

COMMISSION IMPLEMENTING REGULATION (EU) No 870/2014
of 11 August 2014
on criteria for applicants for rail infrastructure capacity
(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 of 21 November 2012 establishing a single European railway area ⁽¹⁾, and in particular Article 41(3) thereof,

Whereas:

- (1) Article 41(2) of Directive 2012/34/EU provides for the possibility for infrastructure managers to set requirements with regard to applicants to ensure that their legitimate expectations about future revenues and utilisation of the infrastructure are safeguarded.
- (2) These requirements should be appropriate, transparent and non-discriminatory. They can only include the provision of a financial guarantee that should not exceed an appropriate level proportional to the contemplated level of activity, and assurance of the capability of the applicant to prepare compliant bids for infrastructure capacity.
- (3) Financial guarantees could take the form of advance payments or guarantees provided by financial institutions
- (4) The appropriateness of the requirements referred to in Recital (2) should take account of the fact that the infrastructure of competing transport modes, such as road and air transport, sea ships and inland waterways, is often free of user charges and hence also free of financial guarantees thereon. In order to ensure fair competition between transport modes, financial guarantees should be limited to the strict minimum in terms of level and duration.
- (5) These financial guarantees are only appropriate if they are necessary for the purpose of reassuring the infrastructure manager about the future revenues and utilisation of the infrastructure. Considering that infrastructure managers are able to rely on the checks and surveillance of the financial fitness of railway undertakings under the licensing procedure in accordance with Chapter III of Directive 2012/34/EU, and in particular Article 20 of that Directive, the need for financial guarantees is further reduced.
- (6) The principle of non-discrimination applies to those guarantees, therefore there should be no distinction between the guarantee requirements for privately and publicly owned applicants.
- (7) Guarantees should be commensurate with the level of risk posed by the applicant for the infrastructure manager at different stages of capacity allocation. The risk is considered generally to be low as long as the capacity can be reallocated to other railway undertakings.
- (8) A guarantee which is requested in relation to the preparation of compliant bids can only be considered as appropriate, transparent and non-discriminatory if the infrastructure manager sets out clear and transparent rules for preparing a capacity request in the network statement, and offers the necessary support tools to applicants. Since it is not possible to objectively determine the capability of preparing compliant bids before the application procedure, any lack of capability can only be determined after that procedure, on the basis of a repeated failure to put forward those bids or provide the necessary information to the infrastructure manager. The applicant is responsible for that failure which carries a sanction involving the exclusion of the applicant from the application for a specific train path.
- (9) The measures provided for in this Regulation are in accordance with the opinion of the Committee referred to in Article 62(1) of Directive 2012/34/EU,

⁽¹⁾ OJ L 343, 14.12.2012, p. 32.

HAS ADOPTED THIS REGULATION:

Article 1

Subject matter

This Regulation sets out requirements for financial guarantees that an infrastructure manager may request to ensure that its legitimate expectations about future revenues are met without exceeding a level proportional to level of activities contemplated by the applicant. The requirements include in particular the conditions when a guarantee or an advance payment may be requested and the level and duration of a financial guarantee. In addition, this Regulation sets out certain details as regards the criteria to assess the capability of an applicant to prepare compliant bids for infrastructure capacity.

Article 2

Definitions

For the purpose of this Regulation, the following definition applies:

'financial guarantee' means: (a) advance payments to reduce and anticipate future obligations to pay infrastructure charges; or (b) contractual arrangements by which a financial institution such as bank commits to ensure that such payments are effected once they are due.

Article 3

Conditions for financial guarantees

1. The applicant may choose to meet a request for financial guarantee by means of either advance payment or contractual arrangement in the meaning of Article 2. Where an infrastructure manager requires an applicant to provide an advance payment for infrastructure charges, it may not at the same time request other financial guarantees for the same contemplated activities.
2. An infrastructure manager shall not request applicants to provide financial guarantees unless the credit rating of the applicant suggests that he might have difficulties in effecting regular payments for infrastructure charges. The infrastructure manager shall mention such credit ratings in the section on charging principles of its network statement, if applicable. The infrastructure manager shall base his request for a financial guarantee on ratings not older than two years provided by a credit rating agency.
3. The infrastructure manager shall not request a financial guarantee:
 - (a) from the designated railway undertaking if a financial guarantee has already been granted or paid by the applicant, which is not a railway undertaking, to cover future payments for the same contemplated activities;
 - (b) if the infrastructure charge is to be paid directly to the infrastructure manager by a competent authority pursuant to Regulation (EC) No 1370/2007 of the European Parliament and of the Council ⁽¹⁾.

Article 4

Level and duration of financial guarantees

1. The level of financial guarantees regarding one applicant shall not exceed the estimated amount of charges incurred during two months of train operations requested.
2. Reservation charges paid in accordance with Article 36 of Directive 2012/34/EU shall be deducted from the maximum estimated amount of charges referred to in paragraph 1.
3. An infrastructure manager shall not require that a financial guarantee takes effect more than 10 days before the first of the month in which the railway undertaking starts the train operations the payment of infrastructure charges from which this financial guarantee is to cover. If the capacity is allocated after this point in time, the infrastructure manager may request the financial guarantee at short notice.

⁽¹⁾ 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, OJ L 315, 3.12.2007, p. 1.

*Article 5***Capability to prepare compliant bids for infrastructure capacity**

The infrastructure manager shall not reject an application for a specific train path on grounds of failing to provide assurance of the capability to prepare a compliant bid for infrastructure capacity, within the meaning of Article 41(2) of Directive 2012/34/EU, unless:

- (a) the applicant has failed to answer two subsequent requests requiring the provision of the missing information or has repeatedly responded in a way that does not satisfy the conditions set out in the network statement referred to in Article 27 of Directive 2012/34/EU and in Annex IV to that Directive regarding the application procedures for train paths; and
- (b) the infrastructure manager is able to demonstrate at the request of and to the satisfaction of the regulatory body that it has taken all reasonable steps to support the correct and timely submission of applications.

*Article 6***Transitional provision**

Where necessary, infrastructure managers shall align their network statements to the provisions of this Regulation for the first timetable period following the entry into force of this Regulation.

Article 7

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 16 June 2015.

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

Done at Brussels, 11 August 2014.

For the Commission
The President
José Manuel BARROSO