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LEGISLATIVE ACTS AND OTHER INSTRUMENTS

Subject:	Position of the Council at first reading with a view to the adoption of a DIRECTIVE OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL amending Directive 2012/34/EU as regards the opening of the market for domestic passenger transport services by rail and the governance of the railway infrastructure - Adopted by the Council on 17 October 2016

DIRECTIVE (EU) 2016/…
OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL

of …

amending Directive 2012/34/EU as regards the opening of the market for domestic passenger transport services by rail and the governance of the railway infrastructure

(Text with EEA relevance)

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],

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1 OJ C 327, 12.11.2013, p. 122.
2 OJ C 356, 5.12.2013, p. 92.
3 Position of the European Parliament of 26 February 2014 (not yet published in the Official Journal) and position of the Council at first reading of 17 October 2016 (not yet published in the Official Journal). Position of the European Parliament of … (not yet published in the Official Journal).

Whereas:

(1) Directive 2012/34/EU of the European Parliament and of the Council[1] establishes a Single European Railway Area with common rules on the governance of railway undertakings and infrastructure managers, on infrastructure financing and charging, on conditions of access to railway infrastructure and services and on regulatory oversight of the rail market. The completion of the Single European Railway Area should be achieved by extending the principle of open access to domestic rail markets and reforming the governance of infrastructure managers with the objective of ensuring equal access to the infrastructure.

(2) The growth of passenger traffic by rail has not kept pace with the evolution of other modes of transport. The completion of the Single European Railway Area should contribute to the further development of rail transport as a credible alternative to other modes of transport. In this context, it is vital that the legislation establishing the Single European Railway Area is effectively applied within the prescribed time limits.

[1] Directive 2012/34/EU of the European Parliament and of the Council of 21 November 2012 establishing a single European railway area (OJ L 343, 14.12.2012, p. 32).

(3) The Union markets for rail freight services and international passenger transport services by rail have been opened to competition since 2007 and 2010 respectively, in accordance with Directive 2004/51/EC of the European Parliament and of the Council[1] and Directive 2007/58/EC of the European Parliament and of the Council[2]. Furthermore, some Member States have also opened their domestic passenger services to competition, by introducing open access rights, tendering for public service contracts, or both. Such opening of the market should have a positive impact on the functioning of the Single European Railway Area, leading to better services for users.

(4) Specific exemptions from the scope of Directive 2012/34/EU should allow Member States to take into account specific characteristics of the structure and organisation of rail systems on their territory, while ensuring the integrity of the Single European Railway Area.

(5) The operation of railway infrastructure on a network includes control-command and signaling. So long as a line is in operation, the infrastructure manager should ensure in particular that the infrastructure is suitable for its designated use.

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1 Directive 2004/51/EC of the European Parliament and of the Council of 29 April 2004 amending Council Directive 91/440/EEC on the development of the Community's railways (OJ L 164, 30.4.2004, p. 164).

2 Directive 2007/58/EC of the European Parliament and of the Council of 23 October 2007 amending Council Directive 91/440/EEC on the development of the Community's railways and Directive 2001/14/EC on the allocation of railway infrastructure capacity and the levying of charges for the use of railway infrastructure (OJ L 315, 3.12.2007, p. 44).

(6) In order to establish whether an undertaking should be considered to be vertically integrated, the notion of control within the meaning of Council Regulation (EC) No 139/2004[1] should be applied. Where an infrastructure manager and a railway undertaking are fully independent of one another, but both are controlled directly by the State without an intermediary entity, they should be considered to be separate. A Government ministry exercising control over both a railway undertaking and an infrastructure manager should not be considered to be an intermediary entity.

(7) This Directive introduces further requirements to ensure the independence of the infrastructure manager. Member States should be free to choose between different organisational models, ranging from full structural separation to vertical integration, subject to appropriate safeguards to ensure the impartiality of the infrastructure manager as regards the essential functions, traffic management and maintenance planning. Member States should ensure that, within the limits of the established charging and allocation frameworks, the infrastructure manager enjoys organisational and decision-making independence as regards the essential functions.

(8) Safeguards should apply in vertically integrated undertakings to ensure that other legal entities within those undertakings do not have a decisive influence on appointments and dismissals of persons in charge of taking decisions on the essential functions. In this context, Member States should ensure that there are complaints procedures in place.

[1] Council Regulation (EC) No 139/2004 of 20 January 2004 on the control of concentrations between undertakings (the EC Merger Regulation) (OJ L 24, 29.1.2004, p. 1).

(9) Member States should put in place a national framework for the assessment of conflict of interests. Within this framework, the regulatory body should take into account any personal financial, economic or professional interests which could improperly influence the impartiality of the infrastructure manager. Where an infrastructure manager and a railway undertaking are independent of one another the fact that they are directly controlled by the same Member State authority should not be considered to give rise to a conflict of interest within the meaning of this Directive.

(10) Decision-making by infrastructure managers with respect to train path allocation and decision-making with respect to infrastructure charging are essential functions that are vital for ensuring equitable and non-discriminatory access to rail infrastructure. Stringent safeguards should be put in place to avoid any undue influence being brought to bear on decisions taken by the infrastructure manager relating to such functions. Those safeguards should be adapted to take into account the different governance structures of railway entities.

(11) Appropriate measures should also be taken to ensure that the functions of traffic management and maintenance planning are exercised in an impartial manner to avoid any distortion of competition. Within this framework, infrastructure managers should ensure that railway undertakings have access to relevant information. In this context, where railway undertakings have been granted further access to the traffic management process by the infrastructure managers, such access should be granted on equal terms to all railway undertakings concerned.

