

**Second Position Paper**

Brussels, 29 November 2016

---

**Implementation of the Recast -  
'Conditions of access to services' –  
Article 13 Recast Directive 2012/34/EU**

# Implementation of the Recast - 'Conditions of access to services' – Article 13 Recast Directive 2012/34/EU

## A. Introduction

On 13 March 2015 the Community of European Railway and Infrastructure Companies (CER) presented a Position Paper<sup>1</sup> to express the Railway sector's concerns regarding the intention of the European Commission (DG MOVE) to start the implementation of article 13 of the Recast: 'Conditions of access to services'.

CER suggested that the European Commission should postpone the preparation of an implementing act, and instead allow the Member States, the railway sector and regulatory bodies time to apply and enforce the Directive in order to gain the requested experience. Moreover, CER suggested that the European Commission and the regulatory bodies should use the network of regulatory bodies – based on Article 57 Recast- to formulate recommendations such as 'Best Practices' on the interpretation of the rules enacted in the Recast if needed. In view of the presentation by the European Commission of the first draft Implementing Act on Service Facilities, CER would like to draw the attention to some concerns related to this proposal.

## B. General Concerns

As already expressed in the first CER Position Paper, according to Article 13 par. 9 of the Recast Directive 2012/34/EU the implementing act shall be based on the experience of regulatory bodies and operators of service facilities. The Recast Directive has just been transposed in most of the Member States and thus more time is required to gather experience with the new regulatory framework. It is therefore too early to propose an implementing act.

The discussion paper presented by the European Commission is lacking a distinction between different types of service facilities. First, a distinction needs to be drawn between service facilities in the situation of a natural monopoly on the one hand and service facilities in a competitive situation

---

<sup>1</sup> Annex 1

on the other hand. According to the Essential Facilities Doctrine, principles of regulatory law exclusively apply to the first group and not to the latter which are ruled by principles of general competition law. For this reason the scope of a future implementing act in the form of a regulation must be restricted to service facilities constituting a natural monopoly.

For service facilities in a competitive situation there is no need or justification for any such regulation. On the contrary, light-touch regulation in order to maintain flexibility would suffice in these circumstances. Providers of such service facilities are willing to develop its services in order to meet the needs of the market, and offer those services in Europe-wide tenders or other competitive procedures. Competition on these markets would be restricted by publishing price information.

Even for operators of service facilities constituting a natural monopoly there are no one size fits all solutions for a future implementing act. A blanket approach would contradict the spirit and the rules enacted on the Recast Directive, which identifies different categories in Annex II and distinguishes between these services in terms of the rules that must be complied with. Moreover, from a concrete and operational perspective, even services that belong to the same category within the meaning of Annex II are very different from one another. As a result, any attempt to define ex-ante theoretical rules of general application is challenging. Therefore, here too, care has to be taken that future regulations do not lead to additional costs and unnecessary red tape. Overregulation and bureaucracy shall be avoided and sufficient room left for flexible solutions according to market needs and taking into consideration differences of specific service facilities.

This draft implementing act imposes a heavy burden on operators of service facilities by enacting numerous obligations for the operators of service facilities towards the users. This additional administrative burden cannot be supported by operators of service facilities – especially small operators - since they will be obliged either to hire more staff - consequently increasing the cost of the services - or to close the business. Furthermore, such a constraining regulatory framework would discourage operators from investing in the creation of new facilities.

Applicants and operators of service facilities should retain their commercial freedom. Given the very competitive environment in which railway undertakings operate it is essential that commercial details are not unnecessarily shared between the applicant and facility operator.

Last but not least, CER wants to point out to the European Commission that the role of the Regulatory bodies is to monitor and act as an appeal body, but not to be involved in the business processes. Another principle to keep in mind in drafting this Implementing Act in order to support the European single market with a harmonize set of rules, is that whether a EU Regulation is adopted, regulatory bodies shall not “gold-plate” it with further national norms.

In conclusion CER and its members propose below specific textual amendments aiming to prevent additional bureaucracy or overregulation, in particular where there is already a successful system of non-discrimination or a heavily competitive environment. An overly burdensome system will stifle competition rather than allow it to thrive. In a transport market where there has always been strong competition from road and air it is essential that this is not allowed to happen through over-regulation.

## C. CER Proposals

### I. Article 1

#### *Article 1*

##### **Subject matter**

(1) This Regulation sets out the details of the procedure and criteria to be followed by operators of service facilities and applicants as regards access to service facilities and rail related services.

(2) This Regulation shall not apply for service facilities and rail related services referred in points 2, 3 and 4 of Annex II of Directive 2012/34/EU which are in an open market according to Competition Law. Operators of service facilities shall justify that their rail related services and service facilities are open to competition to the Regulatory body upon request. The Regulatory Body shall examine the openness of the respective market according to Competition Law. An applicant which can show a demonstrated need for a service facility can request the examination by the Regulatory Body.

##### ***Justification:***

This Implementing act should make a clear distinction between operators of service facilities in competitive positions and operators of service facilities in the situation of natural monopolies. Service facilities in an open market should not be subject to the specific and detailed provisions of the implementing act. The detailed provisions of the implementing act are only needed where a natural monopoly exists. Nevertheless, all facilities remain subject to the general rules of the Recast Directive and of Competition Law. This means in particular that non-discriminatory access has to be provided.

## II. Article 2

### *Article 2*

#### **Definitions**

For the purposes of this Regulation the definitions provided for in Article 3 of Directive 2012/34/EU shall apply.

The following definitions shall also apply:

(1) 'service facility statement' means the statement which sets out in detail the general rules, deadlines, procedures and criteria for charging and allocation of service facility capacity and other information required to enable applications for access to service facilities and rail related services.

