

Third Position Paper

Brussels, 08 February 2017

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

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A. Introduction

Following the invitation of the European Commission – DG MOVE – to participate in a workshop on the draft implementing act on access to services facilities, the Community of European Railway and Infrastructure Companies (CER) would like to present CER 3rd Position Paper on the implementation of Article 13 of the Recast Directive.

The concerns expressed by CER in its first and second position papers on this implementing act still apply¹.

This document is based on the EC 2nd draft implementing act ("service facilities draft for stakeholders meeting on 10 February 2017").

CER and its members propose the following specific textual amendments:

B. 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.

¹ Annex 1 & 2

(2) This Regulation shall not apply to service facilities and rail related services referred in points 2, 3 and 4 of Annex II of Directive 2012/34/EU which are not essential facilities according to Competition Law.

Justification:

This Implementing act should make a clear distinction between service facilities in competitive positions and essential facilities. 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 an essential facility exists. Otherwise, competition law and the rules enacted in the Recast Directive should apply under the control of the Regulatory bodies.

This implementing act imposes a heavy burden on operators of service facilities which will consequently increase the cost of the services rendering the sector less competitive. This additional over regulation could not be justified for services which are not considered as essential facilities.

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 description' means a document 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 and use of service facilities and rail related services; it can either be part of the network statement of the infrastructure manager or published on a common web-portal or on the website of the service facility operator, provided that the network statement contains a link to the relevant web-portal/website.

(2) 'basic service' means all services ~~related to the operation of rail transport activities, which are supplied in service facilities~~ referred to in point 2 of Annex II of Directive 2012/34/EU, ~~with the exception of services referred to in points 3 and 4;~~

[(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;]

(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 (slot);

(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) 'adjoining service facilities' means service facilities which are adjacent to one another;

(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 operator of a service facility but where a railway undertaking is performing itself the rail related service on the premises of a service facility operator [provided that access to and/or independent use of the facility is legally and technically feasible] ~~and the operator of the service facility allows self-supply of services;~~

(11) 'reconversion' means a **formal** process by which the ~~land on which~~ the service facility is ~~situated is~~ being reconverted/transformed for another purpose;

(12) 'facility owner' means an **entity**, body or firm ~~with the right to control or possess the owning a majority of shares of a~~ facility;

(13) 'ad hoc request' means a request for access to a service facility that relates to an ad-hoc path request for an individual train path in the meaning of Article 48(1) of Directive 2012/34/EU.

Justification:

Point 2: this concept needs to be simpler. Basic services are just the ones enacted in point 2 of Annex II of Directive 2012/34/EU.

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: CER would like to request the EC to clarify this definition and the status of the adjacent facility. CER members do not see the need for coordination in cases where there are 2 facilities close to each other. Plus, this coordination could not be done between competitors.

Point 9: The second part of the definition is not needed. This is already regulated in Article 13 (3).

Point 10: CER supports the new wording in []. Furthermore it should be clarified that it is up to the operator of the service facility to decide whether or not to offer the possibility of self-supply services.

Point 11: This definition goes against Article 13 (6) Recast which clearly recognizes to the OSFs the right to reconvert the facility itself, and it never refers to the land where the facility is located. Otherwise the Directive would infringe the property rights of the OSF and will prevent any business oriented investor to build a new facility.

Point 12: the owner of the facility is the entity or body who has the property rights over the facility and at the same the power of disposal. Property rights could be enjoyed in different legal forms (e.g. shares, participations, etc.).

