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From: General Secretariat of the Council

To: Delegations

Subject: Fourth Railway Package:

Proposal for a Directive of the European Parliament and of the Council amending Directive 2010/34/EU establishing a single European railway area, as regards the opening of the market for domestic passenger transport services by rail and the governance of the railway infrastructure

Proposal for a Regulation of the European Parliament and of the Council amending Regulation (EC) No 1370/2007 concerning the opening of the market for domestic passenger transport services by rail

At its meeting on 8 October 2015, the Transport, Telecommunications and Energy Council reached a general approach on the above proposals, as they appear in Annexes I and II.

The changes in those annexes compared to the report to the Council (Doc. 12243/15) are indicated in **bold underline** and ~~striketrough~~.

Proposal for a Directive of the European Parliament and of the Council amending Directive 2012/34/EU establishing a Single European Railway Area, as regards the opening of the market for domestic passenger transport services by rail and the governance of the railway infrastructure

Article 1

Directive 2012/34/EU is amended as follows:

-1. Article 2 is amended as follows:

(a) The first sentence of paragraph 3 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:’;

(aa) A new paragraph 3a is added:

"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, which are used for freight traffic between a mainline and points of origin and destination of shipments along those lines, provided that these lines are managed by entities other than the main infrastructure manager and either a) are used by a single freight operator or b) the essential functions are performed by a body which is not controlled by any railway undertakings. In case 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 provision 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."

(ab) A new paragraph 3b is added:

"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 provision 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. "

(b) 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. 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.’;

(ba) A new paragraph 8a is inserted:

"(8a) For a period of 10 years after the date of entry into force of the Directive, Member States may exclude from the application of Chapters II and IV of the Directive, with the exception of Articles 10, 13 and 56, isolated railway lines of less than 500 km with a different track gauge than the main domestic network, that connect with a third country where EU rail legislation does not apply and which 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.

The exemption 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 the exemption shall notify the Commission of its intention. The Commission shall examine whether the conditions for an exemption as referred to in the subparagraph above are still met. If those conditions are not met, the Commission shall adopt a decision on the termination of the exemption in accordance with the advisory procedure referred to in Article 62(2)."

(c) Paragraph 12 is inserted:

“(12) Where, in the context of an existing public-private partnership concluded before 16 June 2015, the private party to this 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 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.’

(d) Paragraph 13 is inserted:

"(13) Private infrastructure managers that are part of a public-private partnership concluded before [date of entry into force of the Directive] 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 to specific railway undertakings."

1. Article 3 is amended as follows:

(a) Point 2 is replaced by the following: ¹

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

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

(2aa) "operation of the railway infrastructure" means train path allocation, traffic management and infrastructure charging;²

(2b) "maintenance of the railway infrastructure" means works intended to maintain the condition and capability of existing infrastructure;

¹ A recital could be included to clarify that operation of railway infrastructure is possible as separate structures, vertically integrated undertakings or vertically integrated undertakings combined with outsourcing.

² A recital could be included to clarify that the operation of the railway infrastructure includes control, command and signalling. A recital will be included to clarify that in this context, it should be ensured that the infrastructure is suitable for its designated use.

- (2c) "renewal of the railway infrastructure" means major substitution works on the existing infrastructure which do not change its overall performance;
- (2d) "upgrade of the railway infrastructure" means major modification works of the infrastructure which improves its overall performance;
- (2e) "essential functions" of infrastructure management means decision making on train path allocation, including both the definition and the assessment of availability and the allocation of individual train paths, and decision-making on 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."

(b) The following points are added:

"(31) "vertically integrated undertaking" means an undertaking where, in the meaning of Council Regulation (EC) No 139/2004:

- 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 or
- an infrastructure manager is controlled by one or several railway undertakings that operate rail services on the infrastructure manager's network or
- 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 Directive³.

(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 State⁴, 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.

(33a) "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. "

2. In Article 6, paragraph 2 is replaced by the following text:

"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."

