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*(Information)*INFORMATION FROM EUROPEAN UNION INSTITUTIONS, BODIES, OFFICES  
AND AGENCIES

## EUROPEAN COMMISSION

**Interpretative communication from the Commission on certain provisions of Directive 2007/58/EC**

(2010/C 353/01)

## 1. INTRODUCTION

This interpretative communication sets out the Commission's views on implementation of Directive 2007/58/EC of 23 October 2007 which regulates opening of the market for international rail passenger transport services and had to be transposed by Member States by 4 June 2009 <sup>(1)</sup>. The need for a communication like this emerged from a survey on implementation of the Directive by Commission staff at the end of 2009 and subsequent discussions with representatives of Member States and rail sector associations. On these occasions, railway regulatory bodies and transport ministries sought information and guidance from the Commission on how to implement certain provisions of the Directive. This communication therefore aims to ensure that the transposition measures adopted by the Member States fully comply with the Directive.

The stakeholders raised two main questions which are of crucial importance for opening up the international rail passenger transport market, as they have a direct impact on the rights of access to infrastructure granted to railway undertakings:

1. How to determine whether the principal purpose of a rail service is to carry passengers travelling on an international journey; and
2. How to assess whether the economic equilibrium of public service contracts is compromised by the new service.

This communication is limited to these two issues. Other aspects of Directive 2007/58/EC may be addressed subsequently, as appropriate.

**1. How to determine the principal purpose of a rail service***Recital 8*

The introduction of new, open-access, international services with intermediate stops should not be used to bring about the opening of the market for domestic passenger services, but should merely be focused on stops that are ancillary to the international route. On that basis, their introduction should concern services whose principal purpose is to carry passengers travelling on an international journey. The determination of whether that is the service's principal purpose should take into account criteria such

<sup>(1)</sup> Directive 2007/58/EC of the European Parliament and of the Council of 23 October 2007 amending Council Directive 91/440/EEC on the development of the Community's railways and Directive 2001/14/EC on the allocation of railway infrastructure capacity and the levying of charges for the use of railway infrastructure. The article numbering used in this communication refers to the latest consolidated version of Directive 91/440/EEC (the basic act).

as the proportion of turnover, and of volume, derived from transport of domestic or international passengers, and the length of the service. This determination should be made by the respective national regulatory body at the request of an interested party.

*Article 10(3)(a)*

Railway undertakings within the scope of Article 2 shall be granted by 1 January 2010 the right of access to the infrastructure in all Member States for the purpose of operating an international passenger service. Railway undertakings shall, in the course of an international passenger service, have the right to pick up passengers at any station located on the international route and set them down at another, including stations located in the same Member State.

The right of access to the infrastructure of the Member States for which the share of international carriage of passengers by train constitutes more than half of the passenger turnover of railway undertakings in that Member State shall be granted by 1 January 2012.

Whether the principal purpose of the service is to carry passengers between stations located in different Member States shall be determined by the relevant regulatory body or bodies referred to in Article 30 of Directive 2001/14/EC following a request from the relevant competent authorities and/or interested railway undertakings.

*Responsibilities*

Article 10(3)(a) stipulates that the regulatory bodies alone are responsible for determining whether the principal purpose of a service is to carry passengers between stations located in different Member States. In doing so, the regulatory bodies must act independently. This implies that their decision cannot be preconditioned or predetermined by instructions received from any other public authorities under national law.

Under Article 10(3)(a) several regulatory bodies may be responsible for determining the principal purpose of a service in specific cases. This implies that, when the railway activity of several Member States might be affected by any potential decision, two or more regulatory bodies have to be involved in the decision. Considering the international nature of the rail services in question, it is of utmost importance to ensure that the decisions which have a cross-border impact are appropriately coordinated between the regulatory bodies concerned. Regulatory bodies should therefore systematically inform their counterparts in other Member States concerned by the rail service in question and exchange their preliminary views on whether it meets the principal purpose requirement before they take any decision under their competence.

*Decision-making process*

Article 10(3)(a) stipulates that regulatory bodies act following a request from the relevant competent authorities and/or interested railway undertakings. This implies that regulatory bodies should not act on their own initiative, but only following a request from one of the interested parties.

When railway undertakings request access to infrastructure with a view to operating an international passenger service, the service should be presumed to be international if the train crosses at least one border of a Member State, independently of whether the service includes cabotage or not. The regulatory bodies should verify the principal purpose of the service, case by case. The 'interested railway undertakings' are exclusively those which can demonstrate that the new service could have a potential impact on them. The 'competent authorities' are those responsible for granting, limiting or prohibiting access to rail infrastructure.

To ensure that the principles of equality and non-discrimination are fully respected, the decision-making process should be clear, transparent and non-discriminatory. It should be published and based on a stakeholder's consultation and exchanges of information with other regulatory bodies to ensure an appropriate level playing field. The timing and duration for such process has to take into account the need to provide to all market players a sufficient legal certainty to develop their activities. The procedure should be as simple, efficient and transparent as possible and coherent to the track application process. The details of the process may evolve over time, in particular in the light of regulatory bodies' experience.

