

## II

(Non-legislative acts)

## REGULATIONS

**COMMISSION IMPLEMENTING REGULATION (EU) 2017/2177****of 22 November 2017****on access to service facilities and rail-related services****(Text with EEA relevance)**

THE EUROPEAN COMMISSION,

Having regard to the Treaty on the Functioning of the European Union,

Having regard to Directive 2012/34/EU of the European Parliament and of the Council establishing a single European railway area <sup>(1)</sup>, and in particular Article 13(9) thereof,

Whereas:

- (1) The basic rules of Directive 2012/34/EU concerning access to service facilities and use of services supplied in those facilities, such as provisions on access rights, core procedural rules on handling of requests and requirements on publication of information apply to all service facilities. Directive 2012/34/EU also lays down different rules for different types of services provided in service facilities. These distinctions should also be reflected within this Regulation.

Taking into account the purpose and scope of Directive 2012/34/EU, the provisions on access to services provided in service facilities should cover only services that are related to the provision of railway transport services.

- (2) In order to avoid disproportionate burdens for operators of service facilities with minor importance, it seems appropriate to provide a possibility for regulatory bodies to exempt service facility operators from all or some of the provisions of this Regulation with the exception of certain provisions concerning the obligation to publish a service facility description, when the regulatory body considers that the facility is without strategic importance for the functioning of the market. Where the relevant service facilities market is characterised by a variety of operators providing comparable services in competition or a regulatory body considers that specific provisions of this Regulation could negatively impact the functioning of the service facilities market, the regulatory body should also be entitled to grant such exemptions. This could for example be the case if a railway undertaking is providing services to another railway undertaking in order to assist that undertaking in remote locations as part of a cooperation which is necessary due to the economic cost it would otherwise incur.

Regulatory bodies should assess requests for exemptions individually, on a case by case basis. If following a complaint regarding access to the service facility or rail related service concerned, the regulatory body considers that circumstances have changed in a way so that an exemption previously granted has a negative impact on the railway transport services market, the regulatory body should review and might revoke an exemption.

Regulatory bodies should ensure consistent application of exemptions in all Member States; they should develop common principles for the application of the provisions regarding exemptions by the date of application of Article 2. In accordance with Article 57(8) of Directive 2012/34/EU, if needed, the Commission might adopt measures setting out such principles.

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<sup>(1)</sup> OJ L 343, 14.12.2012, p. 32.

Operators of service facilities that have been exempted from the application of provisions of this Regulation remain subject to all other rules on access to service facilities and use of rail related services laid down in Directive 2012/34/EU.

- (3) Regulation (EU) 2017/352 of the European Parliament and of the Council <sup>(1)</sup> establishes a framework for the provision of port services and common rules on the financial transparency of ports. This Regulation which lays down the details of the procedure and criteria to be followed by operators of service facilities and applicants should also apply to maritime and inland port facilities which are linked to rail activities.

Directive (EU) 2016/798 of the European Parliament and of the Council <sup>(2)</sup> defines obligations of the entity in charge of maintenance. This Regulation should be without prejudice to the provisions of that Directive.