(12) Where the essential functions are performed by an independent charging and/or allocation body, the impartiality of the infrastructure manager as regards the functions of traffic management and maintenance should be ensured without the need for transferring these functions to an independent entity.

(13) Regulatory bodies should have the power to monitor traffic management, renewal planning, as well as scheduled and unscheduled maintenance works, in order to ensure that they do not lead to discrimination.

(14) Member States should, as a general rule, ensure that the infrastructure manager is responsible for the operation, maintenance and renewal on a network and is entrusted with the development of the railway infrastructure on that network. Where those functions are outsourced to different entities, the infrastructure manager should nevertheless retain supervisory power and bear ultimate responsibility for their exercise.

(15) Infrastructure managers that are part of a vertically integrated undertaking may outsource within that undertaking functions other than the essential functions subject to the conditions set out in this Directive, provided that this does not give rise to a conflict of interest and that the confidentiality of commercially sensitive information is guaranteed. Essential functions should not be outsourced to any other entity of the vertically integrated undertaking, unless such entity exclusively performs essential functions.

(16) Where appropriate, in particular for reasons of efficiency, including in cases of public-private partnerships, the functions of infrastructure management may be shared between different infrastructure managers. Infrastructure managers should each bear full responsibility for the functions they exercise.

(17) Financial transfers between the infrastructure manager and railway undertakings, and in vertically integrated undertakings between the infrastructure manager and any other legal entity of the integrated undertaking, should be prevented, where they could lead to a distortion of competition on the market, in particular as a result of cross-subsidisation

(18) Infrastructure managers may use income from infrastructure network management activities that involve the use of public funds to finance their own business or to pay dividends to their investors, as a return on their investments in railway infrastructure. Such investors may include the State and any private shareholders, but may not include undertakings which are part of a vertically integrated undertaking and which exercise control over both a railway undertaking and that infrastructure manager. Dividends generated by activities that do not involve the use of public funds or revenues from charges for the use of railway infrastructure may also be used by undertakings which are part of a vertically integrated undertaking and which exercise control over both a railway undertaking and that infrastructure manager.

(19) The principles of charging should not preclude the possibility that revenues from infrastructure charges transit through State accounts.

(20) Where in a vertically integrated undertaking the infrastructure manager does not have distinct legal personality and the essential functions are externalised by assigning them to an independent charging and/or allocation body, the relevant provisions regarding financial transparency and the independence of the infrastructure manager should apply *mutatis mutandis* at the level of certain divisions within the undertaking.

(21) In order to achieve efficient network management and an efficient use of infrastructure, better coordination between infrastructure managers and railway undertakings should be ensured through the use of appropriate coordination mechanisms.

(22) With a view to facilitating the provision of efficient and effective rail services within the Union, a European Network of Infrastructure Managers should be established, building on existing platforms. For the purpose of participating in this network, Member States should be free to determine which body or bodies should be considered to be their main infrastructure managers.

(23) Given the heterogeneity of networks in terms of their size and density and the variety in the organisational structures of national, local and regional authorities and their respective experiences with the process of market opening, Member States should be allowed sufficient flexibility to organise their rail networks in such a way that open access services and services under public service contracts can be performed, in order to ensure a high quality of services readily available to all passengers.

(24) Granting Union railway undertakings the right of access to railway infrastructure in all Member States for the purpose of operating domestic passenger services might 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 such right of access where it would compromise the economic equilibrium of those public service contracts based on a decision by the relevant regulatory body.

(25) The right of railway undertakings to be granted access to the infrastructure does not affect the possibility for a competent authority to grant exclusive rights in accordance with Article 3 of Regulation (EC) No 1370/2007 of the European Parliament and of the Council[1] or to award a public service contract directly under the conditions established in Article 5 of that Regulation. The existence of such a public service contract should not entitle a Member State to limit the right of access of other railway undertakings to the railway infrastructure concerned for the provision of rail passenger services, unless such services would compromise the economic equilibrium of the public service contract.

(26) Regulatory bodies should assess, on the basis of an objective economic analysis, whether the economic equilibrium of existing public service contracts would be compromised, following a request made by the interested parties.

(27) The assessment process should take into account the need to provide all market players with sufficient legal certainty to develop their activities. The procedure should be as simple, as efficient and as transparent as possible as well as being coherent with the process for the allocation of infrastructure capacity.

(28) Provided that non-discriminatory access is ensured, Member States may attach specific conditions to the right of access to the infrastructure in order to allow for the implementation of an integrated timetable scheme for domestic passenger services by rail.

[1] 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 and repealing Council Regulations (EEC) Nos 1191/69 and 1107/70 (OJ L 315, 3.12.2007, p. 1).

(29) The development of railway infrastructure and the improvement of the quality of rail passenger services are key priorities in the promotion of a sustainable transport and mobility system in Europe. In particular, the development of a high-speed rail network has the potential to create better and faster connections between Europe's economic and cultural centres. High-speed rail services link people and markets in a fast, reliable, environmentally-friendly and cost-effective way and encourage a shift of passengers to rail. It is therefore of particular importance to encourage both public and private investment in high speed rail infrastructure, to create favourable conditions for a positive return on investment, and to maximize the economic and social benefits from such investments. It should remain possible for Member States to opt for different ways of promoting investment in high speed rail infrastructure and the use of high speed lines.

(30) With a view to developing the market for high-speed passenger services, promoting optimal use of available infrastructure, and in order to encourage the competitiveness of high-speed passenger services resulting in beneficial effects for passengers, open access for high-speed passenger services should be limited only in specific circumstances and following an objective economic analysis by the regulatory body.

