

**Position Paper**

Brussels, 18 May 2018

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# **Public Consultation on the draft implementing regulation on Economic Equilibrium Test for national rail regulatory bodies**

## **CER answer to the Public Consultation on the draft implementing regulation on Economic Equilibrium Test for national rail regulatory bodies**

During the past months the Community of European Railways and Infrastructure Companies (CER) presented in several meetings with the European Commission and other stakeholders concerns of the Railway sector regarding the Draft Implementing Regulation on the Economic Equilibrium Test proposed by the European Commission (DG MOVE). In November 2017 CER produced a position paper underlining all of the points that required attention in the 2<sup>nd</sup> Draft of the Implementing Regulation released by the European Commission in September 2017. Since then the Draft of the Implementing Regulation was to some extent adjusted with the final text being published and opened for feedback on 20 April 2018. CER welcomes the opportunity to reply to this public consultation and reiterate certain issues.

The Rail sector understands the great importance of this future piece of legislation and the deadlines enacted in the Fourth Railway Package. However, CER members consider:

### **CER Proposals**

#### **I. Recitals**

(3) It is therefore necessary to ~~balance~~ **assess** the legitimate interests of operators performing a public service contract and competent authorities, on the one hand, with the overarching objectives of completing the single European railway area and reaping its wider social benefits, on the other hand. ~~The economic equilibrium test should achieve a balance between those competing interests.~~

...

(5) Such exclusive rights should not preclude the right of access of other railway undertakings, unless the economic equilibrium test shows that, taking into account the value of the exclusive rights, the new service would have a substantial negative impact on the profitability of services operated under the public service contract or the net cost of their provision for the competent authority, or both. ~~The focus of the analysis should depend, in particular, on risk sharing arrangements stipulated in the public service contract.~~

(6) An economic equilibrium test should be requested only in respect of passenger rail services which are not provided under a public service contract and which are either entirely new or entail a substantial modification of an existing service. It should be for the regulatory body to assess whether a proposed modification of a rail passenger service should be considered substantial. ~~An increase in frequencies or number of stops could be considered a substantial modification. On the other hand, a variation in prices should not be considered a substantial modification, provided it is reasonable and consistent with normal market behaviour, and where relevant, with the business plan submitted to the regulatory body at the time the previous economic equilibrium test was carried out.~~

### Note:

Third Recital: CER members understand that finding a balance between various market business interests should be taken into consideration, however the main objective of the Directive is to analyze the impact of the new service on the public service contracts as enacted in Article 11 (2) of Directive 2012/34. Therefore the proposed test goes beyond the scope of the Directive.

Fifth Recital: The last sentence of the Recital (5) should be deleted as it goes beyond the scope of the economic equilibrium test.

Sixth Recital: Variation in prices should be considered as “substantial modifications”. What kind of parameters and market segments are considered to assess whether a variation in prices is “reasonable and consistent with normal market behaviour”?

## II. Article 3

### Article 3 Definitions

For the purposes of this Regulation, the following definitions shall apply:

- (1) ‘new rail passenger service’ means a rail passenger service designed to be operated as a **regular** time-tabled service, that is either entirely new, or that implies a substantial modification of an existing rail passenger service, in particular in terms of increased frequencies of services or increased number of stops, and which is not provided under a public service contract;
- (2) ‘economic equilibrium test’ means the assessment process **as foreseen according to Article 11 paragraph 1 to 4 of the Directive 2012/34/EU and further** described in Article 10 and carried out by a regulatory body at the request of an entity referred to in Article 5 in order to determine whether the economic equilibrium of a public service contract would be compromised by the proposed new rail passenger service;
- (3) ‘public service contract’ means a public service contract as defined in point (i) of Article 2 of Regulation (EC) No 1370/2007 in the area of rail transport;
- (4) ‘competent authority’ means a competent authority as defined in point (b) of Article 2 of Regulation (EC) No 1370/2007;
- (5) ‘net financial **impact balancee**’ means **the net financial impact on** balance of costs and revenues **arising from the discharge** of the public service **obligations stipulated in a public service** contract.
- (6) ‘exclusive right’ means a right as defined in point (f) of Article 2 of Regulation (EC) No 1370/2007.