~~The service facility statement is optional to the introduction of a website link with the relevant information on the conditions for access to service facilities and for supply of services in these facilities on the network statement;~~

(2) 'basic service' means a service referred to in point 2 of Annex II of Directive 2012/34/EU;

(3) 'additional service' means a service referred to in point 3 of Annex II of Directive 2012/34/EU;

(4) 'ancillary service' means a service referred to in point 4 of Annex II of Directive 2012/34/EU;

~~(4 5)~~ 'rail related service' means a basic service, additional service or ancillary service covered by points 2 to 4 of Annex II of Directive 2012/34/EU;

(6) '~~available~~ service facility capacity' means the potential to use a service facility over a given period of time;

(7) 'facility coordination process' means a process through which the operator of a service facility and applicants will attempt to resolve situations in which there are conflicting applications for access to a service facility and/or rail related services;

~~(8) 'service provider' means a service facility operator supplying any of the services referred to in points 2 to 4 of Annex II of Directive 2012/34/EU;~~

(9) 'controlling entity' means a body or firm within the meaning of Article 13(3) of Directive 2012/34/EU, which exercises direct or indirect control over an operator of a service facility and is also active and holds a dominant position in national railway transport services markets for which the facility is used;

(10) 'self-supply of services' means a situation where a rail related service is not supplied by ~~an service provider~~ operator of service facility but where a railway undertaking and/or wagon keeper is performing the rail related service itself provided that access to and/or independent use of the facility is legally and technically feasible.

**Justification:**

Point 1: The Service Facility Statement is out of the scope of this Implementing Act according to Article 13 par. 9 Recast. Instead this provision is laid down in Article 27 and Annex IV Recast. The Network Statement shall contain information regarding service facilities and supply of services in those facilities, but not an obligation to produce a service facility statement.

Point 6: CER would like to point out that it is very difficult to measure capacity. Capacity can vary depending on the demand, type of service, length (e.g. If the long tracks in a facility are in use, there is no capacity for long trains whereas there might still be enough capacity for a short train). The definition of "capacity" cannot be pre-fixed. It has to be open for usage behavior.

Point 8: The definition of service provider should follow what it is enacted in the Recast Directive: *"operator of service facility' means any public or private entity responsible for managing one or more service facilities or supplying one or more services to railway undertakings referred to in points 2 to 4 of Annex II;"*

Point 9: it should be clarified that this point applies only to the basic services. The scope of Article 13(3) Recast covers only the service facilities referred to in points 2(a), (b),(c), (d),(g), and (i) of Annex II Recast.

Point 10: The proposed draft modifications are necessary because providing a service could be impossible due to legal or technical reasons. For instance, a facility may be too sophisticated for a third party to use it unless a burdensome system of entry and exit statement of the condition of the facility were to be implemented (e.g. reprofiling facilities).

### III. Article 3

#### Article 3

##### **Information on Service facility statement**

(1) Operators of service facilities shall, ~~after consultation with all interested parties~~, make publicly available the following information on conditions for access to their services facilities and the supply of services in their facilities:

1. the list of all installations they are responsible for ~~managing and which are related to Article 2 paragraphs (2), (3) and (4)~~, including information on their locations (address) and opening hours;
2. key contact details, including the operator's phone numbers and e-mail addresses;
3. a ~~precise~~ description of the facility including its technical characteristics such as number, length and accessibility of platforms, sidings or shunting/marshalling tracks, technical equipment for loading/unloading, washing or maintenance or storage capacity ~~available~~;
4. a ~~precise~~ description of ~~all the most important~~ rail related services which are supplied in the facility and of the conditions applying to self-supply of rail related services ~~if relevant and provided that self-supply is legally and technically possible, or if the operator of service facility offers such a possibility~~;
5. ~~information on procedures for requesting access to the facility and/or services supplied in the facility, including in particular deadlines for submitting applications and timescales for handling of requests; in service facilities with more than one operator, the service facility statement shall specify whether separate requests for access to the tracks in the facility and for rail related services need to be submitted;~~
6. information on the minimum content and format of a request or a template for requests for access to the facility and/or rail related services;
7. all other relevant documents for the access and use of the service facility and/or supply of a rail related service including model access contracts, ~~specific contractual conditions~~ and, where applicable, the terms of use of the operator's IT-systems for access to and use of the facility and the rules concerning the protection of sensitive and commercial data, ~~if relevant~~;
8. ~~details~~ description of the facility coordination process referred to in Article 8;
9. ~~the process for notifying~~ changes/temporary restrictions of the service facility which could have a significant impact, according to the evaluation made by the operator of service facility, on the capability or capacity of the facility, including in particular planned works;

10. Charges for gaining access to the facility and for each rail related service supplied therein, ~~respecting commercial confidentiality requirements including any discounts granted;~~
- ~~11. Information on charging principles, i.e. the methodology of for calculating charges, the typology of costs taken into account for the calculation of charges, and indexation formulas; the information shall enable an applicant to understand how the charges for access to the facility and rail related services are determined and may evolve, while respecting commercial confidentiality requirements;~~
12. Information on access to infrastructure connecting the main network and the facility, including on connecting infrastructure or intermediate installations managed by an entity other than the operator of service facility.

(2) The operator of a service facility shall make available the information listed in paragraph 1 either by publishing its own service facility statement or by providing ~~a website link with the relevant information~~ to the ~~relevant~~ infrastructure manager ~~with the relevant information~~ to be included in the network statement. ~~All required information provided to the relevant infrastructure manager shall have a form of a complete product.~~ Operators of service facilities may also decide to make available the information referred to in paragraph 1 on a common web portal.

Where the operator of a service facility decides to publish its own service facility statement, it shall make it available free of charge on its web portal and provide the ~~relevant~~ infrastructure manager with the relevant link to be included in the network statement. This also applies when the operator of a service facility has decided to publish the information on a common web portal.

In view of its publication by the date referred to in Article 27(4) of Directive 2012/34/EU, infrastructure managers shall inform operators of services facilities about the deadline for receipt of the ~~information website link~~ to be published in the network statement. Infrastructure managers ~~shall~~ ~~may~~ facilitate the collection of the relevant information by providing a template that operators of service facilities ~~can~~ ~~may~~ use for submission of the relevant information.

(3) The information referred to in paragraph 1 shall be ~~published in at least two languages of the Union and shall be kept up to date~~ updated in line with the content of the Network Statement ~~publication~~. Operators of service facilities shall make public ~~without delay in due time~~ any changes in charges for accessing the service facility and supply of rail related services, works preventing a railway undertaking from accessing a facility or the termination of supply of a rail related service.

(4) Notwithstanding paragraphs 1 to 3 and Article 27 and Annex IV of Directive 2012/34/EU, where rail related services in one service facility are supplied by more than one service provider, the

service providers supplying services in the facility concerned shall coordinate to (also) make available information on all services provided in that facility in aggregated form in one single place.