(31) In order to enable passengers to access the data needed to plan journeys and to book tickets within the Union, common information and through-ticketing systems that have been developed by the market should be promoted. Given the importance of promoting seamless public transport systems, railway undertakings should be encouraged to work on the development of such systems, making multimodal, cross-border and door-to-door mobility options possible.

(32) Through-ticketing systems should be interoperable and non-discriminatory. Railway undertakings should contribute to the development of such systems by making available in a non-discriminatory manner and in an interoperable format all relevant data necessary to plan journeys and book tickets. Member States should ensure that such systems do not discriminate between railway undertakings and that they respect the need to ensure the confidentiality of commercial information, the protection of personal data and compliance with competition rules. The Commission should monitor and report on the development of such systems and, where appropriate, submit legislative proposals.

(33) Member States should ensure that the provision of railway services reflects requirements linked to the guarantee of adequate social protection, whilst ensuring smooth progress towards the completion of the Single European Railway Area. In this context, obligations arising in accordance with national law from binding collective agreements or agreements concluded between social partners and relevant social standards should be respected. Those obligations should be without prejudice to Union legislation in the field of social and labour law. The Commission should actively support the work undertaken by the sectoral social dialogue on railways.

(34) In the framework of the ongoing review of Directive 2007/59/EC of the European Parliament and of the Council[1], the Commission should assess whether new legislative acts on the certification of on-board railway staff are necessary.

(35) Member States should be free to decide on the appropriate financing strategies to accelerate the deployment of the European Train Control System (ETCS), and in particular whether to apply differentiation of track access charges.

[1] Directive 2007/59/EC of the European Parliament and of the Council of 23 October 2007 on the certification of train drivers operating locomotives and trains on the railway system in the Community (OJ L 315, 3.12.2007, p. 51).

(36) Infrastructure managers should cooperate concerning incidents or accidents with an impact on cross-border traffic with a view to sharing any relevant information enabling swift restoration of normal traffic.

(37) With a view to achieving the objectives of the Single European Railway Area, regulatory bodies should cooperate to ensure non-discriminatory access to rail infrastructure.

(38) In particular, it is essential that regulatory bodies cooperate where matters concerning international rail services or bi-national rail infrastructure require decisions of two or more regulatory bodies, for the purpose of coordinating their decision-making, with a view to avoiding legal uncertainty and ensuring the efficiency of international rail services.

(39) In the process of opening national rail markets to competition by granting access to the networks to every railway undertaking, Member States should have a sufficient transitional period to adapt their national law and organisational structures. As a consequence, Member States should be able to maintain their existing national rules on market access until the end of the transitional period.

(40) In accordance with the Joint Political Declaration of 28 September 2011 of Member States and the Commission on explanatory documents[1], Member States have undertaken to accompany, in justified cases, the notification of their transposition measures with one or more documents explaining the relationship between the components of a Directive and the corresponding parts of national transposition instruments. With regard to this Directive, the legislator considers the transmission of such documents to be justified,

HAVE ADOPTED THIS DIRECTIVE:

[1] OJ C 369, 17.12.2011, p. 14.

Article 1

Directive 2012/34/EU is amended as follows:

(1) Article 2 is amended as follows:

(a) in paragraph 3, the introductory wording is replaced by the following:

‘3. Member States may exclude the following from the application of Articles 7, 7a, 7b, 7c, 7d, 8 and 13 and Chapter IV:’;

(b) the following paragraphs are inserted:

‘3a. Member States may exclude the following from the application of Articles 7, 7a, 7b, 7c, 7d and 8:

Local, low-traffic lines of a length not exceeding 100 km that are used for freight traffic between a mainline and points of origin and destination of shipments along those lines, provided that those lines are managed by entities other than the main infrastructure manager and that either (a) those lines are used by a single freight operator or (b) the essential functions in relation to those lines are performed by a body which is not controlled by any railway undertaking. Where there is only a single freight operator, Member States may also exempt it from the application of Chapter IV until capacity is requested by another applicant. This paragraph can equally be applied where the line is used also, to a limited extent, for passenger services. Member States shall inform the Commission of their intention to exclude such lines from the application of Articles 7, 7a, 7b, 7c, 7d and 8.

3b. Member States may exclude the following from the application of Article 7, 7a, 7b, 7c and 7d:

Regional low-traffic networks managed by an entity other than the main infrastructure manager and used for the operation of regional passenger services provided by a single railway undertaking other than the incumbent railway undertaking of the Member State, until capacity for passenger services on that network is requested, and provided that the undertaking is independent of any railway undertaking operating freight services. This paragraph can equally be applied where the line is used also, to a limited extent, for freight services. Member States shall inform the Commission of their intention to exclude such lines from the application of Articles 7, 7a, 7b, 7c and 7d.';

(c) Paragraph 4 is replaced by the following:

'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 railway market from the application of Articles 8(3) and local railway infrastructures which do not have any strategic importance for the functioning of the railway market from the application of Articles 7, 7a, 7c and Chapter IV. Member States shall notify the Commission of their intention to exclude such railway infrastructures. The Commission shall adopt implementing acts setting out its decision whether such railway infrastructure may be considered to be without strategic importance. In doing so, the Commission shall take into account the length of railway lines concerned, their level of use and the traffic volume potentially impacted. Those implementing acts shall be adopted in accordance with the advisory procedure referred to in Article 62(2).';

(d) The following paragraph is inserted:

‘8a. For a period of 10 years after … [the date of entry into force of this amending Directive (st11199/16)], Member States may exclude from the application of Chapters II and IV of this Directive, with the exception of Articles 10, 13 and 56, isolated railway lines of less than 500 km, with a different track gauge to that of the main domestic network, that connect with a third country to which Union rail legislation does not apply and that are managed by a different infrastructure manager than the main domestic network. Railway undertakings operating exclusively on such lines may be exempted from the application of Chapter II.

