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**Proposal for a  
COUNCIL DIRECTIVE**

amending Directive 91/440/EEC on the development  
of the Community's railways

**Proposal for a  
COUNCIL DIRECTIVE**

amending Directive 95/18/EC on the licensing of  
railway undertakings

**Proposal for a  
COUNCIL DIRECTIVE**

relating to the allocation of railway infrastructure capacity  
and the levying of charges for the use of railway infrastructure  
and safety certification

**COMMISSION WORKING PAPER**

explanation of the individual articles in the proposal for a Directive relating  
to the allocation of railway infrastructure capacity and the levying of charges  
for the use of railway infrastructure and safety certification

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(presented by the Commission)

# GENERAL COMMUNICATION

## Introduction

A renewed railway sector is vital for the future of Europe's transport system. The Common Transport Policy therefore aims at reversing rail's long-term decline in market share by creating the conditions for an expanding, competitive, customer-orientated rail system. Achieving the goal of sustainable mobility depends crucially on the revitalisation of this environmentally friendly sector.

To compete with other modes of transport, the railways have to operate first and foremost as businesses, with a strong orientation to the markets. They need independent management and sound finances, and must progressively be exposed to market forces like other sectors. This implies a re-definition of the relationship between the State and the railways and a clear division of responsibilities. This Communication proposes a new regulatory framework for the conditions of access to infrastructure. Later this year it will be complemented by proposals on finances (also covering public services) and a communication on the integration of national systems. This will cover not only technical harmonisation but also social aspects, in particular the qualifications of train crews operating across frontiers. The Commission will also launch a major study on the changing employment opportunities in the railway sector, focussing on job profiles, educational levels and investments in human resources. These three packages would make a major contribution to ensuring that rail transport can compete effectively with other modes of transport and provide the services which the citizens of Europe require.

The Commission recognises the public service role of the rail sector. The regulatory framework must ensure that public services can be efficiently provided and that railway infrastructure is maintained and expanded where it is needed across the Community. This essential objective is most likely to be achieved within a model where the quality and value of rail services improves and where market forces are allowed to improve competitiveness wherever this is possible.

Directive 91/440/EEC was a first step in the revitalisation of the Community's railways. It opened the market to competing railway undertakings and it allowed them to operate trains on the same lines as incumbent rail operators. In addition, it required management independence and the separation of infrastructure management and transport operations, at least in the accounts. As a result, the costs of utilising infrastructure are now being identified and charges will be levied on railway operators. Financial and other contractual arrangements that used to be hidden within one enterprise are now becoming explicit transactions between several enterprises.

The Directive is, however, limited in scope. Some Member States have chosen to go beyond the Directive to establish separate bodies for infrastructure management and transport operations either within a single undertaking or in separate undertakings. Moreover, some Member States have established wider access rights than those contained in the Directive and have introduced tendering for public services. Nevertheless, the fact remains that the Directive has provided only limited opening of the market. This is perhaps best indicated by the fact that the incumbent railway operator remains in a dominant position in all Member States.

One reason for this appears to be that although useful rules have been defined, we have not yet been able to ensure that their application is open and equitable. In particular, the bodies responsible for implementing the rules are in a position to determine the conditions under which undertakings enter the market and conduct their business. The bodies responsible for implementing the rules must be independent in that they cannot be judge and party to decisions giving rise to a conflict of interest. If an incumbent operator has the dual roles of railway undertaking and regulatory body there is an inherent conflict of interest and this could be considered inconsistent with Articles 90.1 and 86 of the Treaty. This situation must change if the rules of access are to have substance.

It is now essential to build on this first step by creating the conditions to make the rights of access effective. The proposals in this Communication have two underlying aims. First, to ensure that all railway undertakings are treated in a fair and non-discriminatory way; second, to provide for the efficient and competitive use of infrastructure.

A first step in this direction was taken with the adoption in 1995 of two complementary Directives, one on the licensing of railway undertakings<sup>1</sup>, and the other on the allocation of infrastructure capacity and the charging of infrastructure fees<sup>2</sup>. These directives established broad frameworks at Community level, but did not settle all regulatory issues. There is a wide agreement that the rules on capacity allocation and on charging in Directive 95/19/EC should be expanded and completed and that the accounting separation required by Directive 91/440/EEC is not sufficient to guarantee fair treatment. In its White Paper of 1996, "A strategy for revitalising the Community's railways"<sup>3</sup>, the Commission demonstrated the need fully to define the conditions of access to railway infrastructure. In its resolution on this White Paper, the Parliament called for the accompanying measures needed to define conditions of access, as well as for the progressive opening of the market<sup>4</sup>. In its 1998 communication on the implementation of Directive 91/440/EEC<sup>5</sup>, the Commission pointed out the inadequacy of present arrangements and the widely shared view that the framework needed to be completed.

Securing access is not sufficient. To ensure the efficient use of infrastructure, charging systems must be economically sound and give the right signals to railway undertakings and infrastructure managers. To develop effective charging systems, there must be transparency about the finances of infrastructure management. In capacity allocation, the needs of different users should be clarified, the choices made explicit and the optimal solutions identified. Indeed, the whole process of drawing up and applying explicit rules would substantially contribute to efficiency.

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<sup>1</sup> Council Directive 95/18/EC of 19 June 1995 on the licensing of railway undertakings, OJ L 143, 27.6.1995.

<sup>2</sup> Council Directive 95/19/EC of 19 June 1995 on the allocation of railway infrastructure and the charging of infrastructure fees, OJ L 143, 27.6.1995.

<sup>3</sup> COM(96) 421 final.

<sup>4</sup> Resolution on the Commission's White Paper "A strategy for revitalising the Community's railways" and the Commission's Communication on the trans-European Freeways. A4-0412/97.

<sup>5</sup> Communication on the implementation and impact of Directive 91/440/EEC on the development of the Community's railways and on access rights for rail freight COM(1998) 202 final.

## **The infrastructure package**

The Commission now proposes three measures to define the conditions of utilisation of railway infrastructure:

- a directive to replace the provisions of Directive 95/19/EC on the allocation of infrastructure capacity and on the charging of infrastructure fees;
- a directive to amend the provisions of Directive 91/440/EEC primarily on the separation of accounts of infrastructure management and of transport operations;
- a directive to widen the scope of Directive 95/18/EC on the licensing of railway undertakings.

### **Allocation of capacity**

So far as the allocation of capacity is concerned, the proposed directive would carefully define the rights of railway undertakings and of the infrastructure manager and would establish a well-defined process for the preparation of timetables. Under this, different operators would be able to bid for capacity, which would be awarded according to clear rules and criteria known in advance. The process would be designed to resolve conflicts between requests for capacity and to overcome problems of scarcity, in ways that respects the rights of all the applicants. The directive would also ensure that the allocation was performed by a body not providing transport services itself, and that there was a right of appeal. As well as ensuring fair and non-discriminatory treatment in this way, the allocation process would promote efficiency. It would make clear the needs of different users, including the infrastructure manager, the scope for flexibility, the real conflicts, the choices to be made and the different solutions. More specifically, it would promote the efficient use of scarce capacity by requiring capacity analyses and capacity enhancement plans.

### **Charging of infrastructure fees**

As for the charging of infrastructure fees, the proposal is to base, in principle, charges on marginal cost, that is the cost which is directly incurred as the result of the operation of a train. It is a generally accepted tenet of economic theory that this gives the optimal use of resources, assuming various conditions are met. However the directive would allow charges to be increased and modulated to attain other objectives: a higher rate of cost recovery than under marginal cost pricing, inclusion of external costs and the resolution of problems of scarcity. In this way, a good balance could be struck between economic efficiency and the achievement of wider aims of transport policy. The directive would also require performance schemes to be included in charging systems with incentives for good performance and penalties for bad; this would greatly promote efficiency.

In addition, the proposed directive would help ensure fair treatment, by obliging the publication of charging schemes in advance and the provision of information on how they are calculated. This in itself would be a major advance, but there would be specific provisions to guarantee fair treatment. The directive would create safeguards to protect railway undertakings against the abuse of monopoly by an infrastructure manager, when it sets charges. It would also establish safeguards to prevent fixed charges and discounts

working against smaller railway undertakings; this would help protect newcomers to the market as they tend to operate on a small scale.

### **Separation of accounts**

An essential provision of Directive 91/440/EEC is the separation of infrastructure management and transport operations at least in the accounts. This is meant to achieve several aims: efficient operation of two different but linked activities, transparency about the use of public money and a solid foundation for infrastructure charges. However, in the case of integrated railways, at most profit and loss accounts have been drawn up for infrastructure management, but not balance sheets, crucial as they are in so capital intensive a sector. The amending directive proposed would therefore clarify the legal situation and require the separation of both profit and loss accounts and balance sheets. Moreover the Community needs to go further in putting railway finances on a sound footing, by creating a comprehensive framework, including rules on restructuring. For this, transparency about the finances of different transport operations is essential. Passenger and freight transport serve different markets and are financed in different ways. In the case of passenger transport, public services play a major role and compensation for these accounts for a large part of income; this is not the case with freight whose commercial orientation is more direct. To help the efficient management of each and to create greater transparency about their finances, their accounts should be separated; this too is proposed in the directive to amend Directive 91/440/EEC.

### **Licensing of railway undertakings**

Directive 95/18/EC on licensing only applies to railway undertakings providing the services referred to by Article 10 of Directive 91/440/EEC, that is the services covered by access rights. Also railway undertakings whose activities are limited to urban, suburban or regional services do not fall under the Directive. However, various Member States have extended access rights to infrastructure beyond those of Directive 91/440/EEC or opened urban, suburban or regional services to tender. To ensure that these rights are applied to all railway undertakings established in the Community fairly and without discrimination, Community rules on licenses should be extended to all such railway undertakings. This is the purpose of the proposed directive.

### **Avoidance of conflict of interest**

Although various Member States have created distinct legal entities, others have maintained integrated railways that are responsible for both activities. In this case, there is no assurance that all railway undertakings will be treated equitably when seeking to enter the market. If integrated railways are responsible for setting rules for charging, allocating capacity, timetabling safety regulation, or licensing they determine the conditions under which their competitors do their business. An infrastructure manager in such a railway has an incentive to further the interests of the whole undertaking, including its transport services. At the same time, it is under an obligation to treat all railway undertakings equitably, which creates a conflict of interest. The Commission's communication on the implementation and impact of Directive 91/440/EEC found that potential new operators considered a barrier to entry the lack of guarantee that all railway undertakings would be treated fairly and without discrimination when seeking to use railway infrastructure managed by integrated railways. Consequently, the proposed directives on the allocation of infrastructure capacity and the charging of infrastructure

fees, on the separation of infrastructure management and transport operations and on licensing would provide that the functions giving rise to the conflicts of interest be made the responsibility of independent bodies that do not supply transport services themselves.

## **Conclusion**

The package of measures contained in this Communication meets the widespread call for defining the conditions of access to railway infrastructure. It will complement the rules laid down in Directive 91/440/EEC. The package is necessary whether or not further liberalisation of different types of railway operations is introduced. These rules would indeed provide a framework within which more liberalised operations could be introduced. But it is also essential for making the existing rights of access work effectively.

The objective of these proposals are the fair and non-discriminatory treatment of railway undertakings and the efficient use of infrastructure. However, the benefit of these proposals, if adopted, would be more far reaching. They would help to increase the efficient use of railway infrastructure, improve the competitiveness of rail transport by improving the quality and pricing mechanisms for the infrastructure and thus increase the competitiveness of rail transport compared to other modes of transport.

If the long-term objective of revitalising the Community's railways, both freight and passenger, is to be achieved, the swift adoption of the proposals outlined in this Communication is an essential step. The Commission will come forward with further complementary proposals in the course of the autumn which, taken together, will provide the essential underpinning for an efficient, competitive revitalised railway system within the Community.

**Proposal for a  
COUNCIL DIRECTIVE**

amending Directive 91/440/EEC on the development  
of the Community's railways

## EXPLANATORY MEMORANDUM

### Purpose of proposal

1. Directive 91/440/EEC is the principal measure taken by the Community to develop rail transport. Its main aims are to create a framework for the development of railway undertakings that operate in a commercial manner and adapt to the needs of the market and to begin the integration of the railway sector into the competitive transport market. The Directive obliged Member States to ensure:
  - the management independence of railway undertakings;
  - separation between infrastructure management and transport operations at least in the accounts;
  - the reduction of the railways' debts and improvement of their financial situation;
  - certain access rights to infrastructure for the operation of international services by railway undertakings.
2. Both the Commission's White Paper "A strategy for revitalising the Community's railways"<sup>1</sup> and its "Communication on the implementation and impact of Directive 91/440/EEC on the development of the Community's railways and on access rights for rail freight"<sup>2</sup> identified certain shortcomings of the Directive, which limit its impact and block the full achievement of its objectives. The aim of this proposal is to strengthen the Directive so that its aims are better met. At the same time the Commission is presenting proposals for guidelines on infrastructure charges and on capacity allocation, which are intended to complete the framework for access to infrastructure, in order to make effective the access rights created by the Directive; it is also presenting proposals on the licensing of railway undertakings.
3. One key element of the Directive is the separation of infrastructure management and transport operations at least in the accounts. There are several reasons for this: to further efficient operation of two different but linked activities by clarifying the financial results of each, to make the use of public money transparent, as Member States support the railways in different ways and for different purposes, and to create a solid foundation for infrastructure charges through clear identification of costs and revenues. However the Commission's Report on the implementation and impact of Directive 91/440/EEC found that in practice accounts had not been separated fully, except for the railways that have been divided into separate entities. No integrated railway had drawn up separate balance sheets, but at most separate profit and loss accounts. This is despite the fact that the railway sector is highly capital intensive, so balance sheets are vital

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<sup>1</sup> COM(96) 421 final, 30.7.1996.

<sup>2</sup> COM(1998) 202 final, 31.3.1998.



for any financial assessment (for a number not even separate profit and loss accounts were available). Although Community legislation on company accounts in general and on railway accounts in particular<sup>3</sup> creates obligations to draw up both profit and loss accounts and balance sheets, it is worth making this requirement clear and explicit in the Directive for the reasons given.

4. Putting railway finances on a sound footing is also an essential part of the Directive. It requires Member States to help reduce debt to a level which does not impede sound financial management. The Commission's "Communication on the implementation and impact of Directive 91/440/EEC" found that the railways' debt position had improved considerably, though debt service remained a heavy burden for some. However this is only a beginning, and the Community has to create a full framework for railway finances, including rules on aid for restructuring. For this, transparency about the finances of different transport operations is essential. Passenger and freight transport serve markets that differ in nature. In passenger transport, public services play a major role, and compensation from the authorities represents a large part of the railways' income. In freight, demands come directly from individual customers, and the State does not intervene to procure public services, so its commercial orientation is therefore more direct. This difference is widely recognised, as Member States are creating separate companies or divisions within companies for passenger and freight services. The Commission believes that greater transparency is now needed about the finances of passenger and of freight services and it therefore proposes to modify the Directive to require separate accounts for each activity.
5. Another requirement of the Directive is to establish certain access rights to railway infrastructure for the provision of international services by railway undertakings established in the Community or groupings of such enterprises. For these to be effective all railway undertakings must be treated equitably and without discrimination when seeking access to infrastructure. An integrated railway that both managed infrastructure and supplied transport services, would have responsibility, for setting rules for charges, allocating capacity, timetabling and regulating safety or licensing. In view of this they would determine the conditions under which their competitors enter the market and do their business and this could be considered inconsistent with Articles 90.1 and 86 of the Treaty. An infrastructure manager in an integrated railway has an incentive to further the interests of the whole undertaking, including its transport services, as well being under an obligation to treat all providers of transport equitably. This conflict of interest would be removed, if the functions that determine access to infrastructure were carried out by an independent body or undertaking that does not operate transport services. Integrated railways could retain the other activities of infrastructure management, as the same conflicts of interest would not arise. This proposal would amend Directive 91/440/EEC to make the setting and enforcement of safety rules the responsibility of a body or an undertaking that does not itself supply rail transport services. The Commission's proposals for directives on

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<sup>3</sup> Fourth Council Directive of 25 July 1978 based on Article 54(3)(g) of the Treaty on the annual accounts of certain types of companies (78/660/EEC). OJ L 222, 14.8.1978. Council Regulation (EEC) No 2830/77 of 12 December 1977 on the measures necessary to achieve comparability between the accounting systems and annual accounts of railway undertakings.

infrastructure charges, capacity allocation and licensing would require the same thing for other functions.

6. Finally it is worth clarifying certain parts of the Directive, in the light of experience. A requirement of the Directive is to give railway undertakings, (the undertakings that operate transport services) management independence and to let them work according to commercial principles. This independence and commercial orientation is necessary if rail transport is to compete with other modes and realise its potential. However Member States may legitimately intervene in infrastructure questions to a greater extent; indeed the Directive requires Member States to develop national railway infrastructure, taking into account the needs of the Community, when necessary. Infrastructure managers may also be given a regulatory function as well as that of managing their assets. This implies that a distinction should be made between railway undertakings and infrastructure management so far as commercial orientation and the role of the State are concerned, although both should be an entity independent of the State and should be free to manage their own affairs.

#### Explanation of individual articles

7. Article 1, second indent. This modifies the summary of the provisions of the Directive. It presently states that only separation of accounts is compulsory. The text should be amended to state that there should be full separation of accounts and separation of functions that determine access to railway infrastructure, to reflect the amendments to Article 6.
8. Article 3, second indent. This makes it clear that the infrastructure manager may be a public or private undertaking, as well as a public body.
9. Article 6, paragraph 1. This amended text would clarify that separation of accounts between transport services and infrastructure management means separation of both profit and loss accounts and of balance sheets.
10. Article 7, paragraph 1. In order to ensure fair and non discriminatory access to infrastructure, this amendment would require that safety regulation be carried out by bodies or undertakings that do not supply rail transport services themselves and are independent of bodies or undertakings doing so. Article 7, paragraphs 4, 5 and 6. These new paragraphs would clarify that, in the interests of efficiency, infrastructure managers, like railway undertakings should have a status independent of the State, should have business plans and should be free to manage their internal affairs. Nevertheless Member States should take the measures necessary for the development of their national infrastructure taking into account, where necessary, the general needs of the Community, as already required by Article 7, paragraph 1.
11. Article 9, paragraph 4. This would require separate accounts for passenger and for freight transport services, to promote efficient management and create transparency about the finance situation of each.

## Subsidiarity

12. Competence. This proposal is put forward on the basis of Article 75 of the Treaty and is therefore the exclusive competence of the Community. It is an amendment of an existing directive.
13. Means of action. The Community has already taken legislative action on the management independence of railway undertakings, the separation of infrastructure management and transport operations and access rights to railway infrastructure. As shown above these rules do not go sufficiently far to achieve the objectives of Directive 91/440/EEC or need to be clarified to be effective. Further Community legislation is therefore needed to attain the goals set and to avoid disparate national measures.
14. Form of legislation. As in the case of the original legislation, a directive should strike the right balance between harmonisation to achieve essential Community objectives and recognition of differences between Member States in the situation and organisation of the railways and in relations between the State and the Railways.

**Proposal for a  
COUNCIL DIRECTIVE**

amending Directive 91/440/EEC on the development  
of the Community's railways

THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty establishing the European Community, and in particular Article 75 thereof,

Having regard to the proposal of the Commission<sup>4</sup>,

Having regard to the opinion of the Economic and Social Committee<sup>5</sup>,

Acting in accordance with the procedure laid down in Article 189c of the Treaty in cooperation with the European Parliament<sup>6</sup>,

1. Whereas Council Directive 91/440/EEC<sup>7</sup> should be amended to take account of experience with its implementation and of developments in the railway sector since its adoption, in order to ensure that its objectives are achieved;
2. Whereas, in order to promote the efficient operation and development of the two distinct activities of provision of transport services and of infrastructure management, to make transparent the use to which public funds for the railway sector are put, and to create a solid basis for infrastructure charges, it is necessary to separate both the profit and loss accounts and the balance sheets of the two activities;
3. Whereas it is necessary that, where railway undertakings and the international groupings which they constitute provide the services referred to in Article 10 of Directive 91/440/EEC, they benefit fully from the access rights laid down in that Article;
4. Whereas, to this end, all railway undertakings and international groupings must be treated on a fair and non-discriminatory basis as concerns activities that condition access to infrastructure, and, consequently, the laying-down and enforcement of safety rules should be carried out by independent bodies or undertakings that themselves do not provide rail transport services;
5. Whereas, to promote efficient management of infrastructure in the public interest, infrastructure managers should be given a status independent of the State, and

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<sup>4</sup> OJ C

<sup>5</sup> OJ C

<sup>6</sup> OJ C

<sup>7</sup> OJ L 237, 24.8.1991, p. 25.

freedom to manage their internal affairs, while Member States should take the necessary measures for the development and the safe use of railway infrastructure;

6. Whereas to promote the efficient operation of passenger and freight transport services and to ensure transparency in their finances, including aid for restructuring, it is necessary to separate the accounts of passenger and of freight transport services,

HAS ADOPTED THIS DIRECTIVE:

#### Article 1

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

1. The second indent of Article 1 is replaced by the following:
  - “- by separating the management of infrastructure from the provision of railway transport services, the separation of both profit and loss accounts and of balance sheets and the award to an independent body or undertaking of responsibility for those functions determinant for equitable and non-discriminatory access to infrastructure being compulsory, and the organisational or institutional separation of other functions being optional,”
2. The first and second indents of Article 3 are replaced by the following:
  - “- 'railway undertaking' shall mean any private or public undertaking whose business is to provide rail services for the transport of goods and/or passengers with a requirement that the undertaking must ensure traction.
  - 'infrastructure manager' means any body or undertaking that is responsible for establishing and maintaining railway infrastructure.”
3. Article 6(1) is replaced by the following:
  - “1. Member States shall take the measures necessary to ensure that separate profit and loss accounts and balance sheets are kept and published, on the one hand, for business relating to the provision of transport services and, on the other, for business relating to the management of railway infrastructure. Public funds paid to one of these two areas of activity may not be transferred to the other.