III. Article 3

Article 3

~~Publication of~~ information on conditions for access to service facilities and the supply of services

(1) Operators of service facilities shall, ~~after consultation with the interested parties~~, make publicly available at least 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, in which services referred to in points 2 to 4 of Annex II of Directive 2012/34/EU are supplied, including information on their locations (address) and standard opening hours;
2. key contact details, including the operator's phone numbers and e-mail addresses;
3. **where relevant**, a 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, storage capacity;
4. an individual description of all rail related services which are supplied in the facility, and **indication of the type: information on their qualification as** basic, additional or ancillary services.
5. The possibility for and conditions applying to self-supply of rail related services, where legally and technically feasible, **if the operator of service facility offers self-supply ;**
- ~~6. information on procedures for requesting access to the facility and/or services supplied in the facility, including in particular deadlines for submitting requests, [and where relevant] acknowledgement of receipt of requests and timescales for handling of requests; in service facilities with more than one operator, the service facility description shall specify whether separate requests for access to the facility and/or for (various) rail related services need to be submitted;~~
7. 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;
8. all other relevant documents for the access and use of the service facility and/or supply of a rail related service; in case of service facilities operated and rail related services **referred to in Annex II point 2 letters a, b, c, f, g, and i** provided by operators referred to in Article 13(3) of Directive 2012/34/EU, this shall include model access contracts and general terms and conditions; where relevant, operators of service facilities shall also provide information on 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;
9. description of the facility coordination process referred to in Article 8, including priority criteria referred to in Article 9;
10. charges for gaining access to the facility and for each rail related service supplied therein, **respecting commercial confidentiality requirements, and discount schemes offered to applicants, including information on their objectives;**
- ~~11. information on charging principles enabling 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; in case of facilities operated and services provided by operators referred to in Article 13(3) of Directive 2012/34/EU this~~

~~shall include the methodology, rules and where applicable scales used for calculating charges;~~

12. information on ~~access to~~ private branch lines and sidings that are not part of the railway infrastructure as defined in Annex I of Directive 2012/34/EU, but are needed to get access to service facilities referred to in point 2 of Annex II of the Directive.

(2) The operator of a service facility shall make available the information listed in paragraph 1, either by publishing its own service facility description or by providing the infrastructure manager with the relevant, comprehensive [and ready to be published] information to be included in the network statement. 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 description, it shall make it available free of charge on its web portal and provide the relevant infrastructure manager with the 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. Where the infrastructure manager to whose network the facility is connected, is exempted from the obligation to publish a network statement in accordance with Article 2(3) or (4) of Directive 2012/34/EU, the service facility operator shall provide the information to the main infrastructure manager.

~~When the operator of service facilities decides not to provide a link to be included in the network statement,~~ 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 in the network statement or on their webpage about the deadline for receipt of the information to be published in the network statement. Infrastructure managers shall facilitate the collection of the relevant information by providing a common template [option 1: to be developed by IMs + RBs; option 2: to be attached to the Regulation] that operators of service facilities can 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 ~~in line with the content of the Network Statement publication.~~ Operators of service facilities shall inform railway undertakings having already subscribed to one or more services in the service facility ~~without delay in due time~~ about 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 facility operator, the service facility operators supplying services in the facility concerned shall coordinate to (also) make available information on all services provided in that facility in one single place or to indicate in the service facility description all other service facility operators supplying services in the same facility.

(5) In addition to the information provided for in paragraph 1, the regulatory body may request from the operator of a service facility referred to in Article 31(7) and (8) of Directive 2012/34/EU 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) Without prejudice to Article 56 of Directive 2012/34/EU, the regulatory body may require the operator of a service facility to provide a justification on the qualification of individual rail related services as basic, additional or ancillary services.

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 Description" (SFD). 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.

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. sub-point 4).

Sub-point 4: CER would like to request the clarification of this point by introducing the proposed changes.

Sub-point 5: The proposed text makes clear that this point just applies in case of self-supply. 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 6: This is not possible for operators of service facilities in competitive positions.

Sub-point 8: In order to be aligned with the Recast Directive, CER proposes the introduction of the concrete letters of point 2. In addition, an inclusive interpretation of this provision may assume an open access for applicants to operator's IT systems. Such an access would be problematic in terms of security of IT systems and possible additional financial burden in order to guarantee security of systems. Possible concerns include such threats like compromising sensitive and commercial data and various forms of cyber terrorism. Any provisions tackling IT systems should take into account the increasing volume and importance of digital transactions and data flow as well as legal liability of operator of service facilities to the clients. Therefore CER would like ask for EC's interpretation of the proposed provision.