Such exemptions may be renewed for periods not exceeding 5 years. No later than 12 months before the expiry date of the exemption, a Member State that intends to renew an exemption shall notify the Commission of its intention to do so. The Commission shall examine whether the conditions for an exemption set out in the first subparagraph are still met. If that is not the case, the Commission shall adopt implementing acts setting out its decision on the termination of the exemption. Those implementing acts shall be adopted in accordance with the advisory procedure referred to in Article 62(2).’;

(e) The following paragraphs are added:

‘12. Where there is an existing public-private partnership concluded before 16 June 2015 and the private party to that partnership is also a railway undertaking responsible for providing passenger railway services on the infrastructure, Member States may continue to exempt such a private party from the application of Articles 7, 7a and 7d and to limit the right to pick up and set down passengers for services operated by railway undertakings on the same infrastructure as the passenger services provided by the private party under the public-private partnership.

13. Private infrastructure managers that are party to a public-private partnership concluded before… [the date of entry into force of this amending Directive (st11199/16)] and that do not receive public funds shall be excluded from the application of Article 7d provided that loans and financial guarantees operated by the infrastructure manager do not benefit directly or indirectly specific railway undertakings.’.

(2) Article 3 is amended as follows:

(a) Point 2 is replaced by the following:

‘(2) “infrastructure manager” means any body or firm responsible for the operation, maintenance and renewal of railway infrastructure on a network, as well as responsible for participating in its development as determined by the Member State within the framework of its general policy on development and financing of infrastructure;’;

(b) the following points are inserted:

‘(2a) “development of the railway infrastructure” means network planning, financial and investment planning as well as the building and upgrading of the infrastructure;

(2b) “operation of the railway infrastructure” means train path allocation, traffic management and infrastructure charging;

(2c) “maintenance of the railway infrastructure” means works intended to maintain the condition and capability of existing infrastructure;

(2d) “renewal of the railway infrastructure” means major substitution works on the existing infrastructure which do not change its overall performance;

(2e) “upgrade of the railway infrastructure” means major modification works to the infrastructure which improve its overall performance;

(2f) “essential functions” of infrastructure management means decision-making concerning train path allocation, including both the definition and the assessment of availability and the allocation of individual train paths, and decision-making concerning infrastructure charging, including determination and collection of charges, in accordance with the charging framework and the capacity allocation framework established by the Member States pursuant to Articles 29 and 39;’;

(c) the following points are added:

‘(31) “vertically integrated undertaking” means an undertaking where, within the meaning of Council Regulation (EC) No 139/2004*:

(a) an infrastructure manager is controlled by an undertaking which at the same time controls one or several railway undertakings that operate rail services on the infrastructure manager’s network;

(b) an infrastructure manager is controlled by one or several railway undertakings that operate rail services on the infrastructure manager’s network; or

(c) one or several railway undertakings that operate rail services on the infrastructure manager’s network are controlled by an infrastructure manager.

It also means an undertaking consisting of distinct divisions, including an infrastructure manager and one or several divisions providing transport services that do not have a distinct legal personality.

Where an infrastructure manager and a railway undertaking are fully independent of each other, but both are controlled directly by a Member State without an intermediary entity, they are not considered to constitute a vertically integrated undertaking for the purposes of this Directive.

(32) “public private partnership” means a binding arrangement between public bodies and one or more undertakings other than the main infrastructure manager of a Member State, under which the undertakings partially or totally construct and/or fund railway infrastructure, and/or acquire the right to exercise any of the functions listed in point (2) for a predefined period of time. The arrangement may take any appropriate legally binding form foreseen in national legislation;

(33) “management board” means the senior body of an undertaking performing executive and administrative functions, which is responsible and accountable for day-to-day management of the undertaking;

(34) “supervisory board” means the most senior body of an undertaking that fulfils supervisory tasks, including the exercise of control over the management board and general strategic decisions regarding the undertaking;

(35) “through ticket” means a ticket or tickets representing a transport contract for successive railway services operated by one or more railway undertakings;

(36) “high speed passenger services” means passenger rail services operated without intermediate stops between two places separated at least by a distance of more than 200 km on specially-built high-speed lines equipped for speeds generally equal or greater than 250 km/h and running on average at those speeds.

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* Council Regulation (EC) No 139/2004 of 20 January 2004 on the control of concentrations between undertakings (the EC Merger Regulation) (OJ L 24, 29.1.2004, p. 1).’.

(3) In Article 6, paragraph 2 is replaced by the following:

‘2. For the purpose of this Article, Member States which apply Article 7a(3) shall require the undertaking to be organised in distinct divisions that do not have a distinct legal personality within a single undertaking.’.

(4) Article 7 is replaced by the following:

‘*Article 7*
Independence of the infrastructure manager

1. Member States shall ensure that the infrastructure manager is responsible for operation, maintenance and renewal on a network and is entrusted with the development of the railway infrastructure of that network in accordance with national law.

Member States shall ensure that none of the other legal entities within the vertically integrated undertaking has a decisive influence on the decisions taken by the infrastructure manager in relation to the essential functions.

Member States shall ensure that the members of the supervisory board and of the management board of the infrastructure manager and the managers directly reporting to them act in a non-discriminatory manner and that their impartiality is not affected by any conflict of interest.

