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REPORT FROM THE COMMISSION TO THE EUROPEAN PARLIAMENT AND THE COUNCIL

on delegated acts under Article 60(2) of Directive 2012/34/EU establishing a single European railway area (recast)

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1. INTRODUCTION

On 21 November 2012, the European Parliament and the Council adopted Directive 2012/34/EU establishing a single European railway area (recast) [1].

Article 60 of the Directive empowers the Commission to adopt delegated acts, subject to specific conditions, under certain other articles in the Directive. These are:

- Article 20(5) (*Information to be provided by undertakings applying for a licence*),
- Article 35(3) (*Performance scheme — delay classes*),
- Article 43(2) (*Allocation process*) and
- Article 56(13) (*Accounting information to be supplied to the regulatory body*).

The Commission's power is limited to five years from 15 December 2012. Pursuant to Article 60(2) of the Directive the Commission is required to draw up a report on its use of this power no later than nine months before the end of the five-year period, i.e. by 15 March 2017. The delegation of power will be tacitly extended for further five-year periods unless the European Parliament or the Council objects no later than three months before the end of each period.

2. USE BY THE COMMISSION OF POWER TO ADOPT DELEGATED ACTS

Powers referred to in Article 20(5)

Article 20 lays down requirements for financial fitness to be met by undertakings applying for a licence to operate rail transport services.

Article 20(1) requires the undertaking to demonstrate that it will be able to meet its actual and potential obligations, established under realistic assumptions, for a period of 12 months.

Article 20(2) requires the licensing authority to verify financial fitness especially by means of a railway undertaking's annual accounts, or a balance sheet if undertakings applying for a licence are unable to present annual accounts. Each undertaking applying for a licence must provide at least the information listed in Annex III to the Directive. This includes information on available funds, working capital, relevant costs, taxes and social security contributions.

Article 20(1) and (2) and Annex III took over provisions in Article 7(1) and in the Annex to Council Directive 95/18/EC of 19 June 1995 on the licensing of railway undertakings.

[1] OJ L 343, 14.12.2012, p. 32

Article 20(5) introduced the provision empowering the Commission to adopt delegated acts amending Annex III on the basis of the experience gained by licensing authorities or the evolution of the rail transport market. The Commission is closely monitoring developments in the rail transport market; however, to date it has found no urgent need to revise the information requirements set out in Annex III. Therefore, no delegated act in this field has yet been adopted.

However, the empowerment bestowed upon the Commission should remain in place. Indeed, there are several areas which might require revision of Annex III in the future. For example the current wording of the Annex does not explicitly require the information provided to licensing authorities to specify whether the funds, capital and assets are located inside or outside the EU. .Depending on the experience of licensing authorities and the behaviour of foreign investors, it might be necessary to require such information, in which case the Commission may need to adopt a delegated act in the future.

Powers referred to in Article 35(3)

Article 35 lays down a framework for setting up performance schemes: infrastructure charging schemes must encourage railway undertakings and infrastructure managers to minimise disruption and improve the performance of the railway network through a performance scheme. The scheme may include penalties for actions which disrupt the operation of the network, compensation for undertakings that suffer from disruption and bonuses for better-than-planned performance. The basic principles of the performance scheme as set out in point 2 of Annex VI to the Directive apply throughout the network (e.g. the list of classes of delays, the basic procedural rules for calculating the payments due, and the obligation to provide a dispute resolution system).

Under Article 35(3), the Commission may adopt delegated acts amending point 2(c) of Annex VI. Point 2(c) of Annex VI lists the classes and sub-classes to which all delays must be assigned. The list may be amended in the light of the evolution of the rail market and experience gained by regulatory bodies, infrastructure managers and railway undertakings. The amendments should adapt the classes to best practice in the industry.

Article 35(1) and (2) took over provisions in Article 11(1) and (2) of Directive 2001/14/EC of the European Parliament and of the Council of 26 February 2001 on the allocation of railway infrastructure capacity and the levying of charges for the use of railway infrastructure and safety certification. However, the detailed provisions in Annex VI were set out for the first time in Directive 2012/34/EU.

Member States were obliged to bring into force the laws, regulations and administrative provisions necessary to comply with the Directive by 16 June 2015. Not all Member States complied with this obligation on time. Even in early 2017, the transposition process had not yet been completed in certain Member States.

Under Article 35(3), the Commission may act in the light of the evolution of the rail market and experience gained by regulatory bodies, infrastructure managers and railway undertakings. Given the delay in transposition and the fact that the Directive only had to be transposed by June 2015, current experience does not justify revising Annex VI. Therefore no delegated act in this field has been adopted so far.

In this context it should be noted that the delay classes of Annex VI are based on a document of the International Union of Railways (UIC) entitled "Assessment of the performance of the network related to rail traffic operation for the purpose of quality analyses - delay coding and delay cause attribution process[2]" As UIC is the worldwide organisation for railway cooperation, this document reflects international best practice in the sector. The document was adopted for the first time in 1990 and has been amended four times since. This suggests that the approach of the sector is evolving in this area and as a result the relevant legislation should be revised, if appropriate. Hence, the Commission may need to use this power in the coming years.

Powers referred to in Article 43(2)

Article 43 requires infrastructure managers to adhere to the schedule for capacity allocation set out in Annex VII to the Directive.

