

## II

(Non-legislative acts)

## REGULATIONS

**COMMISSION IMPLEMENTING REGULATION (EU) No 869/2014****of 11 August 2014****on new rail passenger services****(Text with EEA relevance)**

THE EUROPEAN COMMISSION,

Having regard to the Treaty on the Functioning of the European Union,

Having regard to Directive 2012/34/EU of the European Parliament and of the Council of 21 November 2012 establishing a single European railway area <sup>(1)</sup> and in particular Articles 10(4) and 11(4) thereof,

Whereas:

- (1) In accordance with Article 10 of Directive 2012/34/EU, Member States have opened their market for international rail passenger transport services provided by any railway undertaking licensed under the same Directive. In the course of an international rail passenger service, railway undertakings have the right to pick up passengers at any station located along the international route and set them down at another, including stations located in the same Member State.
- (2) However, the introduction of new, open-access international rail passenger services with intermediate stops should not be used to open up the market for domestic passenger services, but should merely focus on stops that are ancillary to the international service. The principal purpose of the new services should be to carry passengers travelling on an international journey. At the request of competent authorities or interested railway undertakings, the regulatory body referred to in Section 4 of Chapter IV of Directive 2012/34/EU should determine the principal purpose of a proposed new service.
- (3) Opening up international rail passenger services to competition may have implications for the organisation and financing of rail passenger services provided under a public service contract in accordance with Regulation (EC) No 1370/2007 of the European Parliament and of the Council <sup>(2)</sup>. In accordance with Article 11 of Directive 2012/34/EU, Member States may limit the right of access to the market where that right would compromise the economic equilibrium of those public service contracts. At the request of competent authorities, the infrastructure manager or the railway undertaking performing the public service contract, the regulatory body should determine whether a proposed new international rail passenger service would compromise the economic equilibrium of a public service contract.
- (4) In order to avoid the interruption of a new rail passenger service that has already started, and to give legal certainty to this new service about its possibility to operate, the time period that is open for request for a principal purpose test or for an economic equilibrium test should be limited and linked to the time of the applicant's notification of its interest in operating a new international rail passenger service. For the same reason, the procedures of the regulatory body for those tests should also be limited in time.

<sup>(1)</sup> OJ L 343, 14.12.2012, p. 32.

<sup>(2)</sup> Regulation (EC) No 1370/2007 of the European Parliament and of the Council of 23 October 2007 on public passenger transport services by rail and by road and repealing Council Regulations (EEC) Nos 1191/69 and 1107/70 (OJ L 315, 3.12.2007, p. 1).