2. Member States shall ensure that the infrastructure manager is organised as an entity that is legally distinct from any railway undertaking and, in vertically integrated undertakings, from any other legal entities within the undertaking.

3. Member States shall ensure that the same individuals cannot be concurrently appointed or employed:

(a) as members of the management board of an infrastructure manager and as members of the management board of a railway undertaking;

(b) as persons in charge of taking decisions on the essential functions and as members of the management board of a railway undertaking;

(c) where a supervisory board exists, as members of the supervisory board of an infrastructure manager and as members of the supervisory board of a railway undertaking;

(d) as members of the supervisory board of an undertaking which is part of a vertically integrated undertaking and which exercises control over both a railway undertaking and an infrastructure manager and as members of the management board of that infrastructure manager.

4. In vertically integrated undertakings, the members of the management board of the infrastructure manager and the persons in charge of taking decisions on the essential functions shall not receive any performance-based remuneration from any other legal entities within the vertically integrated undertaking, nor shall they receive any bonuses principally related to the financial performance of particular railway undertakings. They may however be offered incentives related to the overall performance of the railway system.

5. Where information systems are common to different entities within a vertically integrated undertaking, access to sensitive information relating to essential functions shall be restricted to authorised staff of the infrastructure manager. Sensitive information shall not be passed on to other entities within a vertically integrated undertaking.

6. The provisions of paragraph 1 of this Article shall be without prejudice to the decision-making rights of Member States as regards the development and funding of railway infrastructure and the competences of Member States as regards infrastructure financing and charging, as well as capacity allocation, as defined in Article 4(2), and Articles 8, 29 and 39.'.

(5) The following Articles are inserted:

'*Article 7a*
Independence of the essential functions

1. Member States shall ensure that the infrastructure manager has organisational and decision-making independence within the limits set out in Article 4(2), and Articles 29 and 39, as regards the essential functions.

2. For the application of paragraph 1, Member States shall ensure in particular that:

(a) a railway undertaking or any other legal entity does not exercise a decisive influence on the infrastructure manager in relation to the essential functions, without prejudice to the role of the Member States as regards the determination of the charging framework and the capacity allocation framework and specific charging rules in accordance with Articles 29 and 39;

(b) a railway undertaking or any other legal entity within the vertically integrated undertaking has no decisive influence on appointments and dismissals of persons in charge of taking decisions on the essential functions;

(c) the mobility of persons in charge of the essential functions does not create conflicts of interest.

3. Member States may decide that infrastructure charging and path allocation shall be performed by a charging body and/or by an allocation body that are independent in their legal form, organisation and decision-making from any railway undertaking. In such a case, Member States may decide not to apply the provisions of Article 7(2) and points (c) and (d) of Article 7(3).

Point (a) of Article 7(3) and Article 7(4) shall apply *mutatis mutandis* to the heads of divisions in charge of management of the infrastructure and provision of railway services.

4. The provisions of this Directive referring to the essential functions of an infrastructure manager shall apply to the independent charging and/or allocation body.

Article 7b

Impartiality of the infrastructure manager in respect of traffic management and maintenance planning

1. Member States shall ensure that the functions of traffic management and maintenance planning are exercised in a transparent and non-discriminatory manner and that the persons in charge of taking decisions in respect of those functions are not affected by any conflict of interest.

2. As regards traffic management, Member States shall ensure that railway undertakings, in cases of disruption concerning them, have full and timely access to relevant information. Where the infrastructure manager grants further access to the traffic management process, it shall do so for the railway undertakings concerned in a transparent and non-discriminatory way.

3. As regards the long-term planning of major maintenance and/or renewal of the railway infrastructure, the infrastructure manager shall consult applicants and, to the best possible extent, take into account the concerns expressed.

   The scheduling of maintenance works shall be carried out by the infrastructure manager in a non-discriminatory way.

Article 7c

Outsourcing and sharing the infrastructure manager's functions

1. Provided that no conflicts of interest arise and that the confidentiality of commercially sensitive information is guaranteed, the infrastructure manager may:

   (a) outsource functions to a different entity, provided the latter is not a railway undertaking, does not control a railway undertaking, or is not controlled by a railway undertaking. Within a vertically integrated undertaking, essential functions shall not be outsourced to any other entity of the vertically integrated undertaking, unless such entity exclusively performs essential functions;

   (b) outsource the execution of works and related tasks on development, maintenance and renewal of the railway infrastructure to railway undertakings or companies which control the railway undertaking, or are controlled by the railway undertaking.

   The infrastructure manager shall retain the supervisory power over, and bear ultimate responsibility for, the exercise of the functions described in Article 3(2). Any entity carrying out essential functions shall comply with Articles 7, 7a, 7b and 7d.

2. By way of derogation from Article 7(1), infrastructure management functions may be performed by different infrastructure managers, including parties to public-private partnership arrangements provided that they all fulfil the requirements of Article 7(2) to (6) and Articles 7a, 7b and 7d and assume full responsibility for the exercise of the functions concerned.

3. Where essential functions are not assigned to a power supply operator, it shall be exempted from the rules applicable to infrastructure managers, provided that compliance with the relevant provisions concerning development of the network, in particular Article 8, is ensured.

4. Subject to supervision by the regulatory body or any other independent competent body determined by the Member States, an infrastructure manager may conclude cooperation agreements with one or more railway undertakings in a non-discriminatory way and with a view to delivering benefits to customers such as reduced costs or improved performance on the part of the network covered by the agreement.

   That body shall monitor the execution of such agreements and may, where justified, advise that they should be terminated.