³ The notion of full independence for the purposes of this definition could be clarified in a recital. The "intermediary entity" should not be understood as a Ministry.

⁴ The fact that it is the Member State which determines which entity is the main infrastructure manager could be clarified in a recital.

3. 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 the operation, maintenance and renewal on a network and is entrusted with the development of the railway infrastructure on that network, in accordance with national law.
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 employed at the same time:
 - as members of the management board of an infrastructure manager and of a railway undertaking,
 - as persons in charge of taking decisions on the essential functions and as member of the management board of a railway undertaking,
 - where a supervisory board exists, as members of the supervisory board of an infrastructure manager and of a railway undertaking.
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 financial benefits from railway undertakings or bonuses principally related to the financial performance of a particular railway undertakings. They can 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 authorized staff of the infrastructure manager.

6. The provisions of paragraph 1 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 Articles 4(2), 8, 29 and 39."

4. The following Articles 7a to 7g are inserted:

"Article 7a

Independence of the essential functions

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

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

– 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.

– a railway undertaking has no decisive influence on appointments and dismissals of persons in charge of taking decisions on the essential functions⁵.

– the mobility of persons in charge of the essential functions does not create conflicts of interest.

⁵ A recital could be included to clarify that complaint procedures are also covered.

3. Member States may decide that infrastructure charging and path allocation shall be performed by a charging body and 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 the third indent of Article 7(3).⁶ Article 7(3), first indent 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 body and/or allocation body.

Article 7b

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

1. The functions of traffic management and maintenance planning shall be exercised in a transparent and non-discriminatory manner.

2. As regards traffic management, Member States shall ensure that railway undertakings have full and timely access to relevant information in cases of disruption concerning them. 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 shall take into account to the best possible extent the concerns expressed.

⁶ A recital could be included to explain how the relevant provisions of this Directive are applied *mutatis mutandis* to vertically integrated undertakings where the infrastructure manager and railway undertaking have no distinct legal personality but are organised in distinct divisions within a single undertaking.

Article 7c

Outsourcing and sharing the infrastructure manager's functions⁷

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

- (a) outsource functions to a different entity, provided the latter is neither a railway undertaking, nor controls a railway undertaking, nor is controlled by a railway undertaking;
- (b) outsource the execution of works and related tasks on the 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 keep the supervisory power over and carry 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 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 Articles 7(2) to (6), 7a, 7b and 7d and assume full responsibility for the exercise of the functions concerned.

2a. When 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.

⁷ A recital could be included to clarify that under national law, it may be a legislative act allowing for the outsourcing of the infrastructure manager's functions.

3. Subject to supervision by the 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, in justified cases, advise that they should be terminated.

Article 7d ⁸

Financial transparency

In addition to Article 6, the following provisions shall apply:

- (a) While respecting national procedures applicable in each Member State, income from infrastructure management activities, including public funds, may be used by the infrastructure manager only to finance its own business, including the servicing of its loans, and to pay dividends to the owners⁹ of the company, which may include any private shareholders¹⁰.
- (b) Infrastructure managers shall not grant loans to railway undertakings, either directly or indirectly.
- (bb) Railway undertakings shall not grant loans to infrastructure managers, either directly or indirectly.
- (c) 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.

⁸ A recital could be included to specify that the provision of Article 31 does not preclude a Member State from foreseeing that the infrastructure manager revenue from infrastructure charges transits through the State accounts.

⁹ A recital could be included to clarify that the owners of the company include the State and any private shareholders to the exclusion of the holding.

¹⁰ A recital could be included to clarify that it should be possible for the infrastructure manager to pay this revenue and dividends directly or via another entity within the undertaking.