~~(5) In addition to the information provided for in paragraph 1, an applicant may request the operator of a service facility to provide information on the nature and method of allocation of costs taken into account for the calculation of the charges for access to the service facility and supply of rail-related services.~~

~~(6) Member States may require operators of service facilities to draw up service facility statements using the template provided in Annex 1 or a template developed by the national regulatory body.~~

***Justification:***

General comment: Provisions on the publication of condition of service facilities are laid down in Article 27 and Annex IV Recast, thus they are not covered by the implementing act according to Article 13 par. 9 Recast. The European Commission should not over use its implementation powers since the Recast Directive only gives the European Commission the possibility to set out details of the procedure and criteria to be followed for access to service facilities and rail related services, but not to implement the obligations enacted in Article 27 Recast. There is no legal obligation of developing such a document and to call it "Service Facility Statement" (SFS). The operator of service facilities should provide the information for the Network Statement to the infrastructure manager, but does not have an obligation of producing another document. It could be just an Annex to the Network Statement or a website link to the Operator of Service facilities website.

If the intention of the European Commission is not to make this SFS compulsory, certain aspects should be modified. Article 4(2) of this implementing act says that the information listed in article 4(1) can be published either in the SFS or by providing a website link with the relevant information to the infrastructure manager or on a common web portal. On the other hand, in several places in the draft the SFS is named as the only document where given information can be published (e.g. art. 8(1), 8 (4)).

Paragraph 1: A consultation with all interested parties is not feasible at this stage.

Sub-Point 3: This information is not necessary if a specific service (package) is offered and not the access to the technical installations. In this case it is sufficient to provide a description of the service offered (cf. point 4).

Sub-point 4: The proposed text makes clear that this point just applies in case of self-supply and when the legal and technical specifications are respected (see above). Neither Article 13 nor Annex

II Recast address self-supply of services as it is a purely business /technical issue and should be kept entirely under business/technical decision of the operator.

Sub-Point 5: This is not possible for operators of service facilities in competitive positions.

Sub-Point 7: Specific contractual conditions are agreed during a particular contractual negotiation. This condition will arise from the agreement and could not be known in advance. Regarding the IT-Systems, the European Commission must evaluate the feasibility of this clause in order to safeguard the confidential information.

Sub-Point 9: An obligation to list this in a service facility statement is not feasible and unnecessary. Such information should be given via other more flexible means/media. The SFS, like the Network Statement is not a live document. By including dynamic information on works the document becomes burdensome to update. However the process for notifying service facility users of works could be included. The detailed approach to the issue of capacity proposed by the European Commission is not practical for the daily business of operators of service facilities and not feasible due to significant changes of regularity from clients such as mines (e.g. the need for capacity depends on the season of the year). In addition, for border Member States like Poland capacity needs and restrictions depend on activities of clients from third countries that don't always communicate their plans to European operators of service facilities. Trains are often delayed and there are no sufficient IT tools in order to monitor the situation in real time.

Sub-point 10: The protection of confidential business information must be guaranteed. Discounts are business tools and thus should not be part of the publicly available information. These reductions on the price are a result of a negotiation between the parties, therefore they could not be announced in advance.

Sub-Point 11: This obligation goes too far and goes beyond the requirements of Article 31 par. 2 Recast. The applicant needs information on the access conditions including charges. It does not need information on the calculation of charges. These are business secrets, the publication of which will endanger competition. The proposal goes beyond the scope of Article 13 Recast. Such detailed information on methodology of costs calculation are confidential and publication goes beyond general competition law. It is not possible to publish such information while respecting commercial confidentiality requirements.

As set out in the Commission's guidelines on horizontal cooperation (2011/C 11/01, para 74), information exchanges between competitors of individualized data regarding intended future prices or quantities are generally considered a restriction of competition by object prohibited in Article 101 of TFEU. Especially opening up the information on calculation of charges seems very problematic from competition law perspective. The information that may not be exchanged, under competition

rules, is to be assessed on a case-by-case basis. Hence, this sub-point 11 of the proposal could in certain cases conflict with Article 101 TFEU, which takes precedence over the proposed regulation.

Sub-Point 12: This obligation should only be applicable if the relevant information is not available elsewhere, e.g. in documents provided by the railway operator.

Paragraph 2: CER proposes to add this sentence in order to make the process of providing the information as efficient as possible. According to the Article 27 Recast, the infrastructure manager has no impact on the content of the information provided by an operator of service facility, therefore it is in interest of future applicants and operator's business that the provided information is complete.

Paragraph 3: Article 27 par. 1 of the Recast Directive lays down the obligation to provide the network statement in two languages only for the network statement not regarding all the necessary information on service facilities. Information on access restrictions is of course vital and should be given via adequate means/media. A publication of restrictions due to works in service facilities via a service facility statement is not feasible due to its inflexibility.

Paragraph 5: This obligation goes too far. It even goes beyond the requirements for infrastructure managers in Article 31 par. 2 Recast. The applicant needs information on the access conditions including charges while it does not need information on the calculation of charges. The calculation of charges is monitored by the Regulatory Body.

Paragraph 6: The concept of templates for service facility statements/different facilities is not feasible.

#### **IV. Article 5**

##### *Article 5*

##### **Principles for allocation and use of service facility capacity**

(1) Operators of service facilities shall ~~coöperate~~ **coordinate** with infrastructure managers in order to ensure an efficient and ~~aligned~~ **harmonized** allocation and use of capacity on infrastructure and in service facilities. ~~The obligation of cooperation shall also apply to operators of adjoining service facilities.~~

(2) As long as the allocation process of the infrastructure manager is pending, requests for service facility capacity shall not be rejected on grounds that a corresponding train path has not yet been allocated. In such case, the operator of a service facility concerned shall coordinate with the infrastructure manager in order to seek alignment of the allocation decisions.