### Criteria

Article 10(3)(a) sets no pre-established criteria for determining the principal purpose of a rail service. However, recital 8 mentions three criteria that regulatory bodies may take into account: the proportion of turnover and of volume derived from transport of domestic and international passengers and the length of the service. These criteria are mentioned only as examples. They are therefore not obligatory and other criteria could also be taken into account.

The criteria set should clearly state the factors to be taken into account by the regulatory bodies when determining the principal purpose of a service. They should enable the regulatory bodies to identify the *vocation* of the service in the medium term, rather than its characteristics at a given moment. There should be an element of foresight in the evaluation and likely gradual changes of the service and market conditions have to be taken into account. Business plans and market forecasts provided by the railway undertaking which intends to operate the new service are possible basis for a decision.

In order to identify the principal purpose of a service, the analysis by the regulatory bodies should be both quantitative and qualitative. It is therefore not possible to apply any quantified threshold strictly or in isolation. In this context, the way the service is marketed, its stopping pattern and the type of rolling stock used are qualitative factors that regulatory bodies might consider in order to determine the purpose of the service.

## 2. How to assess whether the economic equilibrium of public service contracts is compromised

### Recital 10

Opening up international passenger services, which include the right to pick up passengers at any station located on the route of an international service and to set them down at another, including stations located in the same Member State, to competition may have implications for the organisation and financing of rail passenger services provided under a public service contract. Member States should have the possibility to limit the right of access to the market where this right would compromise the economic equilibrium of these public service contracts and where approval is given by the relevant regulatory body referred to in Article 30 of Directive 2001/14/EC on the basis of an objective economic analysis, following a request from the competent authorities that awarded the public service contract.

### Recital 12

The assessment of whether the economic equilibrium of the public service contract could be compromised should take into account predetermined criteria such as the impact on the profitability of any services which are included in a public service contract, including consequential impacts on the net cost to the competent public authority that awarded the contract, passenger demand, ticket pricing, ticketing arrangements, location and number of stops on both sides of the border and timing and frequency of the proposed new service. Respecting such an assessment and the decision of the relevant regulatory body, Member States might authorise, modify or deny the right of access for the international passenger service sought, including the levying of a charge on the operator of a new international passenger service, in line with the economic analysis and in accordance with Community law and the principles of equality and non-discrimination.

### Recital 17

The national regulatory bodies should, on the basis of Article 31 of Directive 2001/14/EC, exchange information and, where relevant in individual cases, coordinate the principles and practice of assessing whether the economic equilibrium of a public service contract is compromised. They should progressively develop guidelines based on their experience.

### Article 10(3)(b)

Member States may limit the right of access defined in paragraph 3a on services between a place of departure and a destination which are covered by one or more public service contracts conforming to the Community legislation in force. Such limitation may not have the effect of restricting the right to pick up passengers at any station located on the route of an international service and to set them down at

another, including stations located in the same Member State, except where the exercise of this right would compromise the economic equilibrium of a public service contract.

Whether the economic equilibrium would be compromised shall be determined by the relevant regulatory body or bodies referred to in Article 30 of Directive 2001/14/EC on the basis of an objective economic analysis and based on predetermined criteria, following a request from:

- the competent authority or competent authorities that awarded the public service contract,
- any other interested competent authority with the right to limit access under this Article,
- the infrastructure manager, or
- the railway undertaking performing the public service contract.

The competent authorities and the railway undertakings providing the public services shall provide the relevant regulatory body or bodies with the information reasonably required to reach a decision. The regulatory body shall consider the information provided, consulting all the relevant parties as appropriate, and shall inform the relevant parties of its reasoned decision within a predetermined, reasonable time, and, in any case, within two months of receipt of all relevant information. The regulatory body shall give the grounds for its decision and specify the time period within which, and the conditions under which,

- the relevant competent authority or competent authorities,
- the infrastructure manager,
- the railway undertaking performing the public service contract, or
- the railway undertaking seeking access

may request a reconsideration of the decision.

#### *Responsibilities*

Article 10(3)(b) stipulates that limiting the right of access on routes covered by public service contracts, if new international services would compromise their economic equilibrium, is one option open to Member States, not an obligation. Only if Member States decide to use this possibility, the regulatory bodies are responsible for determining whether the economic equilibrium of public service contracts would be compromised by the new rail service proposed. In doing so, the regulatory bodies have to act independently. Recital 14 underlines, in particular, how regulatory bodies should be organised in order to ensure that they can exercise this power independently from the authorities that award public service contracts.

Any limitation of the right of access by Member States under Article 10(3)(b) should respect the regulatory body's assessment. As stated in recital 10, *approval* by the relevant regulatory body is a prerequisite for limitation of the right of access by Member States. This approval might be granted by a binding opinion assessing whether the economic equilibrium of public service contracts is compromised and proposing a specific measure or by an assent procedure scrutinising any draft decision to limit the right of access.