- (cc) Loans between legal entities of a vertically integrated undertaking granted before [date of entry into force of this Directive] shall continue until their maturity, provided that they were contracted at market rates and that they are actually disbursed and serviced.
- (d) Any services offered by other legal entities of a vertically integrated undertaking to the infrastructure manager shall be based on contracts and be paid either at market prices or at prices which reflect the cost of production, plus a reasonable margin of profit.
- (dd) Debts attributed to the infrastructure manager shall be clearly separated from debts attributed to other legal entities within vertically integrated undertakings. These debts shall be serviced separately. This does not prevent that the final payment of debts is made via the undertaking mentioned in Article 3 point 31, first indent, or via another entity within the undertaking.
- (de) 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 these provisions and allows for separate accounting and transparent financial circuits within the undertaking.
- (f) 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.

Where essential functions are performed by an independent charging and capacity 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 Article 7d shall be understood as referring to the respective divisions of the undertaking. Compliance with the requirements set out in Article 7d shall be demonstrated in the separate accounts of the respective divisions of the undertaking.

Article 7e

Coordination mechanisms

Where appropriate, Member States shall ensure that appropriate coordination mechanisms are put into place between their main infrastructure managers and all interested railway undertakings and applicants, as referred to in Article 8(3). Representative of users and local/regional authorities may be invited to participate. 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 and use of the infrastructure and the quality of the services of the infrastructure manager.

Article 7f

European Network of Infrastructure Managers¹¹

1. Member States shall ensure that their main infrastructure managers participate and cooperate in a network that convenes at regular intervals to:

(a) develop the Union rail infrastructure,

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

(c) exchange best practices,

(d) monitor performance, and

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

2. The Commission shall be a member of the network, and shall support its work."

¹¹ A recital could be included to clarify that the existing structures will be given a legal basis.

5. Article 10 is amended as follows:

(a) paragraph 2 is replaced by the following:

"2. Without prejudice to Regulation (EC) N°1370/2007, 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.";¹²

(b) a new paragraph 1(a) is added:

"1(a). 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 Article 10 for services operated from/to that third country running on a network whose track gauge is different from the main railway network within the EU 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.

¹² A recital could be included to clarify that this provision ensuring free access to railway infrastructure for the provision of domestic passenger services is without prejudice to the prerogative of competent authorities when deciding which undertaking to consider for the direct award of PSO contracts: "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) N° 1370/2007 or to award a public service contract directly under the conditions established in Article 5 of the same Regulation. The existence of such a public service contract should not entitle a Member State to prohibit other railway undertakings from accessing the railway infrastructure concerned for the provision of rail passenger services, unless such services would endanger the economic equilibrium of the PSO contract."

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

If, within a period of three months, neither the Commission nor a Member State formulates objections, the Member State may adopt the decision.

The Commission may adopt measures setting out the details of the procedure and criteria 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)."

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(c) paragraphs 3 and 4 are deleted.

6. 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.";

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A recital could be included to clarify that Member States may decide that the conditions for granting the right of access to the railway infrastructure for the purpose of operating rail passenger services comprise conditions in order to enable a system of rail passenger services within an integrated timetable scheme.

- (b) the first subparagraph of paragraph 2 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 its decision on pre-determined criteria. They shall determine this after a request from any of the following, submitted within one month from 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 within one month of its notification may be requested 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.

In case 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 such 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, a second sentence is added as follows:

"The Commission shall adopt comparable measures by [36 months from the entry into force of this Directive] in relation to domestic passenger services."

(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 when:

- ~~an~~ exclusive rights to convey passengers between these stations have been granted under a public service contract awarded before 16 June 2015 ~~or and~~

- an additional right / license to operate commercial passenger services in competition with another operator between these stations has been awarded before the end of the transposition period of this Directive on the basis of a fair competitive tendering procedure

and where these ~~public service~~ operators receives no compensation to operate these services. Such a limitation may continue for the original duration of the contract **or license**, or 10 years from the date of entry into force of this Directive, whichever is shorter."¹⁴

¹⁴ This issue should also be adequately reflected in the PSO text, inter alia to ensure some coherence between the time periods included in the PSO and Governance texts.