- (4) Transparency on conditions for access to service facilities and rail related services and information on charges is a pre-requisite for enabling all applicants to access service facilities and services supplied in those facilities on a non-discriminatory basis. Hidden discounts that are negotiated individually with each applicant without following the same principles would undermine the principle of non-discriminatory access to the service facilities and rail related services. Information on the principles of discount schemes provided in the service facility description should, however, take account of commercial confidentiality requirements.
- (5) Directive 2012/34/EU requires operators of service facilities to provide non-discriminatory access to service facilities and services supplied in those facilities. That Directive applies in cases of self-supply of services as well as in cases of services being supplied by an operator of a service facility. Where necessary to correct market distortion or undesirable developments in the market, the regulatory body should be able to request that the operator of a service facility opens the facility for self-supply, provided that this is legally and technically feasible and does not endanger the safety of the operations.
- (6) Where it is necessary to pass through a private branch line or siding to access a service facility, the operator of the service facility should provide information about the private branch line and siding. Such information should enable the applicant to understand who to contact in order to request access to this line in accordance with Article 10 of Directive 2012/34/EU.
- (7) Infrastructure managers should facilitate collection of information on service facilities and alleviate the administrative burden of service facility operators by providing a template in an easily accessible place such as their web portal. This template should be developed by the railway sector and regulatory bodies, in consultation with operators of service facilities. Operators of service facilities are under an obligation to supply all relevant information to the infrastructure managers in accordance with Article 31(10) and point 6 of Annex IV to Directive 2012/34/EU. The main infrastructure manager, to which the service facility description is to be provided in case the infrastructure manager to whose network the facility concerned is connected is exempted from the obligation to publish the network statement, should be the one determined by the Member State for the purpose of participating in the network referred to in Article 7f of Directive 2012/34/EU.
- (8) Different entities may be in charge of deciding on access conditions for a service facility, allocating capacity in the service facility and supplying rail related services in the facility. In such cases, all entities concerned are to be considered operators of a service facility within the meaning of Directive 2012/34/EU. In addition, each of them should meet the requirements of this Regulation for the part for which it is responsible. If a facility is owned, managed and operated by several entities, only the entities effectively responsible for providing the information and deciding on requests for access to the service facility and use of rail-related services should be considered as the operators of the service facility.
- (9) Current practice shows that in many cases applicants such as shippers and freight forwarders request access to service facilities. However, the railway undertaking appointed by the applicant often does not have a contractual relationship with the operator of the service facility. Therefore, it should be clarified that not only railway undertakings but also other applicants should have a right to request access to service facilities under the

<sup>(1)</sup> Regulation (EU) 2017/352 of the European Parliament and of the Council of 15 February 2017 establishing a framework for the provision of port services and common rules on the financial transparency of ports (OJ L 57, 3.3.2017, p. 1).

<sup>(2)</sup> Directive (EU) 2016/798 of the European Parliament and of the Council of 11 May 2016 on railway safety (OJ L 138, 26.5.2016, p. 102).

conditions set out in this Regulation, where national law provides for such a possibility. Operators of such service facilities should be bound by this Regulation regardless of whether they are in a contractual relationship with a railway undertaking or with another applicant entitled to request capacity in service facilities in accordance with national law.

- (10) Train paths and capacity in service facilities are often allocated by different entities. It is therefore important that these entities communicate with one another to make sure that scheduled train paths and scheduled slots in service facilities are consistent so as to enable smooth and efficient train operations. The same should apply to situations where an applicant requests rail related services in a facility which are provided by different providers. For services not directly linked to infrastructure capacity, such cooperation would not be required.
- (11) Exchange of data between entities ordering transport services, railway undertakings and terminals on tracking and tracing and estimated time of arrival and departure should contribute to better service quality and cost-effectiveness in the logistics chain.
- (12) The requirement to make available indicative real-time information on available service facility capacity on a common web portal could be met by providing information on whether the facility is full, has limited remaining capacity or has sufficient remaining capacity to accommodate any type of request. For services such as maintenance, for which a vehicle has to be removed from service for an extended period, such information may not be needed. Maximum operational capacity may be lower than maximum theoretical capacity. This is because appropriate additional time may be needed to enable reliable services in situations such as the delayed arrival of a train in the facility or operational disruptions. The indication of capacity should refer to the available operational capacity.
- (13) Operators of service facilities should not oblige applicants to purchase services offered in a facility, which the applicant does not need. This principle should, however, not imply that the applicant can force the operator of a facility to accept self-supply on the premises of the operator where the operator is offering the respective service in a way that complies with Directive 2012/34/EU and this Regulation.
- (14) When an operator of a service facility receives a request that is in conflict with another request or capacity already allocated, the operator of the service facility should as a first step verify whether it would be possible to accommodate the additional request by proposing a different slot, modifying the allocated slot if the applicant concerned agrees to this, or by taking measures that make it possible to increase the capacity of the facility. The operator should not be obliged to take measures such as changing opening hours or measures that would require investment to increase a facility's capacity. However, where an applicant guarantees to cover costs of investment or additional operational costs incurred, the operator of a service facility should consider this option.
- (15) Where the coordination procedure has not enabled reconciliation of conflicting requests, the operator of a service facility can apply priority criteria to decide between conflicting requests. These criteria should be non-discriminatory and transparent and be published in the service facility description, which is subject to review by the regulatory body.
- (16) The term viable alternative embraces various elements, including in particular *physical and technical characteristics* such as location of a facility, access by road, rail, waterway or public transport, gauge clearance, length of track and electrifications; *operational characteristics* such as opening hours, capacity in and around the facility, driver training requirements, scope and type of services offered; *attractiveness and competitiveness of transport services* such as routing, connections to other modes of transport, and transportation time; and *economic aspects* such as impact on operational costs and the profitability of the envisaged services.
- (17) Building a service facility requires significant investments and the network character of railways implies that there are limitations on where facilities can be constructed; as a result, many service facilities cannot easily be duplicated. Where requests for access to a facility could not be accommodated following the coordination procedure and the facility is close to congestion, regulatory bodies should be able to request operators of service facilities to put in place measure to optimise the use of the facility. The operator of the service facility should identify suitable measures to achieve this objective. These could include for example financial penalties to be paid by applicants that fail to make use of access rights granted or a request to applicants to renounce on rights of access to a service facility or rail related services if they have repeatedly and intentionally failed to make use of such rights or have caused disturbances to the operation of the service facilities or to another applicant.