Sub-point 9: CER would like to know when this coordination will take place.

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 or methodology. 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: Operators of service facilities cannot give information which is not under their control. Plus, they cannot be held responsible for this information. CER would like to ask the EC if there are existing cases in this regard.

Paragraph 2 (last paragraph): CER considers that option 1 is more appropriate, however this common template should be prepared just by the IM and not by the IM and RB. The RB would have the possibility to check this common template *ex post*. Moreover it should be clear that the service facility description is not compulsory. It should be possible to decide to have a document or a website link. It should be up to the OSF to decide the form since one format would not be possible in practice.

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 description is not feasible due to its inflexibility. Moreover CER would like to request the EC to clarify the term "subscribed".

IV. Article 4

Article 4

Applicants

(1) Requests for capacity in service facilities and supply of rail related services may be made by ~~applicants railway undertakings in accordance with the provisions of this Regulation. Applicants shall appoint a railway undertaking to conclude an agreement on use of the service facility capacity with the service facility operator.~~

~~(2) Member States may further extend the scope of entities entitled to request capacity in service facilities.~~

Justification:

Article 13 Recast refers just to railway undertakings and not applicants, thus this principle should be respected in the implementing act.

V. Article 5

Article 5

Principles for allocation and use of service facility capacity

(1) Operators of service facilities referred to in point 2 of Annex II of Directive 2012/34/EU shall coordinate with infrastructure managers in order to ensure an efficient and aligned/harmonized allocation and use of capacity on infrastructure and in service facilities **if aligned or harmonized allocation and use of capacity on infrastructure and on service facilities is necessary**; railway undertakings concerned shall be involved in this coordination. The obligation of coordination shall also apply to operators of adjoining service facilities.

Where an applicant is seeking supply of additional or ancillary services offered in the facility by a supplier other than the service facility operator referred to in the first sentence, the applicant may request involvement of the supplier concerned in the coordination.

(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 referred to in point 2 of Annex II of Directive 2012/34/EU shall coordinate with the infrastructure manager in order to seek alignment of the allocation decisions.

(3) Where applicable, operators of service facilities referred to in point 2 of Annex II of Directive 2012/34/EU shall coordinate with infrastructure managers with respect to priority rules of the annual scheduling.

(4) Operators of service facilities, infrastructure managers and railway undertakings shall coordinate **when necessary on a regular basis** to ensure efficient operation of trains from and to service facilities. This coordination **may shall** include exchange of operational information such as in particular the estimated time of arrival and departure in order to reduce delays and information on disturbances.

(5) Operators of service facilities shall be able to demonstrate to the regulatory body that they have performed the coordination activities in accordance with this Article.

Justification:

Paragraph 1: It would depend on each type of service facility whether the alignment is needed. For heavy maintenance services for example the rolling stock is taken out of service for a longer time

and therefore the alignment is not relevant. In addition in case of location for ticketing in stations, the station manager only has to grant such a location, and thus there is no need to seek any kind of alignment with train paths. Moreover they might be situations when it is clear that the capacity will be allocated in an aligned and harmonized manner with no coordination, for example when the only possible applicant for the infrastructure and service facilities capacity is one railway undertaking. Lastly CER would like to ask the EC to clarify the concept of adjoining service facility.

Paragraph 3: CER would like to know who has the power to decide about the priority rules.

Paragraph 4: This is not feasible in practice and should be undertaken on a case by case basis.

VI. Article 6

Article 6

Information on available service facility capacity

(1) The operator of a service facility referred to in ~~points 2(a) to (g) of Annex II~~ Article 13 (3) of Directive 2012/34/EU shall ~~publish indicative information on available spare service facility capacity on a regular basis~~ make available, upon request, indicative information on available spare service facility capacity to applicants who have formally engaged in an access procedure. ~~Wherever possible, such information shall be made available on a real time basis through the use of a common web portal. Information on changes/temporary restrictions of the service facility which could impact on the capability or capacity of the facility, including in particular planned works, shall also be published.~~

(2) Regulatory bodies may exempt service facilities which do not have any strategic importance for the functioning of the rail market from the application of paragraph 1.