**Note:**

Paragraph 1: the term “regular” is not defined, and thus it could lead to diverging interpretations by the regulatory bodies.

Paragraph 2: the proposed addition should be made for the sake of consistency with the Directive 2012/34 which remains the basis and in particular describes the target and scope of the EET.

Paragraph 5: It should be clear that the Implementing regulation should consider the impact of the new service on the PSO.

**III. Article 4**

*Article 4*

**Notification of a planned new rail passenger service**

1. The applicant shall notify the infrastructure managers and the regulatory bodies concerned of its intention to operate a new rail passenger service at least 18 months before the entry into force of the working timetable to which the request for capacity refers, in accordance with Article 38(4) of Directive 2012/34/EU.

2. Regulatory bodies shall develop and publish on their website a standard notification form to be used by applicants, which shall contain exclusively the following information:

- (a) the applicant's name, address, legal entity, registration number (if appropriate);
- (b) contact data of the person responsible for queries;
- (c) data of licence and safety certificate of the applicant or indication of the stage of the procedure to obtain them;
- (d) detailed route indicating location of departure and destination stations as well as all intermediate stops;
- (e) planned starting date for the operation of the proposed new rail passenger service;
- (f) indicative timing, frequency and capacity of the proposed new rail passenger service, including proposed departure times, arrival times and connections as well as any deviations in frequency or in stops from the standard timetable, in each direction;
- (g) indicative information on the rolling stock the applicant plans to use.

3. The information regarding the planned operation of the new rail passenger service shall cover at least the first three years and, as far as possible, the first five years of operation. The regulatory body may, however, agree to a shorter period.

4. The regulatory body shall publish on its website the standard notification form submitted by the applicant and shall notify the following without undue delay and at the latest within 10 days of receiving a complete notification form:

- (a) any competent authority that has awarded a public service contract for a rail passenger service on that route or an alternative route;
- (b) any other interested competent authority with the right to limit access under Article 11 of Directive 2012/34/EU;
- (c) any railway undertaking operating services under public service contract on the route of the new rail passenger service or an alternative route.

5. All information provided by the applicant via the standard notification form and any supporting documents shall be sent to the regulatory bodies and infrastructure managers in electronic form. However, the regulatory body may, in duly justified cases, accept that documents be submitted in paper format.

6. If the notification is incomplete, the regulatory body shall inform the applicant that incomplete requests will not be considered and shall give the applicant the possibility to complete its request within a reasonable time not exceeding two weeks.

7. The applicant shall notify the regulatory body of any substantial change to the timing, frequency and capacity of the new passenger rail service the applicant proposes while the test is being carried out. The regulatory body shall inform thereof the entities referred to in the paragraph 4. In case of substantial changes, a new economic equilibrium test may be requested.

**Note:**

New Paragraph 7: This is justified by the possible differences between a new rail passenger service as initially notified and the final parameters of the service.

**IV. Article 7**

*Article 7*

**Information requirements for the economic equilibrium test**

1. The entity requesting the economic equilibrium test shall provide the following information:
  - (a) the requesting entity's name, address, legal entity, registration number (if appropriate);
  - (b) contact information of the person responsible for queries;
  - (c) substantiation that the economic equilibrium of the contract risks being compromised by the new rail passenger service;
  - (d) if the requesting entity is a competent authority or the railway undertaking performing the public service contract, a copy of the public service contract.
2. The regulatory body may request ~~any necessary the below information, including, as the case may be:~~

(a) from the competent authority:

- (1) relevant traffic, demand and revenue forecasts, including forecast methodology,
- (2) where appropriate, the methodology and data used to calculate the net financial effect pursuant to Article 6(1) of Regulation (EC) No 1370/2007 and the Annex to that Regulation, ~~substantiating compliance of the contract with Union law;~~

(b) from the railway undertaking performing the public service contract:

- (1) copy of the public service contract, if not provided under point (d) of paragraph 1,
- (2) ~~part of~~ the undertaking's business plan **relevant for the public service contract**,
- (3) information on revenues and profit margins gained by the undertaking, **providing services according to the public service contract**,
- (4) timetable information for the services, including departure times, intermediate stops, arrival times and connections, **according to the public service contract**,
- ~~(5) estimated elasticities of the services (e.g. price elasticity, elasticity with respect to quality characteristics of the services);~~
- ~~(6) possible competitive responses to the new rail passenger service;~~
- (7) cost of capital and operating costs for services provided under the public service contract, as well as variations in costs and demand induced by the new rail passenger service;

(c) from the applicant, information concerning its plans and business strategy, including:

- (1) the business plan for the new rail passenger service concerned,
- (2) forecast of passenger traffic and revenues,
- (3) pricing strategies,
- (4) ticketing arrangements,
- (5) rolling stock specifications (e.g. load factor, number of seats, vehicle configuration),
- (6) marketing strategy;

(d) from the infrastructure manager:

- (1) **preliminary** information regarding the relevant lines or sections, in order to ensure that the new rail passenger service can be run on the infrastructure concerned,
- (2) **preliminary** information on potential performance and resilience impacts of the proposed new rail passenger service,
- (3) **preliminary** assessment of impacts on capacity **use planning**,

~~(4) plans for developing infrastructure as regards routes covered by the proposed new rail passenger service, including an indication of the time when any such plans will be implemented;~~

~~(5) information on framework agreements concluded or under discussion with the undertaking performing the public service contract.~~

Unless a contractual arrangement has been made with the regulatory body on this purpose, the infrastructure manager shall not be held liable for the information or assessment delivered.

The information obligations of the infrastructure manager set out in point (d) of the first subparagraph of this paragraph shall be without prejudice to its obligations under the allocation procedure referred to in Section 3 of Chapter IV of Directive 2012/34/EU.

3. All information shall be sent to the regulatory body in electronic form. The regulatory body may, however, in duly justified cases, accept that documents be submitted in paper format.

### **Note:**

Paragraph 2: Provisions of Art. 5.1. (Deadline) and Art. 7.1. (Mandatory information to be provided) should establish formal requirements (according to the administrative law) for the RB's decision. Other information (according to the provisions of Art. 7.2) may be requested by a regulatory body, but should not be mandatory in order to take a decision.

Paragraph 2 (a) (2): this wording leaves some room for interpretation and could be understood as providing the regulator the new competence of checking the compliance of the contract with EU law, which is out of the scope of the act. The compliance of public services contracts with the financial/compensation rules of Regulation 1370/2007 is to be considered in the context of the PSO-awarding phase – not for the EET.

Paragraph 2 (b) (2): the whole Business Plan should not be provided, but rather only the relevant parts that refer to the PSO. Everything else should be omitted. In the case of the Applicant, it is specified how the requested information refers only to the "business plan for the new rail passenger service concerned" (Art. 7.2.(c)(1)). As in this case, all the information provided by the RU should be referred only to the public service contract.

Paragraph 2 (b) (3): Revenue and margin stream different from PSCs shall not be considered in performing the test.

Paragraph 2 (b) (5): Both prices and characteristics of services may not be fully under RU's control as often (or partially) they have to be consulted with the competent authority. RUs performing a public service contract are not necessarily able to provide such information at that stage, as the launch of a new rail passenger service is a parameter that was not known when the PSO contract was designed. CER suggests deleting this point, even more since the information is not required from the operator willing to launch a new service.

Paragraph 2 (b) (6): It is difficult to see how this can be anticipated. This should not be made part of the assessment. Also, is difficult to apply the term "competitive" to the PSO contracts. As a

principle, RUs performing a public service contract are unable to provide a competitive response to a new rail passenger service contract as they are bound by a contract with a competent authority.

Paragraph 2 (c) (7): When the EET is implemented to evaluate the impact of the new service on the public service contract, it is applied by one EU regulatory body only, since in many cases other EU regulatory bodies will not be notified about the intention to operate a part of the international line on their territory.