7. The following Article 13a is inserted:

"Article 13a

Common information and integrated ticketing schemes

1. Without prejudice to Regulation (EC) No 1371/2007¹⁵ and Directive 2010/40/EU¹⁶, 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 decide to 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. 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."

8. 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 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."

¹⁵ OJ L315, 3.12.2007, p. 14.

¹⁶ OJ L207, 6.8.2010, p. 1.

9. 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.

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, propose new legislative measures."

10. In Article 56(1), the following letters (h), (i) and (j) are inserted:

"(h) traffic management;

(i) maintenance and renewal planning.

(j) compliance with the requirements set out in Articles 2(13), 7, 7a, 7b, 7c and 7d."

11. Reference to "(g)" in paragraphs (2) and (9) of Article 56 is replaced by a reference to "(j)".

12. Article 56(12) is amended as follows:

"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, these 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(a), loans referred to in Article 7d(c) and (cc), and debts referred to in Article 7d(dd) 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."

13. Article 32(4) is amended as follows:

"The infrastructure charges for the use of railway corridors which are specified in Commission Decision 2009/561/EC may be differentiated to give incentives to equip trains with the ETCS compliant with the version adopted by the Commission Decision 2008/386/EC and 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 Decision 2009/561/EC on which only ETCS equipped trains may run.

Member States may decide to extend this differentiation to railway lines not specified in Decision 2009/561/EC."

14. A paragraph 10 is added to Article 57:

"10. For decisions concerning a bi-national infrastructure, **both** Member States **concerned** may **at any time after the entry into force of this Directive agree to** require coordination between the regulatory bodies concerned **in order** to ~~ensure an alignment of~~ the impact of ~~their~~ decisions."

Article 2¹⁷

1. Notwithstanding Article 3(2), Member States shall adopt and publish, by 36 months after entry into force at the latest, 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 provisions, they shall contain a reference to this Directive or be accompanied by such a reference on the occasion of their official publication. Member States shall determine how such reference is to be made.

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 5 to 12 of Article 1 shall apply from 1 January 2020 in time for the working timetable starting on 14 December 2020.

¹⁷ The following recital could be included to clarify that Member States may maintain existing internal rules on market access under national law during the transitional period: "In the process of opening of national rail markets to competition by granting access to the networks to every railway undertaking, Member States should have a sufficiently long transitional period to adapt their national law as well as their national organisation. As a consequence, Member States should be able to maintain their existing national rules on market access until the end of the transitional period."

Article 4

This Directive is addressed to the Member States.

Done at Brussels,

For the European Parliament

The President

For the Council

The President

**Proposal for a Regulation of the European Parliament and of the Council amending
Regulation (EC) No 1370/2007 concerning the opening of the market for domestic passenger
transport services by rail**

Article 1

Regulation (EC) No 1370/2007 is amended as follows¹⁸:

1. The following point is inserted after point (a) of Article 2:

"(aa) 'public passenger transport services by rail' means public passenger transport by rail, excluding passenger transport on other track-based modes, such as metros or tramways".

2. The following Article 2a is inserted:

"Article 2a

Specification of public service obligations

1. The competent authority shall define specifications for public service obligations in public passenger transport and the scope of their application in accordance with Article 2(e).

Those specifications shall be consistent with the objectives of public transport policy.

¹⁸ The following recital could be added: 'A specific objective of this Regulation is to enhance the quality, transparency, efficiency and performance of public passenger transport services by rail.'