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.

VII. Article 7

Article 7

Requests for access to a service facility and rail related services

(1) Applicants shall indicate in their application the services as defined by the operator of service facility on technical and operational basis that they are requesting; ~~the operator of a service facility shall not oblige applicants to purchase services it does not need.~~

(2) ~~In case of an electronic request t~~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. ~~If the operator of a service facility offers a service facility~~ies and rail related services used on a self-service basis, this provision shall apply to the request for conclusion of a framework contract to use the facilities.

(3) 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.

(4) After receipt of all necessary information, operators of service facilities shall decide on requests for access to and supply of services in a service facility referred to in point 2 of Annex II of Directive 2012/34/EU within the reasonable timeframe defined by the regulatory body in accordance with Article 13(4) of Directive 2012/34/EU.

Regulatory bodies shall define the timeframes 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.

For ad-hoc requests, this timeframe ~~shall~~ may be aligned with the timeframe set out in Article 48(1) of Directive 2012/34/EU. ~~For other requests concerning the ongoing timetabling period, the timeframe shall not exceed 10 working days following the receipt of all relevant information.~~

Different deadlines may be set for different types of service facilities and/or services. Upon request of an operator of a service facility and if duly justified, the regulatory body may grant exemptions from these deadlines in individual cases.

(5) Requests for additional and ancillary services referred to in points 3 and 4 of Annex II of Directive 2012/34/EU shall be answered without undue delay. Where an applicant submits an ad-hoc request for different rail related services supplied in one service facility or such a request concerning the

ongoing timetabling period, and it indicates that only their simultaneous allocation is of use, all service facility operators concerned, including suppliers of additional and ancillary services referred to in points 3 and 4 of Annex II, shall decide within the maximum timeframe defined in accordance with paragraph 4.

Justification:

Paragraph 1: The last sentence goes too far and either should be deleted or re-drafted. Customers would be able to refuse certain services although they would be necessary in practice and/or would be under the responsibility of the OSF. Please find below some examples:

- in maintenance centres, applicants can't argue they don't need the piloting service because they want to perform it themselves. It is part of the service provided by the OSF for safety reasons;
- Cases of a 500-meter siding. An applicant could come with a 300-meter train and argue they don't need the extra 200 meters and thus refuse to pay for 500. If the OSF refuses to charge only 300 meters, it should not be considered as a situation in which they force the applicant to purchase a service they don't need. However the OSF cannot allow another RU to stop in the other 200 meters for safety reason.

Moreover, if there is an abuse of dominant position, competition law (Article 102 TFUE) does apply. Practical experience demonstrates that this is not an issue. In addition, this should not be part of the application process but part of the coordination.

Paragraph 2: There is no obligation to offer such a possibility. 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.

Paragraph 4: If necessary RBs would define this timeframe as well. Pre-determined general timeframes would not allow the OSF to properly evaluate the request in terms of operational, technical and safety measures. Each service needs different evaluation time, depending on the individuality, amount, time frame of the requested service etc. Moreover, the time needed for the coordination should be taken into account.

VIII. Article 8

Article 8

Facility coordination process

(1) Where an operator of a service facility referred to in point 2 of Annex II of Directive 2012/34/EU receives conflicting requests for service facility capacity, it shall attempt, through consultation with the relevant applicants (facility coordination process), to ensure the best possible matching of all requests. Where relevant, this coordination shall also involve suppliers of additional and ancillary services referred to in points 3 and 4 of Annex II of Directive 2012/34/EU.

The principles governing the consultation and facility coordination process shall be set out in the service facility description and shall aim at meeting all requests as far as possible and [thereby] ensuring an optimum effective use of available capacity in the facility.

