Commission Implementing Regulation (EU) 2018/1795 of 20 November 2018 laying down procedure and criteria for the application of the economic equilibrium test pursuant to Article 11 of Directive 2012/34/EU of the European Parliament and of the Council (Text with EEA relevance)

COMMISSION IMPLEMENTING REGULATION (EU) 2018/1795

of 20 November 2018

laying down procedure and criteria for the application of the economic equilibrium test pursuant to Article 11 of Directive 2012/34/EU of the European Parliament and of the Council

(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[(1)], and in particular the second subparagraph of Article 11(4) thereof,

Whereas:

(1) Directive 2012/34/EU as amended by Directive (EU) 2016/2370[(2)] has opened up the market for domestic rail passenger services with a view to completing the single European railway area. This may have implications for the organisation and financing of rail passenger services provided under a public service contract. Member States may introduce in their legislation the possibility to deny access to the infrastructure where the economic equilibrium of such public service contracts would be compromised by new open access rail passenger services.

(2) On the other hand, such services, depending on their specific features, such as quality characteristics, timing, destinations served and prospective customers targeted, may not be in head-on competition with public services, and thus cause only limited impact on the economic equilibrium of a public service contract. Furthermore, there may be positive network effects for public service operators, net benefits to passengers or wider social benefits that should be taken into account.

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

(4) Regulation (EC) No 1370/2007 of the European Parliament and of the Council[(3)] lays down that, as a reward for discharging public service obligations in the provision of rail passenger services, operators may be granted financial compensation or exclusive

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rights, or both. However, the grant of exclusive rights to railway operators should not result in the foreclosure of domestic rail passenger markets.

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

(6) An economic equilibrium test should be requested only in respect of passenger rail services which are not provided under a public service contract and which are either entirely new or entail a substantial modification of an existing service. This notion encompasses also commercial services provided by the same operator that carries out the public service contract.

(7) It should be for the regulatory body to assess whether a proposed modification of a rail passenger service should be considered substantial. An increase in frequencies or number of stops could be considered a substantial modification. A variation in prices should not be considered a substantial modification, unless it is inconsistent with normal market behaviour, and where relevant, with the business plan submitted to the regulatory body at the time the previous economic equilibrium test was carried out.

(8) The regulatory body's decision should include an assessment of net benefits to customers arising from the new rail passenger service in the short and medium term, and should take into account the technical information provided by the infrastructure manager on relevant infrastructure requirements and on expected impacts on network performance and on optimal capacity utilisation by all applicants.

(9) The regulatory body should be entitled both to assess the likely impact of the new passenger service, and to assess whether such impact would be substantial and thus compromise the economic equilibrium of the existing public service contract.

(10) 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 period during which an economic equilibrium test can be requested should be limited and linked to the time of the applicant's notification of its interest in operating a new rail passenger service.

(11) To be admissible, a request for an economic equilibrium test should include substantiation that the economic equilibrium of the public service contract would be compromised by the proposed new service.

(12) In order to ensure legal certainty for all parties involved and to enable the infrastructure manager to process requests for capacity according to the procedure set out in Section 3 of Chapter IV of Directive 2012/34/EU, the regulatory body should take a decision on economic equilibrium within a pre-determined time frame, and in any event before the deadline for receipt of requests of capacity, set by the infrastructure manager in accordance with point 3 of Annex VII to Directive 2012/34/EU.

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(13) However, if at the time the applicant's notification is received, a public service contract is in the process of being competitively tendered and an economic equilibrium test has been requested, the regulatory body may decide to suspend consideration of the application for the new rail passenger service for a limited period of time pending the award of the new public service contract. The suspension should last for no longer than 12 months from the receipt of the applicant's notification or until the tender process has concluded, whichever is sooner.
These specific provisions are without prejudice to the application of this regulation to a public service contract which is on-going at the time the applicant's notification is received. In these circumstances, and where the economic equilibrium test on the existing public service contract demonstrates that access can be granted, such access should be time-limited until the expiry of the existing public service contract.

(14) The economic equilibrium of a public service contract should be regarded as compromised if the proposed new service would have a substantial negative impact on the level of profit for the public service operator and/or their operation would imply a substantial increase in net cost for the competent authority.

(15) When assessing whether an impact is substantial, the regulatory body should take into account criteria such as whether the new service would jeopardise the viability and endanger the continuity of the public service, either because performance of the public contract would not be economically sustainable for the public service operator, or because it would entail a substantial increase in net cost for the competent authority.

(16) Beyond the economic analysis, the regulatory body should also assess and take into account the net benefits to customers in the short and medium term and any impacts in network performance and capacity use. The regulatory body should take into account the technical information provided by the infrastructure manager on relevant infrastructure requirements, on expected impacts on network performance and on optimal capacity utilisation by all applicants.