- (18) In order to make the best use of existing facilities, the operation of facilities that have not been in use for at least two years should be publicised for lease or rent when a railway undertaking expresses interest in using such a facility on the basis of demonstrated needs. Any economic entity interested in operating that facility should be able to participate in the tender procedures and submit an offer to take over the operation of the facility. However, a tender procedure does not have to be launched if a formal process to withdraw the dedication of the site to railway purposes is ongoing and the facility is being redeveloped for purposes other than use as a service facility.
- (19) This Regulation lays down a set of new rules for operators of service facilities. Those operators need time to adapt existing internal procedures in order to ensure full compliance with all the requirements of this Regulation. Therefore the Regulation should only apply from 1 June 2019. This means that the service facility description required in accordance with Article 4 or a link to the relevant information will only have to be prepared and included for the first time in the network statement for the working timetable starting in December 2020.
- (20) The measures provided for in this Regulation are in accordance with the opinion of the Single European Rail Area Committee,

HAS ADOPTED THIS REGULATION:

#### *Article 1*

##### **Subject matter**

This Regulation lays down the details of the procedure and criteria to be followed for access to the services to be supplied in the service facilities listed in points 2, 3 and 4 of Annex II to Directive 2012/34/EU.

Where the provisions of this Regulation refer to applicants, they shall be understood as referring to railway undertakings. Where national law entitles applicants other than railway undertakings to request access to service facilities and rail related services, the relevant provisions of this Regulation shall also apply to those applicants in accordance with national law.

#### *Article 2*

##### **Exemptions**

1. Operators of service facilities referred to in paragraph 2 may request to be exempted from the application of all or some of the provisions of this Regulation, with the exception of Articles 4(2)(a) to (d) and (m) and 5.

Operators of service facilities that exist solely for use by heritage railway operators for their own purposes may request to be exempted from the application of all the provisions of this Regulation.

Such requests shall be submitted to the regulatory body and be duly substantiated.

2. Regulatory bodies may decide to exempt operators of service facilities that operate the following service facilities or provide the following services:

- service facilities or services which do not have any strategic importance for the functioning of the rail transport services market, in particular as regards the level of use of the facility, the type and volume of traffic potentially impacted and the type of services offered in the facility;
- service facilities or services which are operated or provided in a competitive market environment with a variety of competitors providing comparable services;
- service facilities or services where application of this Regulation could negatively impact the functioning of the service facility market.

3. Regulatory bodies shall publish any decision granting an exemption referred to in paragraph 2 on their website within two weeks after adoption of the decision.

4. When the criteria for granting an exemption referred to in paragraph 2 are no longer fulfilled, the regulatory body shall revoke the exemption.
5. Regulatory bodies shall develop and publish common decision making principles for the application of the criteria referred to in paragraph 2.