- (5) A request for a principal purpose test should include all relevant information to justify that the principal purpose of the proposed new service is other than to carry passengers between stations located in different Member States. In order to meet this requirement, entities requesting for such a test should be able to use standard request forms published by the regulatory bodies.
- (6) The regulatory body should carry out both a qualitative and quantitative analysis to identify the vocation of the proposed new service in the medium term, rather than its characteristics at a given moment. Assessment criteria should be determined in the methodology adopted by the regulatory body for the principal purpose test with regard to the specificities of rail transport in the Member State concerned. No quantified threshold should be applied strictly or in isolation.
- (7) A request for an economic equilibrium test should include all relevant information to justify that the economic equilibrium of the public service contract would be compromised by the proposed new service. The economic equilibrium of a public service contract should be regarded as compromised by the proposed new service if there is a substantial change in the value of the public service contract which implies that services operated under that contract in a competitively structured market would no longer be sustainable and capable of operating with a reasonable level of profit.
- (8) The assessment of the impact of the proposed new service on the economic equilibrium of a public service contract should be based on an objective method and assessment criteria to be determined in the methodology adopted by the regulatory body for the economic equilibrium test with regard to the specificities of rail transport in the Member State concerned. The economic analysis should focus on the economic impact of the proposed new service on the public service contract as a whole, including the services specifically affected, for its whole time-scale. No predefined quantified threshold should be applied strictly or in isolation. Beyond the economic analysis of the impact of the proposed new service on the public service contract, the regulatory body should also take into account the benefits to customers in the short and medium term.
- (9) The possibility of reconsideration of a decision taken by the regulatory body resulting from an economic equilibrium test should be limited to cases when there is a significant change in the new service in comparison with the data analysed by the regulatory body or when there is a substantial difference between the real and estimated impact on the services under the public service contract. In order to guarantee a minimum of legal stability for the new service operator, there should be a certain period of time when no reconsideration may be requested.
- (10) Without prejudice to the principle of independence of regulatory bodies in decision-making referred to in Article 55(1) of Directive 2012/34/EU, regulatory bodies should exchange information and, where relevant in individual cases, should coordinate their principles and actions related to principal purpose and economic equilibrium tests, in order to avoid major differences in their practice that would bring uncertainty to the market of international rail passenger services.
- (11) In all their activities related to the principal purpose or the economic equilibrium tests, regulatory bodies should respect the confidentiality of commercially sensitive information received from the parties involved in these tests.
- (12) Regulatory bodies have no obligation to request a fee for a principal purpose test, an economic equilibrium test or the reconsideration of an economic equilibrium test. However, Member States may decide to impose such a fee on entities making such requests for the work undertaken by the regulatory bodies covering the net cost of these assessments. In such a case, the fee should be non-discriminatory, reasonable and be effectively levied on all the requesting entities in a transparent manner.
- (13) Taking into account the results of a stakeholders' consultation and exchanges of information with other regulatory bodies, regulatory bodies should develop a consistent methodology for principal purpose tests and, if appropriate, for economic equilibrium tests. This responsibility should not be constrained by other entities. The tests should rely on a case-by-case analysis, rather than simple application of predetermined thresholds. No thresholds should be determined in national legislative acts. The assessment method should be established in a way consistent with market developments, allowing its evolution over time, in particular in the light of the experience of regulatory bodies.
- (14) The measures provided for in this Regulation are in accordance with the opinion of the Committee established by Article 62(1) of Directive 2012/34/EU,

HAS ADOPTED THIS REGULATION:

#### *Article 1*

##### **Subject matter**

This Regulation sets out the details of the procedure and criteria to be followed when determining:

- (a) whether the principal purpose of a rail service is to carry passengers between stations located in different Member States;
- (b) whether the economic equilibrium of a public service contract for rail transport is compromised by an international rail passenger service.

#### *Article 1a*

##### **Exclusions from the scope**

This Regulation does not apply to services organised by an undertaking to transport its own employees to and from work as well as to services for which no tickets are sold to the public.

#### *Article 2*

##### **Definitions**

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

- (1) 'new international passenger service' means an international passenger service that is proposed to be introduced on the market or implies a substantial modification in terms of increased frequencies or an increased number of stops of an existing international passenger service;
- (2) 'principal purpose test' means the assessment process carried out by a regulatory body at the request of an entity referred to in Article 5 in order to determine whether the principal purpose of a proposed new rail service is to carry passengers between stations located in different Member States or to carry passengers between stations located in the same Member State;
- (3) 'economic equilibrium test' means the assessment process carried out by a regulatory body at the request of an entity referred to in Article 10, only applicable in Member States that have decided, in accordance with Article 11 of Directive 2012/34/EU, to limit the right of access to rail infrastructure for international rail passenger services between a place of departure and a destination which are covered by one or more public service contracts, in order to determine whether the economic equilibrium of a public service contract would be compromised by a proposed new international rail passenger service;
- (4) 'public service contract' means a public service contract as defined in Article 2(i) of Regulation (EC) No 1370/2007 that relates to rail transport;
- (5) 'competent authority' means a competent authority as defined in Article 2(b) of Regulation (EC) No 1370/2007;
- (6) 'net financial effect' means the effect of a public service contract on costs incurred and revenues generated in discharging the public service obligations, taking account of revenue relating thereto kept by the railway undertaking performing the public service contract and a reasonable profit, calculated in accordance with point 2 of Annex to Regulation (EC) No 1370/2007.