Under Article 43(2), the Commission may adopt delegated acts amending Annex VII. After consulting all infrastructure managers, the Commission may amend Annex VII to take into account operational considerations in the allocation process. The amendments must be based on what is necessary in the light of experience in order to ensure an efficient allocation process and to reflect the operational concerns of the infrastructure managers.

Article 43 and Annex VII took over provisions in Article 18 and in Annex III to Directive 2001/14/EC. They are identical, with a few exceptions.

Until recently, apart from the basic timetabling rules laid down in Directive 2012/34/EU (and previously in Directive 2001/14/EC), the EU legal framework for allocating capacity was rather rudimentary and the sector was not able to develop a comprehensive common approach on its own.

RailNetEurope (RNE), the infrastructure managers' organisation dealing with questions of capacity allocation, drafted some guidelines and procedures in this domain. For example, in 2013 RNE adopted *Guidelines for coordination/publication of planned temporary capacity restrictions*, which was revised in 2015. However, RNE has no means of enforcing its guidelines and, as a result, individual infrastructure managers can delay or block their implementation. Moreover, RNE has no power to systematically check on compliance with its guidelines, nor does it release information on compliance.

Since the end of 2015, all rail freight corridors (RFC) have used a common framework for capacity allocation. This framework, adopted by the corridor executive boards, applies to freight trains which use the capacity offered by the respective corridor one-stop-shop (C-OSS).

In preparing a delegated act from January 2016, the Commission opted for a process by which railway undertakings and infrastructure managers could be consulted independently from each other. Working closely with the stakeholders, it identified several issues to be addressed in the delegated act.

The Commission consulted railway undertakings, particularly those engaged in international transport, on problems with implementation and timetabling that they had encountered. This

[2] http://www.uic.org/com/IMG/pdf/UIC_Leaflet_450-2.pdf

approach allowed smaller undertakings, too, to exchange views and present existing operational constraints.

At the same time, the Commission consulted infrastructure managers on the schedule for capacity allocation. This matter was also discussed with Member States in the first half of 2016, and in bilateral meetings with representative bodies from June to November 2016.

In July 2016, the Commission published a call for experts with a view to forming a sub-group of the group of experts on rail market access (GERM) to consider timetabling.

From the discussions with stakeholders it appeared that the capacity allocation provisions of Annex VII might need to be supplemented to take into account some railway undertakings' needs to reserve capacity more often than by one annual deadline and to provide for more timely information, consultation and coordination on temporary capacity restrictions.

In October and November 2016, two meetings of the GERM sub-group were held and a draft delegated act based on input from previous exchanges with stakeholders was discussed and reworked. Subsequently, the draft was presented to the GERM plenary meeting in December 2016. The expert group will be consulted again in March 2017.

The delegated act is expected to be adopted by mid-2017.

In consultations with the sector, a number of additional points were raised, some of which cannot yet be tackled by legal measures at EU level because the points in question are not yet mature enough to be translated into legislative measures. These include for example technological developments that offer new solutions for addressing capacity allocation problems. As a result the timetabling rules may have to be amended in the future to take the technological aspect into account.

Powers referred to in Article 56(13)

Article 56(12) empowers the regulatory body to carry out audits or initiate external audits to verify compliance with provisions on the separation of accounts for railway transport activities, infrastructure management activities and activities concerning operation of service facilities (under Articles 6 and 13 of the Directive). It entitles the regulatory body to request any relevant information, in particular as regards the accounting information listed in Annex VIII. Annex VIII details accounting information to be supplied to the regulatory body upon its request covering especially the issues of account separation; monitoring of track access charges and financial performance.

Under Article 56(13), the Commission may adopt delegated acts amending Annex VIII. It may amend Annex VIII to adapt it to changes in accounting and control practices and/or to add other points needed to check that accounts are kept separate.

Article 56(12) and (13) as well as Annex VIII to Directive 2012/34/EU had no direct legal antecedents. As certain Member States were late in transposing the Directive and some regulatory bodies have only recently been given explicit powers to check compliance with accounting separation requirements, the experience gained to date does not justify revising Annex VIII.

However, the experience already gained has shown that checking compliance with the provisions on accounting separation, the charging rules and the financial performance of

infrastructure managers requires detailed and specific data. The practice of regulatory bodies in applying Annex VIII will show whether the level of detail required can be reduced or whether the Annex needs to be made more precise by way of a delegated act.

Therefore, on the basis of this experience to be gained the Commission may need to use this power later with a view to adapting Annex VIII to changes in accounting and control practice or to supplementing it as needed to verify separation of accounts.

3. CONCLUSIONS

Article 60 of Directive 2012/34/EU empowers the Commission to adopt delegated acts as referred to in Article 20(5), Article 35(3), Article 43(2) and Article 56(13) based on the experience gained in a given area. So far, the experience gained has been sufficient to allow the Commission to use its empowerment under Article 43(2) only. Discussions on the draft delegated act on capacity allocation are at an advanced stage mainly because the relevant provisions have existed at EU level for more than a decade, under both Directive 2012/34/EU and Directive 2001/14/EC.

It is a reasonable assumption that once Directive 2012/34/EU has been completely transposed the experience gained by stakeholders may require the Commission to envisage amendments to the other Annexes to the Directive in the years to come.