~~(2) Operators of service facilities referred to in point 2 of Annex II of the Directive shall not reject requests for access to their service facility or refer the applicant to a viable alternative, when capacity that matches the needs of the applicant is available in the facility or may be expected to become available during the facility coordination process. For service facilities and services used on a self-supply basis, this shall apply to the request for conclusion of a (framework) contract to use the facility.~~

(3) In the context of the facility coordination process, depending on the concerned service facility, different options that could allow resolving the conflict shall be considered. These shall also encompass measures to maximise the capacity available in the facility, where this is possible without investment in resources or facilities. Such measures 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 where the operator offers such a possibility, and where technically and legally feasible and provided that compliance with relevant applicable legislation can be ensured,;
- proposing services that can be supplied in the facility and others that may be supplied elsewhere.

~~(3 4) Without prejudice to Article 56 of Directive 2012/34/EU, an applicant and the operator of the service facility may request participation of the regulatory body as observer in the facility coordination process.~~

Justification:

Paragraph 2: This paragraph contradicts the Recast Directive. According to Article 13.4 Recast, an operator of service facility can freely refuse an application if there are viable alternatives allowing the applicant to operate the freight or passenger service concerned on the same or alternative routes under economically acceptable conditions.

Paragraph 3, 2nd 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 3, 3RD 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 4 (wrongly named 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.

IX. Article 9

Article 9

Refusal of access

(1) Where after ~~consultation and~~ coordination in accordance with Article 8 a request for access to a service facility and for rail related services supplied in these facilities cannot be satisfied, the operator of the service facility referred to in point 2 of Annex II shall inform the applicant concerned ~~and, upon request, the regulatory body without undue delay. Member States may require mandatory information of the regulatory body even in the absence of a request.~~

(2) Following this information, the operator of a service facility referred to in point 2 of Annex II of Directive 2012/34/EU and the applicant shall jointly assess whether there are viable alternatives allowing to operate the ~~freight or passenger~~ service concerned ~~so far as it is possible without a requirement on the applicant to disclose business strategy.~~

To this end the operator of the service facility shall ~~identify~~ **indicate** possible alternatives and assess **the viability**, on the basis of information provided by the applicant and published in accordance with Article 3, ~~the viability taking into account in particular the following criteria:~~

~~–substitutability of operational requirements such as 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, such as location, gauge clearance, length of tracks, electrification, road and rail access, signalling system~~

~~— estimated additional cost for the railway undertaking concerned resulting from access to the alternative facility instead of using the initially envisaged facility, such as track access charges and charges for access to and use of the alternative facility~~

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

~~–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.~~

In this context, the operator of a service facility shall respect the commercial confidentiality of information provided to it by the applicant.

The operator of the service facility shall inform the applicant about the outcome of its assessment; the applicant shall consequently assess whether using the proposed alternative would allow to operate the envisaged service under economically acceptable conditions.

~~*[Operators of a service facility and applicants may request information required to enable them 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.]*~~

~~(3) In a case where, following this assessment, the operator of the service facility and the applicant conclude that no viable alternative exists, and it is not possible to accommodate the request for capacity following the procedure set out in Article 8, the operator of a service facility may reject the request. The applicant concerned may complain against the decision to the regulatory body in accordance with Article 13(5) of Directive 2012/34/EU.~~

In case of various conflicting requests for which no alternatives could be identified in accordance with the procedure set out in paragraph 2, the operator of the service facility may apply priority

criteria to allocate remaining available capacity. Such priority criteria shall be published in the service facility description and be subject to review by the regulatory bodies. ~~In determining the priority criteria, the operator of a service facility shall take into account in particular the following aspects:~~

~~–purpose of the facility~~

~~–(un)availability of alternatives~~

~~–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~~

~~–necessary consequence of an agreed train path.~~

In a case where, following this assessment, the operator of the service facility and the applicant conclude that no viable alternative exists, and it is not possible to accommodate the request for capacity following the procedure set out in Article 8, the operator of a service facility may reject the request. The applicant concerned may complain against the decision to the regulatory body in accordance with Article 13(5) of Directive 2012/34/EU.

