Directive (EU) 2016/2370 of the European Parliament and of the Council of 14 December 2016 amending Directive 2012/34/EU as regards the opening of the market for domestic passenger transport services by rail and the governance of the railway infrastructure (Text with EEA relevance)

DIRECTIVE (EU) 2016/2370 OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL

of 14 December 2016

amending Directive 2012/34/EU as regards the opening of the market for domestic passenger transport services by rail and the governance of the railway infrastructure

(Text with EEA relevance)

THE EUROPEAN PARLIAMENT AND THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty on the Functioning of the European Union, and in particular Article 91 thereof,

Having regard to the proposal from the European Commission,

After transmission of the draft legislative act to the national parliaments,

Having regard to the opinion of the European Economic and Social Committee[(1)],

Having regard to the opinion of the Committee of the Regions[(2)],

Acting in accordance with the ordinary legislative procedure[(3)],

Whereas:

(1) Directive 2012/34/EU of the European Parliament and of the Council[(4)] establishes a single European railway area with common rules on the governance of railway undertakings and infrastructure managers, on infrastructure financing and charging, on conditions of access to railway infrastructure and services and on regulatory oversight of the rail market. The completion of the single European railway area should be achieved by extending the principle of open access to domestic rail markets and reforming the governance of infrastructure managers with the objective of ensuring equal access to the infrastructure.

(2) The growth of passenger traffic by rail has not kept pace with the evolution of other modes of transport. The completion of the single European railway area should contribute to the further development of rail transport as a credible alternative to other modes of transport. In this context, it is vital that the legislation establishing the single European railway area is effectively applied within the prescribed time limits.

(3) The Union markets for rail freight services and international passenger transport services by rail have been opened to competition since 2007 and 2010 respectively, in accordance with Directive 2004/51/EC of the European Parliament and of the Council[(5)] and Directive 2007/58/EC of the European Parliament and of the Council[(6)].

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Furthermore, some Member States have also opened their domestic passenger services to competition, by introducing open access rights, tendering for public service contracts, or both. Such opening of the market should have a positive impact on the functioning of the single European railway area, leading to better services for users.

(4) Specific exemptions from the scope of Directive 2012/34/EU should allow Member States to take into account specific characteristics of the structure and organisation of rail systems on their territory, while ensuring the integrity of the single European railway area.

(5) The operation of railway infrastructure on a network includes control-command and signalling. So long as a line is in operation, the infrastructure manager should ensure in particular that the infrastructure is suitable for its designated use.

(6) In order to establish whether an undertaking should be considered to be vertically integrated, the notion of control within the meaning of Council Regulation (EC) No 139/2004[7] should be applied. Where an infrastructure manager and a railway undertaking are fully independent of one another, but both are controlled directly by the State without an intermediary entity, they should be considered to be separate. A government ministry exercising control over both a railway undertaking and an infrastructure manager should not be considered to be an intermediary entity.

(7) This Directive introduces further requirements to ensure the independence of the infrastructure manager. Member States should be free to choose between different organisational models, ranging from full structural separation to vertical integration, subject to appropriate safeguards to ensure the impartiality of the infrastructure manager as regards the essential functions, traffic management and maintenance planning. Member States should ensure that, within the limits of the established charging and allocation frameworks, the infrastructure manager enjoys organisational and decision-making independence as regards the essential functions.

(8) Safeguards should apply in vertically integrated undertakings to ensure that other legal entities within those undertakings do not have a decisive influence on appointments and dismissals of persons in charge of taking decisions on the essential functions. In this context, Member States should ensure that there are complaints procedures in place.

(9) Member States should put in place a national framework for the assessment of conflict of interests. Within this framework, the regulatory body should take into account any personal financial, economic or professional interests which could improperly influence the impartiality of the infrastructure manager. Where an infrastructure manager and a railway undertaking are independent of one another the fact that they are directly controlled by the same Member State authority should not be considered to give rise to a conflict of interest within the meaning of this Directive.

(10) Decision-making by infrastructure managers with respect to train path allocation and decision-making with respect to infrastructure charging are essential functions that are vital for ensuring equitable and non-discriminatory access to rail infrastructure. Stringent safeguards should be put in place to avoid any undue influence being brought to bear on decisions taken by the infrastructure manager relating to such functions.

Those safeguards should be adapted to take into account the different governance structures of railway entities.

(11) Appropriate measures should also be taken to ensure that the functions of traffic management and maintenance planning are exercised in an impartial manner to avoid any distortion of competition. Within this framework, infrastructure managers should ensure that railway undertakings have access to relevant information. In this context, where railway undertakings have been granted further access to the traffic management process by the infrastructure managers, such access should be granted on equal terms to all railway undertakings concerned.

(12) Where the essential functions are performed by an independent charging and/or allocation body, the impartiality of the infrastructure manager as regards the functions of traffic management and maintenance should be ensured without the need for transferring these functions to an independent entity.

(13) Regulatory bodies should have the power to monitor traffic management, renewal planning, as well as scheduled and unscheduled maintenance works, in order to ensure that they do not lead to discrimination.

(14) Member States should, as a general rule, ensure that the infrastructure manager is responsible for the operation, maintenance and renewal on a network and is entrusted with the development of the railway infrastructure on that network. Where those functions are outsourced to different entities, the infrastructure manager should nevertheless retain supervisory power and bear ultimate responsibility for their exercise.

(15) Infrastructure managers that are part of a vertically integrated undertaking may outsource within that undertaking functions other than the essential functions subject to the conditions set out in this Directive, provided that this does not give rise to a conflict of interest and that the confidentiality of commercially sensitive information is guaranteed. Essential functions should not be outsourced to any other entity of the vertically integrated undertaking, unless such entity exclusively performs essential functions.

