

## DIRECTIVES

## 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 EUROPEAN PARLIAMENT AND THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty establishing the European Community, and in particular Article 71 thereof,

Having regard to the proposal from the Commission,

Having regard to the opinion of the European Economic and Social Committee <sup>(1)</sup>,

Having regard to the opinion of the Committee of the Regions <sup>(2)</sup>,

Acting in accordance with the procedure referred to in Article 251 of the Treaty, in the light of the joint text approved by the Conciliation Committee on 31 July 2007 <sup>(3)</sup>,

Whereas:

- (1) Council Directive 91/440/EEC of 29 July 1991 on the development of the Community's railways <sup>(4)</sup> was designed to facilitate the adaptation of the Community's railways to the requirements of the single market and to improve their efficiency.
- (2) 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 <sup>(5)</sup> concerns the principles and procedures to be applied with regard to the setting and charging of railway infrastructure charges and the allocation of railway infrastructure capacity.

- (3) In its White Paper European transport policy for 2010: time to decide, the Commission announced its intention to continue building the internal market in rail services by proposing to open up the market in international passenger services.

- (4) The aim of this Directive is to address the opening of the market for international rail passenger services within the Community, and it should therefore not concern services between a Member State and a third country. In addition, Member States should be able to exclude from the scope of this Directive services transiting the Community.

- (5) International rail services currently present a very contrasting picture. Long-distance services (for instance night trains) are in difficulty and several of them have recently been withdrawn by the railway undertakings operating them in order to limit losses. The market for international high-speed services, on the other hand, has seen a sharp increase in traffic and will continue its vigorous development with the doubling and interconnection of the trans-European high-speed network by 2010. Nevertheless, there is strong competitive pressure from low-cost airlines in both cases. It is therefore essential to stimulate new initiatives by promoting competition between railway undertakings.

<sup>(1)</sup> OJ C 221, 8.9.2005, p. 56.

<sup>(2)</sup> OJ C 71, 22.3.2005, p. 26.

<sup>(3)</sup> Opinion of the European Parliament of 28 September 2005 (OJ C 227 E, 21.9.2006, p. 460), Council Common Position of 24 July 2006 (OJ C 289 E, 28.11.2006, p. 30), Position of the European Parliament of 18 January 2007 (not yet published in the Official Journal), Legislative Resolution of the European Parliament of 25 September 2007 and Council Decision of 26 September 2007.

<sup>(4)</sup> OJ L 237, 24.8.1991, p. 25. Directive as last amended by Directive 2006/103/EC (OJ L 363, 20.12.2006, p. 344).

<sup>(5)</sup> OJ L 75, 15.3.2001, p. 29. Directive as last amended by Directive 2004/49/EC (OJ L 164, 30.4.2004, p. 44), corrected by OJ L 220, 21.6.2004, p. 16.

- (6) It is not possible to open up the market in international passenger services without detailed provisions on infrastructure access, substantial progress on interoperability and a strict framework for rail safety at national and European level. All of these elements are now in place following the transposition of Directive 2001/12/EC <sup>(1)</sup> of the European Parliament and of the Council of 26 February 2001 amending Council Directive 91/440/EEC, Directive 2004/51/EC <sup>(2)</sup> of the European Parliament and of the Council of 29 April 2004 amending Council Directive 91/440/EEC, Directive 2001/13/EC <sup>(3)</sup> of the European Parliament and of the Council of 26 February 2001 amending Council Directive 95/18/EC, Directive 2001/14/EC, and Directive 2004/49/EC of the European Parliament and of the Council of 29 April 2004 on safety on the Community's railways <sup>(4)</sup>. It is necessary for this new regulatory framework to be supported by established, consolidated practice by the proposed date for opening up the market for international passenger services. This will require a certain time. The target date for opening up the market should therefore be 1 January 2010.
- (7) The number of railway services without intermediate stops is very limited. In the case of journeys with intermediate stops, it is essential to authorise new market entrants to pick up and set down passengers along the route in order to ensure that such operations have a realistic chance of being economically viable and to avoid placing potential competitors at a disadvantage to existing operators, which have the right to pick up and set down passengers along the route. This right should be without prejudice to Community and national regulations concerning competition policy.
- (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 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.
- (9) Regulation (EC) No 1370/2007 of the European Parliament and of the Council of 23 October 2007 on public passenger transport services by rail and by road <sup>(5)</sup> authorises Member States and local authorities to award public service contracts. These contracts may contain exclusive rights to operate certain services. It is therefore necessary to ensure that the provisions of that Regulation are consistent with the principle of opening up international passenger services to competition.
- (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.
- (11) Some Member States have already moved towards opening up the market for rail passenger services by transparent, open competitive tendering for the provision of certain such services. They should not have to provide full open access to international passenger services, since this competition for the right to use certain rail routes has involved a sufficient test of the market value of running those services.
- (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.