The accounts for the two areas of activity shall be kept in a way that reflects this prohibition.”
4. Article 7(1), is amended as follows:
  - (a) Paragraph 1 is replaced by the following:
    - “1. Member States shall take the necessary measures for the development of their national railway infrastructure taking into account, where necessary, the general needs of the Community.

They shall ensure that safety standards and rules are laid down, applied and enforced, with appropriate monitoring. This shall be done by bodies or undertakings that do not provide rail transport services themselves and are independent of bodies or undertakings that do so, in such a way as to guarantee equitable and non-discriminatory access to infrastructure.”

(b) The following paragraphs are added:

- “4. Member States shall take the measures necessary to ensure that infrastructure managers have independent status as regards management, administration and internal control over administrative, economic and accounting matters.
5. Business plans shall be drawn up for infrastructure managers, including their investment and financing programmes. Such plans shall be designed to achieve their financial balance and to ensure the optimal and efficient use and development of infrastructure; they must also provide for the means enabling these objectives to be achieved.
6. In the context of the general policy guidelines determined by the State and taking into account national plans and contracts (which may be multi-annual) including investment and financing plans, infrastructure managers shall, in particular, be free to:
  - establish their internal organisation, without prejudice to the provisions of this Section;
  - take decisions on staff and own procurement;
  - manage their own assets as efficiently as possible, develop new technologies and new services and adopt any innovative management techniques.”

5. The following paragraph shall be added to Article 9:

- “4. Separate profit and loss accounts and balance sheets shall be kept and published, respectively, for business relating to the provision of passenger transport services and for business relating to the provision of freight transport services. Funds paid to either of these two areas of activity shall be shown separately in the relevant accounts and shall not be transferred to the other.”

## Article 2

Member States shall adopt the laws, regulations and administrative provisions necessary to comply with this Directive not later than one year following the date of entry into force of this Directive. They shall forthwith inform the Commission thereof.

When Member States adopt those provisions, they shall contain a reference to this Directive or be accompanied by such reference on the occasion of their official publication. Member States shall determine how such reference is to be made.

### Article 3

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

### Article 4

This Directive is addressed to the Member States.

Done at Brussels,

For the Council  
The President

**Proposal for a  
COUNCIL DIRECTIVE**

amending Directive 95/18/EC on the licensing of  
railway undertakings



## EXPLANATORY MEMORANDUM

1. Following the first steps towards an integrated market for rail transport services by giving access and transit rights to railway undertakings and international groupings thereof by means of Article 10 of Directive 91/440/EEC<sup>1</sup>, two additional Directives, 95/18/EC<sup>2</sup> and 95/19/EC<sup>3</sup> were adopted in order to ensure the uniform and non-discriminatory application of the rights granted by Directive 91/440/EEC.
2. Whilst Directive 95/19/EC set broad principles for the allocation of railway infrastructure capacity and the charging of fees for its use, Directive 95/18/EC introduced a licensing scheme for railway undertakings offering the services referred to in Article 10 of Directive 91/440/EEC<sup>4</sup> but not for other railway undertakings. Licences awarded in accordance with Directive 95/18/EC are obligatory for railway undertakings when providing these services. They are granted by the Member State where a railway undertaking is established but are valid throughout the Community. The main requirements for licence, as set by the Directive, are good repute, financial fitness and professional competence. Following the principle of subsidiarity the Directive sets broad principles, but leaves the Member States responsibility for setting detailed rules and for administering the system.
3. When restructuring the railway sector, some Member States have created wider access rights to railway infrastructure than those of Directive 91/440/EEC. Several Member States have established wider rights of access to the Trans-European Rail Freight Freeways. These developments are creating new opportunities for railway undertakings established in the Community; indeed any such undertaking can enter these markets in advance of Community legislation on market access.
4. Member States naturally intend to insist that railway undertakings seeking to enter these markets be licensed, in order to ensure safe, dependable and satisfactory services. It is a basic Community principle, however, that there be free circulation of services and undertakings be treated fairly and without discrimination. A common scheme for licences would allow the achievement of both these objectives and would prevent licensing becoming a barrier to entry. How to licence railway undertakings entering new markets is an issue that has been raised on various occasions, particularly in discussions on the Freight Freeways.

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<sup>1</sup> Council Directive of 29 July 1991 on the development of the Community's railways, OJ L 237, 24.8.1991.

<sup>2</sup> Council Directive of 19 June 1995 on the licensing of railway undertakings, OJ L 143, 27.6.1995, p. 70.

<sup>3</sup> Council Directive of 19 June 1995 on the allocation of railway infrastructure and the charging of infrastructure fees, OJ L 143, 27.6.1995.

<sup>4</sup> I.e. railway undertakings operating international combined transport and international groupings of railway undertakings.

5. The Commission, therefore, proposes to extend the provisions of Directive 95/18/EC on licensing to all railway undertakings established in the Community, irrespective of whether they are providing the services mentioned in Article 10 of Directive 91/440/EC. This would allow all railway undertakings to exploit possibilities to enter markets, on a uniform and non-discriminatory basis, and would prevent licensing requirements becoming a barrier to entry.
6. It must be emphasised, however, that this amendment of Directive 95/18/EC would not create new access or transit rights as such, and so would not change the scope of Directive 91/440/EEC.

**Proposal for a  
COUNCIL DIRECTIVE**

amending Directive 95/18/EC on the licensing of  
railway undertakings

THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty establishing the European Community, and in particular Article 75 thereof,

Having regard to the proposal from the Commission<sup>5</sup>,

Having regard to the opinion of the Economic and Social Committee<sup>6</sup>,

Acting in accordance with the procedure laid down in Article 189c of the Treaty in cooperation with the European Parliament<sup>7</sup>,

1. Whereas Council Directive 91/440/EEC of 29 July 1991 on the development of the Community's railways<sup>8</sup> provides for certain access rights in international rail transport for railway undertakings and international groupings of railway undertakings;
2. Whereas, to ensure dependable and adequate services, a common licensing scheme is necessary to ensure that all railway undertakings meet at any time certain requirements in relation to good repute, financial fitness and professional competence in order to protect customers and third parties and offer services observing a high standard of safety;
3. Whereas, in order to ensure that access rights to railway infrastructure are applied throughout the Community on a uniform and non-discriminatory basis, Council Directive 95/18/EC<sup>9</sup> introduced a licence for railway undertakings providing the services referred to in Article 10 of Directive 91/440/EEC, this license being obligatory for the operation of such services and valid throughout the Community;
4. Whereas, since some Member States have extended access rights going beyond Directive 91/440/EEC it seems necessary to ensure fair, transparent and non-discriminatory treatment of all railway undertakings that may operate in this market by extending the licensing principles laid down by the Directive to all companies active in the sector;

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<sup>5</sup> OJ C

<sup>6</sup> OJ C

<sup>7</sup> OJ C

<sup>8</sup> OJ L 237, 24.8.1991, p. 25.

<sup>9</sup> OJ L 143, 27.6.1995, p. 70.

5. Whereas, in accordance with the principles of subsidiarity and proportionality as set out in Article 3b of the Treaty, the objectives of this Directive, namely to set out broad principles for the licensing of railway undertakings and the mutual recognition of such licences throughout the Community, cannot be sufficiently achieved by the Member States on account of the manifestly international dimension of issuing such licences can therefore, by reason of its trans-national implications, be better achieved by the Community; whereas this Directive confines itself to the minimum required in order to achieve those objectives and does not go beyond what is necessary for that purpose;
6. Whereas it should be specified that transport activities in the form of shuttle services for road vehicles through the Channel Tunnel and passenger services solely operated on a local stand-alone network or by using trams or light rail, are excluded from the scope of Directive 95/18/EC, as are railway undertakings solely carrying out their own freight operations on a network used exclusively for that purpose;
7. Whereas Community conditions for access to or transit via railway infrastructure will be regulated by other provisions of Community law;
8. Whereas Directive 95/18/EC should be amended accordingly,

HAS ADOPTED THIS DIRECTIVE:

Article 1

Directive 95/18/EC is amended as follows:

1. Article 1 is replaced by the following:

"Article 1

1. This Directive concerns the criteria applicable to the issue, renewal or amendment of licences by a Member State intended for railway undertakings which are or will be established in the Community.
2. Railway undertakings which operate passenger services on local stand-alone networks or urban or suburban passenger services using, for example, trams or light rail are excluded from the scope of this Directive. Railway undertakings carrying out their own freight operations on a network used exclusively for that purpose are excluded from the scope of this Directive.
3. Railway undertakings and international groupings the activity of which is limited to the provision of shuttle services transporting road vehicles through the Channel Tunnel shall be excluded from the scope of this Directive.
4. A licence shall be valid throughout the territory of the Community."

2. Article 2 is amended as follows:

(a) Point (a) is replaced by the following:

"(a) 'railway undertaking' means any public or private undertaking the business of which is to provide rail services for the transport of goods and/or passengers with a requirement that the undertaking must ensure traction;"

(b) Point (d) is deleted.

3. Article 3 is replaced by the following:

Article 3

Each Member State shall designate the body responsible for issuing licences and for carrying out the obligations imposed by this Directive. The task of issuing license shall be carried out by a body which does not provide rail transport services itself and is independent of bodies or undertakings that do so."

Article 2

Member States shall adopt the laws, regulations and administrative provisions necessary to comply with this Directive no later than one year following the date of its entry into force. They shall forthwith inform the Commission thereof.

When Member States adopt those provisions, they shall contain a reference to this Directive or be accompanied by such reference on the occasion of their official publication. Member States shall determine how such reference is to be made.

Article 3

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

Article 4

This Directive is addressed to the Member States.

Done at Brussels,

For the Council  
The President

**Proposal for a  
COUNCIL DIRECTIVE**

relating to the allocation of railway infrastructure capacity  
and the levying of charges for the use of railway infrastructure  
and safety certification

## EXPLANATORY MEMORANDUM

### Section 1 - Introduction

1. The Commission's railway policy fits under the umbrella of the Common Transport Policy and there are a number of high level objectives that it seeks to work towards. These are the development of the single market, sustainable mobility, the promotion of efficiency in the transport system and the promotion of freight traffic by rail. This proposal aims to ensure that railway infrastructure charges and capacity allocation procedures contribute to achieving these objectives.
2. It is a fundamental Treaty objective to ensure the completion of the single market throughout the Community. Through developing better and cheaper services, in particular for traffic between the Member States, rail can assist the development of the single market and the further integration of national economies. However, among the transport modes, rail stands out as the one where least progress has so far been made in creating the conditions where undertakings are free to establish operations and offer services in any Member State. To achieve this requires the establishment of appropriate access rights and necessary framework conditions that include appropriate level and structure of infrastructure charges.
3. The Commission's White Paper on the Common Transport Policy<sup>1</sup> notes the need for transport policies to contribute to the pursuit of sustainable mobility. Different modes of transport have different roles to play in meeting the Community's transport needs, but it is important to ensure that sensible and efficient choices are made. Different systems of charging between transport modes or on different networks can have a negative influence on the appropriate distribution of demand. Further distortion to the demand for transport as well as the relative demand for different transport modes will arise as a result of the lack of charges reflecting the external costs of transport.
4. The promotion of efficiency within the transport system means ensuring that appropriate modal choices are made as well as ensuring that mechanisms encourage efficient choices within modes. Progress towards efficient modal choice can be made through ensuring that at point of use, transport users are confronted with the full additional cost (the marginal cost) which their transport imposes on society.
5. In paragraph 103, the Common Transport Policy White Paper states that "Measures affecting the charged costs of transport have a direct impact on the competitive position of transport systems and operators. It is difficult for national or local authorities to act alone if by doing so they will prejudice the position of their enterprises relative to those from other regions. For this reason, measures of this kind are best taken within a framework decided at Community level." Without a coordinated approach, lowering charges on one section of an international route may simply permit the tariffs to be increased on a different part of infrastructure.

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<sup>1</sup> The future development of the common transport policy, COM(92) 494 final.

These interactions point to the desirability of a framework within which charges should be set which will ensure equity and achieve desirable policy aims.

6. Railways must play a key role if the Commission's objective of moving toward sustainable mobility is to be realised, and if some of the goods and passengers that might travel by road will instead travel by rail. Action is required against the background where, within the 15 Member States of the EU between 1990 and 1995, rail transport has continued to see a decline in its market share from 18.8% to some 14.4% of freight tonne-km and from 6.8% to some 6.0% of passenger-km.
7. Rail should be particularly attractive as a means of moving large quantities of freight over long distances. However, in Europe rail has so far been fairly unsuccessful in retaining and developing this market. This sector of the transport market is of importance to the development of the single market and is likely to become increasingly crucial. In Europe a long distance rail journey will frequently mean that capacity must be granted and charges levied for the use of more than one infrastructure network. These factors create an additional barrier to international rail traffic.
8. Purchasers of transport services base their decisions on a number of factors. While the quality of service and reliability are likely to be of major importance, the weighting of the different factors will be influenced by a number of considerations and the price of the final service will also be a major factor in transport decisions. The level of charges, which have to be paid for the use of infrastructure, will in itself have a significant influence on the final cost of the service. The impact will differ between different transport modes since infrastructure costs vary as a proportion of total service cost. In the case of rail, the cost of provision of infrastructure tends to be high while the marginal costs of its use are generally low. Infrastructure costs comprise a substantial proportion of total railway cost and therefore can have a significant effect on its relative attractiveness. It is vital that these factors are taken account of in charging systems if they are to enable rail services to be competitive.
9. Council Directive 91/440/EEC<sup>2</sup> on the development of the Community railways created certain access rights for railway undertakings to the railway infrastructures of the Community. In particular Article 10 provides that international groupings of railway undertakings are permitted access to provide international passenger and freight services and there is a right of access for combined transport services to perform international movements. These access rights resulted in two fundamental changes to the pre-existing situation. First, they began a process of separation of railway infrastructure management from the operation of trains. Second, they established the possibility of there being multiple users of an individual railway infrastructure. It was recognised that these rights would in themselves have little effect unless they were accompanied by a legislative framework governing access conditions.

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<sup>2</sup> Council Directive of 29 July 1991, OJ L 237, 24.8.1991, p. 25.



10. Subsequently in 1995, the Council adopted Directives 95/18/EC<sup>3</sup> dealing with the licensing of railway undertakings and 95/19/EC<sup>4</sup> on the allocation of railway capacity and the charging of infrastructure fees for services operated under Article 10 of Directive 91/440/EEC. Neither Directive 95/19/EC nor this proposal to amend it concerns access rights. Those rights of access are determined by Directive 91/440/EEC and by any national legislation which creates greater rights of access. Directive 95/19/EC and this proposal are intended to ensure that within the access rights existing, the allocation of capacity is performed in an appropriate manner.
11. In addition to the Community legal framework, the railway industry has seen the beginnings of changes in its structure. In some Member States there are a number of private sector railway undertakings operating passenger and freight services. Some Member States allow or require competitive tendering for services operated under contract to public authorities; these contracts may be won by private companies. Nonetheless, despite these developments it remains the case that, in most Member States the traditional incumbent railway undertaking still dominates the other undertakings.
12. The Commission's Railway White Paper<sup>5</sup> set out a strategy for enabling progress toward a revitalised Community railway which will in turn ensure progress towards its high level goals. The White Paper sought to build on the existing Community legal framework and proposed further measures to develop the market. Two of the measures which it identified were the need for further action in the areas of railway infrastructure capacity allocation and railway infrastructure charges (paragraphs 48-55). As foreseen in the White Paper, the Commission has recently published a communication<sup>6</sup> which reviews the impact of Directive 91/440/EEC. This notes the need for further definition of Community rules for infrastructure charges and capacity allocation.
13. In their opinion<sup>7</sup> on the White Paper, the European Parliament noted the need for further elaboration of the framework for access to railway infrastructure. The Economic and Social Committee noted in their report on the White Paper that "Infrastructure charges and timetable priorities are further points which need to be discussed..."<sup>8</sup>.
14. The Commission's White Paper "Fair Payment for Infrastructure use"<sup>9</sup> proposes that the "users pay" principle should underpin the development of charging systems in all commercial modes of transport. The long term objective is to align charges with "marginal social costs", i.e. those costs that are imposed at the point of use, including environmental and other "external" impacts. The White Paper

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<sup>3</sup> Council Directive of 19 June 1995, OJ L 143, 27.6.1995, p. 70.

<sup>4</sup> Council Directive of 19 June 1995, OJ L 143, 27.6.1995, p. 75.

<sup>5</sup> A strategy for revitalising the Community's railways, COM(96) 421 final

<sup>6</sup> Communication on the implementation and impact of Directive 91/440/EEC on the development of the Community's railways and on access rights for rail freight, COM(1998) 202 final.

<sup>7</sup> A4 - 0412/97 of 13 January 1998, OJ C 34, 2.2.1998.

<sup>8</sup> CES 459/97.

<sup>9</sup> Fair payment for infrastructure use: A phased approach to a common transport infrastructure charging framework in the EU, COM(1998) 466 final.

recognises that, given the different starting points, a gradual approach, comprising three phases is required. The framework proposed for rail infrastructure charging in this Communication should be seen as covering the first two phases of the proposed approach as far as railways are concerned.

15. There are a number of links between the allocation of capacity and the levying of infrastructure charges. The level of charges will influence demand, this in turn has an impact on the ease with which requests for capacity may be satisfied. This mechanism may be used specifically to allocate capacity through an auctioning mechanism or through scarcity charge which reflect the value of the capacity. These mechanisms can ensure that users, who value the capacity most highly, will benefit from the use of it. Charges may be levied for booking capacity to provide assurance that the capacity will be used. Economic incentives to operate services as planned can improve the performance of the system and provide an increase in available capacity. Some functions, in particular that of regulation or hearing appeals for both activities, could probably be best undertaken by the same body. To ensure that these links are not lost sight of the two issues are tackled in one proposal as they were in Directive 95/19/EC.
16. It is therefore clear that both capacity allocation procedures and charging schemes will have a significant role in the further development of the rail transport market. Without Community action in these areas, rail is likely to remain disadvantaged by its structure and fail to deliver its full potential. At the same time this action should also be directed at encouraging the more efficient use of railway infrastructure both in terms of access for different traffic types and also in terms of overall utilisation levels.

## **1.2. Section 2 - Current situation in railway infrastructure charging**

17. The Community has for a long time taken an interest in charges for transport use, and there are a number of pieces of legislation on this matter. Regulation (EEC) No 1108/70<sup>10</sup> set out an accounting system for expenditure on infrastructure for land transport and required submission of accounts to the Commission each year. Regulation (EEC) No 2598/70<sup>11</sup> specified the items for inclusion in the accounts required by Regulation (EEC) No 1108/70. Regulation (EEC) No 1384/79<sup>12</sup> amended Regulation (EEC) No 1108/70 by relaxing the reporting requirement to once every five years for smaller railways as well as making some other small amendments. Regulation (EEC) No 2830/77<sup>13</sup> sets out requirements for the establishment of comparable accounts by railway undertakings, while Regulation (EEC) No 2183/78<sup>14</sup> lays down uniform costing principles relating to freight transport.
18. The implementation of Directive 95/19/EC in the Member States has resulted in quite disparate infrastructure charging schemes. Current railway infrastructure charging schemes differ tremendously. The overall level of recovery of rail

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<sup>10</sup> Council Regulation (EEC) No 1108/70 of 4 June 1970, OJ L 130, 15.6.1970, p. 4.

<sup>11</sup> Council Regulation (EEC) No 2598/70 of 18 December 1970, OJ L 278, 23.12.1970, p. 1.

<sup>12</sup> Council Regulation (EEC) No 1384/79 of 25 June 1979, OJ L 167, 5.7.1979.

<sup>13</sup> Council Regulation (EEC) No 2830/77 of 12 December 1977, OJ L 334, 24.12.1977.

<sup>14</sup> Council Regulation (EEC) No 2183/78 of 19 September 1978, OJ L 258, 21.9.1978.

infrastructure costs varies from zero in some Member States whereas others aim, at least in principle, to recover 100% of the costs. The structure also varies widely from negotiated charges via formulae to fixed tariffs, some using multi-part tariffs. There is in addition no uniformity about what services are provided for the charge being levied or what parameters are to be taken into account in setting charges. An overview of different charging systems in the Member States is provided in the Annex.