~~(3) Regulatory bodies may require operators of service facilities whose service facilities are mostly used by trains for which infrastructure capacity is requested under the annual scheduling process defined in Article 43 and Annex VII of Directive 2012/34/EU, to align their schedule for receipt of requests and allocations of service facility capacity with the annual scheduling process for infrastructure capacity.~~

(4) Operators of service facilities and infrastructure managers shall coordinate ~~on a daily basis~~ to ensure efficient operation of trains from and to service facilities. ~~This coordination shall include exchange of information in case of delays.~~

(5) Operators of service facilities shall ~~inform keep a record of cooperation activities undertaken in accordance with this Article and make them available to~~ the regulatory body ~~about cooperation activities~~ upon request.

***Justification:***

Paragraph 1: The obligation of cooperation contradicts competition law.

Paragraph 3: Timeframes for awarding train paths and for awarding timeslots can differ. Furthermore the applicants for train paths and timeslots differ. Therefore this paragraph is not feasible either way. This requirement misjudges the constraints of operators of service facilities. For example Ports have a link function between hinterland infrastructure and loading and unloading of vessels on terminals. The adjustment with reserved paths can therefore only be executed to a very limited extent and would only work if it was not prescribed also for terminals. This would lead to a situation where all activities in service facilities would have to be directed to the paths granted by the operator of the service facility – without respect to the peaks when loading and unloading vessels.

Paragraph 4: “daily basis” does not meet the demand of small service facilities or service facilities which are used in a self-service system (e.g. fuel stations). The coordination should be general, therefore we recommend to delete the last sentence which will be anyway included in the general coordination.

Paragraph 5: This is not feasible in practice in case of the need for immediate and quick reaction; the obligation would create unnecessary bureaucracy. General information regarding coordination activities could be provided upon request. Also, competition authorities are in any case entitled to request information and have access to any communication between competitors.

## V. Article 6

### *Article 6*

#### **Information on available service facility capacity**

The operator of a service facility shall make available, upon request, information on available spare service facility capacity to all interested applicants on a regular basis who have formally engaged in an access request.

#### ***Justification:***

This is not feasible in practice. The measurement of capacity will depend on the concrete demands of the applicants. Moreover it is not possible to provide up-to-date information at all times, for example on the trains using the platforms in a passenger station which is subject to changes at very short intervals. In addition, it contradicts safety concerns e.g. in case of dangerous goods that regularly cannot be ensured against unauthorized access.

## VI. Article 7

### *Article 7*

#### **Requests for access to a service facility and rail related services**

(1) The operator of a service facility shall acknowledge receipt of a request for access to the facility and/or supply of a rail related service without undue delay.

(2) When the request does not contain all the relevant information needed in order to take a decision, the operator of a service facility concerned shall inform the applicant without undue delay and set an appropriate deadline for submission of the missing information. If the missing information is not submitted within the given deadline, the request may be rejected.

(3) After receipt of all necessary information, operators of service facilities shall decide on access requests within ~~the a reasonable~~ timeframe defined by the regulatory body ~~after consultation of the interested parties, unless existing national rules are already setting such a timeframe, which shall not exceed 24 hours of opening time of the facility for ad hoc requests and ten working days of receipt of all relevant information for other requests concerning the ongoing timetabling period.~~

The timeframes shall be defined prior to the publication of the network statement in accordance with Article 27(4) of Directive 2012/34/EU in order to ensure transparency and predictability for

applicants. Different deadlines may be ~~set for~~ applied to different types of service facilities and/or rail related services. Upon request of an operator of a service facility and if justified ~~due to extraordinary circumstances~~, the regulatory body may grant exemptions from these deadlines in individual cases.

~~(4) Where timeframes defined by regulatory bodies do not cover requests for additional and ancillary services, such requests shall be answered without undue delay and within the maximum timeframes defined in paragraph 3. In a case where the applicant indicates in a request for different rail related services supplied in one service facility that only their simultaneous allocation is of use for it, the operator of the service facility shall decide within the maximum timeframe defined in accordance with paragraph 3.~~

### ***Justification:***

Paragraph 3 & 4: These deadlines are not feasible in many member states - CER is aware that these deadlines have been proven to work so far in Great Britain - thus flexibility should be granted in order to achieve the best solution in each market. The implementing act should only stipulate that the request has to be answered within a reasonable time limit set by the national regulatory body after consultation of the interested parties, unless existing national rules already setting such a timeframe. This discretionary power of the regulatory body clearly set by the Recast should be respected and there is no need for a rigid common approach across member states. Such a short timeframe can be impossible in practical terms

Article 13 par.4 Recast entrusts the RB with the power to define time limits. These deadlines cannot be identical for all types of facilities. They should also be adapted based on the complexity and volume of the request: this time limit can range from a few days to several months if it is a request for a large volume or for complex facilities. Comitology is not a legitimate procedure to define a maximum time limit that the Recast directive explicitly leaves up to the RB. Furthermore, 24 hours (including reception, analysis, exchanges with operational staff onsite and, possibly, coordination) is unrealistic.

Operators of service facilities are business oriented companies, therefore they will try to adapt as much as possible to their customers.

## VII. Article 8

### Article 8

#### Handling of conflicting requests

(1) Where an operator of a service facility receives conflicting requests for service facility capacity referred to in point 2 of Annex II of Directive 2012/34/EU, it shall attempt, through ~~consultation~~ ~~coordination~~ with the relevant applicants and a facility coordination process, to ensure the best possible matching of all requests. The principles governing the consultation and facility coordination process shall be ~~set out~~ ~~included in the information on services facilities via a website link on the network statement or in the~~ service facility statement and shall aim at ensuring an optimum effective use of available capacity in the facility.

(2) In the context of the facility coordination process, different options, ~~depending on the concerned service facility,~~ that could allow resolving the conflict shall be considered. These shall include measures to maximise the capacity available in the facility without investment in resources or facilities, ~~where allowed or applicable. such as~~ This may include:

- proposing alternative timing that might allow to accommodate the different conflicting requests;
- ~~modification of opening hours or amendments to shift patterns~~
- allowing access to the facility for self-supply of services ~~if the operator offers such a possibility,~~ provided that compliance with applicable ~~safety~~ legislation and technical requirements can be ensured, ~~and no investments are needed.~~

~~(3) An applicant or the operator of the service facility may request participation of the regulatory body as observer in the facility coordination process.~~

~~(4 3) Where a solution could not be found during the consultation and facility coordination process, the operator of a service facility may allocate capacity applying transparent priority criteria. These priority criteria shall be published in the service facilities statement. In determining the priority criteria, the operator of a service facility shall take into account the following aspects:~~

- ~~– purpose of the facility~~
- ~~– (un)availability of viable alternative~~
- ~~– securing optimum use of available capacity~~

~~–level of use requested and intention and ability to use the capacity requested, including previous failure, if any, to use allocated capacity and the reasons for that failure~~

~~It may further take into account criteria such as operational criteria of the service facility.~~

The priority criteria ~~shall~~ **may** be subject to approval by the regulatory body.

