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PROPOSAL

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To:	Mr Jeppe TRANHOLM-MIKKELSEN, Secretary-General of the Council of the European Union

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Delegations will find attached document COM(2021) 832 final.

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Proposal for a

REGULATION OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL

amending Regulation (EU) 2020/1429 as regards the duration of the reference period for the application of temporary measures concerning the levying of charges for the use of railway infrastructure

(Text with EEA relevance)

EXPLANATORY MEMORANDUM

1. CONTEXT OF THE PROPOSAL

• Reasons for and objectives of the proposal

The railway sector is of strategic importance to the European Union. It makes a vital contribution to the EU's overall economy and employment, by directly employing over 900 000 people, around 500 000 of them by railway undertakings and roughly 400 000 by infrastructure managers (by the end of 2018)¹.

Rail transport is critical to the EU strategy for a more sustainable transport sector, economic and social cohesion and connecting Europeans within and between Member States. Rail is an important contributor to the EU transport mix, providing clean mobility and a high level of efficiency. Therefore, rail transport is crucial for achieving the objectives of the green deal due to its value as the most sustainable and environmentally friendly transport mode.

In 2018, the European rail transported around 1.6 billion tonnes of freight and 7.1 billion passengers. By the same year, EU passenger traffic volumes had reached 400 billion passenger kilometres out of around 5 trillion passenger kilometres of land transport overall. Rail passenger traffic is mostly domestic, with only 7 % crossing borders in 2018².

In 2018³, EU freight traffic volumes reached 435 billion tonne kilometres out of 2.3 trillion of land transport overall. Around half of total rail freight is cross-border. This lends rail freight a strong European dimension.

Since the beginning of 2020, the COVID-19 outbreak has had a major impact on rail transport in the Union. Rail passenger and freight transport have declined due to limitations on mobility and the consequent reduction in the demand for transport. During the first period of the pandemic in spring 2020, rail operators stopped most international passenger trains. Passenger numbers in domestic rail transport decreased during the first wave of the pandemic by up to 90% compared to the previous year. A few operators, in particular new entrants, had to stop operations, whilst rail freight operators reported a severe decrease in transported volumes as many industries slowed down or even ceased their production due to the impact of the pandemic. Throughout the summer of 2020, demand and transport volumes remained at low levels in both passenger and freight transport.

A second wave of the pandemic in the autumn of 2020 obliged many countries to take further restrictive measures with regard to citizens' mobility. The outbreak of a third wave of the pandemic hindered the quick recovery of rail traffic, in particular for rail passenger services. In October and November 2020, Member States imposed new limitations on mobility, only partially and gradually lifting them during 2021. Passenger numbers have not

¹ Commission Staff Working Document accompanying the Seventh monitoring report on the development of the rail market under Article 15(4) of Directive 2012/34/EU of the European Parliament and of the Council, COM(2021) 5 final

² idem

³ idem

come back yet to pre-pandemic levels and the time to recover to pre-pandemic levels may be longer than expected in particular for commercial passenger traffic. Therefore, the impact of the pandemic on the transport sector continues to be significant. The emergence of the new extremely contagious COVID-19 variant Omicron in the autumn of 2021, with still unknown characteristics compared to the previous variants, is raising concerns about a fourth wave of the pandemic and stricter containment measures.

On 7 October 2020, The European Parliament and the Council adopted Regulation (EU) 2020/1429 establishing measures for a sustainable rail market in view of the COVID-19 outbreak⁴. The aim of the Regulation was to enable rail stakeholders to cope better with the financial consequences of the COVID-19 pandemic and to respond to their urgent liquidity need, through the reduction, waiver or deferral of charges for the minimum access package and for access to infrastructure connecting service facilities.

These relief measures applied to charges due throughout the reference period set out in Article 1 of the Regulation, which is from 1 March 2020 until 31 December 2020 (“reference period”). The scope of application was limited within that timeframe to ensure that the measures applied only as long as necessary.

Article 5 of Regulation (EU) 2020/1429 empowered the Commission, based on data provided by infrastructure managers showing persistent reductions in rail traffic demonstrably linked to the COVID-19 outbreak, to extend the reference period by up to six months by way of delegated acts. The reference period could be extended until 14 April 2022.

The Commission exercised that delegation of power twice⁵ and extended the reference period to 31 December 2021. The power to adopt delegated acts to extend the reference period was conferred on the Commission for a period of one year from 13 October 2020 and it has now expired.