### Article 3

#### Definitions

For the purposes of this Regulation the following definitions shall apply:

- (1) 'basic service' means a service supplied in any of the service facilities listed in point 2 of Annex II to Directive 2012/34/EU;
- (2) 'rail-related service' means a basic, additional or ancillary service listed in points 2, 3 and 4 of Annex II to Directive 2012/34/EU;
- (3) 'service facility description' means a document which lays down detailed information necessary for access to service facilities and rail-related services;
- (4) 'service facility capacity' means the potential to use a service facility and supply a service over a given period of time, taking into account the time needed to access and leave the service facility;
- (5) 'coordination procedure' means a procedure through which the operator of a service facility and applicants attempt to resolve situations in which needs for access to a service facility or rail-related services concern the same service facility capacity and are in conflict;
- (6) 'linked service facilities' means service facilities which are adjacent to one another and require passage through one to reach the other;
- (7) 'controlling entity' means a body or firm, which exercises direct or indirect control over an operator of a service facility and is also active and holds a dominant position in national railway transport services markets for which the facility is used or exercises direct or indirect control over an operator of a service facility and a railway undertaking holding such a position;
- (8) 'self-supply of services' means a situation where a railway undertaking performs itself a rail-related service on the premises of a service facility operator, provided that access to and the use of the facility by that railway undertaking for self-supply of services is legally and technically feasible, does not endanger the safety of the operations and the operator of the service facility concerned offers such possibility;
- (9) 'reconversion' means a formal process by which the purpose of the service facility is changed to a use other than for the supply of rail related services;
- (10) 'ad hoc request' means a request for access to a service facility or a rail-related service that is linked to an ad hoc path request for an individual train path referred to in Article 48(1) of Directive 2012/34/EU;
- (11) 'late request' means a request for access to a service facility or a rail related service submitted after the expiry of a deadline for submitting requests defined by the operator of the facility in question;

### Article 4

#### Service facility description

1. Operators of service facilities shall establish a service facility description for the service facilities and services for which they are responsible.
2. The service facility description shall include at least the following information to the extent it is required by this Regulation:
  - (a) the list of all installations in which rail related services are supplied, including information on their locations and opening hours;

- (b) key contact details of the operator of the service facility;
- (c) a description of the technical characteristics of the service facility, such as sidings or shunting and marshalling tracks, technical equipment for loading and unloading, for washing, for maintenance and available storage capacity; information on private branch lines and sidings that are not part of the railway infrastructure, but are needed to get access to service facilities which are essential for the provision of railway transport services;
- (d) a description of all rail-related services, which are supplied in the facility, and of their type (basic, additional or ancillary);
- (e) the possibility for self-supply of rail-related services and conditions applying thereto;
- (f) information on procedures for requesting access to the service facility or services supplied in the facility or both, including deadlines for submitting requests, and time limits for handling those requests;
- (g) in service facilities operated by more than one operator or where rail-related services are provided by more than one operator, an indication as to whether separate requests for access to the facilities and for those services need to be submitted;
- (h) information on the minimum content and format of a request for access to service facilities and rail-related services, or a template for such a request;
- (i) at least in the case of service facilities operated and rail-related services provided by operators under the direct or indirect control of a controlling entity, model access contracts and general terms and conditions;
- (j) where relevant, information on the terms of use of the operator's IT systems, if applicants are required to use such systems, and the rules concerning the protection of sensitive and commercial data;
- (k) a description of the coordination procedure and regulatory measures referred to in Article 10 and priority criteria referred to in Article 11;
- (l) information on changes in technical characteristics and temporary capacity restrictions of the service facility, which could have a major impact on the service facility's operation, including planned works;
- (m) information on charges for getting access to service facilities and charges for the use of each rail-related service supplied therein;
- (n) information on principles of discount schemes offered to applicants, while respecting commercial confidentiality requirements.

#### *Article 5*

#### **Publication of service facility description**

1. Operators of service facilities shall make publicly available the service facility description free of charge, in one of the following ways:

- (a) by publishing it on their web portal or a common web portal and providing the infrastructure managers with a link to be included in the network statement;
- (b) by providing the infrastructure managers with the relevant and ready-to-be-published information to be included in the network statement.

Where the infrastructure manager to whose network the facility is connected is exempted from the obligation to publish a network statement in accordance with Article 2(3) or (4) of Directive 2012/34/EU, the operator of a service facility shall provide the relevant link or ready-to-be-published information to the main infrastructure manager.