19. As explained in the White Paper "Fair Payment for Infrastructure use", to provide price signals for the optimal use of infrastructure, the charges should be set at the level corresponding to the additional cost imposed on society by the service. In the absence of charges covering external costs in all modes of transport and given the relatively low levels of rail traffic resulting from lack of customer orientation and high cost in rail, such charges would currently only represent a proportion of the overall level of the cost of provision of the rail infrastructure. At present an optimal charging system would, therefore, result in under recovery of rail infrastructure costs and the only means of continuing the operation of the infrastructure would be by the provision of support from elsewhere, traditionally from central government. It has to be pointed out, however, that all rail charging systems currently in place require significant direct or indirect government support for rail infrastructure managers.
20. A variety of mechanisms exist for recovering a greater proportion of the infrastructure costs but these are likely to give rise to varying levels of distortion to patterns of use. Such mechanisms are based on principles such as the use of two part tariffs<sup>15</sup>, Ramsey pricing<sup>16</sup> or annual rolling stock charges. So far the impact of some of the inefficiencies caused by the application of these mechanisms may have been limited, since price signals and incentives may only have a small impact on behaviour in industries with extensive public ownership and significant barriers to entry. It is important that charging mechanisms do not prevent traffic from using rail infrastructure when it is able to pay the additional costs which it imposes even if that contribution is only small. Some current practices, if continued, will lead to price sensitive services being priced off the rail network unnecessarily, as well as competition being frustrated by charging structures.
21. It is clear from discussions with railway undertakings that the current situation is a deterrent to the development of international services, because of the complexity of establishing the overall level of infrastructure charges but also because of the different price signals which are sent by the various schemes. In its report on the Commission's Railway White Paper the European Parliament notes the problem of differing charging systems for rail infrastructure and took the view that the Commission should submit proposals on the criteria to be taken into account in calculating the cost of railway infrastructure. In addition the Economic and Social Committee has identified the present systems of infrastructure charges as being a very serious problem and urged the Commission to give the highest priority to this area of work.

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<sup>15</sup> This means the use of a fixed tariff to recover a proportion of the fixed costs and a variable charge which relates to the amount of use made of the infrastructure.

<sup>16</sup> This involves the use of mark ups which vary inversely with the elasticity of demand.

22. For freight traffic the impact of these different charging mechanisms can be particularly problematic. Moving freight by rail should become increasingly attractive as distances increase. In Europe, long distances will frequently mean a journey which crosses more than one railway infrastructure network. Rail freight is almost always in very strong competition with road haulage and in many cases also exposed to competition from inland waterway and short sea shipping. In comparison with these other modes, a high proportion of the cost of rail arises from its infrastructure, which means that the type of charging scheme can have a correspondingly high effect on its competitiveness. This is further re-inforced by the fact that road freight currently pays relatively low infrastructure charges on a marginal basis and is not charged at the point of use for the high external costs it generates. It also needs to be possible for railway undertakings to quickly determine the level of charges they will have to pay if they are to be able to rapidly bid for freight traffic in competition with road services. This problem is exacerbated where a service will cross more than one infrastructure network. Finally if charging schemes in different Member States are designed to send different signals to users, this could produce a confusing situation for operators of long distance services who are unable to respond to the different signals.
23. It can therefore be concluded that there is a pressing need to make progress on the harmonisation of infrastructure charge structures for international rail freight services. The main reasons can be summarised as the different objectives of Infrastructure Managers, the resulting different charging systems which have the potential for discrimination, varying service packages, the use of different parameters for varying charges, the failure to recognise international freight as operating in a different market and ensure its competitiveness at an international level and finally the impossibility of producing a price rapidly as a result of the above factors.
24. A further issue is that the market for the supply of railway infrastructure is by its nature essentially monopolistic. This implies a considerable need to control the behaviour of the Infrastructure Manager to ensure that he does not abuse that position. In particular limits might be needed where he varies access charges between traffic types and might levy excessive charges particularly for traffic which is to a high degree dependent on using rail. It is equally important to ensure that the Infrastructure Manager is provided with the necessary incentives to improve his efficiency and thus lower costs and charges and improve network performance as well as to make investments where these are necessary.
25. There has been much interest in the issues raised, both historically and in the light of recent developments in the rail sector within the Community. In recognition of the problems and the need for action, the International Railway Union (UIC) has independently undertaken a number of studies on railway infrastructure charges. Of particular interest are the study on allocatively efficient pricing mechanisms<sup>17</sup> and a further report entitled Peage II<sup>18</sup> which was intended to identify areas of potential harmonisation for railway infrastructure charges. The Commission has been kept informed of progress on this work and has taken due account of its

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<sup>17</sup> Infrastructure cost recovery under allocatively efficient pricing UIC/CER study by Dr Rana Roy, March 1988.

<sup>18</sup> UIC Le Péage study - Coopers and Lybrand report for UIC April 1998.

results. The European Conference of Ministers of Transport (ECMT) has also recently held a round table on “user charges for railway infrastructure” and published a report<sup>19</sup>.

26. Following the publication of its Railway White Paper, the Commission has undertaken a study<sup>20</sup> including a review of the principles and issues associated with charging for railway infrastructure use as well as the systems currently in use within the Community. This study has been closely monitored and directed by a committee of representatives of the Member States assisted by observers from interested organisations<sup>21</sup> and representatives of small railway undertakings.

#### *Nature of problems to be addressed*

27. Discussion of railway infrastructure charges can be complex on account of the many different objectives which charging schemes can seek to achieve. Frequently those different objectives will result in conflicting requirements from the charging system. While there are many possible objectives for a rail infrastructure charging system, the broad aims can be characterised as ensuring efficient use and provision of rail infrastructure, efficiency in other parts of the rail industry and the promotion of economic and social policy objectives.

#### *The price for efficient use*

28. As the Commission’s White Paper “Fair Payment for Infrastructure use” indicates, the efficient price to be charged for infrastructure use to be optimal will be equal to the additional cost imposed on society by the operation of an additional service. This is referred to as the short run marginal cost (SRMC). This position was backed by the ECMT round table whose report states that “The fundamental principle is that a system of user charges should relate the running of additional trains to the additional cost that running those trains entails”. For a service operating on rail infrastructure without capacity shortages these costs will arise from factors such as:

- track wear and tear;
- traction current used;
- increased signal operations costs;
- train planning costs;
- additional management and administration costs;
- scarcity and congestion costs;
- noise, pollution and other external effects.

29. In reality the charging scheme for railway infrastructure must take account of charges levied for the provision of other transport services which compete with (or are complementary to) rail services. For railways a particular problem is the pricing of road services, since road users are charged directly for only a small

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<sup>19</sup> CEMT/CS/RE(98)3 Committee of Deputies, Economic Research Committee, Conclusions of Round Table 110, User Charges for Railway Infrastructure.

<sup>20</sup> An examination of rail infrastructure charges - report for the European Commission May 1998 - NERA.

<sup>21</sup> CER, UIC, ESC, UIRR, Joint Committee

proportion of the costs generated by their use of road infrastructure. This issue was discussed in the Green Paper “Towards Fair and Efficient Pricing in Transport” and in the White Paper “Fair Payment for Infrastructure use”. The White paper concludes that the most desirable and efficient situation is for all transport users to pay the cost which they impose on society at the point of use. Nevertheless, until there is a willingness to achieve this, a second best solution is to provide compensation to transport users generating relatively low costs to reduce their charges. Until charging for external effects is implemented in all modes of transport, this situation justifies the implementation of compensation scheme resulting in lower charges for access to rail infrastructure. Nevertheless, any such scheme would require solid justification for the proposed levels of compensation.

#### *Other Objectives*

30. While pricing based on additional cost may be the most appropriate way of ensuring optimum use of infrastructure, it does have limitations. It can be criticised for focusing only on rail infrastructure (and not other parts of the rail industry, transport sector or economy as a whole) and then only at a single point in time. In practice, the price mechanism is often also expected to achieve other important objectives in addition to promoting efficient immediate consumption and production decisions. In particular it is important to ensure that there are incentives to attract traffic which makes economic sense, to expand capacity where needed, and to increase efficiency, both of train operations but also of the infrastructure manager.

#### *Economic and social policy objectives*

31. The importance of railways to economic and social activity means that governments often have specific objectives which may mean that they wish to see a departure from commercial pricing and decision-making. It is established Community policy that there should be managerial independence of railways and that over time the accounts of infrastructure managers should balance. To enable this to be reconciled with such other Government objectives may require the provision of substantial state contributions.
32. For example, Member States may wish, for regional policy reasons, to ensure that railway services are provided to rural or isolated locations. It is unreasonable to place the burden for the provision of these services on the infrastructure manager, and in this case government must purchase the supply of the railway service including the appropriate level of infrastructure charges at an appropriate price.

#### *Need for harmonisation measures*

33. From a point of view of transport efficiency at the European level it is desirable to ensure that railway infrastructure charging schemes employ the same principles. This will facilitate journeys crossing more than one network, send clear signals to users and ensure that where competing infrastructures exist, sensible choices are made between them.

### Section 3 - Current situation in capacity allocation

34. Directive 95/19/EC established a broad framework at Community level for the allocation of railway infrastructure capacity for the provision of services operated under Article 10 of Directive 91/440/EEC. Since the implementation of Directive 91/440/EEC, the international capacity allocation process has also been modified under Forum Train Europe – an organisation set up by a large number of European railway companies - to take account of the changes created by that Directive and in particular a number of points are synchronised through the Forum Train Europe process. The actual practical procedures for establishing the timetable are frequently carried out in practice in a similar method in most Member States.
35. The different capacity-allocation schemes currently in use in the Member States and the role of Forum Train Europe were assessed in the course of a study<sup>22</sup> carried out on behalf of the Commission. This study which was accompanied by a committee of experts from the Member States and the industry concerned (CER, UIC, ESC, UIRR, joint committee and small railway undertakings) highlighted differences between the allocation processes and the timing of the different steps for the regular timetable between Member States. The study final report aims to draw together best practice and to put forward proposals for further development of allocation processes which will assist in relieving the problems which have been identified by the various participants in the process.
36. As the market for railway services has begun to evolve, it has become clear that the existing arrangements do not satisfy many of the needs which exist. There are frequent complaints that allocation processes fail to place appropriate value on the needs of specific traffic types, that processes are biased, that information is misused and that the whole process is too slow and unwieldy. While efforts are undoubtedly being made to improve this situation at national level, it is clear that many of these concerns also affect markets at Community level, and therefore require a Community legislative framework.
37. The capacity allocation process cannot be viewed as an isolated process. It fits within a larger framework running from long term infrastructure development through access control, and the scheduling process down to train control. It also has links with other aspects of the management of railway infrastructure such as the scheme for infrastructure charges. These factors all affect the allocation process on one network, but difficult questions also arise about ensuring adequate collaboration between allocation processes to enable operation of services between networks.
38. It is clear that the current situation is far from ideal, and appears in particular to hamper - international services, the development of the rail market and the growth of rail freight. To a large degree, these difficulties are linked with the fact that many of the decisions which must be taken are a matter of judgement and balance, rather than having any clear right answer. These point to a need to address the processes to be followed rather than the development of rigid rules leaving the details to be addressed at Member State level.

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<sup>22</sup> Coopers and Lybrand, Examination of Train Path Allocation, May 1998.

## **Commission Objectives**

39. The main objectives of the Commission in tabling this proposal are therefore to seek to ensure fairness and efficiency in allocation processes, notably with regards to international train paths, and to enhance collaboration for the allocation of capacity across more than one network. Seeking to ensure fairness in arriving at allocation decisions will involve ensuring a better balance between the needs of different users of the network, in particular recognising the specific requirements of freight transport, as well as addressing the different needs of users and the infrastructure manager. Promoting efficiency in the allocation process will involve streamlining the process, making better use of capacity, and ensuring that capacity constraints are addressed. Enhancing collaboration between allocation bodies for different networks will involve addressing how this should take place, and also what redress is required when things go wrong.

## **Nature of specific problems to be addressed**

### *Equality of treatment*

40. It is clear that all applicants for capacity must be treated in a fair and non-discriminatory manner yet schemes frequently fail to provide adequate assurance of this to applicants for capacity. These concerns extend beyond fairness to also concern the treatment of commercially sensitive information during the process. As with any activity where one body is determining the conditions and ability of other undertakings to access a market, it is important that there is no possibility of one of the market players being in a position to unfairly influence decisions. These factors point to the need for greater clarity in the relationships between railway undertakings, the infrastructure manager and the performance of capacity allocation.
41. All parties have, for different reasons an interest in the good performance of the allocation process, undertakings want to know that their needs are given adequate weight while infrastructure managers need to be sure that they are obtaining optimal use of the infrastructure. This is likely to be of most concern for undertakings that are not dominant in the market, but as the trend to a more effective separation between infrastructure management and railway undertakings continues, even the larger undertakings are likely to require assurance.
42. All requests for capacity shall be accorded equal priority in their treatment by the allocation body. This is clearly essential to ensure that different applicants receive non-discriminatory treatment. It is also desirable from the point of view of making optimal use of the rail network. If the allocation process is approached by determining a number of priority services which cannot then be moved or altered in any way then this places immediate constraints on the availability of capacity for other services. This limits the utilisation of the infrastructure as well as the availability of train paths which adequately meet the needs of other services.
43. It is therefore desirable that the allocation body should commence its task with a clear understanding of all of the requests which have been submitted and the commercial needs of those requests. Its task is then to ensure the optimum outcome which ensures that to the greatest degree it can satisfy those requests in an acceptable manner. It must only be the case that when it is unable to



satisfactorily meet all of the requests that it can then apply the previously specified priority rules to determine which requests will be rejected.

44. The allocation body must ensure that information it gathers about operations remains confidential since this type of information could be of considerable interest to other undertakings. At the end of the allocation process, each undertaking should feel confident that his bid has been treated according to the rules set out and that it has been treated with equal priority to comparable requests from other undertakings. Where this is not the case he must have the ability to launch an appeal.

#### *Transparency*

45. For an integrated railway without competitors, decisions on the allocation of capacity are essentially administrative. There is no question of discrimination since all participants are employed by the same company. Such a situation removes one complexity but does not necessarily mean that the results of the process are in any way optimum. It could be that administrative rules are developed to facilitate the performance of the allocation task but which do not in fact reflect the reality of the markets in which the different services are required to operate. In some cases this could arise as a result of changes in markets which have not been reflected in the way the allocation process is performed. It is useful even where only one railway undertaking organises railway services for the choices which are made between different services and types of traffic to be made explicit rather than hidden. To overcome these problems implies a clear need for the rules governing the process to be established after discussion with users and then made available to all applicants in advance of the process.

#### *Requirements of different traffic types*

46. It is vital in establishing the allocation scheme and during the allocation process, that adequate account is taken of the requirements of different traffic types. Different users of the rail network will have different and often conflicting requirements. It is not possible to satisfactorily anticipate these since they will vary between undertakings and between the individual traffic flows performed by those undertakings. A distinction can be drawn between the commercial needs of an applicant within a timetable period, and the need for continuity between timetable periods.
47. Constraints related to capacity allocation can arise from many different factors. Between different types of rolling stock there is a wide spectrum of top speed, deceleration and acceleration characteristics. Different services have different stopping patterns and therefore require access to facilities which may not be required by other services operating on the same route. Very different needs arise for freight and passenger services.
48. In general it is clear that most passenger services, especially those serving a local or regional market are likely to desire stable timetables which are known in advance with a gradual evolution to reflect changing demand or service enhancement. They will wish to provide for appropriate interchanges, with services at suitable intervals to meet customer needs and allow business

development. These needs will differ between long distance services and local services.

49. For freight services, in general the time at points en route is likely to be less crucial than originating, arriving or total journey time. In addition, a large proportion of the potential freight market may only be available to rail if it is able to provide services quickly in response to demand, whether those are occasional or regular. Freight services may often need flexibility to alter operations to fit in with other aspects of the logistic chain. Nevertheless, once services are established they may also have a legitimate interest in retaining aspects of the operation between timetable periods.
50. When coordination is required it will be necessary as part of that process to take account of the needs of the different services. The implications for modifications to requests must be taken into account on the running of the services both within the immediate vicinity but also over the whole length of their journey. It will also be necessary to take account of the effect of the modification on the business of the applicant who is affected. In view of these factors the process must be carried out transparently and in consultation with the railway undertakings involved.

#### *Balance between freight and passenger*

51. Until there is a fuller reflection through charges of the external costs associated with different transport modes, it seems likely that long distance passenger traffic is likely to remain constrained to distances where journey times are not significantly greater than the comparable time to travel by air. However, freight is not so constrained and in fact long distance and international freight services are likely to be one of the areas where rail has significant opportunities to increase market share. However, the operation of these types of services faces numerous difficulties.
52. Freight has traditionally been accorded fairly low priority on the rail network. In part this may be a reflection of the past market where rail tended to carry mostly low value bulk commodities such as coal, steel and grain where journey speeds were less crucial. If rail is to succeed in expanding market share then it is likely to need to increase its share of higher value more time sensitive goods. In theory rail should be ideal for such movements since it offers the potential for secure transport without congestion and thus guaranteed journey times.
53. Traditionally the timetabling process has been geared around passenger services, however, the changing needs of the freight market imply that the methods of allocating capacity must begin to take greater account of the needs of freight. The time frame for requests can be very different with scheduled passenger needs identified many months prior to finalisation of the timetable whereas freight request could vary even up to the point of departure of the train if that could be accommodated. In view of this it is desirable that infrastructure manager's should attempt to reduce the lead-time for preparation of timetables which will retain flexibility till later in the process. In addition increased use of Information Technology will enable later adjustment. Clearly there are constraints such as the lead-time for planning passenger services and the need for timetables to be published and distributed and this will place limits on the time at which the final timetable can be published. It is important that infrastructure managers should pay

regard to the needs of traffic which requires capacity at short notice when they are allocating capacity for regular services.

#### *Services operated under contract to public authorities*

54. Public passenger transport plays a vital role in reducing environmental damage and promoting social cohesion. In view of this, society often requires a higher level of public transport service by road or rail than purely commercial decisions, by operators, would provide. These services are known as public services. In the past, public authorities secured public services by imposing public service obligations on operators. Community law<sup>23</sup> now requires that publicly funded transport services should be clearly defined in public service contracts and the operators of these services should be properly compensated. However, Member States can exempt operators providing only local and regional passenger transport from these requirements.
55. To secure service integration, it is often appropriate for operators of passenger rail services to be awarded an exclusive right to operate defined types of services within a defined geographical area. There is no comprehensive requirement for public authorities to bring market forces to bear in awarding exclusive rights or public service contracts, but this is now the practice in an increasing number of Member States, particularly in relation to the tendering of multi-year contracts to provide rail services within regions. This development is welcome as a means of providing incentives for efficient and effective services.
56. There is a linkage between the capacity allocation process and the ability of local authorities to purchase services which are operated under contract to them. Where railway undertakings are subject to a public service obligation or public service contract requiring them to provide a service, then the capacity allocation scheme must enable them to fulfil their obligations. Where public authorities are preparing to tender a public service contract, the capacity allocation scheme needs to allow them to define – within acceptable parameters – the nature of the capacity that will be available to the successful tenderer during the period of the contract. Directive 95/19/EC went some way to addressing these links, but further clarification is needed.
57. It is important that capacity can be obtained with sufficient long term certainty for the provision of this type of service, and that it is possible for the authority to be able to seek the capacity even if it has not yet defined the operator. However, these needs must be set against the needs of the infrastructure manager to manage the infrastructure efficiently, and the needs of other undertakings to access the infrastructure.

#### *International collaboration*

58. The creation of international train paths introduces an extra dimension and set of problems that can be particularly damaging for freight. On the one hand the need for collaboration can slow down the process, and is likely to impair the quality of

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<sup>23</sup> Regulation (EEC) No 1191/69 (OJ 156, 28.6.1969) amended by Regulation (EEC) No 1893/91 (OJ 169, 29.6.1991).

the final product because of the difficulty of dealing with all the interactions involved. At the same time, assurances are required that decisions are made in a manner which is as fair as that for purely national traffic.

59. Where journeys cover long distances, it is inevitable that they are likely to involve increased interaction with other traffic flows as well as the likelihood that they will need to use capacity constrained track sections. Set against this however, is the possibility that in some circumstances they may offer potential for deviations to avoid such constraints. Appropriate attention must be paid to these difficulties and possibilities when establishing allocation rules and allocating capacity.
60. Some improvements can probably be achieved through enhancing the collaboration between the different bodies responsible for capacity allocation, further improvements may be possible through enhanced communication and exchanges of information. In any case, the timing of the international processes needs to be closely linked to the national allocation processes to ensure that neither process causes excessive constraints for the other.

#### *Rights to capacity*

61. Current Community law does not clarify the rights associated with railway infrastructure capacity. The uncertainties which exist for railway undertakings are mirrored by uncertainties for the infrastructure manager. There is a need to clarify: how long the right to use capacity is granted for; what expectations users may have about their ability to operate a similar service in future; and their ability to use capacity allocated with a particular service in mind for a similar but different service. There is also a need for clarification of whether there is a right to transfer capacity allocated to another undertaking with or without some compensation for such a transfer.

