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To:	Working Party on Land Transport
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Subject:	Proposal for a Regulation of the European Parliament and of the Council on the use of railway infrastructure capacity in the single European railway area, amending Directive 2012/34/EU and repealing Regulation (EU) No 913/201 - Revised Presidency compromise proposal on a new approach for penalties and Annex I, section 3 = Comments from Portugal

Delegations will find, attached, comments from **Portugal** on the above-mentioned document.

Council of the European Union

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Interinstitutional File:
2023/0271 (COD)

WORKING DOCUMENT

From:	General Secretariat of the Council
To:	Delegations
Subject:	Proposal for a Regulation of the European Parliament and of the Council on the use of railway infrastructure capacity in the single European railway area, amending Directive 2012/34/EU and repealing Regulation (EU) No 913/201 - Revised Presidency compromise proposal on a new approach for penalties and Annex I, section 3

In view of the Land transport working party on 31 October, delegations can find annexed a new version of the approach on penalties, together with a Presidency compromise proposal (5th column) on Article 31(6) (line 378-379), Article 35 (line 419-426a), Article 39 (line 450-464) and Article 40 (line 465-475a). The Presidency intends to use these guiding principles and compromise proposal in the final negotiations with the Parliament on the concept of the penalties.

From page 39, delegations can also find a Commission compromise proposal on Annex I, section 3. This proposal follows from a request from the co-legislators in one of the last ITM's to help with sorting out this section. Delegations will notice that the Commission proposes to keep line 775, be it in a slightly reworded version. However, the Presidency proposes to move the content from line 775 to Article 35(6a) (line 426a) with a reference in Article 40(2d) (line 467d). It is the latter what the Presidency intends to do with this paragraph.

PORTUGAL COMMENTS

(ST 14111-re01/25)

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ANNEX

Penalties

The principles of the system:

- A penalty would be due when either the infrastructure manager (IM) or the applicant does not respect the allocated capacity right and if the change of the capacity right has a significant impact on the operations of the other party.

  This implies that all changes that are announced by the IM or requested by the applicant after the final allocation of the capacity right will be subject to penalties (Annex I, section 4), in the cases where these changes have a significant impact (Article 39(4)[1] and (8)). Therefore, there should be no link with Annex I, section 3 anymore. There would be a penalty due if works are announced after the allocation and have a significant impact.

- Both the IM and the applicant can ask for change. In first instance, this would mean that alternative capacity is looked for and allocated, respecting the deadlines in Annex I, section 8. In the worst case this would result in a cancellation of the capacity right.
- The level of a penalty shall be such that they provide effective incentives for the infrastructure managers and for applicants to respect the planned use of capacity and minimise disturbances. These levels shall be proportionate and non-discriminatory. The penalties are also designed to avoid an applicant applying for a too high number of capacity rights and limiting the options for other applicants.
- The penalty for the IM shall not be differentiated according to the market segment, to avoid that the IM would makes changes to those capacity rights with the lower differentiated penalties.

  PT Comments:
  PT believes that the penalty should be at least differentiated between freight and passengers.

- The penalty for the applicant shall be differentiated according to the market segment (passenger vs freight).
- In case of a penalty, the applicant shall not pay the TAC but only a penalty.
- The penalty will be subject to a modulation. This modulation will vary between 0.1 and 2, depending on the circumstances and the timing of the capacity change.

[1] The Presidency proposes a clarification in Article 39(4) (line 456) in order to clarify that the significant impact does not only relate to the applicant but there might equally be a significant impact on the IM due to the change of a capacity right, which might be due to a change introduced by an IM or due to a change requested by the applicant.

PT Comments:

PT believes that the modulation should only be dependent on the timing of the communication of the change.

- As penalties will be subject to a number of variables, it is proposed that the regulatory body will oversee the setting of the penalties based on general rules in the Regulation.

The advantage of the new approach is that it is objective and non-discriminatory.

In case of changes/cancellations for Single network capacity rights:

The penalty for the IM shall be calculated on the basis of the average amount of TACs, based on the 'minimum access package', paid in the given MS, with a modulation to take into account the quality of the alternative capacity that is offered to the applicant.

PT Comments:

PT believes that this will be impossible to harmonize and access. What/who will dictate the level "quality"?

The average amount of TACs should be calculated by adding up all TACs paid and dividing the sum by the train (or train-tonne) kilometres during the working timetable that was completed two years before the year where the penalty should apply. For calculating a penalty in 2032, the reference year for the penalty would be 2030. By using an average, it should be possible for each MS to calculate this average, irrespective of the specific system they use for setting the TAC.

PT Comments:

PT believes that the penalty should be at least differentiated between freight and passengers.

The penalty for the applicant shall be based on the average amount of TACs paid in the given MS for the related market segment.

PT Comments:

If the applicant has a penalty differentiated between market segments so should the IM. PT believes that the penalty should be at least differentiated between freight and passengers.

The penalty will be subject to a modulation.

In case of changes/cancellations of multi-network capacity rights

In case of a change to the capacity right, the Regulation (Article 39) already imposes a coordination task on the IM that is making the change to find an alternative for the applicant. This should result in either a reasonable alternative for the applicant or in the most extreme situation where the whole multi-network capacity right will be cancelled.

PT Comments:

Who will set the terms of reasonability? PT believes that if criteria is not set in advance these classifications will be impossible to perform.

The penalty for the IM introducing the change/cancellation shall be based on the sum of the penalties that are due for each part of the multi-network capacity, including the modulation.