2. Infrastructure managers shall specify in the network statement or on their web portal the deadline to provide information or the link to be published in the network statement, with a view to its publication by the date referred to in Article 27(4) of Directive 2012/34/EU.

Infrastructure managers shall provide a common template to be developed by the railway sector in cooperation with regulatory bodies by 30 June 2018 that operators of service facilities may use to submit the information. The template shall be reviewed and updated as necessary.

3. Operators of service facilities shall keep the service facility description up to date as necessary. They shall in due time inform the applicants having already requested access or subscribed to one or more services in the service facility about any relevant changes in the facility description.

4. In the case of service facilities operated by more than one service facility operator or where services in the facility are supplied by more than one supplier, those operators or suppliers shall coordinate with each other in order to:

- (a) make available in one place their service facility descriptions; or
- (b) indicate in their service facility descriptions all service facility operators responsible for deciding on requests for access to the facility or the rail-related services supplied in the same service facility.

If this coordination is not successful, the regulatory body may adopt a decision designating one of the service facility operators to comply with the requirement laid down in the first subparagraph. Any relevant costs shall be split among all service facility operators concerned.

5. The obligation referred to in paragraph 1 and Article 4 shall be met in a way that is proportionate to the size, technical characteristics and importance of the service facility concerned.

#### *Article 6*

#### **Additional information**

1. The regulatory body may require operators of service facilities to justify why they designate a rail-related service as basic, additional or ancillary.

2. Upon request of an applicant operators of service facilities listed in points 2(a) to (g) of Annex II to Directive 2012/34/EU shall provide indicative information on available service facility capacity.

3. Wherever technically possible with reasonable economic efforts, operators of service facilities shall make the information referred to in paragraph 2 of this Article and information referred to in Article 4(2)(l) available on a real-time basis through the use of a common web portal.

#### *Article 7*

#### **Cooperation on allocation of service facility capacity and its use**

1. Applicants shall submit their requests for access to service facilities and rail-related services in accordance with the deadlines set by operators of service facilities. Where relevant, operators of service facilities listed in point 2 of Annex II to Directive 2012/34/EU shall give due consideration to timelines and priority criteria set out by infrastructure managers for the scheduling process when determining these deadlines with a view to preventing inconsistencies.

2. Operators of service facilities listed in point 2 of Annex II to Directive 2012/34/EU and infrastructure managers shall cooperate with the aim of ensuring that the allocation of capacity on infrastructure and in service facilities is consistent where necessary. The obligation of cooperation shall also apply to operators of linked service facilities. The applicants concerned may be involved in this cooperation upon request. Applicants may also request involvement of entities responsible for granting access to private branch lines and sidings needed to get access to service facilities which are essential for the provision of railway transport services in the cooperation.

Where an applicant is seeking supply of additional or ancillary services listed in points 3 and 4 of Annex II to Directive 2012/34/EU offered in the facility by one or more operators of service facility other than the one responsible for granting access to the facility, the applicant may request participation of all operators of service facilities providing these services in the cooperation.

As long as the scheduling process conducted by the infrastructure manager is pending, requests for access to service facilities and rail-related services shall not be rejected on grounds that a requested train path has not yet been allocated. However, operators of service facilities listed in point 2 of Annex II to Directive 2012/34/EU and infrastructure managers concerned shall seek consistency of their respective decisions.

3. Where relevant, operators of service facilities, infrastructure managers and applicants shall cooperate to ensure efficient operation of trains from and to service facilities. In the case of trains using rail freight terminals, including those in maritime or inland ports, this cooperation shall include the exchange of information on train tracking and tracing and, where available, the estimated time of arrival and departure in the event of delays and disturbances.
4. Upon request of the regulatory body operators of service facilities shall demonstrate in writing for the last three years that they have fulfilled the cooperation requirements in accordance with this Article.

#### *Article 8*

### **Requests for access to service facilities and use of rail-related services**

1. Requests for access to service facilities and use of rail-related services may be made by applicants.
2. Applicants shall indicate in their requests the service facility or the rail-related services for which they have requested access, or both. Operators of service facilities shall not make the access to the facility or supply of a rail-related service subject to mandatory purchase of other services which are not related to the service requested.
3. The operator of a service facility shall acknowledge receipt of a request without undue delay. When the request does not contain all the information required in accordance with the service facility description and necessary to take a decision, the operator of a service facility concerned shall inform the applicant thereof and shall set a reasonable deadline for submitting the missing information. If such information is not submitted within that deadline, the request may be rejected.