2. The specifications of public service obligations and the related compensation of the net financial effect of public service obligations shall:
 - (a) achieve the objectives of the public transport policy in a cost-effective manner. This includes the possibility to group cost-covering services with not cost-covering services;
 - (b) financially sustain the provision of public passenger transport in accordance to the requirements laid down in the public transport policy in the long term."¹⁹ ²⁰

3. Article 4 is amended as follows:

(0a) In paragraph 1, point (a) is replaced by the following:

"(a) clearly define the public service obligations laid down in Article 2(e) and Article 2a with which the public service operator is to comply, and the geographical areas concerned;"

(a) The last sentence of paragraph 1, point (b) is replaced by the following:

"In the case of public service contracts not awarded according to Article 5(1) or (3), these parameters shall be determined in such a way that no compensation payment may exceed the amount required to cover the net financial effect on costs incurred and revenues generated in discharging the public service obligations, taking account of revenue relating thereto kept by the public service operator and a reasonable profit;"

(b) Paragraph 6 is replaced by the following:

"6. Where competent authorities, in accordance with national law, require public service operators to comply with certain quality and social standards or establish social and qualitative criteria, these standards and criteria shall be included in the tender documents and in the public service contracts."

¹⁹ The following recital could be added: 'Public service obligations should be in line with public transport policy. However, this does not entitle the competent authorities to receive a specific amount of funding.'

²⁰ The following recital could be added: "In order to take into account the diversity of the territorial and political organization of Member States, public service contract may be awarded by a competent authority that is a combination of public authorities. In such circumstances, clear rules should set the respective roles of each of them in the awarding process of public service contract."

(c) The following paragraph 8 is added:

"8. Competent authorities shall make available to all interested parties relevant information for the preparation of an offer under a competitive tender procedure while taking into consideration the legitimate protection of confidential business information. This shall include information on passenger demand, fares, costs and revenues related to the public passenger transport covered by the tender and details of the infrastructure specifications relevant for the operation of the required vehicles or rolling stock to enable them to draft well informed business plans. Rail infrastructure managers shall support competent authorities in providing all relevant infrastructure specifications. Non-compliance with the provisions set out above shall be subject to the legal review provided for in Article 5(7)."

4. Article 5 is amended as follows:

(0a) The first sentence of paragraph 2 is replaced by the following:

"Unless prohibited by national law, any competent local authority, whether or not it is an individual authority or a group of authorities providing integrated public passenger transport services may decide to provide public passenger transport services itself or to award public service contracts directly to a legally distinct entity over which the competent local authority, or, in the case of a group of authorities at least one competent local authority, exercises control similar to that exercised over its own departments.

In case of public service in rail transport, the group of authorities referred to in the previous subparagraph may be composed only of local competent authorities whose geographical area of competence is not national. The public passenger transport service or the public service contract referred to in the previous subparagraph may only cover the transport needs of urban agglomerations and/or rural areas."²¹

(0aa) In Article 5(3), the words "specified in paragraphs 4, 5 and 6" are replaced by the words "specified in paragraphs 3a, 4, 4a, 5 and 6".

²¹ A recital could be inserted to clarify that it is up to the Member States to define in national law what corresponds to the concepts of urban agglomerations and rural areas: "Considering the diversity of administrative divisions existing in Member States, in case of contracts for the provision of public passenger transport services by rail directly awarded by a group of local competent authorities as referred to in Article 5(2), the determination of which local authorities are competent regarding the concerned "urban agglomerations" and "rural areas" remains at the discretion of Member States."

(0b) The following paragraph 3a is added:

"3a. **Unless prohibited by national law**, For public service contracts for rail transport awarded on the basis of a competitive tendering procedure, the competent authority may decide to temporarily award new contracts directly where the competent authority considers that the direct award is justified by exceptional circumstances. Such exceptional circumstances shall include situations where:

- the quality and number of bids are deemed to be insufficient to guarantee good value for money, or
- there are a number of competitive tenders already being run by the competent authority and/or other competent authorities which could affect the number and quality of bids likely to be received if the contract is competitively tendered, or
- changes to the scope of one or more public service contracts are required in order to optimise the provision of public services.

The competent authority shall issue a substantiated decision and shall inform the Commission thereof without undue delay.

Contracts awarded pursuant to this paragraph shall not exceed 7 years.