#### *Article 3*

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

1. The applicant shall notify the regulatory bodies concerned of its intention to operate a new international passenger service prior to requesting infrastructure capacity from the infrastructure manager.

2. Regulatory bodies shall develop and publish on their website a standard notification form to be used by applicants which shall contain the following information:
  - (a) the applicant's name, address, legal entity, registration number (if appropriate);
  - (b) contact data of the person responsible for queries,
  - (c) data of licence and safety certificate of the applicant or indication of the stage of the procedure to obtain them;
  - (d) detailed route indicating location of departure and destination stations as well as all intermediate stops and distance between them;
  - (e) planned starting date for the operation of the proposed new international rail passenger service;
  - (f) timing, frequency and capacity of the proposed new service, including the proposed departure times, intermediate stops, arrival times and connections as well as any deviations in frequency or in stops from the standard timetable, per direction;
  - (g) justification that the principal purpose of the proposed passenger service is to carry passengers between stations located in different Member States.
3. The information regarding the planned operation of the proposed new international rail passenger service shall cover at least the first three years and, as far as possible, the first five years of operation.
4. The regulatory body shall publish on its website the notification made by the applicant with the exception of any commercially sensitive information, without delay and inform thereof the entities referred to in Article 5 or 10, as appropriate.
5. The applicant shall justify any exclusion from publication of commercially sensitive information. If the regulatory body finds this justification acceptable, it shall keep the information confidential. If it does not, it shall communicate its refusal to the applicant requesting confidentiality. This procedure shall be without prejudice to an appeal procedure against this decision as provided for in national law.
6. All information provided by the applicant in standard form and any supporting documents shall be sent to the regulatory body in electronic form.

#### *Article 4*

##### **Time-frame to request a principal purpose test or an economic equilibrium test**

1. Requests by the entities referred to in Article 5 or 10, as appropriate, for a principal purpose test or for an economic equilibrium test shall be made within four weeks from the publication of the applicant's notification on the regulatory body's website. Entities that have the right to make requests for both tests may do so simultaneously.
2. If both the principal purpose and economic equilibrium tests are requested, they may be carried out at the same time. If a principal purpose test reveals that the principal purpose of the proposed service is other than to carry passengers between stations located in different Member States and a negative decision is taken, the economic equilibrium test shall be terminated by a decision referring to this negative decision on the principal purpose of the proposed service.

#### *Article 5*

##### **Entities having the right to request for a principal purpose test**

A principal purpose test may be requested by the following entities:

- (a) competent authorities that have concluded public service contracts for rail transport in a geographical area affected by the proposed new service;
- (b) any railway undertaking operating international or domestic passenger rail services on the route(s) to be served by the proposed new service, whether on a commercial basis or on the basis of a public service contract.

*Article 6***Information to be provided in the request for a principal purpose test**

1. In the request, the requesting entity shall provide the following information:
  - (a) the requesting entity's name, address, legal entity, registration number (if appropriate);
  - (b) contact data of the person responsible for queries;
  - (c) explanation of the requesting entity's interest in a decision on the principal purpose of the proposed new service;
  - (d) explanation why, in the requesting entity's opinion, the principal purpose of the proposed new service is other than to carry passengers between stations located in different Member States;
  - (e) information and documentation supporting explanations in (c) and (d).
2. The requesting entity shall justify any proposed exclusion of commercially sensitive information. If the regulatory body finds this justification acceptable, it shall keep this information confidential. If it does not, it shall communicate its refusal to the party requesting confidentiality. This procedure shall be without prejudice to an appeal procedure against this decision as provided for in national law.
3. Regulatory bodies shall publish on their websites a standard form to request a principal purpose test to be used by the requesting entities.
4. All information provided in the standard request form and any supporting documentation shall be sent to the regulatory body in electronic form.