#### *Article 9*

### **Response to requests**

1. After receipt of all necessary information, the operator of a service facility shall respond to requests for access to and supply of services in service facilities listed in point 2 of Annex II to Directive 2012/34/EU within the reasonable time limit set by the regulatory body in accordance with Article 13(4) of Directive 2012/34/EU. Different deadlines may be set for different types of service facilities and/or services.
2. Where the operator of a service facility has responded with an offer of access to the service facility, that offer shall remain valid for a reasonable period of time which it specifies and which shall take account of the business needs of the applicant.
3. Regulatory bodies shall set the time limits to respond to requests submitted by applicants as provided for in Article 13(4) of Directive 2012/34/EU prior to the publication of the first network statement subject to the rules of this implementing Regulation in order to ensure compliance with Article 27(4) of Directive 2012/34/EU.
4. For ad hoc requests concerning access to service facilities and services listed in points (a) to (d) and (f) to (i) of point 2 of Annex II, when setting the time limits in accordance with Article 13(4) of Directive 2012/34/EU, regulatory bodies shall take into account the time limits set out in Article 48(1) of Directive 2012/34/EU. Where regulatory bodies have not defined time limits for such ad-hoc requests, the operator of a service facility shall answer the request within the time limits set out in Article 48(1) of the Directive.

Where the operator of a service facility has defined an annual deadline for submitting requests for access to service facilities and rail-related services listed in points (a) to (d) and (f) to (i) of point 2 of Annex II, the time limits for answering late requests defined by the regulatory body shall take account of the time limits applied by infrastructure managers for processing such requests.

For service facilities and rail-related services listed in point (e) of point 2 of Annex II, the time limit shall start once the technical compatibility of the rolling stock with those facilities and the equipment has been assessed and the applicant was informed thereof.



5. Operators of service facilities providing additional and ancillary services listed in points 3 and 4 of Annex II to Directive 2012/34/EU shall respond to requests for such services within the time limit set by the regulatory body or, where such a time limit has not been set, within reasonable time. Where an applicant submits ad hoc requests for several rail-related services supplied in one service facility and it indicates that only their simultaneous allocation is of use, all service facility operators concerned, including suppliers of additional and ancillary services listed in points 3 and 4 of Annex II, shall respond to those requests within the reasonable time limit referred to in paragraph 4.

For rail-related services listed in point (e) of point 4 of Annex II, the time limit shall start once the technical compatibility of the rolling stock with the facilities and the equipment has been assessed and the applicant was informed thereof.

6. With the agreement of the applicant concerned, the time limits referred to in paragraphs 3, 4 and 5 may be extended.

7. Rights of access to railway infrastructure and rail related services shall not be transferred to other applicants.

8. If an applicant intends not to make use of a right of access to a service facility or a rail related service granted by the service facility operator, it shall inform the operator concerned without undue delay.

#### Article 10

### Coordination procedure

1. Where an operator of a service facility listed in point 2 of Annex II to Directive 2012/34/EU receives a request for access to the service facility or supply of a service that is in conflict with another request or concerns service facility capacity already allocated, it shall attempt, through discussion and coordination with the applicants concerned, to ensure the best possible matching of all requests. This coordination shall also involve suppliers of additional and ancillary services listed in points 3 and 4 of Annex II to Directive 2012/34/EU where such services are offered in the facility and requested by an applicant. Any modification of access rights already granted shall be subject to the agreement of the applicant concerned.

2. Operators of service facilities listed in point 2 of Annex II to Directive 2012/34/EU shall not reject requests for access to their service facility or supply of a service nor indicate to the applicant viable alternatives, when capacity that matches the needs of the applicant is available in their service facility or is expected to become available during or following the coordination procedure.

3. Operators of service facilities shall consider different options enabling them to accommodate conflicting requests for access to the service facility or supply of service in the service facility. Those options shall, when necessary, encompass measures to maximise the capacity available in the facility, to the extent it does not require additional investment in resources or facilities. Such measures may include:

- proposing alternative timing;
- changing opening hours or shift patterns, where possible;
- allowing access to the facility for self-supply of services.