#### *Available capacity*

62. Railway infrastructure capacity is not something that can be precisely defined in terms of a number of train paths per hour, nor is it a concept which exists without regard to factors such as the mix of traffic, the characteristics of the rolling stock and so on. While these characteristics mean that it is not simply a matter of apportioning a given number of rights between competing requests they also make the process of determining which requests shall be met and how fully they shall be met a task which requires a considerable degree of openness and transparency to provide assurance that it is carried out fairly. Where there is scarce capacity the choices that must be made between competing needs should be made within a framework which is explicit. This will ensure that undertakings seeking capacity have an understanding of the likelihood of success thus enabling the avoidance of pointless effort and the production of more informed requests. It will also enable them to assess whether the use of those criteria has resulted in an outcome consistent with the stated principles.

#### *Role of Information Technology*

63. Information technology has been slow in arriving in this area although it is beginning to play an increasingly important role. Nevertheless lack of compatibility between systems could still hamper its playing a full role and

facilitating the establishment of train paths which cross network boundaries. It is desirable to monitor progress in this area and to ensure that the results of Community and national research can be rapidly employed to assist in improving the allocation processes.

### *Charges*

64. There is an obvious relationship between the charges which are levied for access to scarce capacity and the allocation of that capacity among bidders. Ideally charges should be set at a level to reflect the opportunity cost for the infrastructure manager of traffic which is priced off the network. Then, in theory, for a given infrastructure, there should be no allocation problem since bids for capacity should not exceed that which can be made available.
65. Where capacity constraints are identified through the allocation process this raises the question of whether capacity should be expanded. Because of the monopolistic position of the infrastructure manager, it is important to ensure that appropriate processes exist to address the constraints in an open way and to ensure that the views of all parties are taken into account in planning what enhancements are desirable.

### **Section 4 - The Commission proposal**

66. The main issues to be addressed by mechanisms to charge for the use of railway infrastructure and to allocate capacity on it have been identified in Sections 2 and 3. The fact that capacity has a value and that the level of charges will influence demand for capacity lead to strong links between these mechanisms and therefore the Commission believes that a unified approach needs to be taken to address these issues. As discussed above, the main objectives of the proposal are:
  - to ensure greater efficiency in the use of rail infrastructure and to drive down costs;
  - to make existing access rights effective, by clarifying charging and train path allocation rules;
  - to facilitate the provision and use of high quality international train paths by harmonising allocation procedures and charging principles;
  - to ensure that charging and allocation procedures do not act as barriers to market entry.

### Independence of regulatory functions

67. It is self evident that in view of the need to provide assurance that these processes will be fair to all undertakings, it is necessary for the allocation and charging processes to be performed independently of any railway undertaking. To ensure effective collaboration to enable the efficient operation of services at an international level there is a need for these bodies to collaborate and some requirements are laid down about this. There will remain many matters of judgement in the allocation process which even with an unbiased decision maker may be open to dispute. Where negotiation on price forms part of the charging framework, this also will need to be closely supervised. This points to the need for

a powerful body which can ensure that the frameworks are fair and that discrimination does not take place. Such a regulatory body will oversee these processes and deal with complaints, imposing conditions on the parties where necessary. The proposal contains provisions to ensure that these objectives are met.

### Transparency

68. Users and potential users of the infrastructure require information about access to the network and the rules and procedures which apply both as far as train path allocation and charging are concerned. This information will include details of the infrastructure available, the rules and procedures for the allocation process and the methodology used for establishing charges as well as the charges levied where there is a tariff. It is, therefore, proposed that infrastructure managers publish a “network statement” covering these issues. Such a published statement should function as a handbook for these aspects of access to the rail infrastructure.

### Efficient management and provision of rail infrastructure

69. The monopolistic nature of railway infrastructure needs to be addressed in a number of ways. The performance of a railway operation requires access to a number of different types of service. Many of these will only have one supplier, often the infrastructure manager. In view of this some safeguards are required to ensure fair treatment and set general rules which will apply to these. In addition, it is important for more efficient railway operation, as well as to ensure fair treatment that there is greater clarity about infrastructure cost and its causation. Mechanisms are also required to provide incentives for infrastructure managers to take steps to drive down the cost of the infrastructure and to expand it, where necessary. For scarcity constrained infrastructure, it is proposed that infrastructure managers propose a capacity enhancement plan.

### Charging principles

70. A major element of harmonisation which is required is in the area of the principles of charging. The proposal aims to send correct signals about rail usage through charges based on Short Run Marginal Cost. This will include charges relating to the scarcity of capacity. The possibility to offer discounts forms part of this system and rules are proposed to determine the level of discounts which should be permitted so as to ensure fair competition between undertakings. Another important area where charges are required is for external effects. Charges which will lead to a reduction in the production of external effects are highly desirable, but safeguards are also required. In the absence of an intermodal pricing framework, it is proposed that charges could be differentiated in function of external costs but that this should not lead to an increase in average rail charges. In view of this it is also necessary to permit compensatory payments to take account of situations where competing transport operations (e.g. road haulage) are not properly charged for the costs they impose on society. A number of exceptions to the basic charging principles would be permitted where there is either a cost recovery target or where new investment is required that could not be financed otherwise. However, in view of the importance of freight services to the single market no additional charges would be permitted for these. Essentially, two-part

tarrifs and negotiated and published ramsey prices would be allowed, provided certain conditions were met to avoid distortions of competition<sup>24</sup>.

#### Incentives for efficient use

71. A number of measures are required to encourage optimal utilisation of infrastructure capacity and fair access. It is important to ensure that capacity is used when booked. Financial incentives can be created to achieve this. In addition general arrangements need to be defined for the return of capacity which has been requested but is not used so that this does not artificially obstruct the use of the infrastructure. To provide incentives for railway undertakings and the infrastructure manager to ensure that operations are not disrupted it is also desirable that economic signals are provided about the cost of this. This can be achieved through a performance scheme. Specific arrangements may also be required where an infrastructure manager wishes to optimise infrastructure use through dedicating specific infrastructure for a particular purpose. This may for example be desirable for certain freight lines or high speed track. Where this results in a more optimal use it is of course desirable, however some safeguards are also needed. The proposal contains various provisions that are aimed at ensuring these objectives.

#### Authorised applicants

72. A number of different parties have an interest in access to railway capacity. While this is of essential importance to railway undertakings since only they can run railway services, it is essential that those others who wish to use railway services but require certainty about their future needs and their ability to receive an attractive service can also have necessary rights. It is proposed that all persons or legal entities with a commercial or public service interest in procuring infrastructure capacity for the operation of railway services can do so (authorised applicants). Licensed railway undertakings would all be authorised applicants, but other bodies such as, shippers and local governments, may also choose to apply for this status. Obviously, only licensed railway undertakings with access rights defined in Directive 91/440/EEC (or wider rights granted by Member States) could actually carry out rail services.

#### International train services as part of the timetabling process

73. To ensure effective international coordination of capacity allocation requires a harmonisation of certain timings and the consideration of requests for international train paths at an early stage of the timetabling process. This is proposed. . In addition to ensure the efficiency of the process and to guarantee the ability of different undertakings to participate in the process it is desirable to establish general rules about making an application and the scheduling process. A similar purpose is served through ensuring that a broad set of general principles are followed when undertaking capacity allocation.

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<sup>24</sup> These concepts are discussed in "Fair payment for infrastructure use: A phased approach to a common transport infrastructure charging framework in the EU", COM(1998) 466 final.

### Infrastructure scarcity

74. Where capacity is scarce, common rules are desirable to guarantee fair treatment and to promote efficient infrastructure use. Rules are therefore proposed to define the coordination process and procedures when absolute scarcity arises. These procedures are linked with specific rules for addressing an absolute shortage of capacity through an analysis of its use and then a requirement to develop an enhancement plans where this is appropriate.

### Short notice requests and the use of Information Technology

75. A specific challenge concerns services which cannot be planned long in advance. These are often poorly served and measures are therefore proposed to ensure that short-notice requests can be adequately accommodated on the network. This can particularly be assisted through greater use of Information Technology.

### Resolving disputes

76. The nature of the allocation process with a constrained time schedule coupled with decisions that to some degree will be matters of judgement and may result in commercial benefit to undertakings point to the likelihood of disputes arising. While unfair treatment must be open to appeal, it is also desirable to ensure that an arbitration process is available to enable the speedy resolution of straightforward disputes.

## **Section 5**

### **Legal base**

77. This proposal is put forward on the basis of Article 75 of the Treaty and is therefore of exclusive competence of the Community.

### **Means of Action**

78. The Community has already taken legislative action to lay down broad rules for the allocation of capacity and charging for the use of railway infrastructure (Directive 95/19/EC). However, these were only applicable to services carried out under directive 91/440/EEC and it has been noted that they have not been sufficient to overcome problems which can arise from legitimate interpretations within their framework. It is clear that a further defining of the processes and principles to be used is needed to ensure efficient use of railway infrastructure capacity and development of the railway sector. This will need to take the form of legislative action, however the proposal is limited to those aspects which need to be defined at Community level and leaves the administrative and more precise details to the competent authorities of the Member States.

### **Form of Legislation**

79. It has been illustrated that action needs to be undertaken for the development of more coherent, non-discriminatory schemes of charging for access to railway infrastructure and of railway infrastructure capacity allocation. Nevertheless, not all aspects of the schemes need to be harmonised and indeed there are perfectly legitimate reasons for certain substantial variations. Charging schemes may vary



for example, for policy reasons and also to take account for instance of geographic differences whereas capacity-allocation schemes may need to take account of the differences in traffic types. Such an approach can be achieved by the use of a directive which establishes broad frameworks and principles for the scheme but leaves aspects and responsibility for its implementation to the Member States.

### **Subsidiarity**

80. Measures are required to ensure fair access to the market for the provision of railway services and to ensure that charging and capacity-allocation schemes do not hinder the flow of goods throughout the Community. It is apparent that where measures are aimed at ensuring fair access to the market, these must apply to all relevant bodies affected. Thus while it may be legitimate for there to be some difference between charging systems and capacity-allocation schemes, all systems must ensure non-discrimination between undertakings which have the right to use them. This measure does not address the question of access to the market but aims to ensure that there is equitable treatment where access rights exist.
81. In view of the network nature of the railway industry and the fact that it would be inappropriate to make a distinction between national and international traffic it is necessary to establish a common framework covering all services. A proposal that dealt only with international traffic would create unnecessary and counter-productive distortions to the market. A charging scheme with different prices applying to traffic travelling nationally or internationally would be discriminatory and might be impossible particularly where a train might for instance be comprised of international wagons travelling as part of a purely domestic train as one leg of their journey. Similarly for the allocation of capacity, national and international traffic must use the same tracks and must be accommodated within the timetable. It is therefore desirable that processes and timing are sufficiently harmonised to ensure that all services with a legitimate right to access the infrastructure are able to do so on a fair and non-discriminatory basis. To achieve these benefits requires legislation at Community level.
82. It has been noted that there is benefit in some degree of harmonisation at Community level of the provision of services to railway undertakings. The Common Transport Policy White Paper further identified the difficulty of tackling charging problems at the level of individual Member States because of the competitive effects on industry and enterprises. Measures are also required to ensure that the international allocation of railway infrastructure capacity is performed in a manner which complies with the Treaty. This clearly falls outside the competence of individual Member States and must therefore be addressed by Community legislation.
83. All of these factors outlined above make it clear that action is needed at Community level, as evidenced by Directive 95/19/EC, to define the broad principles and methods of capacity allocation and charging systems, while allowing the precise details to be filled in by Member States. It is for these reasons that the Commission is proposing this Directive.

## **Summary of current railway infrastructure charging arrangements in the Community**

### **Austria**

Charges comprise an annual fixed charge per km of route used, a variable charge per gross tonne km, and a variable charge per train-km.

### **Belgium**

A system of infrastructure charging will be introduced during 1998. The revenue will be raised from a system of variable charges. The charge applied to each individual train service will be calculated according to a formula involving a common reference price (per train-km) multiplied by coefficients.

### **Denmark**

Currently a simple charge is levied for each km of the rail network used. A new system of charges will be introduced in 1999, comprising a fixed annual charge per line km, a variable charge and a daytime capacity charge on the most heavily used line.

### **Finland**

There is a simple charge per gross tonne km, which differentiates between passenger and freight trains, plus an additional charge per net tonne for freight traffic, which is not distance related.

### **France**

For high speed, suburban, and ordinary trunk routes there is a monthly fixed charge per km of route, a reservation charge per train km, and a usage charge per train-km. For other routes there is simply a reservation charge per train km.

### **Germany**

Infrastructure charges are calculated on the basis of a set of standard charges per train-km, which vary according to the type and quality of the route and the type of train. The basic charges may be further adjusted to take account of requirements for higher or lower degrees of reliability; higher or lower than normal train weights; discounts are available of up to 5% in respect of high volumes of traffic, and up to 6% in respect of long-term contracts.

### **Greece**

There no infrastructure charges are at present.

### **Ireland**

There are no infrastructure charges at present.

## **Italy**

There are no infrastructure charges at present.

## **Luxembourg**

There are no infrastructure charges at present.

## **The Netherlands**

With the exception of freight freeways, infrastructure charges have been set at zero until 2000, reflecting political concerns about the impact of introducing infrastructure charges.

## **Portugal**

Rail infrastructure charges have not yet been introduced, and the charging framework will need to be approved by the regulator (who has not yet been appointed)

## **Spain**

There are no infrastructure charges at present.

## **Sweden**

Infrastructure charges currently include: a fixed charge per axle per year, which varies between different types of rolling stock, variable charges and a traffic control charge.

## **United Kingdom**

For franchised passenger services the charging framework comprises; a large fixed charge, a low variable charge and a performance scheme. The overall level of fixed charges was calculated so as to allow the Infrastructure manager to cover its total costs, if it achieves expected efficiency improvements.

For other services charges are negotiated. For freight services, mark-ups should be consistent with a structure of charges that enables the recovery of the fixed costs of the freight network (but subject to a standalone cost ceiling on individual charges). For non-franchised passenger services, any mark-up should provide a share of the expected net benefits from a new service which is commensurate with its share of the risks associated with the service.

In Northern Ireland with the exception of some freight services operated by IE for which it pays a simple annual fixed charge agreed with NIR, there are currently no infrastructure charges nor are there any plans to introduce infrastructure charges.

**Proposal for a  
COUNCIL DIRECTIVE**

relating to the allocation of railway infrastructure capacity  
and the levying of charges for the use of railway infrastructure  
and safety certification

THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty establishing the European Community, and in particular Article 75 thereof,

Having regard to the proposal from the Commission<sup>25</sup>,

Having regard to the opinion of the Economic and Social Committee<sup>26</sup>,

Acting in accordance with the procedure laid down in Article 189c of the Treaty in cooperation with the European Parliament<sup>27</sup>,

1. Whereas greater integration of the Community railway sector is an essential element of the completion of the internal market and moves toward achieving sustainable mobility;
2. Whereas Council Directive 91/440/EEC<sup>28</sup> of 29 July 1991 on the development of the Community's railways provides for certain access rights in international rail transport for railway undertakings and international groupings of railway undertakings; whereas these rights mean that railway infrastructure can be used by multiple users;
3. Whereas Council Directive 95/19/EC of 19 June 1995 on the allocation of railway infrastructure capacity and the charging of infrastructure fees<sup>29</sup> set out a broad framework for the allocation of railway infrastructure capacity;
4. Whereas those Directives have permitted a considerable variation in the structure and level of railway infrastructure charges and the form and duration of capacity allocation processes;
5. Whereas appropriate capacity-allocation schemes for rail infrastructure coupled with competitive operators will result in a better balance of transport between modes;

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<sup>25</sup> OJ C

<sup>26</sup> OJ C

<sup>27</sup> OJ C

<sup>28</sup> OJ L 237, 24.8.1991, p. 25.

<sup>29</sup> OJ L 143, 27.6.1995, p. 75.

6. Whereas encouraging optimal use of the railway infrastructure will lead to a reduction in the cost to society of transport;
7. Whereas there are a small but growing number of undertakings seeking to make use of the Community's rail infrastructure;
8. Whereas it is desirable for purchasers of railway services to be able to enter the capacity-allocation process direct;
9. Whereas the charging and capacity-allocation schemes should permit equal and non-discriminatory access for all undertakings and attempt as far as is possible to meet the needs of all users and traffic types in a fair and non-discriminatory manner;
10. Whereas charging and capacity-allocation schemes should encourage railway infrastructure managers to optimise use of their infrastructure for society as a whole;
11. Whereas railway undertakings should receive clear and consistent signals from capacity-allocation schemes which lead them to make rational decisions;
12. Whereas it is desirable to grant some degree of flexibility to infrastructure managers to enable a more efficient use to be made of the infrastructure network;
13. Whereas capacity-allocation and charging schemes may need to take account of the fact that different components of the rail infrastructure network may have been designed with different principal users in mind;
14. Whereas the requirements for passenger services may often conflict with the requirements for freight; whereas the requirements for passenger services may result in a network which is more costly to build and maintain than one designed solely for freight;
15. Whereas the needs of different services need to be properly balanced;
16. Whereas the increasing speed differential between freight and passenger rolling stock can lead to an exacerbation of the conflict between these two types of traffic;
17. Whereas services operated under contract to a public authority may require special rules to safeguard their attractiveness to users;
18. Whereas different users and types of users will frequently have a different impact on capacity;
19. Whereas the charging and capacity-allocation schemes must take account of the effects of increasing saturation of capacity and ultimately the scarcity of capacity;
20. Whereas the different time-frames for planning traffic types mean that it is desirable to ensure that requests for capacity which are made after the completion of the timetabling process can be satisfied;
21. Whereas the use of information technology can enhance the speed and responsiveness of the timetabling process and improve the ability of applicants to

- bid for capacity, as well as improving the ability to establish train paths which cross more than one infrastructure manager's network;
22. Whereas, to ensure the optimum outcome for operators and traffic types, it is desirable to require an examination of the use of capacity when the coordination of infrastructure capacity is required to meet the needs of users;
  23. Whereas, in view of the monopolistic position of the infrastructure manager, it is desirable to require an examination of the available capacity and methods of enhancing it when the infrastructure capacity allocation process is unable to meet the requirement of users;
  24. Whereas a lack of information about other railway undertaking's requests as well as about the constraints within the system may make it difficult for railway undertakings to seek to optimise their capacity requests;
  25. Whereas it is important to ensure the better coordination of allocation schemes so as to ensure the improved attractiveness of rail for traffic which uses the network of more than one infrastructure manager, in particular for international traffic;
  26. Whereas it is important to minimise the distortions of competition which may arise, either between railway infrastructures or between transport modes, from significant differences in charging principles;
  27. Whereas it is desirable to define those components of the infrastructure service which are essential to enable an operator to provide a service and which should be provided in return for minimum access charges;
  28. Whereas investment in railway infrastructure is desirable and infrastructure charging schemes should provide incentives for infrastructure managers to make appropriate investments where they are economically attractive;
  29. Whereas any charging scheme will send economic signals to users; whereas it is important that those signals to railway undertakings should be consistent and lead them to make rational decisions;
  30. Whereas appropriate charging schemes for rail infrastructure coupled with appropriate charging schemes for other transport infrastructures and competitive operators will result in an optimal balance of different transport modes;
  31. Whereas it is desirable to allow some degree of flexibility to infrastructure managers to vary charges so as to encourage more efficient use of the infrastructure network for example the ability to vary train paths or a long-term commitment by operators;
  32. Whereas, to enable the establishment of appropriate and fair levels of infrastructure charges, infrastructure managers should record and establish the valuation of their assets and develop a clear understanding of cost factors in the operation of the infrastructure;

33. Whereas it is desirable to ensure that account is taken of external costs when making transport decisions as outlined in the Commission's Green Paper on Fair and Efficient Pricing<sup>30</sup>;
34. Whereas it is desirable for any infrastructure charging scheme to enable traffic to use the rail network which can at least pay for the additional cost which it imposes on society;
35. Whereas while negotiations for individual train paths could reflect the market value of the access, disparity of information may result in poor outcomes and the burden of the negotiations may be excessive;
36. Whereas a railway infrastructure is a natural monopoly; whereas it is therefore necessary to provide infrastructure managers with incentives to reduce costs and manage their infrastructure efficiently;
37. Whereas it is important to ensure that charges for international traffic are not such as to prevent rail from meeting the needs of the market;
38. Whereas the overall level of cost recovery through infrastructure charges will affect the necessary level of government contribution;
39. Whereas discounts which are allowed to operators must relate to actual cost savings experienced;
40. Whereas it is desirable for railway undertakings and the infrastructure manager to be provided with incentives to minimise disruption of the network;
41. Whereas the allocation of capacity is associated with a cost to the infrastructure manager, payment for which should be required;
42. Whereas, in accordance with the principles of subsidiarity and proportionality as set out in Article 3b of the Treaty, the objectives of this Directive, namely to coordinate arrangements in the Member States governing the allocation of railway infrastructure capacity and the charges made for the use thereof, cannot be sufficiently achieved by the Member States in view of the need to ensure fair and non-discriminatory terms for access to the infrastructure as well as to take account of the manifestly international dimensions involved in the operation of significant elements of the railway networks, and can therefore, by reason of the need for coordinated trans-national action, be better achieved by the Community; whereas this Directive confines itself to the minimum required in order to achieve those objectives and does not go beyond what is necessary for that purpose;
43. Whereas Council Regulation (EEC) No 2830/77 of 12 December 1977 on the measures necessary to achieve comparability between the accounting systems and annual accounts of railway undertakings<sup>31</sup>, Council Regulation (EEC) No 2183/78 of 19 September 1978 laying down uniform costing principles for railway undertakings<sup>32</sup>, and Council Decision 82/529/EEC of 19 July 1982 on the fixing of

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<sup>30</sup> COM(95) 691 final.