(17) The economic analysis should focus on the impact of the proposed new service on the public service contract as a whole, including the services specifically affected, for its entire time-scale, taking into account the value of any existing exclusive rights that may have been granted. No predefined quantified threshold regarding the damage should be applied strictly or in isolation, and no such thresholds should be set in national legislation. The assessment should be based on an objective methodology adopted by the regulatory body having regard to the specificities of rail transport in the Member State concerned.

(18) When the regulatory body comes to the conclusion that the new rail passenger service would compromise the economic equilibrium of the public service contract, in its decision it should indicate, if relevant, possible changes to the new rail passenger service which would enable access to be granted. The regulatory body may issue recommendations to the competent authority as regards other possible conditions that would enable access to be granted, in particular in the light of its analysis of net benefits to customers arising from the new rail passenger service.

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(19) If the application for access concerns a new rail passenger service as defined in Article 3(36) of Directive 2012/34/EU and the objective economic analysis of the regulatory body shows that the new passenger service would have a substantial negative impact on the economic equilibrium of a public service contract, the regulatory body should determine conditions which would enable access to be granted in accordance with Article 11a of Directive 2012/34/EU.

(20) In all its activities related to the economic equilibrium test, the regulatory body should not disclose confidential or commercially sensitive information received from the parties. In particular, it should redact such information from the decision to be published. All decisions of regulatory bodies, including those on the confidential nature of the information received, are subject to judicial review according to Article 56(10) of Directive 2012/34/EU.

(21) Where the economic equilibrium test is carried out in respect of a new international passenger service, without prejudice to the principle of independence of regulatory bodies in decision-making referred to in Article 55(1) of Directive 2012/34/EU, the regulatory bodies concerned should exchange information and cooperate to achieve a reasonable resolution of the matter.

(22) Regulatory bodies should exchange best practices in applying the economic equilibrium test with a view to adapting their methodology over time and developing a consistent methodology across Member States, which may be covered by Article 57(8) of Directive 2012/34/EU.

(23) Commission Implementing Regulation (EU) No 869/2014[(4)] establishes criteria and procedures for the application of the principal purpose test and the economic equilibrium test in respect of new international rail passenger services. However, with the opening of the market for domestic rail passenger services, the principal purpose test has become obsolete and the same criteria and procedures should apply to all new rail passenger services, regardless of whether they are domestic or international. Implementing Regulation (EU) No 869/2014 should therefore be repealed.

(24) Since Articles 10 and 11(1) of Directive 2012/34/EU apply from 1 January 2019 but are not applicable to train services which start to run before 12 December 2020, there is a need to continue applying Commission Implementing Regulation (EU) No 869/2014 after 1 January 2019, but only for new rail passenger services intended to start before 12 December 2020. The application of Implementing Regulation (EU) No 869/2014 should be conditional on applicants' notifications being submitted within a time-frame that allows reasonable time for completion of the authorisation and scheduling process so that the services can actually start to run before 12 December 2020.

(25) 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:

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Article 1

Subject matter

This Regulation sets out the details of the procedure and criteria to be followed when determining whether the economic equilibrium of a public service contract for rail transport would be compromised by a new rail passenger service.

Article 2

Scope

This Regulation applies to situations where a Member State has decided to limit the right of access referred to in Article 10(2) Directive 2012/34/EU for new rail passenger services between a given place of departure and a given destination when one or more public service contracts cover the same route or an alternative route, as provided for in Article 11(1) of that Directive.

Article 3

Definitions

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

(1) ‘new rail passenger service’ means a rail passenger service designed to be operated as a regular time-tabled service, that is either entirely new, or that implies a substantial modification of an existing rail passenger service, in particular in terms of increased frequencies of services or increased number of stops, and which is not provided under a public service contract;

(2) ‘economic equilibrium test’ means the assessment process described in Article 11(1) to (4) and Article 11a of Directive 2012/34/EU and further described in Article 10 and carried out by a regulatory body at the request of one of the entities referred to in Article 11(2) of Directive 2012/34/EU in order to determine whether the economic equilibrium of a public service contract would be compromised by the proposed new rail passenger service;

(3) ‘public service contract’ means a public service contract as defined in point (i) of Article 2 of Regulation (EC) No 1370/2007 in the area of rail transport;

(4) ‘competent authority’ means a competent authority as defined in point (b) of Article 2 of Regulation (EC) No 1370/2007;

(5) ‘net financial impact’ means the impact of the new rail passenger service on the net balance of costs and revenues arising from the discharge of the public service obligations stipulated in a public service contract, which includes reasonable profit;

(6) ‘exclusive right’ means a right as defined in point (f) of Article 2 of Regulation (EC) No 1370/2007.