Contracts awarded in accordance with this paragraph shall be published, while taking into consideration the legitimate protection of confidential business information and commercial interests."²²

²² A recital could be added to clarify the cases that are covered by this provision.

(0c) The following paragraph 3b is added:

"3b. In application of Article 5(3), competent authorities may decide to apply the following procedure:

Competent authorities may make public their intentions to award a public service contract by rail through the publication of an information notice in the Official Journal of the European Union.

The information notice shall contain a detailed description of the services that will be the subject of the contract to be awarded as well as the type and the duration of the contract.

Operators may express their interest within a period fixed by the competent authority which cannot be less than 60 days following the publication of the information notice.

If after this period:

a) only one operator has expressed its interest to participate in the procedure to award the public service contract and

b) has duly proven that it will effectively be able to provide the transport service complying with the obligations established in the public service contract, and

c) the absence of competition is not the result of an artificial narrowing down of the parameters of the procurement and

d) when no reasonable alternative exists,

the competent authorities may start negotiations with this operator in order to award the contract without further publication of an open tendering procedure."

(a) Paragraph 4 is replaced by the following:

"4. Unless prohibited by national law, the competent authority may decide to award public service contracts directly:

(a) where their average annual value is estimated at: less than EUR 1 000 000 or less than EUR 7 500 000 in the case of a public service contract including public passenger transport services by rail or,

(b) where they concern the annual provision of less than 300 000 kilometres of public passenger transport services or less than 500 000 kilometres in the case of a public service contract including public passenger transport services by rail.²³

In the case of a public service contract directly awarded to a small or medium-sized enterprise operating not more than 23 road vehicles, these thresholds may be increased to either an average annual value estimated at less than EUR 2 000 000 or to an annual provision of less than 600 000 kilometres of public passenger transport services."

²³ A recital could be included to clarify that the higher threshold applies to public passenger transport services by rail or to public passenger transport services where rail represents more than 50% of the value of the services in question.

(aa) The following paragraph 4a is added:

“4a. Unless prohibited by national law, the competent authority may decide to award public service contracts for public transport by rail directly:

- (a) (i) where it considers that the direct award is justified by the relevant structural and geographical characteristics of the market and network concerned, in particular their size, demand characteristics, complexity of the network, its technical and geographical isolation and the services covered by the contract, and
- (ii) where such a contract would result in an improvement in quality of services and/or cost-efficiency compared to the previously awarded public service contract.

On that basis, the competent authority shall issue a substantiated decision and shall inform the Commission thereof without undue delay.

Member States where, at the entry into force of this Regulation, the maximum annual volume is less than 23 million train-km and which have only one competent authority at national level and one public service contract covering the entire network shall be deemed to fulfil the conditions of point (i). Where those Member States decide to award a public service contract directly, they shall inform the Commission thereof. The United Kingdom may decide to apply this subparagraph to Northern Ireland.

Where the competent authority decides to award a public service contract directly, it shall define measurable, transparent and verifiable performance requirements. Such requirements shall be included in the contract.

The performance requirements shall in particular cover punctuality of services, frequency of train operations, quality of rolling stock and transport capacity for passengers.

The contract shall include specific performance indicators allowing for periodic assessment by the competent authority and shall specify effective and deterrent measures to be imposed in case the railway undertaking fails to meet the performance requirements.

The competent authority shall periodically assess and make public whether the railway undertaking has achieved its targets to meet the performance requirements as set in the contract. It shall take appropriate and timely measures, including effective and deterrent contractual penalties in case the required improvements in quality of services and/or cost-efficiency are not achieved. The competent authority may at any time wholly or partially suspend or terminate the contract awarded under this provision in case the operator fails to meet the performance requirements.

- (b) where they concern operating only passenger rail services by an operator which manages simultaneously the entire or the major part of the railway infrastructure on which the services are provided, which is excluded from the application of Article 7, 7a, 7b, 7c, 7d, 8, 13 and Chapter IV of Directive 2012/34/EU establishing a single European railway area in accordance with Article 2(3)(a) or (b) of Directive 2012/34/EU.