On the basis of the data provided to the Commission by Union rail infrastructure managers covering the period until September 2021, the pandemic hit harder the passenger service segment and, in particular the commercial passenger service segment, with a significant reduction of its offer across all Member States, which has still not come back to 2019 levels. The number of public service obligation (‘PSO’) passenger trains circulating on the network between January and September 2021 is comparable to that referring to the same period in 2019, while in 2020 it was 7.8% lower compared to 2019. However, the number of passenger commercial trains between January and September 2021 was still 21.5% lower than in the same period in 2019, showing there was no recovery compared to the same period in 2020, when it was 23.3% lower compared to 2019. The number of freight trains circulating on the network was still 2.5% lower than in the corresponding period in 2019.

⁴ OJ L 333, 12.10.2020, p. 1–5.

⁵ Commission Delegated Regulation (EU) 2020/2180 of 18 December 2020 extending the reference period of Regulation (EU) 2020/1429 of the European Parliament and of the Council establishing measures for a sustainable rail market in view of the COVID-19 outbreak (OJ L 433, 22.12.2020, p. 37); and Commission Delegated Regulation (EU) 2021/1061 of 28 June 2021 extending the reference period of Regulation (EU) 2020/1429 of the European Parliament and of the Council establishing measures for a sustainable rail market in view of the COVID-19 outbreak (OJ L 229, 29.6.2021, p. 1).

Similar trends can be observed when traffic is expressed in train-km. Between January and September 2021 passenger PSO services expressed in train-km were 5.2% lower compared to the same period in 2019. Passenger commercial services expressed in train-km remained 25.6% lower in 2021 compared to the same period in 2019, in line with the (low) level reached already in 2020. Train-km run by freight trains circulating on the network showed some sign of recovery, but stayed 2.6% lower between January and September 2021 compared to the same period in 2019. It follows that the reduction in the level of rail traffic resulting from the impact of the COVID-19 pandemic is still persisting.

It is therefore necessary to amend Regulation (EU) 2020/1429, so as to further prolong the reference period.

Because the pandemic is not over yet and a certain level of unpredictability of future developments persists, it is also necessary to delegate on the Commission the power to further extend, each time by a maximum of six months, the above period, in continuity with the existing legal framework.

It is accordingly proposed to extend the reference period until 30 June 2022, and to empower the Commission to adopt delegated acts to further extend such period until 31 December 2023. It is also proposed that the delegation of power should end on the same date, that is, 31 December 2023. All other provisions of the current Regulation should remain unchanged.

Due to the unforeseeable evolution of the COVID-19 outbreak and in particular the sudden emergence of new variants of concern, it was impossible to adopt relevant measures in time. Regulation (EU) 2020/1429 requires the Commission to base the decision on a possible extension of the reference period on data that infrastructure managers were to supply once half of the prolongation of the reference period had elapsed. The Commission was not in a position to adopt a further prolongation of the reference period before the expiration of the delegated powers, as the necessary data was not yet available at that point.

In order to avoid gaps in the application of the measures after 31 December 2021 (the end of the current reference period) this Regulation should also cover the period before its entry into force. Given the nature of the measures provided for by this Regulation, retroactive application does not result in a violation of the legitimate expectations of the persons concerned.

- **Consistency with existing policy provisions in the policy area**

The current proposal aims at ensuring the extension and continuity of the current extraordinary measures that were put in place to mitigate the effects of the COVID-19 outbreak on railway transport and maintain the integrity of the Single European Railway area. Those measures complement and take into account the legal framework established under Directive 2012/34/EU.

- **Consistency with other Union policies**

The effective functioning of the Single European Rail Area depends on the economic performance of the market players and on safeguarding the achievements already made regarding management independence of infrastructure managers and railway undertakings,

transparency of provisions for charging and network access, non-discrimination and equal treatment in paths allocation and charging schemes as well as market opening. The negative economic consequences of the COVID-19 outbreak for rail market stakeholders could endanger their financial viability and possibly have serious negative effects on the functioning of the transport system, which would negatively affect the economy as a whole. The data on volumes gathered from the EU infrastructure managers covering from March 2020 to September 2021 clearly show that the impact of the pandemic on rail traffic is not over yet and that the recovery has been fragile. Therefore, the proposed amending Regulation aims to keep addressing the persisting effects on the sector. This would be also in line with the extension of the validity of other measures helping Member States and EU businesses and citizens to deal with the negative impact of the pandemic. On 18 November 2021 for example, the Commission prolonged the State Aid Temporary Framework⁶ until 30 June 2022, allowing Member States, where needed, to continue their support schemes and ensure that businesses still affected by the crisis will not be cut off suddenly from necessary financial support.