The assessments and decisions of regulatory bodies should be coordinated, where relevant in individual cases. This applies, in particular, when the public service contracts concerned are of a cross-border nature or, more generally, in cases where restriction of cabotage rights in one Member State could have repercussions on the viability of an international rail service provided in another. In such circumstances, in order to reach a common understanding of the situation, the regulatory bodies concerned should exchange information and their preliminary views on whether the economic equilibrium of public service contracts is compromised and on any limitation which could be appropriate. Regulatory bodies should consult their counterparts regardless of the possibility to limit the right of access on routes covered by public service contracts in the Member State of the regulatory body consulted.

Beside the specific cases mentioned above, recital 17 of Directive 2007/58/EC underlines that, on the basis of Article 31 of Directive 2001/14/EC, regulatory bodies should systematically exchange information about their work and decision-making principles and practices in order progressively to develop guidelines based on their experience.

#### *Decision-making process*

Assessment of whether the economic equilibrium of a public service contract could be compromised is an exercise that regulatory bodies should be able to conduct whether or not the principal purpose of the rail service has been verified. These two exercises can be run together, but one cannot be considered a prerequisite for the other.

As stipulated in Article 10(3)(b), the assessment should be triggered by a request submitted to the relevant regulatory body. This request may be made exclusively by (1) the competent authority or authorities that awarded the public service contract covered by the assessment; (2) any other competent authorities with the right to limit access to the infrastructure concerned; (3) the infrastructure manager concerned or (4) the railway undertaking performing the public service for which an assessment is requested. If the party requesting an assessment cannot provide the information required in order to reach a decision or if the request is not submitted within a reasonable time, predetermined by the regulatory body, no assessment should be conducted. The timing and duration for the assessment should take into account the need to provide to all market players a sufficient legal certainty to develop their activities. The procedure should be as simple, efficient and transparent as possible and coherent to the track application process.

Regulatory bodies should not carry out such assessments on their own initiative, but only at the request of one of the abovementioned interested parties. The assessment conducted by the regulatory body should be limited to the points mentioned in the request received.

The assessment should be based on an objective method and predetermined criteria. The regulatory bodies alone are responsible for developing such a method, including the criteria to apply. This responsibility cannot be constrained by any public authority involved in awarding public service contracts or in exercising shareholder control over a railway undertaking.

The assessment method should be established in a way consistent with market developments and that allows it to evolve over time, in particular in the light of regulatory bodies' experience and to comply with the common guidelines foreseen in recital 17.

The method should consist of a detailed *economic analysis*. This implies that the regulatory bodies must conduct a proper assessment of the economic and financial impact of the new rail service on the public service contract concerned. Therefore, normally, simple application of pre-established thresholds should not be regarded as sufficient.

The impact assessment should demonstrate whether the economic equilibrium of the contract is compromised. This implies that identification of an impact caused by the new service is necessary but not enough in itself. The economic analysis should determine the extent to which the economic equilibrium of the contract is impaired. Beyond that, this impact should be attributable specifically to the new rail service and not to other factors, such as the general economic climate. The public service contracts concerned are those for providing services between places of departure and destinations catered for by the new rail service proposed or those covering services of similar nature between the same places of departure and destinations provided on a parallel route which may be affected.

To ensure that the principles of equality and non-discrimination are fully respected, the method used should be clear, transparent and non-discriminatory. It should be published and based on a stakeholder's consultation and exchanges of information with other regulatory bodies to ensure an appropriate level playing field. The details of the method may evolve over time, in particular to adapt them to the common guidelines developed in the light of regulatory bodies' experience.

*Criteria*

The analysis should focus on the economic impact of the new service on the public service contract as a whole, not on individual services. As mentioned in recital 12, this implies taking into account (1) the net costs for the authority that awarded the contract and (2) the profitability of the services which the railway undertaking is operating under the contract. The simple fact that the new service is offered at a lower price or during the same time period than those under public service contract does not allow concluding that the economic equilibrium of such contract would be compromised.

To determine the impact on profitability for the railway undertaking and on net costs for the relevant authority, recital 12 suggests various items which it is useful to consider: passenger demand, ticket pricing, ticketing arrangements, location and number of stops on both sides of the border and the timing and frequency of the new service. However, giving consideration to these factors does not, in itself, count as the economic analysis required by the Directive and does not suffice to determine whether the economic equilibrium would be compromised. These aspects are mentioned only as examples. This list is neither exhaustive nor compulsory.

Not every impact on a public service contract should be considered to compromise its economic equilibrium. Any limited or one-off impact, in particular within the margins specified in the contract itself, should not be considered 'compromising'. The assessment should demonstrate that the viability of the services operated under the public service contract is affected. The equilibrium should be considered compromised when it can be demonstrated that the economic feasibility of operating these public services providing a reasonable level of quality would be jeopardised.

In this context, demonstrating that the entry of the new operator on the market would lead to a rise in the public contribution would not be sufficient. In order to be considered as compromising the economic equilibrium of the public service contract in question, any such increase in the public contribution would have to be substantial.

This interpretative communication is without prejudice to the obligation of Member States to adopt transition measures to comply with the provisions of Directive 2007/58/EC.

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