In derogation from Article 4(3), directly awarded contracts pursuant to this paragraph shall not exceed 10 years, except where Article 4(4) applies.

Contracts awarded in accordance with this paragraph shall be published while taking into consideration the legitimate protection of confidential business information and commercial interests."

- (ab) Paragraph 5 is replaced by the following:

"5. In the event of a disruption of services or the immediate risk of such a situation, the competent authority may take an emergency measures. This emergency measure shall take the form of a direct award or a formal agreement to extend a public service contract or a requirement to provide certain public service obligations. The public service operator shall have the right to appeal against the decision to impose the provision of certain public service obligations. The award or extension of a public service contract by emergency measure or the imposition of such a contract shall not exceed two years."

- (b) The following paragraph 6a is added:

"6a. Competent authorities may decide that, in order to increase competition between railway undertakings, contracts for public passenger transport by rail covering parts of the same network or package of routes shall be awarded to different railway undertakings. To this end the competent authorities may decide before launching the tender procedure to limit the number of contracts to be awarded to the same railway undertaking."

5. The following Article 5a is inserted:

"Article 5a

Rail rolling stock

In a view of a competitive award procedure competent authorities shall assess whether measures are necessary to ensure effective and non-discriminatory access to suitable rolling stock."²⁴

6. In Article 6, paragraph 1 is replaced by the following:

"1. All compensation connected with a general rule or a public service contract shall comply with Article 4, irrespective of how the contract was awarded. All compensation of whatever nature connected with a public service contract not awarded according to Article 5(1) or (3) or connected with a general rule shall also comply with the provisions laid down in the Annex."

7. Article 7 is amended as follows:

(a) Paragraph 1 is replaced by the following:

"1. Each competent authority shall make public once a year an aggregated report on the public service obligations for which it is responsible, the starting date and duration of the public service contracts, the selected public service operators and the compensation payments and exclusive rights granted to the said public service operators by way of reimbursement. The report shall distinguish between bus transport and rail transport, allow the performance, quality and financing of the public transport network to be monitored and assessed and, if appropriate, provide information on the nature and extent of any exclusive rights granted. Member States shall facilitate central access to these reports, for instance through a common web portal."

(b) In paragraph 2, the following point is added:

"(d) the envisaged starting date and duration of the public service contract."

²⁴ A recital could be included to explain that the purpose of that provision is to ensure effective competition in the tendering process.

8. Article 8 is amended as follows:

(a) The first sentence of paragraph 2 is replaced by the following:

"2. Without prejudice to paragraph 3,

- i) Article 5 shall apply to the award of public service contracts for passenger transport services by road and by track-based modes other than rail such as metro or tramways as from 3 December 2019.
- ii) Article 5, with exception of paragraph 4a, shall apply to passenger transport services by rail as from 3 December 2019.
- iii) Article 5(4a) shall apply to passenger transport services by rail as from 10 years after the date of entry into force of this Regulation.
- iv) Article 5(6) and Article 7(3) shall cease to apply as from 10 years after the date of entry into force of this Regulation.

Public service contracts for public passenger transport services by rail directly awarded in accordance with Article 5(6) may continue until their expiry date."

(b) The following paragraph 2a is inserted:

"2a. Public service contracts for public passenger transport services by rail directly awarded on the basis of a procedure other than a fair competitive procedure as of the date of entry into force of this Regulation until 3 December 2019 may continue until their expiry date. In derogation from Article 4(3), the duration of such contracts shall not exceed 10 years, except where Article 4(4) applies."

(c) In paragraph 3, letter (d) is replaced by the following:

"(d) as from 26 July 2000 and before [the entry into force of this Regulation] on the basis of a procedure other than a fair competitive tendering procedure".

Article 2

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 all Member States.

Done at Brussels,

For the European Parliament
The President

For the Council
The President