Paragraph 2 (d) (1-3): “preliminary” should be added to the points (1), (2) and (3) as the accuracy of such information and impact assessment may not be fully ensured at the time the economic equilibrium test is performed. Furthermore, a sentence is added at the end of point (d) to make clear that an infrastructure manager cannot be held liable for information or an assessment the accuracy of which may not be fully guaranteed.

Paragraph 2 (d) (3): It should be opportune to keep the former version in order to be compliant with the provision of the art. 10.5 (c).

Paragraph 2 (d) (4): this point should be removed as this information is not necessary for the EET and is already being taken into account during another assessment.

Paragraph 2 (d) (5): this point should be removed as the framework agreements are outside of the scope of the EET. As alternative it should be preferable to focus on the FA related to routes covered by the proposed service avoiding administrative burdens for IM.

## V. Article 8

### *Article 8* **Confidentiality**

1. The regulatory body shall not disclose commercially sensitive information received from the parties in connection with the economic equilibrium test.
2. The entity requesting the economic equilibrium test and the applicant shall substantiate any proposed non-disclosure of commercially sensitive information at the time the information is provided to the regulatory body. Such information may include, in particular, technical or financial information relating to an undertaking's know-how, business plan, cost structures, marketing and pricing strategies, supply sources and market shares. The regulatory body shall redact any commercially sensitive information from its decision to be notified and published in accordance with Article 11(3).
3. If the regulatory body finds that the reasons for non-disclosure provided under paragraph 2 cannot be accepted, that decision shall be communicated **and justified in writing** to the party requesting confidentiality.
4. Where so provided for in national law, the regulatory body's decision on confidentiality may be subject to judicial review, which **may shall** have suspensive effect on the disclosure of information.

### **Note:**

Paragraph 3: Bearing in mind that the refusal of non-disclosure may establish the basis for further legal steps (according to the Art. 56(1) of the Directive), the RB should provide an exhausting legal justification in writing. The burden of proof should be put on the RB.

Paragraph 4: Such an appeal should be suspensive because the disclosure of information has immediate effects, namely the availability of confidential information to third parties whose use of such information can damage the interests/business strategy of the company.

## **VI. Article 9**

### *Article 9*

#### **Procedure for the economic equilibrium test**

1. The regulatory body may request the entity requesting the economic equilibrium test to provide it with ~~any additional~~ information ~~it deems necessary~~ in accordance with Article 8(2) within one month of receiving the request. The requesting entity shall provide such information within a reasonable deadline set by the regulatory body. The regulatory body may request further information if it ~~demonstrates~~ ~~considers~~ that the ~~additional~~ information received is not sufficient.
2. In the event that six weeks before the final date for receipt of requests for capacity set in accordance with point 3 of Annex VII to Directive 2012/34/EU the information provided by the requesting entity is still incomplete, the regulatory body shall perform the test on the basis of available information. ~~If, however, the regulatory body considers that the information is insufficient to perform the test, it shall reject the request.~~
3. Within one month of receiving the request for the economic equilibrium test, the regulatory body shall also ask other parties referred to in Article 8(2) to provide it with the information necessary to perform the test in accordance with that provision, to the extent that such information can reasonably be provided by the party concerned. Where the information thus provided is incomplete, the regulatory body may request further clarifications, setting reasonable deadlines. ~~If those are not met, the regulatory body shall perform the test on the basis of available information and justified reasoning.~~
4. In the event that six weeks before the final date for receipt of requests for capacity set in accordance with point 3 of Annex VII to Directive 2012/34/EU the information provided by the applicant seeking access is still incomplete the regulatory body shall perform the test on the basis of available information. If, however, the regulatory body considers that the information provided by the applicant is insufficient to perform the test, it shall adopt a decision resulting in access being denied. ~~This shall not prevent the applicant from renewing a notification of a planned new rail passenger service.~~
5. The regulatory body shall adopt a decision within six weeks from the receipt of all relevant information, and in any event before the final date for receipt of requests for capacity set in

accordance with point 3 of Annex VII to Directive 2012/34/EU. The regulatory body shall inform the infrastructure manager of its decision without delay.