<sup>31</sup> OJ L 334, 24.12.1977, p. 13.

<sup>32</sup> OJ L 258, 21.9.1978, p. 1.

rates for the international carriage of goods by rail<sup>33</sup>, all of which were last amended by the Act of Accession of Austria, Finland and Sweden, are now superseded and should therefore be repealed;

44. Whereas the requirements of Directive 95/19/EC relating to safety certification should be replicated in this Directive; whereas Directive 95/19/EC should therefore be repealed,

HAS ADOPTED THIS DIRECTIVE:

## **CHAPTER I**

### **Introductory provisions**

#### **Article 1**

##### **Scope**

1. This Directive concerns the principles and procedures to be applied with regard to the setting and charging of railway infrastructure charges and the allocation of railway infrastructure capacity. Member States shall ensure that charging and capacity-allocation schemes for relevant railway infrastructure follow the principles set down in this Directive and allow the infrastructure manager to market and make optimum effective use of the available infrastructure capacity.
2. This Directive applies to main-line railway infrastructure used for domestic or international rail services.
3. Stand-alone local passenger networks, and networks such as tram or light rail which can solely be used for the provision of urban and suburban passenger services, are excluded from the scope of this Directive.

Privately owned networks that exist solely for the use by the owner for its own freight operations are also excluded from the scope of this Directive.

4. Railway undertakings and international groupings the business of which is limited to providing shuttle services for road vehicles through the Channel Tunnel are excluded from the scope of this Directive.

#### **Article 2**

##### **Definitions**

For the purpose of this Directive:

- (a) **'Allocation'** means the allocation of railway infrastructure capacity by an infrastructure manager or allocation body.

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<sup>33</sup> OJ L 234, 9.8.1982, p. 5.



- (b) **'Authorised applicant'** means a person or legal entity with a commercial or public service interest in procuring infrastructure capacity for the operation of a railway service, who has complied with the necessary requirements to enable him to seek to book capacity and who wishes to reserve the use of capacity on the relevant railway infrastructure. This shall include licensed railway undertakings.
- (c) **'Capacity-constrained infrastructure'** means a section of infrastructure for which demand for capacity cannot be fully satisfied even after coordination of the different request for capacity.
- (d) **'Capacity enhancement plan'** means a measure or series of measures with a timetable for their implementation which are proposed to alleviate the capacity constraints leading to the declaration of a section of infrastructure as "capacity constrained infrastructure".
- (e) **'Coordination'** means the process through which the allocation body and authorised applicants will attempt to resolve situations in which there are conflicting applications for infrastructure capacity.
- (f) **'Framework agreement'** means a general agreement setting out the railway infrastructure capacity needs of an authorised applicant over a period longer than one timetable period.
- (g) **'Infrastructure capacity'** means the potential to schedule train paths on an element of infrastructure.
- (h) **'Infrastructure manager'** means any body or undertaking that is responsible for establishing and maintaining railway infrastructure.
- (i) **'Network'** means the entire railway infrastructure owned and managed by an infrastructure manager.
- (j) **'Network statement'** means the statement which sets out in detail the general rules, deadlines, procedures and criteria concerning the charging and capacity-allocation schemes. It shall also contain such other information as is required to enable application for capacity.
- (k) **'Railway undertaking'** means any public or private undertaking the business of which is to provide rail services for the transport of goods and/or passengers with a requirement that the undertaking must ensure traction.
- (l) **'Regulatory body'** means the organisation which is charged with overseeing the processes of railway infrastructure capacity allocation and charging schemes.
- (m) **'Scheduling process'** means the process which begins with applications for infrastructure capacity and is completed with the production of the working timetable.
- (n) **'Short notice request'** means a request for capacity which, because the requirement is not known sufficiently far in advance, cannot be requested through the normal scheduling process.

- (o) **'Train path'** means the infrastructure capacity needed to run a train between two places over a given time-period.
- (p) **'Working timetable'** means the data defining all planned train and rolling-stock movements which will take place on the relevant infrastructure during the period for which it is in force.

### **Article 3**

#### **Network statement**

1. The infrastructure manager shall, in consultation with authorised applicants and other interested parties, develop and publish a network statement.
2. The network statement shall set out the nature of the infrastructure which is available to railway undertakings. It shall contain information setting out the conditions for access to the relevant railway infrastructure. It shall contain a separate section setting out charging principles, and tariffs where appropriate, as specified in Article 7 and a section setting out capacity allocation criteria and rules as specified in Article 17. It shall also contain detailed information on procedures and deadlines to be followed.
3. The network statement shall be made available to all parties that are or may wish to be authorised applicants, at a charge not exceeding its cost of publication.
4. The network statement shall be kept up to date, and modified as necessary.

## **CHAPTER II**

### **Infrastructure charges**

#### **Article 4**

#### **Establishing, determining and collecting charges**

1. Member States may establish a charging framework while respecting the managerial independence laid down in Article 7 of Directive 91/440/EEC. The establishing of specific charging rules, the determination of charges for the use of infrastructure and the collection of those charges shall be performed by the infrastructure manager.
2. Where the infrastructure manager, in its legal form, organisation and decision-making functions, is not independent of any railway undertaking, the function referred to in paragraph 1 and described in this Chapter shall be performed by a charging body that is independent in its legal form and organisation and decision-making from any railway undertaking.
3. Infrastructure managers shall collaborate to achieve the efficient operation of train services which cross more than one infrastructure network. They may establish such joint organisations as are appropriate to enable this to take place. Any collaboration or joint organisation shall be bound by the rules set out in this Directive.

4. Except where specific arrangements are made under Article 9(1), infrastructure managers shall ensure that the charging system in use is based on the same principles over the whole of their network.
5. Infrastructure managers shall ensure that the application of the charging system results in objective, equivalent and non-discriminatory charges for different railway undertakings that perform services of equivalent nature in a similar part of the market.
6. An infrastructure manager or charging body shall respect the commercial confidentiality of information provided to it by authorised applicants.

## **Article 5**

### **Services**

1. Railway undertakings shall be entitled to the package of services that are described in the Annex as the minimum access package as well as those of the services described in the Annex as access services which are required.
2. To ensure the safe operation of the network, railway undertakings may be required by the infrastructure manager to procure a number of services. These services are described in the Annex as mandatory services and may be supplied by the infrastructure manager or by some other body approved by an independent regulatory body.
3. Where the infrastructure manager offers any of the range of services described in the Annex as additional services he shall supply them upon request to an authorised applicant.
4. Railway undertakings may request a further range of ancillary services, listed in the Annex, from the infrastructure manager or from other suppliers. The infrastructure manager is not obliged to supply these services.

## **Article 6**

### **Infrastructure cost and accounts**

1. Member States shall lay down conditions, including where appropriate advance payments, to ensure that the accounts of an infrastructure manager shall, under normal business conditions over a reasonable time period, at least balance income from infrastructure charges, surplus from other commercial activities and State aid, on the one hand, and infrastructure expenditure on the other. Such aid shall be made in accordance with Articles 77, 92 and 93 of the Treaty.
2. Infrastructure managers shall, due regard being had to safety and to maintaining and improving the quality of the infrastructure service, be provided with incentives to reduce the costs of provision of infrastructure and the level of access charges.
3. Member States shall ensure that the provision set out in paragraph 2 is implemented, either through a contractual agreement between the competent authority and infrastructure manager covering a period of not less than three years

which provides for State aid as referred to in paragraph 1, or through the establishment of an appropriate regulatory scheme with adequate powers.

4. Where a contractual agreement as described in paragraph 3 exists, the terms of the contract and the structure of the payments agreed to provide financial support to the infrastructure manager shall be agreed in advance to cover the whole of the period of the contract.
5. Infrastructure managers shall develop and maintain an inventory of assets that they manage, which shall contain their current valuation as well as details of expenditure on enhancement and renewal of the infrastructure.
6. The infrastructure manager shall establish a methodology for apportioning costs between different types of rolling stock and operations, based upon the best available understanding of cost causation.

## **Article 7**

### **Statement of charges and charging schemes**

1. The infrastructure manager shall, in consultation with the authorised applicants and other interested parties, prepare a statement of charges and charging schemes for inclusion in the network statement.
2. The statement shall contain appropriate details of the charging scheme and sufficient information on charges that apply to the services listed in the Annex which are provided by only one supplier. The statement shall contain information on the charging scheme in force as well as indications of likely changes in charges for the following five years. It shall contain a general analysis of sales and income which does not permit identification of the charges payable by an undertaking for a specific service.
3. Where an infrastructure manager implements a discount scheme as defined in Article 10, a performance scheme as defined in Article 12, or reservation charges as defined in Article 13, then details of these schemes shall be included in the statement of charges.
4. Upon receiving a reasonable request from an authorised applicant, the regulatory body shall require infrastructure managers to make available to the regulatory body, within one month and free of charge, sufficiently detailed costing information used for infrastructure charge calculations as well as data illustrating the basis on which they establish and apportion costs between different types of rolling stock and services to enable that applicant to satisfy himself that the charges comply with the requirements of this Directive.
5. To permit the assessment of the feasibility of operation of a service an infrastructure manager shall provide free of charge, within one month of a request from an authorised applicant, information on charges which would apply for rolling stock types or services which are not covered in the published information.

## **Article 8**

### **Principles of charging**

1. Charges for the use of railway infrastructure shall be paid to the infrastructure manager and used to fund his business.
2. Member States may require the infrastructure manager to provide all necessary information on the charges imposed to satisfy them that the charges are levied on a non-discriminatory basis.
3. Without prejudice to paragraph 5, the infrastructure charge for the use of railway infrastructure, which comprises the minimum access package and any of the access services required, shall be set at the cost that is directly incurred as a result of the operation of the train.
4. The infrastructure manager shall include in the infrastructure charge a sum which reflects the scarcity of capacity. This charge shall only be levied on identifiable segments of the infrastructure which are subject to capacity constraints. The determination of the level of this charge shall be based on a methodology about which interested parties shall be consulted in advance. The methodology employed shall be described in the statement of charging principles.
5. The infrastructure charge may be modified by a charge to take account of the cost of the external effects arising from the operation of the train. Such a charge shall be differentiated as a function of the magnitude of the effect caused. The level of these charges shall be based on a published methodology on which railway undertakings that are either using or may wish to use the infrastructure have been consulted. In the absence of any comparable level of charging of external costs in other, competing modes of transport, any such charges shall result in no overall change in revenue to the infrastructure manager. In situations where the incorporation of an external charge component leads to additional revenue, it is for Member States to decide how the revenue shall be used.
6. To avoid undesirable excessive fluctuations, the charges referred to in paragraphs 3, 4 and 5 may be averaged over a reasonable spread of trains and times. Nevertheless, the relative magnitudes of the infrastructure charges shall be related to the relative difference in costs between services.
7. Where services listed in the Annex as additional, mandatory and ancillary services may only be supplied by one supplier then the charge imposed for the service shall relate to the cost of their provision based upon the actual level of usage.
8. Charges shall be levied for capacity used for the purpose of infrastructure maintenance. These charges shall not exceed the net revenue loss to the infrastructure manager due to the effects of the maintenance.

## **Article 9**

### **Exceptions to charging principles**

1. In exceptional circumstances and for specific projects, charging arrangements for the use of infrastructure or improvements to existing infrastructure may be based

on the long-run additional costs arising from the investment made, including a reasonable rate of return. Charges may only be set on this basis on the condition that the infrastructure manager demonstrates to the regulatory body that:

- (a) the investment required would not otherwise have been made; and
  - (b) the investment and the charging scheme together result in an improvement in economic efficiency.
2. Member States should in principle seek to ensure that any service which is able to pay at least the cost which it gives rise to, is not prevented by the charging scheme from utilising infrastructure capacity. Where a charging body wishes to recover a higher level of costs than that permitted by Article 8(3), (4) and (5), then it may only do so, for services other than freight, by imposing additional charges following one of the sets of rules laid down in paragraphs 3, 4 and 5.
3. A fixed charge may be levied on the railway undertaking making greatest use of an element of infrastructure and a system of fixed and variable charges levied on other railway undertakings. For this purpose, the network may be divided into elements; each element of the infrastructure shall be no less than 1 000 km in length. The charge shall be based upon, and shall not exceed, the costs which are associated with the infrastructure element but which are not covered by the charges set out in Article 8(3). Where a fixed charge is levied, the charging body shall ensure that, when performing an equivalent service at the same time in the same market, other railway undertakings shall not face an average charge or a charge for running an additional service either of which is more than 10% greater than that which is paid by the railway undertaking making the greatest use of the element.
4. Charges may be increased and modulated through negotiation in relation to the elasticity of demand for different services or types of services. This may only be permitted under the close supervision of a regulatory body and where safeguards are in place which ensure that charges to users who are dependent on rail transport are not excessive. Regulatory bodies shall, after consultation, prepare and publish rules to be followed. Charges defined in this way shall be included in a contract between the infrastructure manager and the authorised applicant.
5. The infrastructure manager may publish tariffs, distinguishing between different clearly defined traffic types, which reflect the willingness to pay more than the costs that they impose. This may only be permitted in circumstances where safeguards are in place which ensure that charges to users who are dependent on rail transport are not excessive and that arrangements are in place to ensure that traffic which can at least pay the additional costs which it imposes may be accepted. Regulatory bodies shall supervise the tariffs for different traffic types and ensure that they are appropriate.

## **Article 10**

### **Discounts**

1. Without prejudice to Articles 85, 86 and 90 of the Treaty, any discount on the charges levied on a railway undertaking by the infrastructure manager, for any service, shall comply with the criteria set out in paragraphs 2, 3 and 4.
2. Discounts shall not exceed the actual cost saving to the infrastructure manager from the operation in comparison with a single isolated equivalent journey. In determining the level of discount, no account may be taken of cost savings already internalised in the charge levied.
3. Discounts may only relate to charges levied for a specified infrastructure section.
4. Separate discount schemes shall apply for different types of service.

## **Article 11**

### **Compensation schemes for unpaid marginal external and infrastructure costs**

1. Member States may put in place a time-limited scheme to compensate for the use of railway infrastructure for the demonstrably unpaid marginal external and infrastructure costs of other transport modes in so far as these exceed the marginal external and infrastructure costs of rail.
2. The methodology used and calculations performed must be publicly available. It shall in particular be possible to demonstrate the specific uncharged costs of the competing transport infrastructure that are avoided and to ensure that the scheme is granted on non-discriminatory terms to undertakings.
3. Member States shall ensure that such a scheme is compatible with Articles 77, 92 and 93 of the Treaty.

## **Article 12**

### **Performance scheme**

1. Infrastructure charging schemes shall encourage railway undertakings and the infrastructure manager to minimise disruption and improve the performance of the railway network. This shall be achieved through a performance scheme which provides for penalties for actions which disrupt the operation of the network, compensation for undertakings which suffer from disruption and bonuses that reward better than planned performance.
2. The basic principles of the performance scheme shall apply throughout the network.

## **Article 13**

### **Reservation charges**

1. Infrastructure managers may levy a charge for capacity that is requested but not used according to the principles set out in paragraphs 2 to 6.
2. The charge shall be utilised in such a manner as to provide incentives for efficient use of capacity.
3. Where all requests for capacity can be satisfied without coordination, the charge shall, as a maximum, be no greater than the costs of providing the path.
4. Where coordination is required, the charge shall, as a maximum, reflect the value of the capacity requested.
5. Special arrangements may be made where an undertaking has an agreement to enable it to run one or more trains without specifying the exact times of operation.
6. Reservation charges shall not be collected until after the time of the capacity requested.

## **CHAPTER III**

### **Allocation of capacity**

## **Article 14**

### **Capacity rights**

1. The right to permit train operations on railway infrastructure shall belong to the infrastructure manager of that network.
2. Capacity shall be allocated by an infrastructure manager and, once allocated to an authorised applicant, may not be transferred by the recipient to another undertaking or service. The use of capacity by a railway undertaking when carrying out the business of an authorised applicant who is not a railway undertaking shall not be considered a transfer.
3. The right to use specific railway infrastructure capacity in the form of a train path may be granted to authorised applicants for a maximum duration of one timetable period.
4. An infrastructure manager and an authorised applicant may enter into a framework agreement for the use of capacity on the relevant railway infrastructure for a longer term than one timetable period, in the manner laid down in Article 20.
5. Infrastructure managers and authorised applicants shall enter into contracts that define their respective rights and obligations in respect of any allocation of capacity.



## **Article 15**

### **Capacity allocation**

1. Member States may establish a framework for the allocation of railway infrastructure capacity while respecting the managerial independence laid down in Article 7 of Directive 91/440/EEC. The infrastructure manager shall establish the specific capacity allocation rules and shall perform the capacity allocation processes. In particular, the infrastructure manager shall ensure that railway infrastructure capacity is allocated on a fair and non-discriminatory basis and in accordance with Community law.
2. Where the infrastructure manager is not independent in its legal form and organisation and decision-making from any railway undertaking, then the allocation function shall be performed by an allocation body. Such an allocation body shall be independent from any railway undertaking in its legal form and organisation and decision making.
3. Infrastructure managers and allocation bodies shall respect the commercial confidentiality of information provided to them.

## **Article 16**

### **Collaboration to allocate capacity on more than one network**

1. Infrastructure managers shall collaborate to enable the efficient creation and allocation of capacity which crosses more than one network. They may establish such joint organisations as are appropriate to enable this to take place. Any collaboration or joint organisation shall be bound by the rules set out in this Directive.

In particular, they shall establish an organisation to coordinate the allocation of capacity at an international level that includes representatives of infrastructure managers for all railway infrastructures whose allocation decisions have an impact on more than one other infrastructure manager. This organisation may include appropriate representatives of infrastructure managers from outside the Community. The Commission shall be informed and shall be invited to attend meetings of the organisation as an observer.

2. At any meeting or other activity undertaken to permit the allocation of infrastructure capacity for trans-network train services, decisions shall only be taken by representatives of infrastructure managers.
3. The participants in the collaboration referred to paragraph 1 shall ensure that its membership, methods of operation and all relevant criteria which are used for assessing and allocating capacity be made publicly available.
4. Working in collaboration as referred to in the first subparagraph of paragraph 1, infrastructure managers may assess the need for, and may where necessary organise and request the creation of international train paths to facilitate the operation at short notice of freight trains.

Such pre-arranged international train paths shall be made available to authorised applicants via any of the participating infrastructure managers.

## **Article 17**

### **Network statement - capacity allocation**

1. The infrastructure managers in consultation with authorised applicants, other interested parties and, where appropriate, other infrastructure managers, shall prepare a statement of capacity allocation principles and criteria which shall form part of the network statement.
2. This statement shall set out the general capacity characteristics of the infrastructure which is available to railway undertakings and any restrictions relating to its use, including likely capacity requirements for maintenance.
3. The statement shall specify the procedures and deadlines which relate to the capacity allocation process. It shall contain specific criteria which are employed during that process, in particular:
  - (a) the modalities according to which authorised applicants may request capacity from the infrastructure manager;
  - (b) the requirements governing authorised applicants;
  - (c) the schedule for the application and allocation processes;
  - (d) the principles governing the coordination process;
  - (e) the procedures which shall be followed and criteria used where infrastructure is capacity constrained; and
  - (f) details of specialised infrastructure designations;
  - (g) any conditions by which account is taken of previous levels of utilisation of capacity in determining priorities for the allocation process.
4. The statement shall detail the measures taken to ensure the adequate treatment of freight services, international services and short-notice requests.
5. The statement shall be published no less than four months in advance of the deadline for requests for infrastructure capacity.

## **Article 18**

### **Principles of allocation**

In determining its statement on capacity allocation, the infrastructure manager shall have regard to the necessity or desirability of factors such as:

- (a) sharing the capacity and securing the development of the infrastructure for the carriage of passengers and goods for domestic and international traffic in the most efficient and economical manner in the interests of all users of railway services;

- (b) prevention of discrimination between undertakings or classes of undertakings;
- (c) promotion of competition in the provision of railway services;
- (d) maintaining and improving service reliability levels;
- (e) satisfaction of reasonable requirements of authorised applicants and the infrastructure manager with regard to the future development of their businesses;
- (f) maximisation of the flexibility available to the infrastructure managers with regard to the allocation of capacity, but consistent with satisfaction of the authorised applicant's reasonable requirements;
- (g) prevention of any imposition of undue constraints on the wishes of other undertakings holding, or intending to hold, rights to use the infrastructure to develop their business;
- (h) appropriate regard to the financial interests of providers of public funds for the purchase of passenger services;
- (i) providing incentives for good performance.