(16) Where appropriate, in particular for reasons of efficiency, including in cases of public-private partnerships, the functions of infrastructure management may be shared between different infrastructure managers. Infrastructure managers should each bear full responsibility for the functions they exercise.

(17) Financial transfers between the infrastructure manager and railway undertakings, and in vertically integrated undertakings between the infrastructure manager and any other legal entity of the integrated undertaking, should be prevented, where they could lead to a distortion of competition on the market, in particular as a result of cross-subsidisation.

(18) Infrastructure managers may use income from infrastructure network management activities that involve the use of public funds to finance their own business or to pay dividends to their investors, as a return on their investments in railway infrastructure. Such investors may include the State and any private shareholders, but may not include undertakings which are part of a vertically integrated undertaking and which exercise control over both a railway undertaking and that infrastructure manager. Dividends

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generated by activities that do not involve the use of public funds or revenues from charges for the use of railway infrastructure may also be used by undertakings which are part of a vertically integrated undertaking and which exercise control over both a railway undertaking and that infrastructure manager.

(19) The principles of charging should not preclude the possibility that revenues from infrastructure charges transit through State accounts.

(20) Where in a vertically integrated undertaking the infrastructure manager does not have distinct legal personality and the essential functions are externalised by assigning them to an independent charging and/or allocation body, the relevant provisions regarding financial transparency and the independence of the infrastructure manager should apply *mutatis mutandis* at the level of certain divisions within the undertaking.

(21) In order to achieve efficient network management and an efficient use of infrastructure, better coordination between infrastructure managers and railway undertakings should be ensured through the use of appropriate coordination mechanisms.

(22) With a view to facilitating the provision of efficient and effective rail services within the Union, a European Network of Infrastructure Managers should be established, building on existing platforms. For the purpose of participating in this network, Member States should be free to determine which body or bodies should be considered to be their main infrastructure managers.

(23) Given the heterogeneity of networks in terms of their size and density and the variety in the organisational structures of national, local and regional authorities and their respective experiences with the process of market opening, Member States should be allowed sufficient flexibility to organise their rail networks in such a way that open access services and services under public service contracts can be performed, in order to ensure a high quality of services readily available to all passengers.

(24) Granting Union railway undertakings the right of access to railway infrastructure in all Member States for the purpose of operating domestic passenger services might have implications for the organisation and financing of rail passenger services provided under a public service contract. Member States should have the option of limiting such right of access where it would compromise the economic equilibrium of those public service contracts based on a decision by the relevant regulatory body.

(25) The right of railway undertakings to be granted access to the infrastructure does not affect the possibility for a competent authority to grant exclusive rights in accordance with Article 3 of Regulation (EC) No 1370/2007 of the European Parliament and of the Council[8] or to award a public service contract directly under the conditions established in Article 5 of that Regulation. The existence of such a public service contract should not entitle a Member State to limit the right of access of other railway undertakings to the railway infrastructure concerned for the provision of rail passenger services, unless such services would compromise the economic equilibrium of the public service contract.

(26) Regulatory bodies should assess, on the basis of an objective economic analysis, whether the economic equilibrium of existing public service contracts would be compromised, following a request made by the interested parties.

(27) The assessment process should take into account the need to provide all market players with sufficient legal certainty to develop their activities. The procedure should be as simple, as efficient and as transparent as possible as well as being coherent with the process for the allocation of infrastructure capacity.

(28) Provided that non-discriminatory access is ensured, Member States may attach specific conditions to the right of access to the infrastructure in order to allow for the implementation of an integrated timetable scheme for domestic passenger services by rail.

(29) The development of railway infrastructure and the improvement of the quality of rail passenger services are key priorities in the promotion of a sustainable transport and mobility system in Europe. In particular, the development of a high-speed rail network has the potential to create better and faster connections between Europe's economic and cultural centres. High-speed rail services link people and markets in a fast, reliable, environmentally friendly and cost-effective way and encourage a shift of passengers to rail. It is therefore of particular importance to encourage both public and private investment in high speed rail infrastructure, to create favourable conditions for a positive return on investment, and to maximise the economic and social benefits from such investments. It should remain possible for Member States to opt for different ways of promoting investment in high speed rail infrastructure and the use of high speed lines.

(30) With a view to developing the market for high-speed passenger services, promoting optimal use of available infrastructure, and in order to encourage the competitiveness of high-speed passenger services resulting in beneficial effects for passengers, open access for high-speed passenger services should be limited only in specific circumstances and following an objective economic analysis by the regulatory body.

(31) In order to enable passengers to access the data needed to plan journeys and to book tickets within the Union, common information and through-ticketing systems that have been developed by the market should be promoted. Given the importance of promoting seamless public transport systems, railway undertakings should be encouraged to work on the development of such systems, making multimodal, cross-border and door-to-door mobility options possible.

(32) Through-ticketing systems should be interoperable and non-discriminatory. Railway undertakings should contribute to the development of such systems by making available in a non-discriminatory manner and in an interoperable format all relevant data necessary to plan journeys and book tickets. Member States should ensure that such systems do not discriminate between railway undertakings and that they respect the need to ensure the confidentiality of commercial information, the protection of personal data and compliance with competition rules. The Commission should monitor and report on the development of such systems and, where appropriate, submit legislative proposals.

(33) Member States should ensure that the provision of railway services reflects requirements linked to the guarantee of adequate social protection, whilst ensuring smooth progress towards the completion of the single European railway area. In this context, obligations arising in accordance with national law from binding collective