensate infrastructure managers for the specific financial loss incurred as a result of the application of paragraphs 1, 2 and 3 by 31 December of the year following the year in which the loss was incurred. This compensation is without prejudice to the Member States' obligation under Article 8(4) of Directive 2012/34/EU, to ensure that, over a reasonable period, which shall not exceed the period of five years, the profit and loss account of an infrastructure manager shall remain balanced.
- 5. Member States shall inform the European Commission of the measures taken under this Article no later than 3 months from the date of entry into force of this Regulation, and shall inform the Commission of subsequent measures or changes thereof. The European Commission shall make this information publicly available.**

Article 3

Adjustments of the conditions for the use of rail infrastructure

Notwithstanding Article 27 of Directive 2012/34/EU, infrastructure managers shall amend, as appropriate and without delay, the network statement referred to in Article 27 of that Directive so as to display the conditions applied by them, in view of the measures taken by the Member State concerned in accordance with Article 2.

Article 4

Regulatory body

~~This Regulation is without prejudice to the provisions of Directive 2012/34/EC concerning the regulatory body.~~ Article 56 of ~~that~~ Directive 2012/34/EC shall apply to the reduction, waiver or deferral of charges for the minimum access package and of reservation charges referred to in cases covered by Articles 2 of this Regulation and to the adjustment of the conditions for the use of railway infrastructure referred to in Article 3 of this Regulation, in respect of the criteria set out therein, applicable to infrastructure managers.

Article 5

Extension of the reference period

1. By 1 November 2020, infrastructure managers shall provide the Commission with data on the usage of their networks categorised by market segments, in accordance with Article 32(1) of Directive 2012/34/EU, for the periods from 1 March 2019 until 30 September 2019 and from 1 March 2020 until 30 September 2020. ~~Infrastructure managers shall cooperate with the Commission in the assessment of the development of the situation~~any prolongation of the reference period
Where the reference period is extended, the infrastructure managers shall provide the Commission with a new set of data when half of the prolongation of the reference period has elapsed, in order to allow the Commission the assessment of the development of the situation during any prolongation of the reference period.
2. Where the Commission finds, on the basis of the data referred to in paragraph 1, that there is a persistent reduction in the level of rail traffic, as compared to the level in the corresponding period in the previous years, and that the trend is likely to persist, and also finds, on the basis of the best available scientific data, that the situation is the result of the impact of the COVID-19 pandemic, the Commission shall, by means of delegated acts adopted in accordance with Article 6, amend the reference period accordingly. Any such amendment may only extend the reference period by up to six months, and the reference period may not be extended beyond [date of entry into force plus 18 months].

3. Where, in the case of a prolonged impact of the COVID-19 pandemic on the rail transport sector in the Union, imperative grounds of urgency so require, the procedure provided for in Article 7 shall apply to delegated acts adopted pursuant to this Article.

Article 6

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 power to adopt delegated acts referred to in Article 5(2) shall be conferred on the Commission for a period of one year from [*the date of entry into force of this Regulation*].
3. The delegation of power referred to in Article 5(2) 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. Before adopting a delegated act, the Commission shall consult experts designated by each Member State in accordance with the principles laid down in the Interinstitutional Agreement of 13 April 2016 on Better Law-Making.
5. As soon as it adopts a delegated act, the Commission shall notify it simultaneously to the European Parliament and to the Council.
6. A delegated act adopted pursuant to Article 5(2) shall enter into force only if no objection has been expressed either by the European Parliament or by 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 7

Urgency procedure

1. Delegated acts adopted under this Article shall enter into force without delay and shall apply as long as no objection is expressed in accordance with paragraph 2. The notification of a delegated act to the European Parliament and to the Council shall state the reasons for the use of the urgency procedure.
2. Either the European Parliament or the Council may object to a delegated act in accordance with the procedure referred to in Article 6(6). In such a case, the Commission shall repeal the act immediately following the notification of the decision to object by the European Parliament or by the Council.

Article 8

Entry into force

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

This Regulation shall be binding in its entirety and directly applicable in the Member States in accordance with the Treaties.

Done at Brussels,

For the European Parliament
The President

For the Council
The President