2. LEGAL BASIS, SUBSIDIARITY AND PROPORTIONALITY

• Legal basis

This initiative is based on Article 91 of the Treaty on the Functioning of the European Union, which is also the legal basis of Regulation (EU) 2020/1429.

• Subsidiarity (for non-exclusive competence)

The objectives of the proposal cannot be sufficiently achieved by the Member States for the following reason: Track access charges are comprehensively regulated at EU level and therefore Member States cannot deviate from Union rules unless there is specific European legislation. Directive 2012/34/EU does not allow Member States, in the context of the COVID-19 outbreak, to react to the unforeseeable impacts on railway transport in particular by adapting the rules on charging and capacity allocation. This was only exceptionally permitted, within certain limits, by Regulation (EU) 2020/1429. Moreover, under the terms of that Regulation, it remains up to Member States to decide whether to implement the measures provided for, having also regard to the means at their disposal in terms of public funding. Therefore, the proposed extension of the application of the measures foreseen in Regulation (EU) 2020/1429 is in line with the principle of Subsidiarity.

• Proportionality

The proposal does not go beyond what is necessary to achieve the objective of alleviating the impact of the current COVID-19 outbreak through extending for a limited time the targeted derogations from Directive 2012/34/EU allowed under Regulation (EU) 2020/1429. The

⁶ Communication from the Commission - Sixth Amendment to the Temporary Framework for State aid measures to support the economy in the current COVID-19 outbreak and amendment to the Annex to the Communication from the Commission to the Member States on the application of Articles 107 and 108 of the Treaty on the Functioning of the European Union to short-term export-credit insurance (2021/C 473/01) (OJ C 473, 24.11.2021, p. 1–15)

proposed measure is therefore proportionate. The extension of the reference period is consistent with previous extensions and it reflects the conclusions that can be drawn from the data currently available. It is also proposed to extend in time the empowerment to the Commission to prolong the reference period to account for future developments of the pandemic.

- **Choice of the instrument**

Since this is a proposal for amending an existing Regulation, the same instrument should be used.

3. RESULTS OF EX-POST EVALUATIONS, STAKEHOLDER CONSULTATIONS AND IMPACT ASSESSMENTS

- **Ex-post evaluations/fitness checks of existing legislation**

This is an urgent measure triggered by the unforeseeable nature of COVID-19 pandemic.

- **Stakeholder consultations**

Given the urgency of the matter, a formal stakeholder consultation has not been carried out. However, both Member States authorities and stakeholders have called upon the Commission to prolong Regulation (EU) 2020/1429.

In particular, rail sector associations representing railway undertakings repeatedly approached the Commission asking for the continuation of the measures. Also, Member States and infrastructure managers have already in place such measures.

Given the lack of appropriate emergency provisions in Directive 2012/34/EU and the persisting effects of the pandemic on the railway sector, there is a need for extending the possible application of the current measures.

- **Collection and use of expertise**

As explained, collection of expertise at the usual degree of detail was not possible due to the urgency of the situation. However, the Commission has drawn on experience gained through its contacts with Member States and railway stakeholders and from the constant monitoring of rail traffic volumes through the input provided by infrastructure managers over the past two years.

- **Impact assessment**

Given the urgency of the situation, an impact assessment has not been carried out.

- **Regulatory fitness and simplification**

Not applicable.

- **Fundamental rights**

Not applicable.

4. BUDGETARY IMPLICATIONS

Not applicable.

5. OTHER ELEMENTS

- **Implementation plans and monitoring, evaluation and reporting arrangements**

The measure does not include any specific monitoring or reporting arrangements. However the Commission should follow the development of the COVID-19 outbreak and its impact on Single European Rail Area and if necessary be empowered to adopt a delegated act to extend the time periods concerned by this measure.

- **Explanatory documents (for directives)**

None.

- **Detailed explanation of the specific provisions of the proposal**

Article 1 of the proposed Regulation amends Articles 1, 5(2) and 6(2) of Regulation (EU) 2020/1429, extending the reference period, its maximum further extension, and the duration of the empowerment of the Commission in that respect.

Article 2 provides for the application of the proposed Regulation from 1 January 2022.