Article 7d

Financial transparency

1. While respecting national procedures applicable in each Member State, income from infrastructure network management activities, including public funds, may be used by the infrastructure manager only to finance its own business, including the servicing of its loans. The infrastructure manager may also use such income to pay dividends to owners of the company, which may include any private shareholders, but excludes undertakings which are part of a vertically integrated undertaking and which exercise control over both a railway undertaking and that infrastructure manager.

2. Infrastructure managers shall not grant loans to railway undertakings, either directly or indirectly.

3. Railway undertakings shall not grant loans to infrastructure managers, either directly or indirectly.

4. Loans between legal entities of a vertically integrated undertaking, shall only be granted, disbursed and serviced at market rates and conditions which reflect the individual risk profile of the entity concerned.

5. Loans between legal entities of a vertically integrated undertaking granted before …[the date of entry into force of this amending Directive (st11199/16)] shall continue until their maturity, provided that they were contracted at market rates and that they are actually disbursed and serviced.

6. Any services offered by other legal entities of a vertically integrated undertaking to the infrastructure manager shall be provided on the basis of contracts and be paid either at market prices or at prices which reflect the cost of production, plus a reasonable margin of profit.

7. Debts attributed to the infrastructure manager shall be clearly separated from debts attributed to other legal entities within vertically integrated undertakings. Such debts shall be serviced separately. This does not prevent the final payment of debts being made via an undertaking which is part of a vertically integrated undertaking and which exercises control over both a railway undertaking and an infrastructure manager, or via another entity within the undertaking.

8. The accounts of the infrastructure manager and of the other legal entities within a vertically integrated undertaking shall be kept in a way that ensures the fulfilment of this Article and allows for separate accounting and transparent financial circuits within the undertaking.

9. Within vertically integrated undertakings, the infrastructure manager shall keep detailed records of any commercial and financial relations with the other legal entities within that undertaking.

10. Where essential functions are performed by an independent charging and/or allocation body in accordance with Article 7a(3) and Member States are not applying Article 7(2), the provisions of this Article shall apply *mutatis mutandis*. References to infrastructure manager, railway undertaking and other legal entities of a vertically integrated undertaking in this Article shall be understood as referring to the respective divisions of the undertaking. Compliance with the requirements set out in this Article shall be demonstrated in the separate accounts of the respective divisions of the undertaking.

Article 7e

Coordination mechanisms

Member States shall ensure that appropriate coordination mechanisms are put in place to ensure coordination between their main infrastructure managers and all interested railway undertakings as well as applicants referred to in Article 8(3). Where relevant, representatives of users of the rail freight and passenger transport services, and national, local or regional authorities, shall be invited to participate. The regulatory body concerned may participate as an observer. The coordination shall concern *inter alia*:

(a) the needs of applicants related to the maintenance and development of the infrastructure capacity;

(b) the content of the user-oriented performance targets contained in the contractual agreements referred to in Article 30 and of the incentives referred to in Article 30(1) and their implementation;

(c) the content and implementation of the network statement referred to in Article 27;

(d) issues of intermodality and interoperability;

(e) any other issue related to the conditions for access, the use of the infrastructure and the quality of the services of the infrastructure manager.

The infrastructure manager shall draw up and publish guidelines for coordination, in consultation with interested parties. Coordination shall take place at least annually and the infrastructure manager shall publish on its website an overview of the activities undertaken pursuant to this article.

Coordination under this Article shall be without prejudice to the right of applicants to appeal to the regulatory body and the powers of the regulatory body as set out in Article 56.

Article 7f

European Network of Infrastructure Managers

1. With the view to facilitating the provision of efficient and effective rail services within the Union, Member States shall ensure that their main infrastructure managers participate and cooperate in a network, that meets at regular intervals to:

   (a) develop Union rail infrastructure;

   (b) support the timely and efficient implementation of the Single European Railway Area;

   (c) exchange best practices;

   (d) monitor and benchmark performance;

   (e) contribute to the market monitoring activities referred to in Article 15;

   (f) tackle cross-border bottlenecks; and

   (g) discuss the application of Articles 37 and 40.

   For the purpose of point (d), the network shall identify common principles and practices for the monitoring and benchmarking of performance in a consistent manner.

Coordination under this paragraph shall be without prejudice to the right of applicants to appeal to the regulatory body and the powers of the regulatory body as set out in Article 56.

2. The Commission shall be a member of the network. It shall support the work of the network and facilitate coordination.'.

(6) Article 10 is amended as follows:

(a) the following paragraph is inserted:

'1a. Without prejudice to the international obligations of the Union and the Member States, Member States having a border to a third country may limit the right of access provided for in this Article for services operated from and to that third country running on a network the track gauge of which is different from the main railway network within the Union if distortions of competition arise in cross-border railway transport between Member States and that third country. Such distortions may result, *inter alia*, from lack of non-discriminatory access to rail infrastructure and related services in the third country concerned.

If a Member State, in accordance with this paragraph, intends to adopt a decision to limit the right of access, it shall submit the draft decision to the Commission and consult the other Member States.

If, within a period of three months after submitting that draft decision, neither the Commission nor another Member State objects to it, the Member State may adopt the decision.

The Commission may adopt implementing acts setting out the details of the procedure to be followed for the application of this paragraph. Those implementing acts shall be adopted in accordance with the examination procedure referred to in Article 62(3).';

(b) paragraph 2 is replaced by the following:

'2. Without prejudice to Regulation (EC) No1370/2007, railway undertakings shall be granted, under equitable, non-discriminatory and transparent conditions, the right of access to railway infrastructure in all Member States for the purpose of operating rail passenger services. Railway undertakings shall have the right to pick up passengers at any station and set them down at another. That right shall include access to infrastructure connecting service facilities referred to in point 2 of Annex II to this Directive.';

(c) paragraphs 3 and 4 are deleted.