<sup>(1)</sup> OJ L 75, 15.3.2001, p. 1.

<sup>(2)</sup> OJ L 164, 30.4.2004, p. 164, corrected by OJ L 220, 21.6.2004, p. 58.

<sup>(3)</sup> OJ L 75, 15.3.2001, p. 26.

<sup>(4)</sup> OJ L 164, 30.4.2004, p. 44, corrected by OJ L 220, 21.6.2004, p. 16.

<sup>(5)</sup> See page 1 of this Official Journal.

- (13) In order to contribute to the operation of passenger services on lines fulfilling a public service obligation, Member States should be able to authorise the authorities responsible for those services to impose a levy on passenger services which fall within the jurisdiction of those authorities. That levy should contribute to the financing of public service obligations laid down in public service contracts awarded in conformity with Community law. It should be imposed in accordance with Community law, and in particular with the principles of fairness, transparency, non-discrimination and proportionality.
- (14) The regulatory body should function in a way which avoids any conflict of interests and any possible involvement in the award of the public service contract under consideration. In particular, if for organisational or legal purposes it is closely linked to the competent authority involved in the award of the public service contract under consideration, its functional independence should be ensured. The competence of the regulatory body should be extended to allow the assessment of the purpose of an international service and, where appropriate, the potential economic impact on existing public service contracts.
- (15) This Directive constitutes a further phase of the opening of the rail market. Some Member States have already opened up the market for international passenger services on their territory. In this context, this Directive should not be understood as creating obligations for those Member States to grant, before 1 January 2010, access rights to railway undertakings licensed in a Member State where similar rights are not granted.
- (16) In order to encourage investment for services using specialised infrastructure, such as high-speed railway lines, applicants need to be able to plan and require legal certainty reflecting the substantial long-term investment involved. It should therefore be possible for those undertakings normally to conclude framework agreements with a term of up to 15 years.
- (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.
- (18) The application of this Directive should be evaluated on the basis of a report to be presented by the Commission two years after the date of opening up the market in international passenger services. This report should also assess the development of the market, including the state of the preparation of a further opening-up of the passenger rail market. In this report the Commission should also analyse the different models for organising this market and the impact of this Directive on public service contracts and their financing. In so doing, the Commission should take into account the implementation of Regulation (EC) No 1370/2007 and the intrinsic differences between Member States (density of networks, number of passengers, average travel distance). In its report the Commission should, if appropriate, propose complementary measures to facilitate any such opening, and should assess the impact of any such measures.
- (19) The measures necessary for the implementation of Directives 91/440/EEC and 2001/14/EC should be adopted in accordance with Council Decision 1999/468/EC of 28 June 1999 laying down the procedures for the exercise of implementing powers conferred on the Commission <sup>(1)</sup>.
- (20) In particular, the Commission should be empowered to adapt the Annexes to those Directives. Since those measures are of general scope and are designed to amend non-essential elements of those Directives, they must be adopted in accordance with the regulatory procedure with scrutiny provided for in Article 5a of Decision 1999/468/EC.
- (21) A Member State which has no railway system, and no immediate prospect of having one, would be under a disproportionate and pointless obligation if it had to transpose and implement Directives 91/440/EEC and 2001/14/EC. Therefore, such Member States should be exempted, for as long as they have no railway system, from the obligation to transpose and implement these Directives.
- (22) Since the objective of this Directive, namely the development of the Community's railways, cannot be sufficiently achieved by the Member States, given the need to ensure fair and non-discriminatory conditions of access to infrastructure and to take account of the obviously international dimension of the way in which important parts of the rail networks operate, as well as the need for coordinated transnational action, and can therefore be better achieved at Community level, the Community may adopt measures, in accordance with the principle of subsidiarity as set out in Article 5 of the Treaty. In accordance with the principle of proportionality, as set out in that Article, this Directive does not go beyond what is necessary in order to achieve that objective.
- (23) In accordance with point 34 of the Interinstitutional Agreement on better law-making <sup>(2)</sup>, Member States are encouraged to draw up, for themselves and in the interests of the Community, their own tables illustrating, as far as possible, the correlation between this Directive and the transposition measures, and to make them public.

<sup>(1)</sup> OJ L 184, 17.7.1999, p. 23. Decision as amended by Decision 2006/512/EC (OJ L 200, 22.7.2006, p. 11).

<sup>(2)</sup> OJ C 321, 31.12.2003, p. 1.