6. If, at the time the applicant's notification referred to in Article 4 is received, a public service contract covering the same route or an alternative route is being competitively tendered and the tender documents have already been published by the competent authority, the regulatory body shall carry out the economic equilibrium test ~~as soon as possible without undue delay, and at the very latest according to the deadline set out in Article 9(5)~~, having regard to the state of advancement of the tender and the availability of the information required. It shall adopt a decision at the latest when the tender results are announced or 18 months from receipt of the applicant's notification, whichever is earlier.

7. ~~Where the economic equilibrium test has been requested during the award process of a public service contract, without prejudice to paragraphs (1) to (5), the decision of the regulatory body remains valid after the award of the new public service contract. Notwithstanding Article 6, the entities listed in Article 4(4) may request a reconsideration of a decision resulting from the economic equilibrium test when there is a significant change in the parameters of the new public service contract in comparison with the parameters available when the regulatory body performed the economic equilibrium test. The request for reconsideration shall be submitted within 3 months of simultaneous operation of both services.~~

### **Note:**

Paragraph 1: The range of information that may be requested by the RB is very wide and the requesting entity will bear all related costs of providing such information. Bearing in mind the above, the request for any further information should be justified in writing by the RB. In addition, the notion "further" is not precise as it suggests that the RB requests additional information (on top of obligatory information), while the previous line mentions that the purpose of the provision is to complete the information. We propose the last amendment to provide a more balanced legal requirements for requesting entities and applicants (in the light of Art. 10.4 "the RB shall perform the test on the basis of available information.") The proposal will also allow RBs to meet requirements of the national law.

Paragraph 2: It is not clear what the difference is between "incomplete" and "insufficient". The last sentence of the paragraph contradicts the rest of it.

Paragraph 3: Without this sentence, the non-provision of information by the other parties does not bring any consequence. According to CER members, all parties involved in the EET shall be treated equally and suggests to align the last sentences of points 1, 2 and 3.

Paragraph 4: Article 12 does not foresee the case where access is denied to a new high speed rail passenger service. In order to align article 10 with article 13, CER suggests adding this sentence, in order to allow an applicant to renew a notification.

Paragraph 6: would lead to a significant restriction of new open access applications. If the open access provider knows he would have to wait 18 months before the regulatory body will take a decision on his application, market entry will simply not occur. While being on hold, open access providers would be reluctant to continue planning for the service and could not take important business decisions such as those regarding rolling stock investments which have to be place a long

time in advance. Together with the notification period of 18 months, this provision could lead to an application for an open access service being deterred for over three years. Nevertheless, a clarification is needed about the proposed timeframe of 18 months for the adoption of the EET decision by the RB.

Paragraph 7: CER suggests keeping the possibility for the regulatory body to re-examine its decision after the award of the new public service contract, but under the above-specified conditions.

## **VII. Article 10**

### *Article 10*

#### **Contents of the economic equilibrium test and assessment criteria**

1. The regulatory body shall assess whether the economic equilibrium of a public service contract would be compromised by the proposed new rail passenger service. Economic equilibrium shall be considered as compromised where the new rail passenger service would have a substantial negative impact on at least one of the following elements:

- (a) the profitability of services that the railway undertaking operates under the public service contract;
- (b) the net cost for the competent authority awarding the public service contract.

2. The analysis shall refer to the public service contract as a ~~whole, not to result of a conjugation of~~ individual services operated under it, over its entire duration. Predetermined thresholds or specific criteria may be applied but not ~~strictly or~~ in isolation from other criteria.