***Justification:***

General comment: Article 13 par.5 Recast handles the specific cases of conflicting capacity requests and the efforts to be made to reconcile them. Following this principle, Article 8 of this implementing act should provide a number of possible measures to deal with it via a consultation and coordination process. If not possible, the priority criteria defined by the operator of service facility should be considered as a second option.

Paragraph 2, 2<sup>nd</sup> bullet point: This is not legally or technically feasible. It would lead to higher cost for the operator and it is excluded by Article 13 par. 4 Recast (no obligation to invest in resources). It would also mean an intervention in operational practice in terms of work organization and organization of working time which could evoke conflicts with the unions.

Paragraph 2, 3<sup>rd</sup> bullet point: The obligation of allowing a competitor to enter and work in your facility could lead to a distortion of competition and/or a lack of technical expertise or equipment. Neither Article 13 nor Annex II Recast address the self-supply services as it is a purely business /technical issue and should be kept entirely under business/technical decision of the operator.

Paragraph 3: This is in contradiction with normal regulatory procedures. The regulatory body comes into play when a complaint is placed or ex officio to control the process, but not to participate in it. The process itself is up to the business partners.

Paragraph 4 (new 3): There is no need for pre-established criteria in the implementing act. Each OSF should develop priority criteria which should be published in a transparent way. These criteria may vary depending on type of service, volume and duration of the service. Moreover the Regulatory body has already the power to intervene ex post in case these priority criteria are discriminatory. In addition the viable alternative concept should not be part of these criteria.

## VIII. Article 9

### Article 9

#### Refusal of access

(1) Operators of service facilities referred to in point 2 of Annex II of Directive 2012/34/EU shall ~~not~~ may reject requests for access to their service facility in the following cases: ~~or refer the applicant to a viable alternative, when capacity that matches the needs of the applicant is available in the facility or may become available during the consultation and facility coordination process,~~

- when the operator of service facility has indicated a viable alternative and after an unsuccessful consultation and facility coordination process; or
- when there is a technical or legal constraint rendering access to the facility or service provision incompatible with the specific request.

This shall also apply to requests for access for the purpose of self-supply of rail related services, where this modality is allowed and if the operator of service facility offers such a possibility.

~~This provision shall not prevent an o~~Operators of a service facility ~~from~~ may ~~reserving~~ reserve an appropriate part of service facility capacity for ad-hoc requests, where an evaluation of capacity requests has shown a need to keep reserve capacity for ad-hoc requests.

(2) Where after consultation and coordination in accordance with Article 8 a request for access to a service facility and for rail related services referred to in point 2 of Annex II of Directive 2012/34/EU cannot be satisfied, the operator of the service facility shall inform the applicant concerned ~~and the regulatory body~~ without undue delay ~~and indicate viable alternatives in other facilities.~~

The operator of a service facility within the meaning of Article 13 (4) par. 2 of Directive 2012/34/EU shall justify in writing any decision of refusal of access to service facilities referred in Article 13 par. 3 of Directive 2012/34/EU and indicate a viable alternative in another facility if there is such alternative. ~~why, on the basis of the information available, he considers that the proposed alternative meets the applicant's requirements and is thus viable within the meaning of Articles 3(10) and 13(4) of Directive 2012/34/EU and Article 10 of this Regulation.~~

(3) An operator of a service facility refusing a request for service facility capacity shall be able to demonstrate to the regulatory body and the applicant the needs preventing him from attributing the requested capacity to the applicant and the options examined in view of trying to accommodate the applicant's request. Preventive reservation of service facility capacity for own use by the

operator of the facility shall not be considered as demonstrated needs within the meaning of Article 13(5) of Directive 2012/34/EU, unless the facility operator can demonstrate to the satisfaction of the regulatory body that he ~~has plans will be in a position~~ to start using the capacity reserved within ~~two~~ 12 months at the latest. During that period, the service facility capacity concerned shall nevertheless be made available to other applicants requesting ad-hoc capacity.

~~(4) Without prejudice to Article 13(4) and (5) of Directive 2012/34/EU, any operator of service facility shall provide a written justification of the refusal of the service facility capacity request, outlining the reasons for the refusal and the options assessed in the consultation and facility coordination process.~~

### **Justification:**

General comment: These obligations only apply for service facilities and basic services under Point 2 of Annex II Recast.

Furthermore, the European Commission should clarify that the provision does not apply to cases of a justified refusal of access, e.g. in case of defaults of payment.

Paragraph 1: As the conditions and criteria for refusal are not specified in the Directive, all possible acceptable refusal cases should be covered by this article (so as to limit the risk of legal disputes). Even though operators of service facilities will always try to offer their services to all possible clients in order to develop their business, access refusal is enacted in the Recast Directive and thus this Implementing act should follow the rules established therein. Article 13 par.4 Recast allows this access refusal if there is a viable alternative, regardless if there is still capacity available. Therefore CER considers that the text proposed by the European Commission contradicts the Recast Directive and should be amended as proposed.

Neither Article 13 nor Annex II Recast address the self-supply services as it is a purely business /technical issue and should be kept entirely under business/technical decision of the operator.

CER proposes these changes on the second part of paragraph 1 in order to clarify the text. Paragraph 2: According to Article 13 par. 4 subpar. 2 Recast this obligation only applies to the categories of service facilities mentioned in Article 13 par. 3 Recast, thus this point should be clarified. In addition just the applicant should be informed, this proposal goes beyond the scope of Article 13 Recast.