*Article 7***Procedure for the principal purpose test**

1. The regulatory body shall examine the request submitted by the requesting entity.
2. If the regulatory body considers that the requesting entity has not provided full information with their request, it may request further information within three weeks of receipt of the request. If the requesting entity replies to this request for further information, and its reply is still incomplete, the regulatory body may make a second request for further information within three weeks of receipt of the response to the first request for further information. The requesting entity shall provide such information in response to the requests for further information within a reasonable period as set out by the regulatory body in accordance with Article 56(8) of Directive 2012/34/EU. If the requesting entity does not provide such information within the timescales set by the regulatory body, the request shall be rejected.
3. The regulatory body may ask the applicant to provide additional information. It may set one more deadline for clarification in case the information provided is unclear.
4. Where a request cannot be substantiated in accordance with Article 6(1)d), it shall be rejected.
5. The regulatory body shall take a decision within six weeks at the latest from the receipt of all relevant information.

*Article 8***Assessment criteria for the principal purpose test**

1. The regulatory body shall verify the principal purpose of a proposed new service. It shall carry out both a qualitative and quantitative analysis that takes into account the foreseeable evolution of the service as well as foreseeable changes in market conditions during the period covered in the applicant's notification.
2. During the assessment process and in addition to the information provided in the standard notification form, the regulatory body shall take into account in particular the following criteria:
  - (a) proportion of turnover and of volume derived from the transport of international passengers as expected by the applicant as compared to domestic passengers in the Member State where the regulatory body is established;
  - (b) the distance covered by the proposed new service in different Member States and the location of the stops;

- (c) passenger demand for the new service;
- (d) the marketing strategy of the applicant;
- (e) nature of the rolling stock to be used in the new service.

3. The regulatory body may set and apply thresholds expressed as a proportion of the turnover or volume derived from the transport of international passengers. These thresholds shall not exceed 50 % of the turnover or of the volume derived from the transport of all passengers, estimated for the whole period covered by the decision of the regulatory body, to qualify the service as international and shall not be applied in isolation.

#### *Article 9*

##### **Result of the principal purpose test**

1. Following the assessment of the new proposed service, the regulatory body shall determine whether the principal purpose of the proposed new service is:
  - (a) to carry passengers between stations located in different Member States; or
  - (b) to carry passengers between stations located in the Member State where the regulatory body is established.
2. If the regulatory body takes a decision referred to in point (a) of paragraph 1, access to rail infrastructure shall be granted for the proposed new international passenger service.
3. If the regulatory body takes a decision referred to in point (b) of paragraph 1, the regulatory body shall requalify the application into an application for a national passenger service and inform the applicant thereof. The applicant shall then follow the relevant national rules to apply for the access to railway infrastructure.
4. The regulatory body shall notify the applicant of the decision taken.
5. The decision of the regulatory body shall be duly justified and published without delay on its website while respecting the confidentiality of commercially sensitive information.

#### *Article 10*

##### **Entities having the right to request an economic equilibrium test**

Where a Member State concerned by the proposed new international rail service has decided to limit the right of access to rail infrastructure for international rail passenger services between a place of departure and a destination which are covered by one or more public service contracts, an economic equilibrium test may be requested by the following entities:

- (a) a competent authority or competent authorities that have concluded a public service contract covering a place of departure and a destination of the proposed new service;
- (b) any other interested competent authority with a right to limit access under Article 11 of Directive 2012/34/EU;
- (c) the infrastructure manager in the geographical area covered by the proposed new international passenger service;
- (d) any railway undertaking performing the public service contract awarded by the authority referred to in point (a).

#### *Article 11*

##### **Information requirements for the economic equilibrium test**

1. The requesting entity shall provide the following information:
  - (a) the requesting entity's name, address, legal entity, registration number (if appropriate);
  - (b) contact data of the person responsible for queries;
  - (c) explanation of the requesting entity's interest in a decision on the economic equilibrium test;