(7) Article 11 is amended as follows:

(a) paragraph 1 is replaced by the following:

‘1. Member States may limit the right of access provided for in Article 10(2) to passenger services between a given place of departure and a given destination when one or more public service contracts cover the same route or an alternative route if the exercise of this right would compromise the economic equilibrium of the public service contract or contracts in question.’;

(b) in paragraph 2, the first subparagraph is replaced by the following:

‘In order to determine whether the economic equilibrium of a public service contract would be compromised, the relevant regulatory body or bodies referred to in Article 55 shall make an objective economic analysis and base their decision on pre-determined criteria. They shall determine this after a request from any of the following, submitted within one month from the receipt of the information on the intended passenger service referred to in Article 38(4):

(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.’;

(c) paragraph 3 is replaced by the following:

‘3. The regulatory body shall give the grounds for its decision and the conditions under which a reconsideration of the decision may be requested, within one month of its notification, by one of the following:

(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.

Where the regulatory body decides that the economic equilibrium of a public contract would be compromised by the intended passenger service referred to in Article 38(4), it shall indicate possible changes to that service which would ensure that the conditions to grant the right of access provided for in Article 10(2) are met.’;

(d) In paragraph 4, the following subparagraph is added:

‘Based on the experience of regulatory bodies, competent authorities and railway undertakings, and based on the activities of the network referred to in Article 57(1), the Commission shall by 16 December 2018 adopt implementing acts setting out the details of the procedure and criteria to be followed for the application of paragraphs 1, 2 and 3 of this Article as regards domestic passenger services. Those implementing acts shall be adopted in accordance with the examination procedure referred to in Article 62(3).’;

(e) paragraph 5 is replaced by the following:

‘5. Member States may also limit the right of access to railway infrastructure for the purpose of operating domestic passenger services between a given place of departure and a given destination within the same Member State where:

(a) exclusive rights to convey passengers between these stations have been granted under a public service contract awarded before 16 June 2015; or

(b) an additional right/authorisation to operate commercial passenger services in competition with another operator between these stations has been awarded by... [24 months after the entry into force of this amending Directive (st11199/16)] on the basis of a fair competitive tendering procedure,

and where these operators receive no compensation to operate these services.

Such a limitation may continue for the original duration of the contract or authorisation, or until...[10 years after the date of entry into force of this amending Directive (st11199/16)], whichever is shorter.’.

(8) The following Articles are inserted:

‘*Article 11a*

High-speed passenger services

1. With a view to developing the market for high-speed passenger services, promoting optimal use of available infrastructure, and in order to encourage the competitiveness of high-speed passenger services resulting in beneficial effects for passengers, without prejudice to Article 11(5), the exercise of the right of access provided for in Article 10 as regards high speed passenger services may only be subject to the requirements established by the regulatory body in accordance with this Article.

2. Where the regulatory body, following the analysis foreseen in Article 11(2), (3) and (4), determines that the intended high speed passenger service between a given place of departure and a given destination compromises the economic equilibrium of a public service contract that covers the same route or an alternative route, the regulatory body shall indicate possible changes to the service which would ensure that the conditions to grant the right of access provided for in Article 10(2) are met. Such changes may include a modification of the intended service.

Article 13a

Common information and through-ticketing schemes

1. Without prejudice to Regulation (EC) No 1371/2007 of the European Parliament and of the Council* and Directive 2010/40/EU of the European Parliament and of the Council**, Member States may require railway undertakings operating domestic passenger services to participate in a common information and integrated ticketing scheme for the supply of tickets, through-tickets and reservations or give the power to competent authorities to establish such a scheme. If such a scheme is established, Member States shall ensure that it does not create market distortion or discriminate between railway undertakings and that it is managed by a public or private legal entity or an association of all railway undertakings operating passenger services.

2. The Commission shall monitor rail market developments concerning the introduction and use of common information and through-ticketing systems and shall assess the need for action at Union level, taking into account market initiatives. It shall in particular consider non-discriminatory access for rail passengers to data necessary to plan journeys and book tickets. By 31 December 2022, it shall present a report to the European Parliament and the Council on the availability of such common information and through-ticketing systems, to be accompanied, if appropriate, by legislative proposals.

3. Member States shall require railway undertakings operating passenger services to put in place contingency plans and shall ensure that these contingency plans are properly coordinated to provide assistance to passengers, in the sense of Article 18 of Regulation (EC) No 1371/2007, in the event of a major disruption to services.

* Regulation (EC) No 1371/2007 of the European Parliament and of the Council of 23 October 2007 on rail passengers' rights and obligations (OJ L 315, 3.12.2007, p. 14).

** Directive 2010/40/EU of the European Parliament and of the Council of 7 July 2010 on the framework for the deployment of Intelligent Transport Systems in the field of road transport and for interfaces with other modes of transport (OJ L 207, 6.8.2010, p. 1).'.

(9) In Article 19, the following point is added:

'(e) have not been convicted of serious offences resulting from obligations arising in accordance with national law from binding collective agreements, where applicable.'.

(10) In Article 32, paragraph 4 is replaced by the following:

'4. The infrastructure charges for the use of railway corridors which are specified in Commission Regulation (EU) 2016/919* may be differentiated to give incentives to equip trains with the ETCS that is compliant with the version adopted by the Commission Decision 2008/386/EC** and with successive versions. Such differentiation shall not result in any overall increase in revenue for the infrastructure manager.

