

COMMISSION OF THE EUROPEAN COMMUNITIES

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Proposal for a

COUNCIL DIRECTIVE

on the licensing of railway undertakings.

SYN 488

Proposal for a

COUNCIL DIRECTIVE

on the allocation of railway infrastructure
capacity and the charging of infrastructure fees

SYN 490

(presented by the Commission)

Proposal for a

COUNCIL DIRECTIVE

on the licensing of railway undertakings.

Explanatory Memorandum

Introduction

1. Community legislation setting out the conditions under which undertakings are allowed to operate on the market already exists for the road and the aviation sectors¹⁾. The main aspects covered, competence, financial backing and experience are generally similar for all modes. For the railways the need for such legislation has not arisen due to the lack of access rights to the network. However, with the approval by the Council of Directive 91/440²⁾ the situation has changed. Directive 91/440 for the first time gave the right of access to rail infrastructure to undertakings that provide international combined transport services and for groupings of railway enterprises to provide international services between their countries of establishment. In addition it is clear that a rethinking of the policy regarding the access to national rail networks has been stimulated by the Directive and plans are underway in a number of Member States to amend the current situation regarding the monolithic structure of railway operations. The Commission has been requested by the Council to examine ways to improve the efficiency of the railways and to present any necessary proposals by the 1 January 1995: this proposal represents an important element in the preparation for any new Community action as well as complementing Directive 91/440.
2. General points : Justification of the action.

- 2a. What are the objectives of the proposal in relation to the Community's obligations?

To ensure the application of common conditions for entry into the Community rail market, particularly in the context of the new access rights granted under Directive 91/440, a Community licence is called for. The recent Communication on the future of the Common Transport Policy lays stress upon the need to make a better use of existing transport systems. As far as the railways are concerned one of the key elements to ensure that the system is used more effectively is to admit new enterprises and facilitate international groupings between existing companies. However, this process poses certain problems in relation to the need to balance between the requirement to maintain safety standards and a satisfactory working environment while not creating barriers to new entrants.

¹⁾ Council Regulation (EEC) No 2407/92 on the licensing of air carriers; O.J. L 240 24/8/92
Council Directive 74/561 of 12 Nov 1974 on the admission to the occupation of road haulage operator in national and international transport operations; O.J. L 308 19/11/74.

²⁾ Council Directive of 29 July 1991 on the development of the Community's railways. O.J. L 237 24/08/91 p 25.

If there is to be a greater access to the Community rail system this cannot be allowed to occur at the expense of sacrificing the quality of existing rail operations. It is clear that the possibility of multiple operators on the Community railway network requires that there exists a system of licensing operators in order to ensure that they can confidently be expected to provide rail services that are both safe and efficient. Moreover, Directive 91/440, as the first step with regard to open access, needs to be consolidated, in particular in relation to the conditions upon which access is granted to infrastructure. This proposal, together with in associated proposal regarding infrastructure³⁾, define a common framework for licensing and infrastructure access and as such provide additional elements to support the application of the measures created by Directive 91/440.

- 2b Does the proposal fall under the exclusive competence of the Community or is there shared competence with the Member States?

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

- 2c. What means of action are available to the Community?

In order that new railway undertakings can benefit from the facilities offered by the single market in the transport sector, it is necessary to create in a legislative framework a broad Community system to grant operating licences. A Community system would avoid disparate national measures. Such measures would hinder the development of the Community's railways, particularly in the field of international traffic.

- 2d. Is a uniform Regulation necessary or would a Directive be sufficient?

The Directive establishes a broad legislative framework, with Member States left to implement the detailed requirements. A Directive appears to represent the right balance between the need to ensure a reasonably harmonised Community approach to a licence and the need to create an efficient decentralised system taking full account of the principle of subsidiarity.

Scope of proposal

3. As has been noted the Community railways have an excellent safety record, much better in fact than their competitors in the road transport sector. Experience in the transport sector demonstrates that the economic stability and financial strength of undertakings can have an impact on their performance as regards compliance with safety rules. In the railway sector, the international nature of business and the need to ensure high safety standards imply that requirements should be fixed at Community level to judge the competence, the financial fitness and the performance of undertakings that wish to enter the market or are already involved. However, all enterprises that meet such requirements are entitled to receive an operating licence. The granting of such a licence will serve to indicate the capacity of an undertaking to provide efficiently operated railway services.

³⁾ COM xxx 93 (in circulation).

4. In addition to the general requirements regarding professional competence, etc. railway undertakings must also be able to cover their liability in the event of accidents occurring. Moreover, in the absence of any specific Community provisions on safety, railway undertakings should respect international agreements and conventions regarding passenger and freight transport. Such agreements, which cover inter-alia the movement of dangerous goods, technical characteristics of rolling stock and other equipment, facilitate cross border activities in general. In addition to these points, and in compliance with the principle of subsidiarity, the Member States should have the possibility of imposing certain other essentially technical requirements, that are compatible with Community law.
5. As much stress is laid on the professional and technical competence of railway enterprises it is important that access to specialised training facilities should be made generally available. Such access, which should be organized on a commercial basis, is vital if barriers to entry are to be avoided, particularly at the beginning of new operations.
6. The administrative arrangements and practical implementation, as was stressed earlier, will be left to the Member States.