4. Applicants and operators of the service facilities may jointly request the regulatory body to participate as an observer in the coordination procedure.

5. Where a request for access to a service facility listed in point 2 of Annex II to Directive 2012/34/EU could not be accommodated following the coordination procedure and the service facility is close to congestion, the regulatory body may request the operator of the service facility to take measures aimed at enabling the accommodation of additional requests for access to their facility. Such measures shall be transparent and non-discriminatory.

#### Article 11

### Priority criteria

Operators of the service facility may determine priority criteria to allocate capacity in the case of conflicting requests for access to service facilities and rail-related services, where such requests cannot be accommodated after the coordination procedure.

Such priority criteria shall be non-discriminatory and objective and published in the service facility description in accordance with letter k of Article 4(2). They shall take into account the purpose of the facility, the purpose and nature of the railway transport services concerned and the objective of securing an efficient use of available capacity.

The priority criteria may also take into account the following aspects:

- existing contracts;
- the intention and ability to use the capacity requested, including previous failure, if any, to use all or part of allocated capacity and the reasons for that failure;
- already allocated train paths linked to the requested services;
- priority criteria for allocation of train paths;
- timely submission of requests.

#### Article 12

##### **Viable alternatives**

1. Where a request for access to service facilities and rail-related services cannot be accommodated after the coordination procedure, the operator of a service facility listed in point 2 of Annex II to Directive 2012/34/EU shall inform the applicant concerned and the regulatory body, upon its request, without undue delay. Member States may require that the regulatory body is informed even in the absence of such a request.

2. The operator of a service facility listed in point 2 of Annex II to Directive 2012/34/EU and the applicant shall, if a request cannot be accommodated, jointly assess whether there are viable alternatives allowing to operate the freight or passenger service concerned on the same or alternative routes under economically acceptable conditions. The applicant shall not be required to disclose its business strategy.

3. For the purpose of paragraph 2 the operator of the service facility shall indicate possible alternatives, including, where relevant, in other Member States, on the basis of other service facility descriptions, information published on a common web portal in accordance with Article 5 and any information provided by the applicant. When proposing possible alternatives, at least the following criteria shall be taken into account, to the extent that those can be assessed by the operator of the service facility:

- substitutability of operational characteristics of the alternative service facility;
- substitutability of physical and technical characteristics of the alternative service facility;
- clear impact on attractiveness and competitiveness of the railway transport service envisaged by the applicant;
- estimated additional cost for the applicant.

The operator of a service facility shall respect the commercial confidentiality of information provided by the applicant.

4. Where information on the capacity of the proposed alternative is not publicly available, the applicant shall verify it.

The applicant shall assess whether using the proposed alternative would allow it to operate the envisaged transport service under economically acceptable conditions. It shall inform the operator of the service facility about the outcome of its assessment within a jointly agreed deadline.

5. The applicant may request the operator of a service facility not to indicate the viable alternatives and not to proceed to the joint assessment.

#### Article 13

##### **Refusal of access**

1. Where the operator of a service facility listed in point 2 of Annex II to Directive 2012/34/EU and the applicant conclude that no viable alternative exists, and it is not possible to accommodate the request for access to or supply of a service in the facility following the coordination procedure, the operator of a service facility may refuse the request.

Where the operator of the service facility and the applicant cannot agree on a viable alternative, the operator of the service facility may refuse the request indicating the alternatives which it considers to be viable.

The applicant may complain to the regulatory body in accordance with Article 13(5) of Directive 2012/34/EU.

2. Where the operator of the service facility and the applicant have jointly identified viable alternatives, the operator of the service facility may refuse the request.
3. Operators of a service facility referred to in Article 13(3) of Directive 2012/34/EU shall justify in writing to the applicant why the request could not be accommodated following the coordination procedure and why, on the basis of the information available, they consider that any proposed alternative meets the applicant's requirements and is viable.
4. An operator of a service facility refusing a request shall demonstrate to the regulatory body and to the applicant, upon their request, the reasons for the refusal, including the alternatives examined and the outcome of the coordination procedure.
5. In the cases referred to in Article 12(5) the operator of a service facility may refuse the request without complying with the requirements laid down in paragraphs 3 and 4 of this Article.
6. Where the applicant repeatedly failed to pay for access rights already granted and used, the operator of a service facility may request financial guarantees to safeguard its legitimate expectations about future revenues and utilisation of the facility. Information on such guarantees shall be published in the service facility description.