Member States may decide that this differentiation of infrastructure charges does not apply to railway lines specified in Regulation (EU) 2016/919 on which only ETCS equipped trains run.

Member States may decide to extend this differentiation to railway lines not specified in Regulation (EU) 2016/919.

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* Commission Regulation (EU) 2016/919 of 27 May 2016 on the technical specification for interoperability relating to the "control-command and signalling" subsystems of the rail system in the European Union (OJ L 158, 15.6.2016, p. 1)

** Commission Decision 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).'.

(11) In Article 38, paragraph 4 is replaced by the following:

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

(12) In Article 53, in paragraph 3,the following subparagraph is added:

‘The regulatory body may require the infrastructure manager to make such information available to it, if it deems that this is necessary.’.

(13) In Article 54, paragraph 1 is replaced by the following:

‘1. In the event of disturbance to train movements caused by technical failure or accident, the infrastructure manager shall take all necessary steps to restore the situation to normal. To that end, it shall draw up a contingency plan listing the various bodies to be informed in the event of serious incidents or serious disturbances to train movements. In the event of a disturbance which has a potential impact on cross-border traffic, the infrastructure manager shall share any relevant information with other infrastructure managers the network and traffic of which may be affected by that disturbance. The infrastructure managers concerned shall cooperate to restore the cross-border traffic to normal.’.

(14) Article 56 is amended as follows:

(a) in paragraph 1 the following points are added:

‘(h) traffic management;

(i) renewal planning and scheduled or unscheduled maintenance;

(j) compliance with the requirements, including those regarding conflicts of interest, set out in Article 2(13) and Articles 7, 7a, 7b, 7c, and 7d.’;

(b) paragraph 2 is replaced by the following:

‘2. Without prejudice to the powers of the national competition authorities to secure competition in the rail services markets, the regulatory body shall have the power to monitor the competitive situation in the rail services markets, including in particular the market for high-speed passenger services, and the activities of infrastructure managers in relation to points (a) to (j) of paragraph 1. In particular, the regulatory body shall verify compliance with points (a) to (j) 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.’;

(c) in paragraph 9, the first subparagraph is replaced by the following:

‘9. The regulatory body shall consider any complaints and, as appropriate, shall ask for relevant information and initiate consultations with all relevant parties, within one month from the receipt of the complaint. It shall decide on any complaints, take action to remedy the situation and inform the relevant parties of its reasoned decision within a pre- determined, reasonable time, and, in any case, within six weeks from receipt of all relevant information. Without prejudice to the powers of the national competition authorities for securing competition in the rail service markets, the regulatory body shall, where appropriate, decide on its own initiative on appropriate measures to correct discrimination against applicants, market distortion and any other undesirable developments in these markets, in particular with reference to points (a) to (j) of paragraph 1.’;

(d) paragraph12 is replaced by the following:

‘12. In order to verify compliance with accounting separation provisions laid down in Article 6 and provisions on financial transparency laid down in Article 7d, 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. In the case of vertically integrated undertakings, those powers shall extend to all legal entities. 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.

Financial flows referred to in Article 7d(1), loans referred to in Article 7d(4) and (5), and debts referred to in Article 7d(7) shall be subject to monitoring by the regulatory body.

Where a Member State has designated the regulatory body as the independent competent body referred to in Article 7c(3), the regulatory body shall assess the cooperation agreements referred to in that Article.’.

(15) Article 57 is amended as follows:

(a) the following paragraph is inserted:

‘3a. Where matters concerning an international service require decisions of two or more regulatory bodies, the regulatory bodies concerned shall cooperate in preparing their respective decisions in order to bring about a resolution of the matter. For that purpose, the regulatory bodies concerned shall carry out their functions in accordance with Article 56.’;

(b) paragraph 8 is replaced by the following:

‘8. Regulatory bodies shall develop common principles and practices for making the decisions for which they are empowered under this Directive. Such common principles and practices shall include arrangements for the resolution of disputes that arise within the framework of paragraph 3a. Based on the experience of regulatory bodies and on the activities of the network referred to in paragraph 1, and, if needed, to ensure efficient cooperation of regulatory bodies, the Commission may adopt implementing acts 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). ’;

(c) the following paragraph is added:

‘10. For decisions concerning a bi-national infrastructure, both Member States concerned may at any time after … [the date of entry into force of this amending Directive (st11199/16)] agree to require coordination between the regulatory bodies concerned in order to align the impact of their decisions.’.

(16) In Article 63, paragraph 1 is replaced by the following:

‘1. By 31 December 2024, the Commission shall evaluate the impact of this Directive on the rail sector and shall submit to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions a report on its implementation.

In particular, the report shall evaluate the development of high-speed rail services and assess the existence of discriminatory practices regarding access to high-speed lines. The Commission shall consider whether it is necessary to submit legislative proposals.

By the same date, the Commission shall assess whether discriminatory practices or other types of distortion of competition persist in relation to infrastructure managers which are part of a vertically integrated undertaking. The Commission shall, if appropriate, submit legislative proposals.’.

Article 2

1. Notwithstanding Article 3(2), Member States shall adopt and publish, by... [24 months after the entry into force of this amending Directive (st11199/16)], the laws, regulations and administrative provisions necessary to comply with this Directive. They shall communicate to the Commission the text of those provisions immediately.

When Member States adopt those measures, they shall contain a reference to this Directive or be accompanied by such a reference on the occasion of their official publication. The methods of making such reference shall be laid down by Member States.

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 3

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

2. Points 6 to 8 and 11 of Article 1 shall apply from 1 January 2019 in time for the working timetable starting on 14 December 2020.

Article 4

This Directive is addressed to the Member States.

Done at …,

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