- (d) evidence that the economic equilibrium shall be compromised by the new service;
  - (e) information and documentation supporting explanations in (c) and (d).
2. The regulatory body may request information from the entities involved in the test including but not limited to:
- (a) from the competent authority:
    - (i) the copy of the public service contract;
    - (ii) national rules for awarding and amending public service contracts;
    - (iii) relevant journeys and revenue forecasts, including forecast methodology;
  - (b) from the railway undertaking performing the public service contract:
    - (i) the copy of the public service contract;
    - (ii) the business plan of this undertaking;
    - (iii) information on revenues gained by this undertaking;
    - (iv) timetable information for the services, including departure times, intermediate stops, arrival times and connections;
    - (v) its estimated elasticities of the services (e.g. price elasticity, elasticity with respect to quality characteristics of the services) and plans for competitive responses to the new service, as well as possible cost savings induced by the new service;
  - (c) from the applicant:
    - (i) business plan;
    - (ii) forecast of revenue and journeys from domestic passengers, including forecast methodology;
    - (iii) pricing strategies;
    - (iv) ticketing arrangements;
    - (v) rolling stock specifications (e.g. load factor, number of seats, wagon configuration);
    - (vi) marketing strategy;
    - (vii) its estimated elasticities of the services (e.g. price elasticity, elasticity with respect to quality characteristics of the services);
  - (d) from the infrastructure manager:

information regarding the relevant lines or sections, in order to ensure that the new international passenger service can be run on this infrastructure. This information obligation of the infrastructure manager shall be without prejudice to its obligations under the allocation procedure referred to in Chapter IV, Section 3 of Directive 2012/34/EU.
3. The entities involved in the economic equilibrium test shall justify any proposed exclusion of commercially sensitive information. If the regulatory body finds this justification acceptable, it shall keep this information confidential. If not, this shall be communicated to the party requesting confidentiality. This procedure is without prejudice to a possible appeal procedure against this finding in national law.

#### Article 12

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

1. The regulatory body shall examine the request submitted by the requesting entity.
2. If the regulatory body considers that the requesting entity has not provided full information with their request, it may request further information within three weeks of receipt of the request. If the requesting entity replies to this request for further information, and its reply is still incomplete, the regulatory body may make a second request for further information within three weeks of receipt of the response to the first request for further information. The requesting entity shall provide such information in response to the requests for further information within a reasonable period as set out by the regulatory body in accordance with Article 56(8) of Directive 2012/34/EU. If the requesting entity does not provide such information within the timescales set by the regulatory body, the request shall be rejected.

3. Within one month from receipt of the request, the regulatory body shall ask for information referred to in Article 11 from other relevant parties, in particular the railway undertaking seeking access to rail infrastructure with a view to operating a new international rail passenger service. It may set one more time-frame for clarification in case the information provided is not clear.
4. Where a request cannot be sufficiently substantiated in accordance with Article 11(1)d), it shall be rejected.
5. If the information provided by the requesting entity justifies the request for an economic equilibrium test to be carried out, and the information provided by the applicant seeking access is not sufficient to invalidate the request for such a test, the access shall not be granted.
6. The regulatory body shall set a time-frame for the adoption of its decisions which shall not exceed six weeks from the receipt of all relevant information.
7. All the information shall be sent to the regulatory body in electronic form.

#### *Article 13*

##### **Contents of the economic equilibrium test**

1. The economic equilibrium of a public service contract shall be considered as compromised, when the proposed new service has a substantial negative impact on:
  - (i) the profitability of services operated under the public service contract, and/or
  - (ii) the net cost for the competent authority awarding the public service contract.
2. The regulatory body shall assess whether the economic equilibrium of a public service contract is compromised by the proposed new service. The analysis carried out by the regulatory body shall focus on the economic impact of the proposed new service on the public service contract as a whole, not on individual services operated under it, over its entire duration. Predetermined thresholds on specific criteria may be applied but not in isolation from other criteria.
3. The regulatory body shall also take into account the benefits to customers flowing from the new service in the short and medium term.