Paragraph 2, 2nd Part: It goes beyond the scope of Article 13 Recast. According to Article 13 Recast the OSF has to justify a possible refusal, not its choice of alternative. The burden of the proof cannot be on the OSF, this contradicts general law principles. Moreover the OSF could not know if the alternative is a real viable alternative for the applicant. The OSF should only inform about a viable

alternative based on the public information provided by other OSF. Operators of service facilities are competitors and thus they should not exchange commercially sensitive information because that would constitute an infringement of Article 101 TFUE. It would not be possible to assess the viability of the alternative without illegal exchange of commercial sensitive information. For this reason, the OSF should base its justification on the public information and the applicant should assess if this alternative is viable or not and lodge a complaint to the Regulatory body if needed.

Paragraph 3: Facility owners should be able to invest in a facility with a business case and return on investment that may include some capacity usage. A two months period is too short. Moreover, this article should provide for a practicable solution for repeated use of facilities, for example in case of a PSO contract. In such a case, trains go to the maintenance facilities every day for a period of several years (the whole duration of the PSO contract). CER would like to ask the European Commission to clarify that the reservation made 12 months in advance can be a reservation covering each access for the whole duration of the contract so that the PSO operator is not obliged to make a new capacity reservation for every single day.

Paragraph 4: It goes beyond the scope of Article 13 Recast. Too heavy formal requirements will create additional red tape and increase costs of OSF (e.g. more staff). Article 13 par.4. 2 Recast enacts that this obligation should only be performed by OSF referred in Article 13 par. 3 Recast. Any detailed disclosure of reasons should be left for the Regulatory body in case of appeal.

## IX. Article 10

### *Article 10*

#### **Viable alternative**

(1) Where a request for a service facility ~~capacity and supply of basic services referred to in point 2 of Annex II of Directive 2012/34/EU~~ cannot be accommodated, the operator of a service facility concerned shall ~~make reasonable efforts to identify~~ indicate on the basis of the information provided by the applicant in its ~~initial complete~~ request for access, ~~the best available~~ viable alternatives in accordance with Article 13(4) of Directive 2012/34/EU. ~~In this context, the operator of a service facility shall respect the commercial confidentiality of information provided to it by applicants.~~

~~Where the request for access to a service facility or a rail related service relates to an international service, the operator of the service facility shall also take into account alternatives in other Member States through which the service concerned is running.~~

~~(2) In order to assess whether an alternative is viable, the operator of the service facility shall take into account in particular the following aspects~~

~~———— substitutability of operational requirements including available capacity on the access route and in the alternative installation, opening hours, scope/types of services offered (including additional and ancillary services)~~

~~— substitutability of physical and technical requirements of the facility, including location, gauge clearance, length of tracks, electrification, road and rail access~~

~~———— additional cost for the railway undertaking concerned resulting from access to the alternative facility instead of using the initially envisaged facility~~

~~— for freight services: impact on freight service concerned in terms of envisaged transshipment options, transportation time and envisaged delivery time~~

~~— for passenger services: impact on attractiveness of services for travellers in terms of routing, travelling time, accessibility, connections with other rail passenger services or other modes of transport.~~

(3) Where, despite reasonable efforts, the operator of a service facility referred to in Annex II, point 2 of Directive 2012/34/EU is not in a position to identify indicate a viable alternative or to assess the viability on the basis of the information provided by the applicant, in its initial request, the operator of the service facility may ask the applicant to provide additional information enabling him to identify such an alternative. If an applicant refuses to provide such information and such refusal prevents the operator of a service facility from completing a thorough assessment of the viability, the operator of a service facility shall indicate any possible the best suitable viable alternative he could identify on the basis of the available information or provide reasons why he could not indicate any possible viable alternative.

~~(4) Operators of a service facility seeking a viable alternative may request information required to enable him to assess the viability of an alternative from the operator of a facility offering a potential viable alternative. The operator of a facility offering a potential viable alternative shall provide the relevant information without undue delay.~~

***Justification:***

General comment: No further definition of the concept of viable alternative is necessary. It should be made use of the definitions laid down in the Recast text itself and the general principles of competition law – under the control of the regulatory body. In general the applicant knows best its needs as regards service facilities and which alternative fits best its needs.

Paragraph 1: The OSF should base its assessment on the public information provided by other OSFs, therefore the last sentence is not appropriate.

Paragraph 1, 2<sup>nd</sup> Part: The OSF is not in the position to produce such assessment.

Paragraph 2: the proposal goes beyond the scope of Article 13 Recast. The proposed analysis goes far beyond business scope and responsibilities of the OSF on the railway market and puts on the OSF a burden of ensuring seamless traffic flow on railway paths. This is not feasible and moreover it is not necessary: Applicants will have access to all relevant information in the network statements and the information provided by OSFs. Moreover, the provisions are excessive and too prescriptive. They would cause substantial burden for OSFs if feasible at all; high personnel expenses are necessary to fulfil this requirement: this burdens the anyhow difficult situation for the service facility.

Paragraph 3: If an applicant does not want to cooperate it should be possible to reject the allocation of the service facility. This provision causes excessive red tape.

Paragraph 4: It does not make sense to initiate negotiations between different operators of service facilities without involvement of the applicant. Such exchange of information between competitors would be in conflict with Article 101 TFUE. The only party that is able to assess about the viability of the alternative is the applicant, OSFs should use just public information, and therefore they would not have enough information to analyze the alternatives.

**X. Article 11**

*Article 11*

**Regulatory intervention in case of conflicting requests**

~~When a regulatory body decides in accordance with Article 13(5) of Directive 2012/34/EU that an appropriate part of capacity shall be granted to the applicant whose request could not be~~

~~accommodated after a consultation and coordination procedure, the regulatory body shall take account of the following aspects:~~

~~–impact on the viability of the business models of other undertaking(s) possibly affected by the decision;~~

~~–overall amount of service facility capacity already attributed to other undertaking(s) possibly affected by the decision;~~

~~–investments made into the facility by undertaking(s) possibly affected by the decision;~~

~~–viable alternatives available to accommodate needs of other undertaking(s) possibly affected by the decision.~~

**Justification:**

This article is not necessary, the Regulatory bodies already have these powers as enacted in the Recast. In addition, the regulatory body must not be restricted by a binding list of criteria.