## **Article 19**

### **Authorised applicants**

1. Applications for railway infrastructure capacity may only be made by an authorised applicant.
2. The infrastructure manager may set requirements with regard to authorised applicants to ensure that its legitimate expectations about future revenues and utilisation of the infrastructure are safeguarded. Such requirements shall be appropriate, transparent and non-discriminatory. The requirements shall be published as part of the allocation principles in the network statement, and the Commission shall be informed.
3. The requirements in paragraph 2 may only include the provision of a financial guarantee that must not exceed an appropriate level which shall be proportional to the contemplated level of activity of the authorised applicant, and assurance of the capability to prepare compliant bids for capacity.

## **Article 20**

### **Framework agreements**

1. Without prejudice to Articles 85, 86 and 90 of the Treaty, an authorised applicant and an infrastructure manager may enter into a framework agreement that specifies the characteristics of the railway infrastructure capacity required by the authorised applicant over a period of time exceeding one timetable period. The framework agreement shall not specify a train path in detail, but should be such as to seek to meet the legitimate commercial needs of the authorised applicant.

2. Framework agreements shall not be such as to preclude the use of the relevant infrastructure by other authorised applicants or services.
3. A framework agreement shall allow for the amendment or limitation of its terms to enable better use to be made of the railway infrastructure.
4. The parties to a framework agreement may agree penalties in the event of its being necessary to modify or terminate the agreement.
5. Framework agreements shall in principle be no longer than five years. The infrastructure manager may agree to a longer period in specific cases. Any such exemption shall be justified by the existence of commercial contracts, specialised investments or risks.
6. While respecting commercial confidentiality, the general nature of each framework agreement shall be made available to any interested party.
7. Users with specific needs may wish to define aspects of capacity in the framework agreement more closely than is normally permitted, in recognition of its economic or social importance. Infrastructure managers may take account of such requirements for more specifically defined capacity, provided that it is purchased through a contract that recognises the cost of this to the infrastructure manager and that it is compatible with the principles set out in the network statement.

## **Article 21**

### **Schedule for the allocation process**

1. The infrastructure manager shall adhere to the schedule for capacity allocation set out in paragraphs 2 to 7.
2. The working timetable shall be established once per calendar year.
3. The timetable change shall take place at midnight on the last Saturday in May. Where a change or adjustment is carried out after the summer it shall take place on the last Saturday in September each year and at such other intervals between these dates as are required.
4. The final date for receipt of requests for capacity to be incorporated into the working timetable shall be no more than 12 months in advance of the entry into force of the timetable.
5. No later than 11 months before the working timetable comes into force, the infrastructure managers shall ensure that provisional international train paths have been established in collaboration with other relevant allocation bodies as set out in Article 16. Infrastructure managers shall ensure that as far as possible these are adhered to during the subsequent processes.
6. Infrastructure managers shall agree international train paths to be included in the working timetable, with the other relevant infrastructure managers concerned before commencing consultation on the draft timetable. Adjustments shall only be made if absolutely necessary.

7. No later than four months after the deadline for submission of bids by authorised applicants, the infrastructure manager shall prepare a draft timetable.

## **Article 22**

### **Application**

1. Authorised applicants may apply to the infrastructure manager to request an agreement granting rights to use railway infrastructure against a charge as laid down in Chapter II.
2. Requests relating to the regular timetable must adhere to the deadlines set out in Article 21.
3. An authorised applicant who is a party to a framework agreement shall apply in accordance with that agreement.
4. Authorised applicants may request capacity crossing more than one network by applying to one infrastructure manager. That infrastructure manager shall then be permitted to act on behalf of the authorised applicant to seek capacity with the other relevant infrastructure manager.
5. Infrastructure managers shall ensure that, for capacity crossing more than one network, authorised applicants may apply direct to any joint body which the infrastructure managers establish.

## **Article 23**

### **Scheduling**

1. The infrastructure manager shall as far as is possible meet all requests for capacity including requests for train paths crossing more than one network, and shall as far as possible take account of all constraints on authorised applicants, including the economic effect on their business.
2. The infrastructure manager shall ensure that, except as set out in Articles 20(7), 25(3) and 27, no priority is given to any type of service or authorised applicant within the scheduling and coordination process.
3. The infrastructure manager shall consult interested parties about the draft timetable and allow them at least one month to present their views. Interested parties shall include all those who have requested capacity as well as other parties who wish to have the opportunity to comment on how the timetable may affect their ability to procure rail services during the currency of the timetable.
4. The infrastructure manager shall take appropriate measures to deal with any concerns that are expressed.

## **Article 24**

### **Coordination process**

1. During the scheduling process, when the infrastructure manager encounters conflicts between different requests then he shall attempt, through coordination of the requests, to ensure the best possible matching of all requirements.
2. When a situation requiring coordination arises, the infrastructure manager shall have the right, within reasonable limits, to propose capacity that differs from that which was requested.
3. The infrastructure manager shall attempt, through consultation with the appropriate applicants, to achieve a resolution of any conflicts in the light of the principles set out in Article 18.
4. The principles governing the coordination process shall be defined in the network statement. These shall in particular reflect the difficulty of arranging international train paths and the effect that modification may have on other infrastructure managers.
5. When requests for capacity cannot be satisfied without coordination, the infrastructure manager shall attempt to accommodate all requests through coordination.

## **Article 25**

### **Scarcity of capacity**

1. Where after coordination of the requested paths and consultation with applicants it is not possible to adequately satisfy requests for capacity then the infrastructure manager must immediately declare that element of infrastructure on which this has occurred to be capacity constrained infrastructure. This shall also be done for infrastructure which it can be foreseen will suffer from insufficient capacity in the near future.
2. When infrastructure capacity has been declared to be constrained, the infrastructure manager shall carry out a capacity analysis as described in Article 28, unless a capacity enhancement plan as described in Article 29 is already being implemented.
3. When charges levied under Article 8(4) have not achieved a satisfactory result and the infrastructure capacity has been declared to be constrained, the infrastructure manager may in addition employ priority criteria to allocate capacity.
4. The priority criteria shall take account of the importance of a service to society, relative to any other service which will consequently be excluded. This shall include taking account of the effect in other Member States.
5. The importance of freight services and in particular international freight services shall be given adequate consideration in determining priority criteria.

6. For capacity-constrained infrastructure, the infrastructure manager shall, to an appropriate degree, take sufficient steps to ensure that it can accommodate short-notice requests which are foreseen or foreseeable at the time of the scheduling process. It shall ensure that the ability to satisfy these requests is comparable with that for requests within the timetabling process.
7. The procedures which shall be followed and criteria used where infrastructure is capacity-constrained shall be set out in the network statement.

## **Article 26**

### **Short-notice requests**

1. The infrastructure manager shall ensure that at any time it is able to respond to short-notice requests for individual train paths in no more than five days. The average response time for this type of request shall be less than two days.
2. Infrastructure managers shall where necessary undertake an evaluation of the need for spare capacity to be kept available within the final scheduled timetable to enable them to rapidly respond to foreseeable short-notice requests for capacity.
3. The infrastructure manager shall ensure that information on spare capacity which may be used to satisfy short-notice requests is made available to all authorised applicants who may wish to use this capacity.
4. General statistics of response times to short-notice requests and the outcome of the requests shall be published for each timetable period referred to in Article 21.

## **Article 27**

### **Specialised infrastructure**

1. Unless suitable alternative routes exist, railway infrastructure capacity shall be considered to be available for the use of all types of service which conform to the characteristics necessary for operation on the line.
2. Where there are suitable alternative routes the infrastructure manager may, after consultation with interested parties, designate particular infrastructure for use by specified types of traffic. Without prejudice to Articles 85, 86 and 90 of the Treaty, when such designation has occurred, the infrastructure manager may give priority to this type of traffic when allocating capacity.

Such designation shall not prevent the use of such infrastructure by other types of traffic when capacity is available and when the train conforms to the characteristics necessary for operation on the line.

3. When infrastructure has been designated pursuant to paragraph 2, this shall be described in the network statement.

## **Article 28**

### **Capacity analysis**

1. The objective of a capacity analysis referred to in Article 25(2) is to determine the restrictions on capacity which prevent requests for capacity from being adequately met, and to propose methods of enabling additional requests to be satisfied. This analysis shall identify the reasons for the constraints and what measures might be taken in the short and medium term to ease the constraints.
2. The analysis shall consider the infrastructure, the operating procedures, the nature of the different services operating and the effect of all these factors on capacity. Any measures proposed include in particular re-routing of services, re-timing services, speed alterations and infrastructure improvements.
3. A capacity analysis shall be performed by the infrastructure manager in consultation with current and prospective users of the relevant infrastructure.
4. A capacity analysis shall be completed within two months of the identification of infrastructure as capacity constrained.

## **Article 29**

### **Capacity enhancement plan**

1. Within six months of the completion of a capacity analysis described in Article 28, the infrastructure manager shall propose a capacity enhancement plan.
2. A capacity enhancement plan shall be developed in consultation with users of the relevant capacity constrained infrastructure. It will identify the reasons for the capacity constraint, the options for enhancement, the likely future development of traffic, constraints on infrastructure development, the cost of options including likely changes to access charges and a cost benefit analysis of the possible measures identified to enhance capacity.
3. The proposed plan shall contain a plan of the action that shall be taken and a timetable for implementation of the measures.
4. Unless it is for reasons beyond his control, where an infrastructure manager does not make progress with the action plan identified in the capacity enhancement plan, then he shall, on request of railway undertakings using the relevant infrastructure, cease to levy any fees which are levied in respect of the shortage of capacity for the relevant infrastructure.

## **Article 30**

### **Use of train paths**

1. Infrastructure managers shall impose conditions concerning the utilisation of train paths which they grant to authorised applicants as set out in paragraphs 2, 3 and 4.



2. For capacity constrained infrastructure, the infrastructure manager shall require the surrender of a train path which, over a period of at least one month, has been used on less than 75% of the occasions for which it has been booked.
3. For infrastructure sections where coordination was required, but which are not capacity constrained, the infrastructure manager may require the surrender of a train path which, over a period of at least one month, has been used on less than 75% of the occasions for which it has been booked.
4. In the network statement, an infrastructure manager may specify conditions by which it will take account of previous levels of utilisation of train paths in determining priorities for the allocation process.

#### Article 31

#### **Infrastructure capacity for maintenance**

1. Requests for infrastructure capacity to enable maintenance to be performed, shall be submitted during the scheduling process.
2. Adequate account shall be taken by the infrastructure manager of the effect of capacity reserved for track maintenance on other authorised applicants.

#### Article 32

#### **Arbitration**

1. The infrastructure manager shall ensure that an arbitration procedure capability which can reach a decision on a dispute within ten working days is available when it allocates railway capacity or participates in a joint organisation to allocate international railway capacity. The arbitration shall assist in the resolution of disputes relating to the allocation of infrastructure capacity. The procedures and method of operation shall be agreed in consultation with authorised applicants and shall be published as part of the network statement.
2. Where arbitration is required, each participant shall pay its own costs. Additional costs of the arbitration shall be shared equally between the parties.
3. When authorised applicants and an infrastructure manager or joint organisation of infrastructure managers request arbitration, they shall commit themselves to provide all information required to reach a decision and shall agree to be bound by the decision of the arbitration body.

### **CHAPTER IV**

#### **General measures**

#### Article 33

#### **Regulatory body**

1. Without prejudice to Article 32, Member States shall establish a regulatory body. This body shall be independent in its organisation, funding, legal structure and

decision-making from any infrastructure manager, charging body, allocation body or authorised applicant. The body shall function according to the principles outlined in paragraphs 2 to 8 below.

2. An undertaking shall have a right to appeal to the regulatory body if it believes that it has been unfairly treated, discriminated against or is in any other way aggrieved, and in particular against decisions adopted by the infrastructure manager concerning:
  - (a) the network statement;
  - (b) criteria contained within it;
  - (c) the allocation process and its result;
  - (d) the charging scheme;
  - (e) level or structure of infrastructure fees which they are, or may be, required to pay.
3. The regulatory body shall ensure that charges set by the infrastructure manager comply with Chapter II and are non-discriminatory. Negotiation between undertakings and an infrastructure manager concerning the level of infrastructure charges in as provided for in Article 9(4) shall only be permitted if these are carried out under the supervision of the regulatory body. The regulatory body shall intervene if negotiations are likely to contravene the requirements of this Directive.
4. The regulatory body shall have the power to request relevant information from the infrastructure manager, authorised applicants and any third party involved within the Member State concerned, which must be supplied without undue delay.
5. The regulatory body shall be required to determine any complaints and take action to remedy the situation within a maximum period of two months from receipt of all information.
6. A decision of the regulatory body shall be binding on all parties covered by that decision.
7. In the event of an appeal on a refusal to grant capacity, or on the terms of an offer of capacity, the regulatory body shall either confirm that no modification of the infrastructure manager decision is required, or it shall require modification of that decision in accordance with directions specified by the regulatory body.
8. Member States shall take the measures necessary to ensure that decisions taken by the regulatory body are subject to judicial review.

## **Article 34**

### **Safety certification**

1. The arrangements for safety certification for railway undertakings which are or will be established in the Community and the international groupings which they

form, where such undertakings and groupings carry out services referred to in Article 10 of Directive 91/440/EEC under the conditions laid down in that Article shall be in accordance with paragraphs 2 and 3 of this Article.

2. The Member States shall provide that a safety certificate in which the railway undertakings' safety requirements are set out be submitted in order to ensure safe service on the routes concerned.
3. In order to obtain the safety certificate, the railway undertaking shall comply with the regulations under national law, compatible with Community law and applied in a non-discriminatory manner, laying down the technical and operational requirements specific to rail services and the safety requirements applying to staff, rolling stock and the undertaking's internal organisation.

In particular, it shall provide proof that the staff whom it employs to operate and accompany the trains providing services referred to in Article 10 of Directive 91/440/EEC has the necessary training to comply with the traffic rules applied by the infrastructure manager and to meet the safety requirements imposed on it in the interests of train movement.

The railway undertaking shall also prove that the rolling stock making up the trains has been approved by the public authority or by the infrastructure manager and checked in accordance with the operating rules applicable to the infrastructure used. The safety certificate shall be issued by the authority designated for the purpose by the Member State in which the infrastructure used is situated.

### **Article 35**

#### **Report**

The Commission shall, four years after entry into force of this Directive, submit to the Council a report, accompanied if necessary by proposals for further Community action.

### **Article 36**

#### **Implementation**

Member States shall adopt the laws, regulations and administrative provisions necessary to comply with this Directive from 1 January 2000. They shall forthwith inform the Commission thereof.

When Member States adopt those provisions, they shall contain a reference to this Directive or be accompanied by such reference on the occasion of their official publication. Member States shall determine how such reference is to be made.

### **Article 37**

#### **Repeals**

Regulation (EEC) No 2830/77, Regulation (EEC) No 2183/78, Decision 82/529/EEC, and Directive 95/19/EC are hereby repealed with effect from the date laid down in Article 36.

### **Article 38**

#### **Entry into force**

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

### **Article 39**

#### **Addressees**

This Directive is addressed to the Member States.

Done at Brussels,

For the Council  
The President

The minimum access package shall comprise:

- (a) handling of requests for capacity;
- (b) the right to utilise track capacity which is granted;
- (c) use of running track points and junctions;
- (d) train control including signalling, regulation, dispatching and the communication and provision of information on train movement;
- (e) all other information required to implement or operate the service for which capacity has been granted.

Access services shall comprise:

- (a) access to refuelling facilities;
- (b) access to passenger stations, their buildings and other facilities;
- (c) access to freight terminals;
- (d) access to marshalling yards;
- (e) access to train formation facilities;
- (f) access to storage sidings;
- (g) access to maintenance and other technical facilities.

Mandatory services shall comprise:

- (a) assistance in the case of serious incidents or serious disturbance to normal train movements;
- (b) police intervention where necessitated;
- (c) monitoring the compliance with safety and regulatory standards by undertakings.

Additional services shall comprise:

- (a) use of electrical supply equipment for traction current;
- (b) traction current;
- (c) pre-heating of passenger trains;
- (d) supply of fuel;
- (e) shunting;
- (f) tailor made contracts for:
  - control of transport of dangerous goods,
  - assistance in running abnormal trains.

Ancillary Services shall comprise:

- (a) access to telecommunication network;
- (b) provision of supplementary information;
- (c) technical inspection of rolling stock.

## COMMISSION WORKING PAPER

explanation of the individual articles in the proposal for a Directive relating to the allocation of railway infrastructure capacity and the levying of charges for the use of railway infrastructure and safety certification

### Article 1

1. This article defines the scope of the proposal. Measures are required to ensure that capacity allocation and charging schemes ensure fair access to the market for the provision of railway services and to ensure that they not hinder the flow of goods throughout the Community. Paragraph 1 defines the purpose of the proposal, which is to define the framework for the allocation of railway infrastructure capacity, and for charging for the use of railway infrastructure.
2. It is intended that the rules proposed here should apply to infrastructures which are available for the use of conventional freight, combined transport or passenger railway services. The proposal is not intended to address infrastructures which are specifically constructed and operated for light rail services, metros or trams. For conventional rail networks which are operated solely for the use of an undertaking in the course of its business then equally it would not be appropriate for the terms of this proposal to apply. These limits are defined in paragraph 2.
3. Paragraph 3 repeats the exclusion contained within Directive 95/19/EC relating to shuttle services through the Channel Tunnel.

### Article 2

4. This article defines a number of terms as they are used in the proposal.

### Article 3

5. Paragraph 1 of this article requires the infrastructure manager responsible for the network to prepare, in consultation with users, a statement. Paragraph 2 requires that it shall set out: details of the network; of the schemes in force for access to the network; and the detailed criteria and procedures which will be followed. The intention is to ensure that parties with a right of access should be able to access this information, which they will require, in a straightforward manner and paragraph 3 requires the publication to be made available at cost.
6. It is not intended that the production of the network statement should present an excessive bureaucratic burden. From year to year the network and its constraints will only change in so far as investment is undertaken or there are other physical changes. The deadlines and data that are required in the submission of bids are also likely to remain constant and matters such as the criteria for making decisions in the case of scarcity are also likely to be broadly constant. In view of this, it is unlikely that for the majority of the information, these changes will be very frequent and paragraph 4 requires the statement to be modified as necessary.

#### **Article 4**

7. Paragraphs 1 and 2 require that the establishment of charges and their collection is performed by a body that is completely independent from any railway undertaking. Where there is a complete separation between the infrastructure manager and railway undertakings then the infrastructure manager could perform this task. Paragraph 3 permits infrastructure managers to coordinate their charging activities, this is particularly desirable for international services along the route of international traffic flows so as to ensure that decisions by individual infrastructure managers do not prevent the development and operation of this traffic.
8. There may be reasons why an infrastructure manager will wish to vary its access charges to influence traffic patterns. It might do this under political or commercial pressure to favour a specific destination such as a port, or for its own commercial reasons, e.g. to encourage rail traffic to travel further over its own network thus resulting in higher revenues for it. Such distortions are unlikely to result in more efficient transport systems and therefore should be avoided as far as possible. It is therefore desirable that an infrastructure manager should employ the same charging principles throughout the network. This is required by paragraph 4 and will ensure that there is no distortion between routes or destinations. An exception is made in this paragraph for situations where specific arrangements have been made to facilitate investment that might require a departure from the standard principles.
9. Paragraph 5 places a requirement on the infrastructure manager to ensure that it does not discriminate between undertakings operating in the same market. It is a fundamental requirement that infrastructure charges must not discriminate between different users. This may not result in identical charges, but if two undertakings using the same equipment perform the same service in a comparable market, then the only likely difference in charges should relate to any cost savings which the infrastructure manager receives. Paragraph 6 requires that infrastructure managers must not disclose commercially sensitive information provided to them.

#### **Article 5**

10. This article is concerned with the provision of services to railway undertakings. Infrastructure managers frequently offer a wide range of services. While some of these will inevitably only have one supplier, for example signalling, others can reasonably be provided by other suppliers e.g. diesel fuel or storage facilities. Because of the monopoly position of the infrastructure manager, it is necessary to ensure, as required by Article 86(d) of the Treaty, that it does not abuse its position and require customers to purchase a bundle of unrelated services or charge excessively for those services which only it can provide. At the same time it is necessary to ensure that a railway undertaking may buy the services needed to exercise its right of access. These will vary from a minimum package of services required to operate a diesel train service through a range of other services that may be purchased if required.
11. Where there is potential for competing suppliers then there is a reduced need for strict control over the prices that may be charged. There is merit in having harmonised ranges of services available and therefore five levels of service are

proposed and defined in annex 1. The minimum service package should comprise everything which is required to enable the operation of a diesel powered train. Providing the operator is licensed and the equipment and operation safety approved, there should be no obligation to make further expenditure. Paragraph 1 requires that these services are provided to the railway undertaking. Paragraph 2 deals with other services which the infrastructure manager may require a railway undertaking to procure, even though he may not supply them. Paragraphs 3 and 4 concern other types of services which an undertaking will require to carry out a number of activities and set out the conditions relating to them.