#### *Article 14*

### **Complaints**

Where the applicant complains to the regulatory body pursuant to Article 13(5) of Directive 2012/34/EU, that regulatory body shall, in assessing the impact of any decision it may take to grant an appropriate part of the capacity to the applicant, take into account at least the following elements, where these are relevant:

- Contractual obligations and the viability of the business models of other users of the service facility affected;
- overall volume of service facility capacity already allocated to other users affected;
- investments made into the facility by other users affected;
- availability of viable alternatives to accommodate needs of other users affected, including alternatives in other Member States in case of international train services;
- the viability of the business model of the operator of the service facility;
- access rights to connecting infrastructure.

#### *Article 15*

### **Unused facilities**

1. Service facilities listed in point 2 of Annex II to Directive 2012/34/EU which have not been in use for at least two consecutive years shall be subject to expression of interest and lease or rent. Information on unused facilities shall be published in accordance with Article 5.
2. The two-year period referred to in paragraph 1 shall start on the day following the day on which a rail-related service was supplied in the service facility concerned for the last time.
3. An applicant interested in using a service facility listed in point 2 of Annex II to Directive 2012/34/EU which has not been in use for at least two consecutive years shall express its interest in writing to the operator of the facility concerned and inform the regulatory body thereof. Such an expression of interest shall demonstrate the needs of the railway undertaking concerned. The operator of the service facility may decide to resume operations in a way that satisfies the railway undertaking's demonstrated needs.

4. Where the owner of a service facility does not operate that facility, the operator of that facility shall inform the owner about the expression of interest within 10 days following its receipt. The owner of the facility shall publicise that the facility is available for lease or rent, as a whole or in part, unless the operator of the service facility has decided to resume operations after the expression of interest.

5. Before such publication is made, the owner of the service facility may allow the operator of the service facility to submit its observations on that publication within four weeks. The operator may object to that publication by submitting documents proving that there is an ongoing process of reconversion, launched before the expression of interest.

6. The regulatory body shall be informed by the owner about the reconversion process and may request documents from the operator in order to assess its plausibility.

If the assessment is unsatisfactory the regulatory body shall require the publication of the operation of the facility as being for lease or rent, as a whole or in part.

7. Without prejudice to applicable public procurement rules, the owner of a service facility listed in point 2 of Annex II to Directive 2012/34/EU shall publicise on its web portal a notice on the lease or rent of the service facility concerned and shall inform thereof the regulatory body and the infrastructure manager to whose network the facility is connected. The publication shall include all information necessary to enable interested undertakings to submit an offer to take over operation of the facility, as a whole or in part. This information shall include in particular:

- (a) the details of the selection procedure which shall be transparent and non-discriminatory and take into account the objective of ensuring an optimum effective use of the capacity of the facility;
- (b) the selection criteria;
- (c) main characteristics of the technical equipment of the service facility;
- (d) the address and time limit for submission of tenders which shall be at least 30 days from publication of the notice.

8. The infrastructure manager concerned shall also publish on its web portal the information referred to in paragraph 7.

9. Without prejudice to applicable public procurement rules, the owner of a service facility listed in point 2 of Annex II to Directive 2012/34/EU shall select the successful candidate and make a reasonable offer without undue delay.

10. Member States may apply existing procedures for the regulatory control of decommissioning of service facilities. In this case the regulatory body may grant exemptions from the application of the provisions of this Article.

#### *Article 16*

#### **Review**

By 1 June 2024, the Commission shall assess the application of this Regulation and based on the outcome of that assessment review it, if necessary.

#### *Article 17*

#### **Entry into force**

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

It shall apply from 1 June 2019.

However, Article 2 shall apply from 1 January 2019.

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This Regulation shall be binding in its entirety and directly applicable in all Member States.

Done at Brussels, 22 November 2017.

*For the Commission*  
*The President*  
Jean-Claude JUNCKER

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