**XI. Article 12**

*Article 12*

**Single point of contact for requests**

~~(1) In service facilities where services referred to in point 2 to 4 of Annex II of Directive 2012/34/EU are supplied either by a service provider, which is not responsible for handling requests for access to the facility, or by more than one service provider, a single point of contact for applicants to request access to the services facility and/or rail related services shall be established. Information on the contact point shall be published in the service facility statement.~~

~~(2) The applicant may choose to submit a request for access to the facility and/or rail related services directly to the different operators of service facility or to the single point of contact. The single point of contact shall act as an interface between the applicant and the operators of service~~

~~facility concerned and shall contribute to ensuring the optimum effective use of capacity available in the facility.~~

***Justification:***

There is no legal basis in the Recast Directive for this obligation. The possibility of having a single point of contact for services open to competition could represent a distortion of competition and therefore be against competition law. Even if there are services which could be considered natural monopolies, the OSF could also be providing services open to competition which are indeed competing with other services in the same facility. Regardless if the OSF is an infrastructure manager, a railway undertaking or an independent OSF, when the services are in competition this single point of contact is not feasible. Moreover the only solution would be to establish for each facility – irrespective of its size - an independent body as a one stop shop. This will increase considerably the costs of service facilities making rail less attractive than other transport modes.

Besides, the coordination between the parties is already granted by other articles of this IA.

**XII. Article 13**

*Article 13*

**Incentive mechanisms to ensure optimum effective use of service facility capacity**

Operators of service facilities ~~shall~~ may put in place measures to encourage optimum effective use of the capacity available in their facility; these ~~shall~~ may include incentives of financial nature. Such measures shall be transparent and non-discriminatory; they may include penalty payments in case of disruption or failure to use capacity reserved. Information on the measures shall be provided in the service facility statement.

***Justification:***

This article is out of the scope of Article 13 Recast. These measures should not be compulsory but just a possibility given to the OSF. Moreover, Article 35 Recast lays down the obligation to set up performance regimes for infrastructure managers only. Service facilities are not covered by these regulations.

### XIII. Article 14

#### Article 14

#### **Continuous Effective capacity management**

~~(1) Where a service facility operator encounters capacity constraints, it shall put in place mechanisms enabling him to assess on a regular basis whether the capacity available is efficiently used. This may include periodical review of agreements concluded with applicants for the purpose of considering the service facility capacity. A summary of the assessment shall be published.~~

(2) Applicants shall without delay inform the operator of a service facility of any permanent intention not to use all or part of the allocated capacity.

(3) In case of repeated failure to use capacity that has been reserved, the operator of a facility shall require the surrender of the relevant capacity.

~~4) In case of non-payment of the capacity use, the operator of a facility may require the surrender of the relevant capacity and/or refuse further access.~~

#### **Justification:**

General Comment: This article is out of the scope of Article 13 Recast. OSFs are business oriented companies and therefore they will try to adapt as much as possible in order to provide more services to their clients in the most efficient way. Capacity cannot be calculated on a general case scenario, it will depend on the service requested and its characteristics. A case by case approach should apply in order to assess how it could be adapted to the needs of the client. A general capacity assessment could lead to the loss of clients where it would be possible to provide the service with a case by case approach.

Paragraph 1: Such analysis are internal issues and shouldn't be published, especially if agreements with applicants are involved; (possibly it could be available for the regulatory body on its request).

Paragraph 2: OSF should be allowed to impose fees on booked and not used capacity as part of effective capacity management and/or request the surrendering of the capacity.

Paragraph 4: This article should clarify that an operator of a service facility could request the surrendering of the capacity and refuse any future request in case of defaults of payment.

#### XIV. Article 15

##### Article 15

###### **Publication of unused facilities for lease or rent**

(1) The timeline for calculating the two year period referred to in Article 13(6) of Directive 2012/34/EU shall start on the day following the last day of provision of a rail related service in the service facility or the parts of the service facility concerned.

The two year period shall not be interrupted by occasional use of the facility by the operator of the facility for the purpose of self-supply if according to the service facility statement the facility is not open for use by other applicants during these times.

~~(2) Owners of service facilities envisaging a reconversion of their facility shall make public their intention in due advance in order to enable undertakings potentially interested in taking over the operation of the facility to express interest in accordance with paragraph 3.~~

(3) An applicant interested in using a facility referred to in Article 13(6) of Directive 2012/34/EU shall express its interest in writing to the operator of the facility concerned ~~and inform the regulatory body~~. The expression of interest shall contain information on the needs of the railway undertaking.

Where the owner of a facility does not ensure the operation of the facility, the operator of a facility shall inform the owner of the facility about the expression of interest within 10 days.

(4) Before publishing the facility for lease or rent, the owner of the facility may allow the operator of the facility to submit his observations on the envisaged publication for lease or rent within an appropriate delay not exceeding four weeks. The operator may object to the publication for lease or rent in one of the following cases:

- he resumes operation of the facility to which the railway undertaking has requested access within a timeframe and to an extent that would satisfy the railway undertaking's demonstrated needs; or
- he submits documents proofing that the land on which the facility is located is in a formal process of being reconverted, which has been launched before the expression of interest in using the facility and which involves planning and construction works aimed at removing the current function of the facility.

(4 5) [Without prejudice to applicable procurement rules], the owner of a service facility shall publicise the facility for lease or rent on its webpage ~~in at least two official languages of the Union~~ and shall inform the infrastructure manager to whose network the facility is connected and the regulatory body. The publication shall include all information necessary to enable interested candidate to submit an offer for taking over the operation of the facility. The regulatory body shall set detailed requirements concerning the information to be published and timeframes for the publication. The infrastructure manager concerned shall also publish this information on its web portal.

(5 6) [Without prejudice to applicable procurement rules], the owner of a service facility shall select the new operator of the facility in a transparent and non-discriminatory selection process on the basis of appropriate criteria defined in the publication. The owner of the facility ~~shall aim at identifying offers that are suited to ensure an optimum effective use of the capacity of the facility and~~ shall make a reasonable offer to the most suitable candidate without undue delay.

***Justification:***

General comment: This article is out of the scope of Article 13 Recast. This provision neither deals with the details of procedure, nor with access-criteria for service facilities. Instead, it imposes certain duties on the facility owners in case of non-usage and temporary closure which clearly interfere with the property rights of the facility owners.