3. The regulatory body shall assess the ~~variation in the~~ net financial ~~impact of the proposed new service on balance of~~ the public service contract. The analysis of costs and revenues generated in operating the services covered by the public service contract after the market entry of the new rail passenger service shall ~~include analyse~~ the following elements:

- (a) variation in costs incurred by the railway undertaking performing the public service contract ~~(including as appropriate any cost savings, such as those arising from the non-replacement of rolling stock reaching the end of its useful life or staff whose contract ends);~~
- (b) negative (financial) effects generated for the public service by the proposed new open access passenger service;
- ~~(b)~~ (c) positive financial effects generated within the network under public service contract by the proposed new rail passenger service ~~(such as bringing passengers who might be interested in a connection with a regional service covered by the public service contract);~~
- ~~(c)~~ possible competitive responses by the railway undertaking performing the public service contract;

(d) impact on investments by railway undertakings, or by competent authorities, if appropriate, ~~in particular in rolling stock;~~

~~(e) the monetary value of any existing exclusive rights.~~

~~4. The regulatory body shall assess the significance of the impact taking into account, in particular, the contractual arrangements between the competent authority and the railway undertaking operating the public services, including where applicable the level of compensation determined in accordance with the Annex to Regulation (EC) No 1370/2007 or resulting from competitive award and any mechanisms for sharing risks such as traffic and revenue risks.~~

5. The regulatory body shall also assess:

(a) the ~~net~~ benefits or losses to customers arising from the new rail passenger service in the short and medium term;

(b) the impact of the new rail passenger service on the performance and quality of railway services;

(c) the impact of the new rail passenger service on timetable planning for railway services, ~~based on the information provided by the infrastructure manager according to the Article 7.2.(d).3.~~

6. Where the regulatory body receives more than one application for access, it may take different decisions on the applications received, based on the analysis of their respective impacts on the economic equilibrium of the public service contract, ~~net~~ benefits to customers and network impacts.

7. The assessment carried out in accordance with this Article is without prejudice to the regulatory body's obligation to report State aid issues to the national authorities in accordance with the second subparagraph of Article 56(12) of Directive 2012/34/EU.

### Note:

Paragraph 1: The notion of substantial negative impact should have quantitative references. There is too much discretionary power on the side of Regulatory Bodies in the current proposal leading to no legal certainty to the PSC operator. There is no information about the methodology used to calculate the impact on the "profitability" of the services offered by the PSO operator and on the "net cost" for the authority that award the service.

Paragraph 2: Public service contracts are being awarded as a sum of individual services (links). Competent authorities should grant the optimal level of compensation which is rewarded to service operators, therefore this involve a combination of both commercially profitable and unprofitable services within the same public service contract. Since new rail passenger service proposals are invariably to be operated on lucrative links, the tests referred to the public service as a whole could never be concluded as compromising the economic equilibrium of the entire public service contract.

Paragraph 3: These proposals are required to keep consistency with the other comments. It would be appropriate to introduce a bullet concerning the loss of revenues for the railway undertaking and the increase of contribution it will ask to the competent authority

Paragraph 3 (a): As public service obligations are set in a contract, the RU performing the contract does not have leeway to achieve cost savings.

New Paragraph 3 (b): this point should be added to insure that not only positive but also negative outcomes for the services are taken into account, i.e. not only costs (point (a)), but also revenues, network-effects etc. The corresponding recital (7) should be then adapted accordingly.

Paragraph 3 (c): As a principle, RUs performing a public service contract are unable to provide a competitive response to a new rail passenger service contract as they are bound by a contract with a competent authority.

Paragraph 3 (e): This new addition should be removed as it is mentioned in the Recital 5 that 'such exclusive rights should not preclude the right of access of other railway undertakings' and it is the *raison d'être* of this IA. In other words, the existence of an EET shows that no right is exclusive. It is not clear what value could be objectively put on this right. Furthermore, there might be a risk that this is used for protectionist reasons.

Paragraph 4: This paragraph shall be deleted as the risk sharing arrangements have nothing to do with the EET. The negative substantial impact referred to in point 1 does not depend on the risk-sharing arrangements set in a contract. The economic equilibrium can indeed be compromised even if the operator is not bearing any risk, as a substantial cost increase for the competent authority (point 1.b) is enough to consider that the economic equilibrium is compromised. This provision seems to provide the regulator with the competence to assess the content of a PSO contract which, for CER, is out of the scope of this draft.