#### *Article 14*

##### **Assessment criteria for the economic equilibrium test**

During the assessment process the regulatory body shall take into account, in particular, the following criteria:

- (a) impact on the net financial effect of services under the public service contract considered over the duration of this contract;
- (b) possible competitive responses by the railway undertaking performing the public service contract;
- (c) possible cost savings to be made by the railway undertaking performing the public service contract (such as in terms of non-replacement of rolling stock coming to expiration or staff whose contract ends) as well as potential benefits for this railway undertaking resulting from the proposed new service (such as by bringing international passengers who might be interested in a connection with a regional service within the public service contract);
- (d) possibility to narrow the scope of the public service contract, in particular when it is close to expiry at the time of the assessment;
- (e) impact on the performance and quality of railway services;
- (f) impact on timetable planning for railway services;
- (g) impact on rolling stock investments by railway undertakings or competent authorities, if appropriate.



*Article 15***Result of the economic equilibrium test**

1. As a result of the economic equilibrium test, the regulatory body shall take a decision under Article 11(1) of Directive 2012/34/EU, on the basis of which the right of access to the rail infrastructure shall be granted, modified, granted only under conditions or denied.
2. Before taking a decision that would result in denying access to rail infrastructure for the proposed new international passenger service, the regulatory body shall give the opportunity to the applicant to adjust the plan so that it would not compromise the economic equilibrium of the public service contract.
3. The decision of the regulatory body shall be published with its justification on the website of the regulatory body while respecting the confidentiality of commercially sensitive information.

*Article 16***Reconsideration of a decision resulting from the economic equilibrium test**

1. The entities listed in Article 11(3) of Directive 2012/34/EU may request a reconsideration of a decision resulting from the economic equilibrium test under the conditions set out by the regulatory body. These conditions may include:
  - (a) there is a significant change in the new international passenger service in comparison with the data analysed by the regulatory body; or
  - (b) there is a substantial difference between the real and the estimated impact on the services under the public service contract; or
  - (c) when the public service contract has expired before its initial term.
2. Unless the regulatory body provides otherwise in its decision, no reconsideration of a decision may be requested within three years from the publication of the decision, except in the case described in paragraph 1(a).

*Article 17***Cooperation of the regulatory body with other regulatory bodies competent for the proposed new service**

1. Upon receipt of the applicant's notification of its intention to start a new international passenger service, the regulatory body shall inform other regulatory bodies having competence for the route of the proposed new service. Those regulatory bodies shall check whether the information contained in the notification form published on the website of the regulatory body is consistent with the information received by them from the applicant. They shall inform the regulatory body of any inconsistencies.
2. Upon receipt of a request from entities referred to in Article 5 or 10 for either a principal purpose test or an economic equilibrium test, the regulatory body shall inform the other regulatory bodies having competence for parts of the route of the proposed new service.
3. Regulatory bodies shall communicate the results of the tests to the other regulatory bodies having competence for parts of the route of the proposed new service. They shall do it sufficiently ahead of the final adoption of their decision to give other regulatory bodies the opportunity to comment on the results of the tests.
4. During any exchange of information regarding the tests, regulatory bodies shall respect the confidentiality of commercially sensitive information received from the parties involved in the tests. They may only use the information for the case concerned.

*Article 18***Fees**

Member States or, where appropriate, regulatory bodies may request a fee for the principal purpose test, the economic equilibrium test or the reconsideration of an economic equilibrium test from the entity requesting the test or the reconsideration. In such a case, the fee shall be non-discriminatory, reasonable, effectively levied on all the requesting entities in a transparent manner, and it shall not exceed the cost of the work undertaken by the staff and the expenditure associated with the application.

*Article 19***Methodology**

1. The regulatory bodies shall develop a methodology for principal purpose tests and, if appropriate, for economic equilibrium tests, in line with the provisions of this Regulation. This methodology shall be clear, transparent and non-discriminatory and shall be published on the website of the regulatory body.
2. The methodology shall be established in a way consistent with market developments, allowing it to evolve over time, in particular in the light of the experience of regulatory bodies.

*Article 20***Entry into force**

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

It shall apply from 16 June 2015.

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

Done at Brussels, 11 August 2014.

*For the Commission*  
*The President*  
José Manuel BARROSO

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