(24) Directives 91/440/EEC and 2001/14/EC should therefore be amended accordingly,

HAVE ADOPTED THIS DIRECTIVE:

*Article 1*

Directive 91/440/EEC is hereby amended as follows:

1. the following paragraph shall be added to Article 2:

‘4. Member States may exclude from the scope of this Directive any railway service carried out in transit through the Community and which begins and ends outside the Community territory.’;

2. the fourth indent of Article 3 shall be deleted;

3. the following indent shall be inserted in Article 3 after the fifth indent:

— “international passenger service” shall mean a passenger service where the train crosses at least one border of a Member State and where the principal purpose of the service is to carry passengers between stations located in different Member States; the train may be joined and/or split, and the different sections may have different origins and destinations, provided that all carriages cross at least one border’;

4. the following indent shall be inserted in Article 3 after the sixth indent:

— “transit” shall mean the crossing of the Community territory which is carried out without loading or unloading of goods, and/or without picking up of passengers nor setting them down in the Community territory.’;

5. the first indent of Article 5(3) shall be deleted;

6. the phrase ‘and international groupings’ shall be deleted in Article 8(1);

7. Article 10(1) shall be deleted;

8. the following paragraphs shall be inserted in Article 10:

‘3a. 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.

3b. 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 pre-determined 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 pre-determined, 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.

3c. Member States may also limit the right to pick up and set down passengers at stations within the same Member State on the route of an international passenger service where an exclusive right to convey passengers between those stations has been granted under a concession contract awarded before 4 December 2007 on the basis of a fair competitive tendering procedure and in accordance with the relevant principles of Community law. This limitation may continue for the original duration of the contract, or 15 years, whichever is the shorter.

3d. The provisions of this Directive shall not require a Member State to grant, before 1 January 2010, the right of access referred to in paragraph 3a to railway undertakings and their directly or indirectly controlled subsidiaries, licensed in a Member State where access rights of a similar nature are not granted.

3e. Member States shall take the necessary measures to ensure that the decisions referred to in paragraphs 3b, 3c and 3d are subject to judicial review.

3f. Without prejudice to paragraph 3b, Member States may, under the conditions laid down in this Article, authorise the authority responsible for rail passenger transport to impose a levy on railway undertakings providing passenger services for the operation of routes which fall within the jurisdiction of that authority and which are operated between two stations in that Member State.

In that case, railway undertakings providing domestic or international rail passenger transport services shall be subject to the same levy on the operation of routes which fall within the jurisdiction of that authority.

The levy is intended to compensate the authority for public service obligations laid down in public service contracts awarded in conformity with Community law. The revenue raised from such levy and paid as compensation may not exceed what is necessary to cover all or part of the cost incurred in the relevant public service obligations taking into account the relevant receipts and a reasonable profit for discharging those obligations.

The levy shall be imposed in accordance with Community law, and shall respect in particular the principles of fairness, transparency, non-discrimination and proportionality, in particular between the average price of the service to the

passenger and the level of the levy. The total levies imposed pursuant to this paragraph shall not endanger the economic viability of the rail passenger transport service on which they are imposed.

The relevant authorities shall keep the information necessary to ensure that the origin of the levies and their use can be traced. Member States shall provide the Commission with this information.;

9. Article 10(8) shall be replaced by the following:

'8. By 1 January 2009, the Commission shall submit to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions a report on the implementation of this Directive.

This report shall address:

- the implementation of this Directive in the Member States, and in particular its impact in the Member States as referred to in the second subparagraph of paragraph 3a and the effective working of the various bodies involved;
- market developments, in particular international traffic trends, activities and market share of all market actors, including new entrants.;

10. the following paragraph shall be added to Article 10:

'9. By 31 December 2012, the Commission shall submit to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions a report on the implementation of the provisions of paragraphs 3a to 3f.

The application of this Directive shall be evaluated on the basis of a report to be presented by the Commission two years after the date of the opening-up of the market in international passenger services.

This report shall also assess the development of the market, including the state of the preparation of a further opening-up of the rail market. In its report the Commission shall also analyse the different models for organising this market and the impact of this Directive on public service contracts and their financing. In so doing, the Commission shall take into account the implementation of Regulation (EC) No 1370/2007 of the European Parliament and of the Council of 23 October 2007 on public passenger transport services by rail and by road and repealing Council Regulations (EEC) Nos 1191/69 and 1107/70 (\*) and the intrinsic differences between Member States (density of networks, number of passengers, average travel distance). In its report the Commission shall, if appropriate, propose complementary measures to facilitate any such opening, and shall assess the impact of any such measures.