~~(4) In a case where it is not possible to accommodate a request for capacity following the procedure set out in Article 8, but the operator of the service facility and the applicant have jointly identified viable alternatives in accordance with the procedure set out in paragraph 2, the operator of the service facility may reject the request.~~

~~(5) Notwithstanding paragraphs (3) to (5) an operator of a service facility referred to in Article 13(3) of Directive 2012/34/EU, which after having performed the facility coordination process in accordance with Article 8, is not in a position to accommodate the request of an applicant, shall identify alternatives, assess their viability on the basis of the criteria set out in paragraph 2 and indicate them to the applicant. For services referred to in Article 13(3) of Directive 2012/34/EU the service facility operator shall justify in writing why the request could not be accommodated and 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 the provisions of this Regulation. If the applicant concerned does not consider the alternatives proposed to be viable, he may complain to the regulatory body in accordance with Article 56 of Directive 2012/34/EU.~~

~~(6) An operator of a service facility rejecting 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. The operator of the service facility may decide to take into account only the~~

operationally available service facility capacity. Operationally available capacity does not comprise in particular capacity preventively reserved for own use within two months or a longer period approved by the regulatory body and capacity needed for repair works in the facility or buffering in case of operational disruptions.

~~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 will be in a position to start using the capacity reserved within two months at the latest or a longer period approved by the regulatory body. During that period, the service facility capacity concerned shall nevertheless be made available to other applicants requesting ad-hoc capacity.~~

(7) Where, after receipt of the information referred to in paragraph 2, an applicant, whose request cannot be accommodated following the procedure described in Article 8, informs the operator of a service facility on its own initiative and in writing that it does not wish the operator of the service facility to ~~identify and~~ indicate viable alternatives, the operator of a service facility shall not be subject to the provisions of paragraphs 2 to 5.

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: 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. Member States already have this power, thus there is no need to include this in the IA.

Paragraph 2: the proposal goes beyond the scope of Article 13 Recast. The proposed criteria 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. 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.

The wording "identify" goes beyond the underlying legal text in Art. 13 para. 4 Recast.

Paragraph 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.

Paragraph 4: This provision is unnecessary. According to Article 13.4 Recast, an operator of service facility can freely refuse an application if there are viable alternatives allowing the applicant to operate the freight or passenger service concerned on the same or alternative routes under economically acceptable conditions.

Paragraph 5: the first paragraph should be deleted due to the abovementioned reasons.

Paragraph 6: See comment above.

Paragraph 7: The wording "identify" goes beyond the underlying legal text in Art. 13 para. 4 Recast.

X. Article 10

Article 10

Regulatory intervention

~~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 facility coordination procedure, the regulatory body shall, where relevant, take account in particular the following aspects:~~

- ~~– impact on the viability of the business models of other applicants 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, with the exception of investments covered by public funds;~~
- ~~– viable alternatives available to accommodate needs of other undertaking(s) possibly affected by the decision, including in case of international services alternatives in other Member States through which the service concerned is running;~~

~~–impact on the viability of the business model of the operator of the service facility.~~

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 11

~~Article 11~~

Single point of contact for requests

~~In service facilities where services referred to in point 2 to 4 of Annex II of Directive 2012/34/EU are provided either by a supplier, 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 information on access to the service facility and/or rail related services shall be established. Information on the contact point shall be published in the service facility description. The single point of contact 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 and provided by different operators 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.

However, CER does not oppose the possibility that a single point of contact would be established within one facility where different services are provided by different departments within the same company.

XII. Article 12

Article 12

Measures to ensure optimum effective use of service facility capacity

(1) Operators of service facilities referred to in Article 13(3) ~~shall~~ **may** put in place measures to encourage optimum effective use of the capacity available in their facility. Such measures shall be transparent and non-discriminatory; they may include penalty payments or an obligation to surrender capacity in case of disruption or repeated failure to use capacity reserved, unless the reasons are beyond the control of the applicant. **If applicable**, information on the measures shall be provided in the service facility description.