## **Article 6**

12. The purpose of this article is to ensure that infrastructure managers have a good understanding of the value of their assets and the cost of maintaining them as well as of cost causation within their business and have incentives to reduce costs. The intention is to encourage good commercial practice and goes beyond that required in Directive 91/440/EEC to have separate accounts for the infrastructure manager. Paragraph 1 replicates the requirement in Article 6(1) of Directive 95/19/EC for infrastructure managers accounts to balance while recognising that such contributions must respect treaty obligations.
13. Infrastructure managers are in a monopolistic position and are thus less subject to competitive pressure and therefore less likely to ensure that costs are reduced and efficiency increased. Charging schemes can affect the willingness of infrastructure managers to reduce cost. For example, where charges are based upon the additional cost imposed by a train operation, then the benefits of any cost reduction by the infrastructure manager would need to be passed on immediately to railway undertakings. This will remove any incentive for the infrastructure manager to achieve the improvement in the first place. Therefore, paragraph 2 requires there to be an obligation on the infrastructure manager to reduce costs while paragraph 3 requires this to be achieved either through a regulatory scheme or a contractual arrangement exceeding three years. Paragraph 4 ensures that where a contractual arrangement is made, this should define the level of State contributions in advance for the whole period of the contract.
14. Incentives are also required to ensure that investment is undertaken where it is needed and makes economic sense. Both of these objectives could also be pursued via the external regulatory scheme or a contract between State and infrastructure manager.
15. Paragraph 5 requires an inventory of assets and their valuation to be maintained by the infrastructure manager while paragraph 6 requires the establishment of a methodology for apportioning cost between different users of the infrastructure. This is essential to enable charging based upon cost.

## **Article 7**

16. This article requires infrastructure managers to develop a statement of their charging principles for incorporation in the network statement defined in Article 3. Not only do efficient charging schemes need to be developed but that the necessary information on the level and structure of charges needs to be openly available. To ensure that charges and charging schemes are reasonable and fair,



infrastructure managers need to consult all users of their network when they propose changes to the infrastructure charging scheme and this is set out in Paragraph 1.

17. Paragraph 2 ensures that the necessary information is included in the statement including information on revenues and foreseeable changes in the charging scheme over the next five years. Paragraph 3 requires information on other aspects of the charging scheme to be included in the statement. Paragraph 4, requires more detailed data to be made available, to enable current and prospective railway undertakings and other users to ascertain the cost of operating existing and potential services and to understand how modifying their operations could affect the charge incurred. Paragraph 5 ensures that similar information will also be made available for any type of new service. Only with all of this information openly available is it possible for railway undertakings to respond to price signals relating, for example, to wear, energy use, capacity shortages or performance. These requirements will lead to greater efficiency in rail operations as well as facilitating the introduction of new services.

## Article 8

18. The proposed charging scheme for rail infrastructure is part of the first stage of the Commission's approach towards ensuring a consistent introduction of fair and efficient infrastructure charging systems across all modes of transport as set out in the White Paper on Infrastructure Charging in Transport (COM(1998) 460). In keeping with the general approach, the rail proposal aims at better aligning charges with marginal costs. The various provisions aim at bolstering the competitiveness of rail transport by providing a much more transparent, efficient and equitable charging structure and constitute an important step in harmonising rail infrastructure charging. The Commission intends further developing the charging system over time as part of the three stage approach proposed in the White Paper.
19. Several features of the system are noteworthy: First, as a transitional measure, it allows derogations from the marginal cost charging rule, enabling member states to seek higher levels of cost recovery through a non-discriminatory second tier charging system. This is, however, not allowed for freight transport which is in direct competition with road haulage, a mode which, on a marginal basis, does not pay for its avoidable infrastructure costs. Moreover, European rail networks are predominantly passenger networks. Secondly, the proposal allows compensation payments for unpaid marginal external and infrastructure costs in other modes of transport, thereby facilitating the establishment of efficient relative prices between different modes of transport. Thirdly, it is also proposed to include scarcity (congestion) charges. These are an integral component of marginal costs and their inclusion ensures that marginal cost based pricing can lead to satisfactory levels of cost recovery. Their inclusion is also vital in order to ensure that efficient incentives are provided to authorised applicants who apply for scarce infrastructure, thereby enhancing the efficiency of the train path allocation process. Obviously, their inclusion would render rail transport more competitive vis-à-vis road transport because it ensures that incentives are in place to keep high value added traffic on the rail system. Finally, differentiation of charges on the basis of external costs is permitted, but increases in average charges are not allowed until equivalent charging systems are in place in other modes of transport.

As set out in the White Paper, the Commission proposes to develop a Community methodology for estimating external costs and developing appropriate charging systems.

20. Paragraph 1 ensures that charges, which are levied for the use of railway infrastructure, shall, not only be paid to, but be retained by the infrastructure manager. The objective is to ensure that the infrastructure manager has an incentive to boost traffic volumes, and also has an interest in making best use of the network. If the infrastructure manager does not retain the charges then this link is lost.
21. Paragraph 2 requires the provision of information by the infrastructure manager to the Member State so that it may verify that there is no price discrimination, this is identical to Article 9(2) of Directive 95/19/EC.
22. Paragraph 3 defines the basic requirements of infrastructure charges for the minimum service package. The first sentence requires the level of the charge to be that which will result in optimal use of the infrastructure, that is to say that fees should be based upon the additional cost caused by the operation of the train. While this provides the basis for the charges, the charge may be higher as a result of other elements.
23. Paragraph 4 requires charges to reflect scarcity of capacity. At high levels of capacity utilisation, infrastructure managers may find that they cannot satisfy authorised applicants' demands for access. Initially, this might mean that authorised applicants are unable to obtain the train paths, or the journey times, they would like. At locations with extremely high demand, it may mean that services or authorised applicants are unable to access the network at all. For efficiency reasons, the opportunity cost (i.e. the net revenue foregone by the infrastructure manager because the same capacity could have been sold to other operators) should therefore be included in the infrastructure fees. Where opportunity costs are included in infrastructure fees, this will ensure that scarce capacity is allocated efficiently between competing users. However, it is important in view of the monopolistic position of the infrastructure manager, that he must consult with interested parties to ensure that the charging methodology is optimal.
24. Paragraph 5 is concerned with charging for external effects arising from rail transport. It is entirely appropriate and desirable for charging mechanisms to take account of the external effects of the use of the infrastructure. Where competing modes of transport do not pay comparable charges for external costs, it is important that the changes in railway infrastructure charges to reflect different levels of impact on society should not disadvantage rail. This would arise through a net increase in the infrastructure manager's revenue and is therefore prohibited. This paragraph should be read with Article 11, which provides for compensation schemes where a competing transport mode fails to pay a comparable level of charges.
25. It is important that such charges must be calculated on a clear and transparent basis and the methods of calculation published. Careful consideration will need to be given to the use of revenues from this type of charge. When such mechanisms are put in place they need to reflect the fact that it is not the infrastructure manager who is suffering the burden of the cost, and must not provide incentives for him to

encourage traffic which is more damaging to society because of the resulting higher revenues. For this reason it may be desirable that revenues do not accrue to the infrastructure manager but are used for the general alleviation of impacts and improvement of the transport situation. In all cases, mechanisms to influence the level of external costs need to be realistic and non-discriminatory and should be developed in consultation with railway undertakings who will use the infrastructure.

26. Paragraph 6 permits a degree of averaging of charges. There are two reasons for this, first the cost of continuously recalculating charges and second the need for some predictability. It may be costly to calculate specific charges for different types of train service, different parts of the network and at different times of the day or week, particularly if costs also change over time and therefore would require frequent recalculation. Averaging will involve a trade-off between the cost of recalculating a detailed set of charges and the accompanying uncertainty for users set against the likely welfare loss (in terms of under or over use of the network) from basing charges on averaged cost data. The nature of this welfare loss will depend on the way in which average costs are calculated. For example the impact of averaging charges between peak and off-peak periods is likely to be far more serious than the impact of averaging between off-peak periods on different days of the week.
27. Excessive variation in charges can make it difficult for railway undertakings to plan services, particularly those involving major investment decisions or where services are planned long in advance and they require a firm price for future access rights. For example, a new service introduced on a route with no capacity shortage may become uneconomic if charges rise as a result of increased congestion on that route. Therefore, undertakings may prefer stable prices, which would require price variations to be smoothed out and this is permitted. It is desirable to publish likely price changes over time, and this was required in Article 7(2).
28. Paragraph 7 requires the charges for services which are listed as mandatory, additional, and ancillary, but which only have one supplier to relate to the cost of their provision. This would permit a reasonable level of profit, but prevent exploitation of a dominant position. Where there is a choice between multiple suppliers, competition should ensure that prices are appropriate.
29. Paragraph 8 permits charges to be levied for capacity which is taken out of use to permit infrastructure maintenance. The charges should not exceed the net revenue loss to the infrastructure manager had the maintenance not been performed and the track had instead been in use. The levying of such charges will provide a good economic signal of the cost of the track possession and provide incentives to perform the maintenance at the least disruptive times and find means of reducing the length of time required.

## **Article 9**

30. This article deals with methods of covering a high proportion of rail infrastructure costs through charges. Efficient pricing based on marginal costs would generally recover only a relatively small proportion of total rail infrastructure costs. However, a number of Member States will wish to recover a higher level of cost. There are a number of concerns about this. In the first place, this has distorting

effects because a high level of cost recovery from rail infrastructure has the same effect as a tax on rail infrastructure and such a tax will be more distorting in its effect than a more general tax. The need to meet cost recovery targets accounts for many of the inefficiencies in current charging frameworks in use in the Member States.

31. Where it is necessary for the infrastructure manager to levy charges which lead to revenues systematically higher than marginal cost then careful consideration is required of the impact of those charges on rail traffic in general and their effect on individual railway undertakings. It is particularly important that charges are not based on average costs or anything that approximates this as it provides a major disincentive to attract traffic which can cover at least the costs which it imposes. A number of different systems are possible. It is essential that any system employed is non-discriminatory and this requirement will lead to the need for certain safeguards depending on the system employed. It is equally important that where there are classes of users who are rail dependent, limits should be placed on the charges which can be imposed upon them. Finally, even where a higher level of cost recovery is sought, the system should still enable a user, who could at least cover the cost that he causes, to operate on the network.
32. Paragraph 1 provides for special arrangements to enable charges to be higher than marginal cost up to the level of the additional costs imposed in the long run, where this is required to cover the cost of investment. Provisions (a) and (b) require it to be shown that without charges at this level the investment would not have been undertaken and crucially that the combination of the investment and the resulting charges will lead to enhanced efficiency of the transport system.
33. Where a higher degree of cost coverage is required from charges, a number of options exist.
34. The use of fixed charges, which do not vary with traffic levels, may enable a higher degree of cost recovery while still allowing variable charges to reflect the additional cost of traffic. However, fixed charges may deter potential new undertakings, or distort competition between large and small undertakings.
35. Alternatively a higher level of cost recovery may be achieved through variable charges set above the additional cost. There are a number of different ways in which this can be achieved, some of which result in more distortion than others. Ramsey Pricing (which involves setting mark-ups over SRMC which are inversely proportional to demand elasticity) should minimise the impact on the total volume of traffic.
36. Paragraph 2 requires that, for freight traffic, infrastructure charges may not exceed the efficient price, determined in Article 8. For other traffic, higher charges may be levied based upon paragraphs 3 to 5.
37. Paragraph 3 requires that where fixed charges are employed, measures must be taken to ensure that railway undertakings are not disadvantaged through facing substantially higher average or marginal fees. Multi-part tariffs where a fixed element is payable for access to a part of the network for a significant period of time can provide a substantial hurdle for any potential undertaking to overcome and will remain a substantial dis-benefit to undertakings other than the largest

undertaking operating on the section of infrastructure. Fixed charges may not be imposed for short sections of track because this has the effect of being virtually an average cost charge. In view of this the lower limit of an infrastructure element for the application of fixed charges is set as 1000km.

38. Paragraphs 4 and 5 deal with the situation where mark-ups are used to assist in achieving a higher level of cost recovery by enabling an infrastructure manager to extract maximum revenue from each traffic. Paragraph 4 deals with the situation where charges are negotiated. Because of the great danger of discrimination either deliberately or as a result of different undertakings' market position this type of system can only be permitted where there is an effective system of regulation which can ensure that deals made are not discriminatory. The rules to be followed shall be prepared by the regulatory body in consultation with users. It is important to ensure that the costs of performing the negotiations are not excessive and that as far as possible undertakings are sufficiently well informed to be able to negotiate. Paragraph 5 deals with the situation where tariffs are published that vary depending on market segment. Here there is less danger of discrimination although it is still necessary to ensure that the tariffs are applied in a fair manner. This system runs the risk of pricing traffic, that could cover the additional costs that it imposes, off the infrastructure. This would be inefficient and therefore provision must be included to enable special exemptions to be made to enable such traffic to operate.

#### **Article 10**

39. This article details limits to discount schemes. The Commission's decision on the Zaventem airport charges case<sup>34</sup> set out principles which should govern any discount which is offered by an undertaking in a dominant position. The Commission considered that in this case a system of discounts could only be justified on the basis of any cost savings to the manager of the infrastructure. The cost savings arising from an applicant submitting a large number of requests for capacity are likely to be quite small and this will govern the likely size of any discount.
40. Paragraph 2 requires that such a scheme may only reflect actual identifiable cost savings to the infrastructure manager. Where an infrastructure manager provides for a discount scheme, such a scheme could confer unfair advantage on one or more undertakings. If a scheme applied to a whole network it is clear that the only undertaking likely to qualify would be the existing national railway undertaking and that this must be prohibited. This is the intention of paragraph 3. Even where a scheme applies at the level of an infrastructure element it can be unfair in that one undertaking may only offer freight services yet for example both freight and passenger services are counted together toward the discount for no objective reason. This is prevented by paragraph 4.

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<sup>34</sup> Commission Decision 95/364/EC of 28 June 1995, OJ L 216, 12.9.1995.

## **Article 11**

41. Distortion between different transport modes is likely to arise as a result of a failure to fully charge users of one mode of transport or type of transport for all its marginal costs. While full charging of marginal costs is the first best solution, where a Member State has not taken measures to achieve this in other modes of transport, then they must be free to provide appropriately calculated compensation to railway operations and this is provided for in paragraph 1. Such schemes shall be calculated to take account of the different impact of transport modes on society. The compensation must be calculated on a clear and transparent basis and the methods of calculation must be published as required by paragraph 2. Member States should take account of the comment of interested bodies when elaborating such a scheme. Member States will need to ensure that such schemes to compensate users of rail infrastructure for specific unpaid external costs of competing transport modes are compatible with Articles 77, 92 and 93 of the Treaty as set out in paragraph 3. The Commission is likely to propose a specific exemption in the revision of Regulation (EEC) No 1107/70 setting out the basis on which such schemes will be approved, including requirements that the cost valuation be strictly proven and that the scheme be resubmitted for approval at regular intervals.

## **Article 12**

42. The charging framework should provide appropriate incentives for both railway undertakings and the infrastructure manager to improve performance. Paragraph 1 requires the introduction of performance incentives within the charging system. Incentives are required to minimise disruption and are probably best achieved through the use of a monitoring process and performance scheme where undertakings pay penalties when they cause delay and receive compensation when they are delayed or bonuses if they exceed planned performance. Corresponding payments should arise where the infrastructure manager is at fault. If linked to charges, an incentive mechanism will require charges to vary independently of costs, so that revenue may rise or fall in response to good or poor performance. Paragraph 2 requires the scheme to be applied equally throughout the network and to all undertakings.

## **Article 13**

43. This article describes the framework that should apply for the levying of charges for the reservation of capacity. This expands on the previous requirements of Article 12 of Directive 95/19/EC. It is important that an undertaking should not be able to prevent another undertaking from obtaining the capacity needed to perform a railway service by booking large amounts of capacity. This needs to be balanced against the desirability for undertakings not to be penalised for trying to develop new services. Paragraph 2 establishes a general requirement for these charges to encourage efficient use of the infrastructure capacity. Paragraphs 3 and 4 describe the maximum levels of charge which may be levied in certain circumstances. Paragraph 5 enables special arrangements for example where capacity is only required by an undertaking on an occasional basis and at other times the capacity is available for other uses. Paragraph 6 requires that any charges may not be collected until the time when the capacity requested has passed. While the infrastructure manager should have adequate assurance that it will be able to

collect any charges owing, the need to pay in advance would unnecessarily hamper development of the market and be in particular a barrier to smaller undertakings.

#### **Article 14**

44. This article defines the terms under which the right to use railway infrastructure capacity may be granted. This has important ramifications for the provision of services operated under contract to a public authority, for the ability for undertakings to develop new services, for freight customers to obtain competitive offers for services they require and the development of the railway sector. In view of this it is important to clarify the extent of the right, including the ability to effect transfers of it.
45. For services operated under contract to a public authority it is desirable to ensure that if the authority decides to contract with a different supplier of services, then the service may continue to be purchased by the local authority. This implies that the right to the capacity must not belong to the previous undertaking providing the service. There may also be situations where it is desirable for public authorities to seek capacity for the operation of services before they have appointed the undertaking that will provide the service.
46. In view of these needs it is desirable that the ownership of the capacity of the railway infrastructure to carry trains rests with the infrastructure manager as required in paragraph 1. Paragraph 2 requires that the allocation of these rights is performed by the infrastructure manager. Once allocated, the right must be used or returned to the infrastructure manager, it cannot be transferred even within one company since this would undermine the role of the infrastructure manager in making decisions on the optimal use of the limited capacity. Paragraph 3 permits the granting of right to applicants to use specific capacity over one timetable period. The allocation of a train path for a timetable period provides a short term right for the applicant to use that train path subject to the agreed terms and conditions of access. Paragraph 4 provides for arrangements to be made for longer term capacity needs and which are dealt with more fully in Article 20. Paragraph 5 requires the establishment of legally enforceable contracts which specify the agreements that have been entered into.

#### **Article 15**

47. This article sets requirements for the performance of capacity allocation. Where there is a dominant railway undertaking closely linked to the infrastructure manager, other railway undertakings may have reasonable fears concerning the impartiality of the allocation process. In this case the only effective solution is to require that the allocation process be performed by a body which is completely independent from any user of the infrastructure. Ideally this will be the infrastructure manager as set out in paragraph 1. Paragraph 2 ensures that where there is not a clear legal and managerial separation of the infrastructure manager from railway undertakings then a separate allocation body must undertake this task. Paragraph 3 requires the commercial sensitivity of information to be respected during the allocation process.

## Article 16

48. To create the possibility of offering an international train service it is necessary to ensure that capacity can be reserved in a coordinated manner in more than one network. At present train paths tend to be allocated on a national basis and then adapted through the Forum Train Europe process to enable them to be usable. This can frequently result in poor paths particularly where the service has a low priority e.g. freight. Better coordination is required, with to as large a degree as possible comparable access conditions, processes and criteria. Coordination may be best performed bi-laterally for services across a border, multilaterally for an international route such as the Freight Freeways which have been put in place, or in a multilateral forum.
49. Paragraph 1 establishes an obligation for infrastructure managers to collaborate in any appropriate manner with other infrastructure managers to enable the efficient creation and allocation of capacity crossing multiple networks. This is of course of greatest significance for the international routes. In any of these situations it is essential that similar conditions apply to the collaboration as to the individual bodies. This will apply in particular to; the methods of decision making, provision of information, and confidentiality of information provided by applicants. Paragraph 2 requires that an organisation be created to coordinate the international allocation of capacity. It acknowledges that such an organisation will need to incorporate representatives from railway infrastructure bodies outside the Community and requires that the Commission should be both kept informed of the activities of this organisation and permitted to attend meetings.
50. Paragraph 2 establishes that in parallel with the arrangements for individual infrastructure managers, decisions must be taken only by infrastructure managers and not by railway undertakings or their representatives. Paragraph 3 requires that when collaborating in this way, infrastructure managers shall ensure that information on the membership of such collaboration, as well as sufficient information about how the collaboration functions shall be made available. Paragraph 4 permits the creation of pre-arranged train paths. This enables the operation of Trans European Rail Freight Freeways as outlined in the Commission's Communication COM (97) 242 final. Paragraph 4 requires that such train paths should be made available through any of the participating infrastructure managers.

## Article 17

51. Paragraph 1 requires the preparation of a section of the network statement describing the framework in which applications for capacity will be considered. To enable an efficient allocation process to be carried out, it is important that applicants understand the availability of capacity on the infrastructure network and the rules and criteria which will be applied. This information, which is required by paragraphs 2 and 3, forms the framework within which applications for capacity will be judged and must be clear and available to all applicants. It provides a measure against which decisions may be judged and it provides guidance to enable applicants to make informed requests. Paragraph 4 requires that the statement should specifically address measures to tackle the specific needs of freight, international and short notice services, which have tended to be poorly served in the past. To enable the statement to inform bids for capacity, paragraph 5 requires



that the infrastructure manager should produce the network statement four months in advance of the deadline for the timetabling process.

#### **Article 18**

52. This article aims to provide guidance on the type of issues that the infrastructure manager will need to address in its capacity allocation statement. The infrastructure manager is required to have regard to these issues, but how it reacts and addresses any issues which arise is legitimately a matter for which it should be free to make decisions. The list is not intended to be exhaustive, although it covers the principal areas of concern.