Paragraph 5 (a): "Or losses" should be inserted to be consistent with the proposed new paragraph 3(b).

Paragraph 5 (c): In order to be consistent with the Art. 7.2.(d)(3), the evaluation of the impact on timetable planning by the regulatory body should be based on the assessment of impacts on capacity planning provided by the infrastructure manager playing the role of technical advisor of the regulatory body during the EET process.

Paragraph 6: CER would like to ask the European Commission how the regulatory body should deal with several successive requests. What would this article mean practice in those cases? Consider a situation where a proposal from a new entrant is tested according to the Economic Equilibrium Test and its proposed service is approved as it will give sufficient net benefits and the impact on the undertaking of the PSO is found to be reasonable. However, a second new entrant comes along, offering a service which, had it been tested in isolation against the public service contract, would give even more benefits without substantial harm. On the other hand, as the first new entrant is now already established, the service from the second new entrant may not be considered to give substantial added value and would also, in combination with the services of the first new entrant, cause substantial harm to the public service contract.

Furthermore, the impacts related to each of the applications shall be assessed both separately and together against the economic equilibrium of the public service contract.

**VIII. Article 11**

*Article 11*

**Result of the economic equilibrium test**

1. As a result of the economic equilibrium test carried out in accordance with Article 11, the regulatory body shall take a decision provided for in Article 11(2) of Directive 2012/34/EU, on the basis of which the right of access to the rail infrastructure shall be granted, modified, granted only under conditions or denied.
2. Where the economic equilibrium of a public service contract would be compromised by the new rail passenger service, the regulatory body:
  - (a) shall, as appropriate, indicate possible changes to that new rail passenger service, such as a modification of frequencies, paths, intermediate stops or schedule, which would ensure that the conditions for granting the right of access provided for in Article 10(2) of Directive 2012/34/EU are met; and/or
  - ~~(b) may recommend to the competent authorities, where relevant in the light of net benefits to customers referred to in point (a) of Article 10(5) of this Regulation, other changes not related to the new passenger service that would ensure that the conditions for granting the right of access are met.~~
3. The regulatory body shall notify a non-confidential version of its decision to the entities listed in Article 11(3) of Directive 2012/34/EU and publish it on its website.

**Note:**

Paragraph 2(b): This paragraph should be deleted as there is no legal basis for such competence of the regulatory body in the Directive 2012/34/EU. The regulatory body should not interfere with the content of existing PSO contracts.

**IX. Article 12**

*Article 12*

**Result of the economic equilibrium test for high speed passenger services**

1. Where the request for access concerns the operation of a new high speed passenger service, following the procedure laid down in Article 9 of this Regulation and as a result of the economic equilibrium test conducted in accordance with Article 10 of this Regulation, the regulatory body shall take a decision under Article 11a(2) of Directive 2012/34/EU.
2. Where any changes indicated in the decision of the regulatory body have been accepted by the applicant seeking access, they shall be binding on all the parties concerned. ~~Where the regulatory body indicates a financial compensation, that compensation shall be set at the minimum necessary~~

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~~to conclude that the impact of the new high speed rail passenger service would not be substantial.~~  
The decision of the regulatory body shall be notified and published in accordance with Article 11(3).

### **Note:**

Paragraph 2: The Recast Directive does not foresee the possibility for an operator of High speed rail passenger services to provide such compensation. Besides, the purpose of an economic equilibrium test is not to allow negotiations between competent authorities and operators of new rail passenger services.

## **X. Article 14**

### *Article 14* **Fees**

A Member State ~~or the regulatory body~~ may decide that a fee be paid for the economic equilibrium test resulting from an economic equilibrium test by the entity requesting the test. In such a case, the fee shall be non-discriminatory, reasonable, transparent, and shall not exceed the cost of the assessment.

### **Note:**

It should not be possible for the regulatory body to decide whether to use a fee or not as this would go beyond the competence of the regulatory body set in the Directive 2012/34/EU. Instead, this should be based on a decision of the Member State.

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### **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.

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