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

~~3) 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.~~

~~(3) Where a service facility operator referred to in point 2 of Annex II encounters capacity constraints and has had a request expressed as per Article 7 or anticipates such a request, 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 kept.~~

Justification:

Paragraph 1: This is out of the scope of Article 13 Recast. These measures should not be compulsory but just a possibility given to the OSF. Article 35 set out performance regimes just for the IM but not for the OSF.

Paragraph 3: This 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 general and regular 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 3(New): 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.

XIII. Article 13

Article 13

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 supply 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 description the facility is not open for use by other applicants during these times.

(2) 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~~; a request for access to the facility shall be considered as expression of interest. 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.

Where, upon receipt of the expression of interest the operator of the service facility decides to resume operations within a timeframe and to an extent that satisfies the railway undertaking's demonstrated needs, the owner of the facility shall not be obliged to publicise the facility for lease or rent.

(3) 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 by submitting documents proving that the ~~land on which the~~ facility ~~is located~~ is in a formal process of reconversion ~~or sale~~, 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~~.

The regulatory body may assess the documents concerning the reconversion ~~or sale~~ process.

(4) [Without prejudice to applicable procurement rules], the owner of a service facility shall publicise a notice concerning the lease or rent of the facility 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. This shall include in particular information on the technical equipment of the service facility, the award criteria as well as the address and time limit for submission of tenders. The infrastructure manager concerned shall also publish this information on its web portal. ~~The minimum time limit for receipt of tenders shall be 30 days from publication of the notice.~~

(5) [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 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, it needs to be sufficient leeway for national implementation concepts

Paragraph 3: This proposal goes against Article 13 (6) Recast which clearly recognize to the OSFs the right to reconvert or sale the facility. Plus Article 13 (6) Recast never refers to the land where the facility is located, just the facility itself. Otherwise the Directive would infringe the property rights of the OSF and will prevent any new comer to build a new facility. CER would like to request the EC to clarify this paragraph.

Paragraph 4: There is no legal basis to impose such a deadline.

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

XIV. Article 16

Article 16

Independence requirements for service facility operators

(1) Without prejudice to Article 13(3), third subparagraph of Directive 2012/34/EU decision-making and organisational independence required for operators of service facilities referred to in Article 13(3), first subparagraph of Directive 2012/34/EU shall be ensured through measures including ~~at least~~ the following:

(a) ~~operation of service facilities shall be ensured by a distinct division;~~

(b) where information systems are common to the controlling entity and the service facility operator, access to sensitive information relating to service facility access requests, ~~conditions for access~~ and charging shall be restricted to authorised staff of the division responsible for operating the service facility; sensitive information relating to service facility access requests, ~~conditions for access~~ and charging shall not be passed on to the controlling entity;

(c) the controlling entity shall not exercise a decisive influence on decisions concerning service facility access requests, ~~conditions for access~~ and charging;

~~(d) the managers of the division in charge of taking decisions on service facility access requests, conditions for access and charging 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 decide on additional measures necessary to ensure organisational and decision-making independence.~~

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

Justification:

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.

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).

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.

The definition of essential facilities for the infrastructure manager comprises only decisions on access and pricing. The same should apply for service facilities. The wording "Conditions for access" is too wide.

XV. Article 17

Article 17

Entry into force

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

Articles 3 and 6 shall apply from [...] in time for the working timetable starting on 8 December ~~2020~~²⁰¹⁸.

Article 17 shall apply from 25 December ~~2020~~²⁰¹⁸.

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

Justification:

Some of the obligations enacted in this implementing act could not be enforced without a reasonable transitional period since the entry into force. There is a need for a consistent transitional period avoiding the partial application of this regulation. For this reason CER would like to propose the introduction of a transitional period of minimum 3 years.

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 or follow us via Twitter at @CER_railways.

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