#### **Article 19**

53. This article defines which entities may apply for railway infrastructure capacity. The ability to bid for the right to capacity is totally distinct from the right of access to the railway infrastructure to operate a train service. The latter right is governed under Community law by Directive 91/440/EEC and by national legislation where this provides for a greater degree of access. These rights of access are associated with additional requirements governing issues such as licensing, safety certification and compliance with other appropriate regulations concerning operations of, for example, the rolling stock.
54. The ability to hold rights to railway capacity is linked to the ability to use rail for a transport service. It is self evident that railway undertakings need to have this possibility to enable them to offer rail transport services. It is also the case that there are other parties with an equally legitimate interest in the use of rail for a transport service, these will include purchasers of public passenger services, combined transport operators and industry with large volumes of freight. There are a variety of reasons why these parties may wish to have the right to hold capacity. In so far as a market exists for the provision of train services, purchasers of a service may wish to have the freedom to use different railway undertakings to satisfy their business needs. Where a business is taking a risk in developing or operating a service then it is understandable and legitimate that it should also have the ability to control the factors used in running its business. A customer of a railway service may have different objectives for the development of their business, which may even conflict with the business objectives of a railway undertaking. Businesses may want greater assurance that their interests will be safeguarded in the allocation process than can be provided by an intermediary. In the case of services carried out on contract to a public authority the authority may need to acquire the capacity before it has selected the railway undertaking, it will need to ensure the continuity of services if the undertaking changes, and it needs to ensure that the outgoing undertaking does not seek to keep any of the capacity which is granted for those services.
55. These arguments provide overwhelming evidence of the need to enable bodies other than railway undertakings with a legitimate interest to seek railway infrastructure capacity. Paragraph 1 restricts the ability to apply for capacity to authorised applicants. Paragraphs 2 and 3 permit the setting of appropriate requirements to provide assurance that any body which submits a bid can do so in an appropriate manner and can pay any necessary penalties should the capacity bid for remain unused.

56. In all cases, the right to use of capacity allocated by the infrastructure manager rests with the body to whom it was allocated for the period of allocation. Where the operation of the service is contracted to a licensed railway undertaking, that undertaking does not acquire any right to the capacity used beyond the period for which they perform the service.

## **Article 20**

57. This article defines the means to provide applicants with longer-term assurance of capacity through entering into a framework agreement as set out in paragraph 1. Applicants need to have some certainty over the type of rights that they enjoy and the likelihood that those rights will be available and usable for a period of time in the future. This is important for undertakings' ability to win and retain customers, but also to underpin their ability to carry out investments in, for example, equipment and in developing the service.
58. The most desirable type of right will vary between traffic and operator types. It may be that local passenger services would benefit from relatively fixed schedules over a period of years, whereas for long distance passenger services this may be less important and for freight, the most important point may be to ensure that the departure and arrival times are satisfactory. While these framework principles might be optimal for different traffic types, the challenge is to ensure that a balance is struck between the competing needs. Assurance must be proportionate to the applicant's identifiable needs and must not be such as to prevent other applicants with a legitimate expectation to be able to operate services on the infrastructure from having a reasonable expectation of acquiring the necessary capacity. Providing rights that are too narrowly defined will create constraints on the network capacity, which can hamper the scheduling of other services, while on the other hand, too little security will deter or hinder development of their business. Paragraph 2 requires that the arrangements do not prevent other legitimate users from obtaining capacity on the network.
59. The commitment must include explicit requirements for flexibility, which will allow optimal use to be made of available capacity. This is set out in paragraph 3, while paragraph 4 permits these to be accompanied by penalties if agreed. Long term capacity commitments must be proportionate to need, and paragraph 5 requires that they must not normally be allowed to be for longer than five years. Paragraph 6 requires that the nature of the agreements entered into must be made public to ensure that any concerns about their effect can be addressed. Paragraph 7 provides the means for authorised applicants that place a high value on meeting one or more particular characteristics of a service to purchase a greater degree of assurance that their commercial needs will be satisfied. However, this must reflect the cost that the additional inflexibility will impose upon the network.

## **Article 21**

60. This article determines the timing of the various steps in the allocation process. There is considerable merit to the synchronisation of the timetabling process across infrastructure networks to facilitate bidding for paths which cross more than one network. A similar argument can be made to enable undertakings to more easily bid for capacity on another infrastructure network. In any case in view of the unavoidable linkage between the international allocation processes and

national processes it seems desirable to propose a synchronisation of the main elements within the process. Paragraph 2 therefore defines the dates of the major timetable changes as well as the maximum period beforehand for the submission of bids. Specific mention is made of the timing of the international coordination which must take place in parallel with the national processes to ensure an optimal outcome.

## **Article 22**

61. This article determines how applicants may apply for capacity. Paragraph 1 requires that applicants must apply to the appropriate infrastructure manager for capacity. Paragraph 2 ensures that the application respects the deadlines for the process. Paragraph 3 requires that where an applicant has a framework agreement, then their application must conform to that agreement. Paragraphs 4 and 5 concern applications for capacity crossing more than one network. Paragraph 4 permits an application to be made to one of the infrastructure managers who will coordinate the granting of capacity with other relevant infrastructure managers. Alternatively paragraph 5 ensures that if infrastructure managers create any joint body for the allocation of capacity on more than one network then an authorised applicant may apply directly to that body for capacity.

## **Article 23**

62. This article determines how the draft timetable shall be created. Paragraph 1 places a requirement on the infrastructure manager to attempt to satisfy all properly submitted requests for capacity. In doing so, it must take account of the needs of the applicants. Paragraph 2 requires that the infrastructure manager should treat all requests for capacity equally except as provided for where there is scarcity of capacity or specialised infrastructure. Paragraph 3 requires the infrastructure manager to consult interested parties about the draft timetable. This is to ensure that all parties have the opportunity to identify whether the draft will be unable to satisfy their requirements and to provide an opportunity for those problems to be resolved or for them to seek arbitration. It also provides time for possible reallocation of staff or rolling stock where required. Paragraph 4 require the infrastructure manager to take appropriate action to deal with any concerns raised.

## **Article 24**

63. This article describes the process to be followed where conflicts arise between requests. It is inevitable that as demand for the use of capacity rises on a section of the network that request for train paths may conflict. Measures need to be taken to ensure that while attempting to respect the necessary aspects of the paths requested, through making minor adjustments to the characteristics of the path it becomes possible to accommodate additional requests. This is set out in paragraphs 1 and 2. Paragraph 3 establishes the principle that the infrastructure manager should seek to achieve an optimal resolution of conflicting requests for capacity. Paragraph 4 requires that the principles to be employed must be set out in the network statement. Paragraph 5 establishes the principle that it is more desirable to attempt to satisfy all requests for capacity than to prevent the operation of a requested service.

## Article 25

64. This article describes the procedure where a request for capacity cannot be adequately satisfied due to a shortage of capacity. As demand for train paths increases it will become increasingly difficult to satisfy the requirements of the authorised applicants. Initially this may require minor differences between capacity requested and that allocated. As demand increases, so the capacity that can be made available will often be unacceptable to users and it is possible that there may simply be no suitable capacity available at all. The traditional solution to this issue was to allocate priorities to different traffic types, which would then be allocated paths with the least important being squeezed out of the system first. There are a number of reasons why such a simple approach is no longer acceptable. Firstly the existence of more than one railway undertaking may require decisions which require choices about comparable priority services of different railway undertakings. Secondly the system fails to give due consideration to the different requirements of service types.
65. In the situation where scarcity arises the potential for coordination will already have been exhausted. Paragraph 1 requires that in this situation, the infrastructure must be declared capacity constrained. Following this, paragraph 2 then requires a thorough analysis of the scope for greater adjustments, than would normally be considered in the coordination process. Paragraph 3 permits the infrastructure manager, when it must make a choice between conflicting requests, after coordination has been carried out, to base that choice on priority criteria which it has previously specified. Paragraph 4 requires that the priority criteria must take account of the value to society of a service which is excluded relative to one which is not. This must also take account of the effect in other Member States, for example additional lorry traffic through the Alps if an international freight train is excluded from the network in Denmark.
66. Paragraph 5 notes that adequate consideration must be given to freight and international freight when determining priorities. This implies that freight should not automatically be allocated least priority, but that the importance of services should be considered on their merits and in particular the implications for the development of rail services. Paragraph 6 requires that adequate steps are taken to enable short-notice requests, that is to say for traffic types which are not planned so far in advance, to receive a comparable chance of being granted capacity to those within the timetabling process. The infrastructure manager will need to employ a set of pre determined rules to decide which traffic is to be excluded from the network. The rules shall be clear and explicit and paragraph 7 requires the rules which are applied to be published as part of the network statement.

## Article 26

67. The purpose of this article is to enable greater potential flexibility to railway undertakings. Paragraph 1 requires that the infrastructure manager should be able to respond rapidly to requests for capacity which are tabled outside the timetabling process. Paragraph 2 creates a requirement for infrastructure managers to be aware of the extent to which they have spare capacity available to meet requests for capacity outside the normal scheduling process. This capacity is most likely to be attractive to freight train operators and should enhance their ability to compete with road haulage for late booked traffic or amendments to pre arranged traffic.

Paragraph 3 requires information on the availability of spare capacity, which has been identified, to be supplied to all likely users. Paragraph 4 requires the publication of statistics showing the overall performance of the allocation process.

#### **Article 27**

68. This article replaces Articles 4(b) and 5 of Directive 95/19/EC, and makes special arrangements for certain infrastructures. Paragraph 1 requires that infrastructure shall normally be available for all types of service, unless suitable alternative routes exist which are not capacity constrained. There will be circumstances where the infrastructure manager wishes to ensure for operational reasons either that specific types of service are accorded priority on a piece of infrastructure or that it is necessary to grant some rights to access, perhaps related to the financing of investment. In so far as such rights are not in contradiction with other rules, paragraph 2 provides for them to be permitted after consultation. Typical examples might relate to a dedicated high speed line where the operation of other traffic types, even if technically compatible might lead to dramatic reduction in the availability of the infrastructure for the purpose for which it was constructed. Similar arguments might apply where a link is intended for freight services to keep them off a passenger line and its use by passenger services could inhibit that purpose. Clearly the extent to which such special arrangements may be put in place must be proportionate to their need and effect. Paragraph 2 ensures that such arrangements cannot be put in place to prevent legitimate requests to use the infrastructure. Paragraph 3 requires the publication of such a designation in the network statement.

#### **Article 28**

69. This article defines what is meant by a capacity analysis in case of scarcity. Railway infrastructure is a natural monopoly and in the majority of cases this is likely to remain the case. This coupled with his frequent close links with the State implies that the manager of the infrastructure is not forced by a market to respond in an economically rational manner. This may result in sub-optimal behaviour with regard to the provision or use of capacity. A key role therefore needs to be played by the State, either itself or through a regulatory body to ensure that infrastructure managers do behave in a manner that is consistent with the interests of society and not simply their own interest. In particular, with regard to capacity allocation, processes are needed to ensure that where capacity becomes scarce, appropriate measures are put in place to alleviate this situation in an appropriate manner.
70. Where any request is unable to be met, either because there is simply no capacity or the capacity available is so far from what was requested as to be effectively unusable then the infrastructure has become saturated for at least some time period. This situation is not necessarily of concern to the infrastructure manager particularly if he is able to increase his access charges in view of the scarcity. If the infrastructure manager is sufficiently commercially motivated then he is likely to explore all possible ways of extracting the maximum possible usage from his infrastructure. In situations where this is not the case it is desirable to ensure that he carries out, in consultation with railway undertakings, an assessment of the infrastructure involved and the apparent constraints. These requirements are set out in paragraphs 1 and 2. There should also be a thorough assessment of the

competing demands around the time of the request to identify what possible methods of re-timing, slowing or re-directing traffic could enable a fuller accommodation of the requested paths. This analysis may identify measures which enable the operation of further services, however if they do not then they should lead the infrastructure manager to perform an assessment of possible methods of capacity enhancement and appropriate cost benefit analysis. Paragraph 3 requires that all of the interested parties should be consulted during the performance of the analysis. Paragraph 4 sets a time limit for the completion of the analysis.

## **Article 29**

71. This article describes the nature of a capacity enhancement plan. Paragraph 1 requires that where, after the capacity assessment process, the infrastructure manager still cannot fully satisfy the request for paths, then he must within 6 months carry out an assessment of the potential for capacity expansion through investment. Paragraph 2 requires that such an assessment should take account of projected traffic alterations, should consider short and long term measures, should take account of their costs and benefits and the ability of operators to pay those costs through higher access charges. The infrastructure manager shall consult all interested railway undertakings on the conclusions of the assessment before announcing its proposals for measures to alleviate the capacity scarcity. Where an infrastructure manager has carried out such a survey and is implementing the proposals agreed, it has no further need to perform such a survey. Dependent on the outcome of this the infrastructure manager will be able to develop plans for investment to alleviate the constraints. This plan should be set out and followed by him. Paragraph 3 requires the plan to include a timetable for the implementation of the measures. Paragraph 4 ensures that where, for reasons which he can control, the infrastructure manager fails to make progress to the timetable in the plan then, if requested by the railway undertakings using the infrastructure which it covers, he must cease to levy any fees which arise from the shortage of capacity.

## **Article 30**

72. This article requires that booked capacity must be used or returned to the infrastructure manager. The purpose of this requirement is to ensure optimal use of scarce capacity. Paragraph 1 permits an infrastructure manager to impose requirements on the use of train paths that are booked. Paragraph 2 deals with the situation where there is insufficient capacity to meet all requests. In this case the infrastructure manager must request the surrender of any paths used for less than 75% of the booking over a period of at least one month. Paragraph 3 deals with the situation where coordination was required but no services were excluded. In this case the infrastructure manager is permitted to require the surrender of paths which are used for less than 75% of the booking over a period of at least one month. Paragraph 4 permits the infrastructure manager to base future priority decisions on past performance in the utilisation of booked capacity.

## **Article 31**

73. This article describes the arrangements for booking capacity for maintenance of the railway infrastructure. Paragraph 1 requires that bids shall be submitted for capacity to undertake infrastructure maintenance. The infrastructure manager may be making the allocation decision, and may also be the body seeking capacity to

carry out maintenance. In view of this paragraph 2 requires that adequate account be taken of the effect of the capacity reserved for track maintenance on other applicants for capacity.

## **Article 32**

74. This article describes arrangements for arbitration with the aim of offering a more rapid resolution for more straightforward problems. Many of the decisions that must be taken during the allocation process involve matters of judgement, and it would be surprising if disagreements did not arise. Proper consultation and openness about the process and criteria used should help to ensure a better understanding of the limitations. In time this is likely to result in better bids for capacity from applicants. Nevertheless, it is quite likely that there will be occasions where applicants feel that they have not been properly treated and would like a second opinion. In addition because of the constraints on the timetabling process, it is desirable to offer the parties the possibility of reaching agreement through some sort of arbitration process rather than a lengthy appeal. Nonetheless, it is clear that the existence of an arbitration process neither prevents an appeal to the regulatory body, nor to seek a judicial ruling on any decision. Paragraph 1 requires an infrastructure manager to ensure that an arbitration procedure exists both when it carries out the allocation process and where it collaborates with other infrastructure managers. It also requires that arrangements exist to enable a decision to be reached in ten working days.
75. Paragraph 2 requires each party to an arbitration to pay its own costs, with any other costs shared equally between them. Paragraph 3 ensures that when choosing to agree to arbitration, the parties commit themselves to providing the necessary information and to abide by the decision reached.

## **Article 33**

76. The right to appeal against decisions of the infrastructure manager is fundamental, Article 13 of Directive 95/19/EC ensured that in all Member States a right of appeal must exist with regard to the charging of fees or applications for railway infrastructure capacity to operate services permitted under Article 10 of Directive 91/440/EEC. Those decisions must be made within two months of all information being available. However, it is important that the ability to appeal must cover not only the actual decision but also the rules and criteria which set the framework for the decision. In view of the complexity of the issues involved, it is desirable that this appeal body should be a specialised body with detailed knowledge of the railway sector and in particular the allocation process. In any case it is likely that, given the existing requirement for a decision within two months, this process cannot be dealt with by the courts.
77. This article sets out the requirements for a regulatory body to be established for rail infrastructure networks. This requirement supersedes the provision of Directive 95/19/EC, and the regulatory body will have wider powers to oversee the charging and capacity allocation processes rather than to provide only the possibility of appeal. The latter possibility still exists, but the possibility for arbitration in the capacity allocation procedures, and the requirement in this proposal to oversee elements of the charging scheme should reduce the need for appeals.

78. Paragraph 1 requires that this body must be completely independent of all the parties involved. Paragraph 2 sets out the areas where the regulatory body must have the power to take action. Paragraph 3 requires that negotiation may only be employed as part of the process of setting infrastructure charges under the supervision of the regulatory body. Paragraph 4 ensures that the regulatory body shall have the power to request information which it requires to make its decisions while paragraph 5 requires that a decision must be taken within two months of any complaint to the regulatory body. Paragraph 6 provides for it to have the power to impose conditions on all relevant parties. Paragraph 8 ensures that any decision that it takes must be open to review in a court.
79. Each national regulatory body clearly only has a remit to consider allocation complaints in the territory in which it is established. In the case of charges this is unlikely to be a problem because the charge will be levied for the use of a specific element of infrastructure. If charges are set which make an international service uneconomic, then they can be challenged in the State where they are set. However, applicants for capacity which crosses more than one Member State may be unhappy with allocation decisions taken but be unable to pinpoint a particular infrastructure manager which they believe has not acted appropriately, possibly because the decision was taken by a joint organisation. This situation implies the need for an international appeal body. However desirable this might be, providing such an appeal body would present a number of difficulties. In particular it might be controversial to create a body which has the necessary legal powers, and it could also prove difficult to achieve this through a directive addressed to the Member States. Nonetheless, it of course remains possible for a party which feels that it has been treated in a manner which contravenes the competition requirements of the Treaty to bring this to the notice of the Commission. In view of these considerations it is not proposed at this stage that an appeal body should be established to deal with problems arising from the international allocation of railway capacity.

#### **Article 34**

80. This article replicates those parts of Directive 95/19/EC which deal with safety certification issues. No changes are made to any of these provisions, and in view of this, paragraph 1 is required to ensure that the scope of this article is the same as that covered by the safety article in the preceding Directive.

#### **Articles 35, 36, 37 and 38**

81. These articles deal with the coming into force of the proposal and the need for the Commission to report on the effects, four years after entry into force along with any recommendations on further action.



### Article 37

82. This article repeals Directive 95/19/EC as well as two other Regulations and a Decision relating to charges that are superseded by this proposal.
83. There is in existence a considerable quantity of Community legislation relating to rail transport. Those texts which address the question of charges should be reconsidered when putting forward this proposal. Regulations (EEC) No 2830/77 and (EEC) No 2183/78 and Council Decision 82/529/EEC in particular appear to fall in this category. Regulation (EEC) No 2830/77 lays down measures which were considered to be necessary to achieve comparability between the accounting systems and annual accounts of railway undertakings. Regulation (EEC) No 2183/78 lays down uniform costing principles for railway undertakings charging for international full train freight traffic. Council Decision 82/529/EEC relates to the fixing of rates for the international carriage of goods by rail.
84. In view of their age, both Regulations do not reflect the changed railway industry in a number of ways. In particular, both are only addressed to a limited number of railway undertakings one of which no longer exists, and neither reflect the accounting separation required in Directive 91/440/EEC, nor the fact that in many Member States that there is a separation of the function of Infrastructure Management from Railway undertakings.
85. Regulation (EEC) No 2830/77 lays down measures which were considered to be necessary to achieve comparability between the accounting systems and annual accounts of railway undertakings. With the development of a proper market for rail transport in the Community, it should be of considerably less importance for there to be comparability between railway accounting systems. The current proposal requires sufficient information to be made available by Infrastructure Managers to ensure that railway undertakings can be confident that they are being required to pay a legitimate charge. In addition Community rules governing company accounts should also ensure a reasonable degree of conformity.
86. Regulation (EEC) No 2183/78 lays down uniform costing principles for railway undertakings for charging for international full train freight traffic. Many of the cost factors referred to in the Regulation are infrastructure cost factors which are covered in this proposal. Such a legal framework is in addition only necessary where the market is insufficiently developed to ensure rational behaviour by the undertakings. Directive 91/440/EEC has provided the first steps toward the creation of a proper market for railway services and many Member States have gone further. These developments provide for the possibility of competing operators and therefore make the regulation an anachronism.
87. Therefore, in view of the fact that in many ways both of these regulations no longer reflect the structure of the industry and that they will be largely superseded by this proposal, Regulations (EEC) No 2183/78 and (EEC) No 2830/77 are repealed.

88. Council Decision 82/529/EEC also no longer reflects the changed nature of the rail market. The Decision is based upon Council Decision 75/327/EEC which itself was repealed by Directive 91/440/EEC. As with the Regulations, the Decision is only addressed to a limited number of railway undertakings one of which no longer exists. The Decision is however no longer compatible with the situation created by Directive 91/440/EEC which creates the possibility of competing international rail freight services. This possibility means that the fixing of rates between undertakings as foreseen in the Decision could run counter to Article 85 of the Treaty. In addition, the commercial independence and managerial freedom which was sought by the Decision to enable the setting of different tariffs for international freight services is now enshrined in Article 4 of Directive 91/440/EEC. In view of these factors there is no objective reason for the continued existence of this Decision and it is therefore repealed.

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