The penalty for the applicant requesting a change or cancelling its capacity rights shall be the sum of the penalties that are due for each part of the multi-network capacity for applicants, differentiated according to the market segment, including the modulation.

PT Comments:

The penalty should be the same for IM and applicant, and differentiation must be always made between freight and passengers.

The applicant shall request the change/announce the cancellation to the IM that was in charge of the initial allocation of the multi-network capacity right (in accordance with Article 28).

While the system needs to be designed as to dissuade both IMs and applicants to ask for changes after the allocation, there remains a challenge that the system should not dissuade smaller IMs to be part of a multi-network capacity right. The smaller IM might be confronted with having to pay a very high penalty if they need to change or cancel a capacity right that passes over their network if the penalty for the smaller IM is based on the whole capacity right.

Therefore, the penalty for the IM shall be set at three times the part that is related to its relative part of the entire multi-network capacity right but never more than sum of the penalties that are due for each part of the multi-network capacity, including the modulation.

PT Comments:

PT believes that the cap should be 2 times.

The modulation

ENIM shall adopt guidelines for the modulation.

The Regulation shall set out the guiding principles for the guidelines:

(a) impact of the change of the capacity right;

(b) the timing of the notification of the change;

(c) where the change is caused by the IM, the quality of the alternative capacity provided in terms of routing, timing, technical characteristics and other relevant aspects, when alternative capacity exists or

(d) where the change is caused by the applicant, whether the capacity can be re-allocated and used by another applicant;

Based on a proposal by the infrastructure manager, taking into account the ENIM guidelines, the modulation scale shall be adopted by the regulatory body. This will ensure that the modulation is done according to the market conditions in each Member State.

PT Comments:

What will it happen if the RB does not approve of the modulation proposed by the IM or takes too long to approve it?

The modulation shall be at least 0.1 and not more than **two times** the level of the average amount of TACs (per segment). The maximum should only apply in case of a cancellation, and if no alternative capacity can be found.

Based on its guidelines, ENIM shall also develop a tool to calculate the penalties in case of changes to multi-network capacity rights.

Works

- Works should be announced according to the deadlines in Annex I, section 3. All works that are announced in the working timetable and performed accordingly will not be subject to penalties.
- As regards Annex I, section 3, the Presidency proposes to revert to the general ideas of the Commission approach. It would be best to keep table 3a as an illustration of lines 767-772 of the Commission proposal, as this is easier to read. The issue of the works that are defined as having 'less than medium impact' can be resolved later in the delegated act that shall be adopted by the Commission. As this is an important issue, the Presidency will set a deadline for the Commission to adopt the delegated act.
  PT Comments:

  PT would rather this be solved in the trilogues before the regulations is published in order to be able to actively contribute to the final solution.
- It is proposed to move the content from line 775 into Article 35, as this is a general rule and fits better in the Regulation as compared to an Annex.
- Rescheduling windows should be introduced in Annex I, section 8. Six months before a rescheduling period begins, the infrastructure managers shall publish draft capacity restrictions and provide offers on alternative capacity, 1 month later the applicants shall either accept the offer or place a request for alternative capacity, and then another month later, the infrastructure manager shall allocate alternative capacity rights. As this is an important issue, the Presidency will set a deadline (within 18 months) for the Commission to adopt the delegated act.

Operators of service facilities

They will not be eligible for or bound to pay penalties. They should be entitled to contractual compensation, in accordance with their respective contracts with either IMs or applicants.

PT Comments to the Table

- Line 420 - PT strongly defends that when establishing deadlines for the IMs to respond to ad-hoc requests from the applicants, the same methodology as the one agreed within RNE (*1.2_HB_Ad_Hoc_Management_V3.0_2020-12-09.pdf (rne.eu)*) should apply.

  Most important a distinction between "ad hoc requests for individual train path" and "ad hoc requests for recurrent train path" should be reflected in the regulation.

  The complexity of preparing the replies to each type of requests is completely different and it should be reflected in the deadlines defined in the regulation.
- Line 426 a - PT supports this proposal.
- Line 457 a - PT supports this proposal.
- Line 459 - PT believes that the PCY should review this proposal as different IMs have different handling of "cancellation on the day of the train run" and therefore it might result in contradictory incentives throughout the TEN-T.
- Line 464 - PT would rather see this handled in the trilogues.

- Line 457e - PT believes that this text "The level of the penalty shall be differentiated according to the market segment. These market segments can be differentiated in accordance with Annex VI of Directive 2012/34/EU" is missing here.
- Line 467e - PT believes that a cap is missing and should be 2 times the TAC calculated according to this Alinea.
- Line 467f - PT believes that a cap is missing and should be 2 times the TAC calculated according to this Alinea.
- Line 468 - the same tool should be developed to calculate the level of the penalties for changes to single-network capacity right.
- Line 469 - PT would like to see here what happens if the RB does not approve of the modulation proposed by the IM or if take too long to approve it.
- Line 472b - PT would like to delete this Alinea. And limit the modulation to “the timing of the notification of the change provided by the party initiating the change to the other party,”
- Line 472d - PT would like to delete this Alinea. And limit the modulation to “the timing of the notification of the change provided by the party initiating the change to the other party,”
- Line 472e - PT would like to delete this Alinea. And limit the modulation to “the timing of the notification of the change provided by the party initiating the change to the other party,”
- Line 473 a - the cap should be two times.
- Line 473b - Maybe introduce cap here too?
- Line 775 - PT agrees with the proposal.

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