Moreover, there needs to be sufficient leeway for national implementation concepts

Paragraph 2: This proposal goes against Article 13 (6) Recast which clearly recognize to the OSFs the right to reconvert the facility. Otherwise the Directive would infringe the property rights of the OSF and will prevent any new comer to build a new facility.

Paragraph 6: This is not required in Article 13 (6) Recast. There is no justification with regard to such restriction of the owners interests.

## XV. Article 16

### *Article 16*

#### **Ticketing services in passenger stations**

Ticketing services in passenger stations within the meaning of point 4(d e) of Annex II of Directive 2012/34/EU shall comprise ticket vending services provided at staffed ticket offices and/or use of ~~technical appliances~~ **ticket vending machines** for ticket sales installed in passenger stations.

#### ***Justification:***

The term “technical appliances” is not clear and should be replaced by “ticket vending machines”.

## XVI. Article 17

### ~~Article 17~~

#### **~~Accounting separation~~**

~~Without prejudice to Article 13(3) of Directive 2012/34/EU, any operator of a service facility operating more than one type of service facility and/or providing more than one category of rail related services shall keep separate accounts for each type of service facility and category of service provided. The accounts shall be kept in a way that allows the regulatory body to control whether the operator of a service facility has complied with the charging rules set out in Article 31(7) and (8) of Directive 2012/34/EU.~~

#### ***Justification:***

This proposal goes beyond the scope of Article 13 (3) par. 2 Recast which does not require separate accounts for each type of service facility and category of service. It only requires a separate account for all service facilities. The aim of this provision is to separate between the accounts of railway undertakings and operators of service facilities. Further separation requirements cannot be justified from legal or economic point of view.

Additionally, Article 13 par.9 Recast specifically confers the European Commission the power to set out the details of procedure and criteria to be followed for access to the services to be supplied in the service facilities. Unlike other implementing powers in the Recast, the one contained in Article 13 par. 9 does not empower the European Commission to set out the details of the procedure and criteria to be followed for the application of Article 13 in general. Thus the Commission is not empowered to adopt further accounting separation provisions or to further detail the provisions to be found in Article 13 par.3 Recast.

## XVII. Article 18

### *Article 18*

#### **Independence requirements for service facility operators**

(1) Decision-making and organisational independence required for operators of service facilities ~~referred to in the situations described~~ in Article 13(3) of Directive 2012/34/EU shall be ensured through measures including ~~at least the following~~ the following obligations:

~~(a) operation of service facilities shall be ensured by a distinct division having its own dedicated staff;~~

~~(b) the division responsible for operating service facilities should have information systems that are separate from those of the controlling entity;~~

(c) the operator of the service facility shall not pass on confidential information to the controlling entity; ~~the operator of the service facility shall develop and adhere to a code of best practice for handling confidential information, which shall be submitted to the regulatory body for approval;~~

(d) the controlling entity shall not exercise a decisive influence on the ~~operator of the service facility in relation to day to day management of the facility, and in particular on decisions concerning~~ access requests, conditions for access and charging;

~~(e) the managers of the division in charge of operation of the service facility shall not be affected by any conflicts of interest and shall not receive bonuses related to the performance of the controlling undertaking;~~

(2) Regulatory bodies ~~shall~~ **may** assess whether the measures put in place are sufficient to guarantee organisational and decision-making independence of operators of service facilities

referred to in Article 13(3) of Directive 2012/34/EU. ~~If this is not the case, the regulatory body may impose additional measures necessary to attain full organisational and decision-making independence.~~

(3) These provisions do not apply to infrastructure managers fulfilling independence requirements of Article 7 of the Directive 2012/34/EU.

***Justification:***

The requirements listed in the article would effectively impose the establishment of separate legal entity. The criteria proposed are not consistent with Article 13 par.3 Recast in addition to be partly beyond the requirements for infrastructure managers in the aforementioned Directive and even in the fourth railway package. Service facilities must remain subject to a less strict unbundling regime according to their competitive relevance which is minor compared to track infrastructure. In addition operational flexibility, particularly of station staff would be lost potentially increasing the cost of running the railways making them less competitive with other transport modes.

The draft implementing act imposes new obligations that would require a new directive, in particular when it comes to the obligation to have dedicated staff and dedicated IT systems for service facilities. Such rules would disregard the fact that economic performance is largely dependent on shared resources (i.e. shared resources between infrastructure management & operation of service facilities owned by an IM as well as shared resources between transport services and facilities operated by an RU. This new obligation does not make sense from an economic perspective, as shared resources are often the main driver for cost containment. Regarding IT systems, the financial cost of this dedication of staff would undoubtedly be very high and would require a transition period of several years before implementation. Moreover, setting up this systems or the day-to-day management goes beyond the underlying legal requirements.

Once again CER wants to point out that Article 13 par.9 Recast specifically confers the European Commission the power to set out the details of procedure and criteria to be followed for access to the services to be supplied in the service facilities. Unlike other implementing powers in the Recast, the one contained in Article 13 par. 9 does not empower the European Commission to set out the details of the procedure and criteria to be followed for the application of Article 13 in general. Therefore the European Commission is not entitled to enact additional requirements with regard to the organizational structure, decision-making and manning of OSFs and remuneration of OSF management.

## **XVIII. New Article – Transitional period**

Some of the obligations enacted in this implementing act could not be enforced without a reasonable transitional period since the entry into force. For this reason CER would like to propose the introduction of a transitional period of minimum 3 years.

For example, this would be the minimum period needed to provide the requested information for the Network Statements. The NSs are normally finished 1 and half years in advance.

---

### **About CER**

The Community of European Railway and Infrastructure Companies (CER) brings together more than 70 railway undertakings, their national associations as well as infrastructure managers and vehicle leasing companies. The membership is made up of long-established bodies, new entrants and both private and public enterprises, representing 73% of the rail network length, 80% of the rail freight business and about 96% of rail passenger operations in EU, EFTA and EU accession countries. CER represents the interests of its members towards EU policy makers and transport stakeholders, advocating rail as the backbone of a competitive and sustainable transport system in Europe. For more information, visit [www.cer.be](http://www.cer.be) or follow us via Twitter at @CER\_railways.

This CER document is for public information.

Although every effort is made to ensure the accuracy of the information in this document, CER cannot be held responsible for any information from external sources, technical inaccuracies, typographical errors or other errors herein. Information and links may have changed without notice.