(\*) OJ L 315, 3.12.2007, p. 1.'

11. Article 11(2) shall be replaced by the following:

'2. Measures designed to amend non-essential elements of this Directive and relating to the adaptation of the Annexes thereto shall be adopted in accordance with the regulatory procedure with scrutiny referred to in Article 11a(3).';

12. Article 11a(3) shall be replaced by the following:

'3. Where reference is made to this paragraph, Article 5a(1) to (4), and Article 7 of Decision 1999/468/EC shall apply, having regard to the provisions of Article 8 thereof.';

13. the following subparagraph shall be added to Article 15:

'The obligations for transposition and implementation of this Directive shall not apply to Cyprus and Malta for as long as no railway system is established within their territory.'

#### Article 2

Directive 2001/14/EC is hereby amended as follows:

1. the following point shall be added to Article 1(3):

'(e) transport operations in the form of railway services which are carried out in transit through the Community.';

2. the following point shall be added to Article 2:

'(n) "transit" shall mean the crossing of the Community territory which is carried out without loading or unloading of goods, and/or without picking up of passengers nor setting them down in the Community territory.';

3. the following paragraph shall be added to Article 13:

'4. When an applicant intends to request infrastructure capacity with a view to operating an international passenger service as defined in Article 3 of Directive 91/440/EEC, it shall inform the infrastructure managers and the regulatory bodies concerned. In order to enable the assessment of the purpose of the international service to carry passengers between stations located in different Member States, and the potential economic impact on existing public service contracts, regulatory bodies shall ensure that any competent authority that has awarded a rail passenger service defined in a public service contract, any other interested competent authority with a right to limit access under Article 10(3b) of Directive 91/440/EEC and any railway undertaking performing the public service contract on the route of this international passenger service is informed.';

4. Article 17(5) shall be replaced by the following:

'5. Framework agreements shall in principle cover a period of five years, renewable for periods equal to their original duration. The infrastructure manager may agree to a

shorter or longer period in specific cases. Any period longer than five years shall be justified by the existence of commercial contracts, specialised investments or risks.

5a. For services using specialised infrastructure referred to in Article 24 which requires substantial and long-term investment, duly justified by the applicant, framework agreements may be for a period of 15 years. Any period longer than 15 years shall be permissible only in exceptional cases, in particular where there is large-scale, long-term investment, and particularly where such investment is covered by contractual commitments including a multi-annual amortisation plan.

The applicant's requirements may in this case call for detailed definition of the capacity characteristics — including the frequency, volume and quality of train paths — which are to be provided to the applicant for the duration of the framework agreement. The infrastructure manager may reduce reserved capacity which, over a period of at least one month, has been used less than the threshold quota provided for in Article 27.

As from 1 January 2010, an initial framework agreement may be drawn up for a period of five years, renewable once, on the basis of the capacity characteristics used by applicants operating services before 1 January 2010, in order to take account of specialised investments or the existence of commercial contracts. The regulatory body referred to in Article 30 shall be responsible for authorising the entry into force of such an agreement.';

5. the following sentence shall be inserted before the final sentence of Article 30(1):

'It shall furthermore be functionally independent from any competent authority involved in the award of a public service contract.';

6. Article 34(3) shall be replaced by the following:

'3. Measures designed to amend non-essential elements of this Directive and relating to the adaptation of the Annexes thereto shall be adopted in accordance with the regulatory procedure with scrutiny referred to in Article 35(3).';

7. Article 35(3) shall be replaced by the following:

'3. Where reference is made to this paragraph, Article 5a(1) to (4), and Article 7 of Decision 1999/468/EC shall apply, having regard to the provisions of Article 8 thereof.';

8. the following subparagraph shall be added to Article 38:

'The obligations for transposition and implementation of this Directive shall not apply to Cyprus and Malta for as long as no railway system is established within their territory.'

*Article 3*

1. Member States shall bring into force the laws, regulations and administrative provisions necessary to comply with this Directive before 4 June 2009. They shall forthwith communicate to the Commission the text of those measures.

When Member States adopt those measures, they shall contain a reference to this Directive or shall be accompanied by such reference at the time of their official publication. The methods of making such reference shall be determined by the Member States.

2. Member States shall communicate to the Commission the text of the main provisions of national law which they adopt in the field covered by this Directive.

3. The provisions of points 2, 5, 6 and 7 of Article 1 shall apply from 1 January 2010.

*Article 4*

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

*Article 5*

This Directive is addressed to the Member States.

Done at Strasbourg, 23 October 2007.

*For the European Parliament*  
*The President*  
H.-G. PÖTTERING

*For the Council*  
*The President*  
M. LOBO ANTUNES