Proposal for a

REGULATION OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL

amending Regulation (EU) 2020/1429 as regards the duration of the reference period for the application of temporary measures concerning the levying of charges for the use of railway infrastructure

(Text with EEA relevance)

THE EUROPEAN PARLIAMENT AND THE COUNCIL OF THE EUROPEAN UNION,
Having regard to the Treaty on the Functioning of the European Union, and in particular Article 91 thereof,

Having regard to the proposal from the European Commission,

After transmission of the draft legislative act to the national parliaments,

Having regard to the opinion of the European Economic and Social Committee¹,

After consulting the Committee of the Regions,

Acting in accordance with the ordinary legislative procedure²,

Whereas:

- (1) The COVID-19 pandemic has led to a sharp drop in rail traffic, because of a significant fall in demand. This has had a serious impact on railway undertakings.
- (2) Those circumstances are beyond the control of railway undertakings that have continuously faced considerable liquidity problems, major losses and in some cases are risking insolvency.
- (3) In order to counteract the negative economic effects of the COVID-19 pandemic and support railway undertakings, Regulation (EU) 2020/1429 of the European Parliament and of the Council³ enabled Member States to authorize infrastructure managers to reduce, waive or defer charges for accessing rail infrastructure. That possibility was granted for a reference period from 1 March 2020 until 31 December 2020 and was further extended by Commission Delegated Regulation (EU) 2021/1061⁴ until 31 December 2021. The Commission is no longer empowered to extend further that reference period.

¹ Opinion of [to be updated in the final version by EP and Council].

² Position of the European Parliament of [to be updated in the final version by EP and Council] and decision of the Council of [to be updated in the final version by EP and Council].

³ Regulation (EU) 2020/1429 of the European Parliament and of the Council of 7 October 2020 establishing measures for a sustainable rail market in view of the COVID-19 outbreak (OJ L 333, 12.10.2020, p. 1).

⁴ Commission Delegated Regulation (EU) 2021/1061 of 28 June 2021 extending the reference period of Regulation (EU) 2020/1429 of the European Parliament and of the Council establishing measures for a sustainable rail market in view of the COVID-19 outbreak (OJ L 229, 29.6.2021, p. 1).

- (4) The COVID-19 pandemic is continuing and the emergence of very contagious and unpredictable variants, such as the COVID-19 Omicron variant, casts uncertainty on the future and on the risks of new restrictive measures.
- (5) The negative impact of the COVID-19 pandemic on rail traffic is persisting and it is possible that railway undertaking will continue to be affected, depending on the future evolution of the pandemic. In an effort to respond to the urgent needs of the sector, the reference period of Regulation (EU) 2020/1429 should be extended until 30 June 2022.
- (6) The unforeseeable evolution of the COVID-19 outbreak, the sudden emergence of new variants and the need to assess their impact on the railway sector require swift and flexible regulatory response. In order to avoid a gap in the response to the current situation, it is appropriate to ensure continuity in the application of the measures after 31 December 2021. Given the nature of the measures provided for by this Regulation, the retroactive application of this extension of the reference period will not result in a violation of the legitimate expectations of the persons concerned.
- (7) The Commission should continuously analyse the economic impact of the COVID-19 outbreak on the rail sector and the Union should be in a position to prolong without undue delay the period of application of the measures provided for by this Regulation if the adverse conditions persist. The delegation of powers conferred under Regulation (EU) 2020/1429 should be extended, under the same terms, until 31 December 2023.
- (8) Since the objective of this Regulation, namely to extend the application of the temporary rules on the levying of charges for the use of railway infrastructure laid down in response to the urgent situation created by the COVID-19 outbreak, cannot be sufficiently achieved by the Member States but can rather, by reason of the scale or effects of the action, be better achieved at Union level, the Union may adopt measures, in accordance with the principle of subsidiarity as set out in Article 5 of the Treaty on European Union (TEU). In accordance with the principle of proportionality as set out in that Article, this Regulation does not go beyond what is necessary to achieve that objective.
- (9) Regulation (EU) 2020/1429 should therefore be amended accordingly.
- (10) In order to allow for the prompt application of the measures provided for in this Regulation, it should enter into force as a matter of urgency on the day following that of its publication in the Official Journal of the European Union,

HAVE ADOPTED THIS REGULATION:

Article 1

Amendments to Regulation (EU) 2020/1429

Regulation (EU) 2020/1429 is amended as follows:

- (1) in Article 1, the second sentence is replaced by the following:
‘It applies to the use of railway infrastructure for domestic and international rail services covered by that Directive, during the period from 1 March 2020 until 30 June 2022 (‘the reference period’).’
- (2) in Article 5(2), the second sentence is replaced by the following:
‘Any such amendment may only extend the reference period by up to six months, and the reference period may not be extended beyond 31 December 2023.’

(3) in Article 6, paragraph 2 is replaced by the following:

‘2. The power to adopt delegated acts referred to in Article 5(2) shall be conferred on the Commission until 31 December 2023.’

Article 2

Entry into force

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

It shall apply from 1 January 2022.

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

Done at Brussels,

For the European Parliament
The President

For the Council
The President