Detailed points :

REVIEW OF THE ARTICLES

ARTICLE 1

--Indicates the aims and scope of the Directive.

--The possible exclusion of undertakings whose operations are geographically limited follows the line of Directive 91/440. The Member States may exclude certain types of basically local operations, but should not exclude services that operate over infrastructure where licensed operators run trains, in order to avoid the problems that could occur if a mixture of licensed and unlicensed operators were created.

ARTICLE 2

--Definitions. It may be recalled that the requirement to provide traction has been stated (see the Council Minute Statement of the 29/07/91) to imply that arrangements such as leasing or renting traction are acceptable. The definition of a "business plan" is necessarily left somewhat open as the content of such a plan will relate to the nature and type of operations that the enterprise wishes to operate.

ARTICLE 3

No comment.

ARTICLE 4

--This article lays down that all railway undertakings have to apply for an operating licence. The operating licence can be delimited to cover only operations of certain types of services, or it may cover the operation of any service. The operating licence will be a condition of an application for access to infrastructure capacity, but as the requirements of infrastructure allocation can only be fulfilled on the basis of a specific route analysis, the operating licence as such does not imply an automatic access to specific routes. Such access will require a licence holder to hold a safety certificate and make the appropriate commercial arrangements with the infrastructure manager.

ARTICLE 5

--The provision of information should be limited to that absolutely necessary hence the specification in the Annex : all information provided should be treated as commercially confidential.

ARTICLE 6

--The provisions of this article draw upon the experience of other sectors and have been shown to be acceptable and realistic.

ARTICLE 7

--The time set for the test of financial fitness represents a compromise between a long period, which could be difficult to meet for new entrants, and a very short period, which could be easily circumvented. The time period is directly linked to the period covered by the "business plan". This requirement is not restrictive as all new undertakings have to make a forward plan for their own financial purposes.

ARTICLE 8

--The requirements for professional competence are framed in relation to the staff and the facilities that the undertaking possess : this follows accepted practice in other transport sectors. The equipment, staff etc. should relate directly to the services that the undertaking wishes to provide i.e. a freight operator should have staff trained in freight train operation but not necessarily for passenger traffic. As regards training 8.2 lays down that such facilities should not be used as a barrier to the entry of new undertakings.

ARTICLE 9

--This refers to adequate insurance cover.

ARTICLE 10

--The review period has been introduced in order to allow the licensing authority to re-examine the situation after the first year but then the periodicity of the review is limited to five year periods.

ARTICLE 11

--The provisions of this article allow for certain eventualities such as the revoking of licences and also the possibility that temporary licences may be granted to allow services to be maintained. Adequate possibilities are provided to allow the licensing authorities to undertake their supervisory functions. Information should be exchanged between the Member States regarding the status of licences.

ARTICLE 12

--No comments.

ARTICLE 13

--A number of international conventions exist and are widely applied for international transport: these arrangements, which facilitate cross frontier operations, should be maintained until such time as they may be replaced by Community arrangements.

ARTICLE 14

--No comments.

ARTICLE 15

--The time period of two months is regarded as a reasonable compromise between the need to undertake a comprehensive check on the suitability of an applicant and the commercial requirements to start an operation.

ARTICLES 16 & 17

--No comments.

Proposal for a
COUNCIL DIRECTIVE

on the licensing of railway undertakings. SYN 488

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⁽¹⁾,

In cooperation with the European Parliament⁽²⁾

Having regard to the opinion of the Economic and Social Committee⁽³⁾,

Whereas the internal market shall comprise an area without internal frontiers in which the free movement of goods, persons, services and capital is ensured;

Whereas the application in the railway sector of the principle of the freedom to provide services needs to take into account the specific characteristics of that sector;

Whereas Council Directive 91/440/EEC of 29 July 1991 on the development of the Community's railways⁽⁴⁾ provides for certain access rights in international rail transport for railway undertakings and international groupings of railway undertakings;

Whereas in order to ensure that access rights to railway infrastructure are applied throughout the Community on a uniform and non-discriminatory basis, it is appropriate to introduce an operating licence for railway undertakings;

Whereas, having regard to the principle of subsidiarity and in order to ensure the requisite uniformity and transparency, it is appropriate that the Community lays down the broad principles of such a licensing system, leaving to Member States the responsibility for the granting and the administration of such licences;

Whereas in order to ensure dependable and adequate services it is necessary to ensure that railway undertakings meet at any time certain requirements in relation to good repute, financial fitness and professional competence;

Whereas for the protection of users and other parties concerned it is important to ensure that railway undertakings are sufficiently insured or have made equivalent arrangements in respect of liability risks;

⁽¹⁾ OJ No C

⁽²⁾ OJ No C

⁽³⁾ OJ No C

⁽⁴⁾ OJ No L 237, 24.8.1991, p. 25

Whereas in order to ensure the efficient operation of international rail transport it is necessary that railway undertakings respect the agreements in force in this field;

Whereas the procedures for the granting, maintenance and amendment of operating licences to railway undertakings shall be transparent and non-discriminatory,

HAS ADOPTED THIS DIRECTIVE :

INTRODUCTION

ARTICLE 1

1. This Directive concerns the provisions to be adopted by Member States for the granting, maintenance and amendment of operating licences by Member States in relation to railway undertakings established in the Community.
2. By derogation from the above Member States may exclude from the scope of this Directive railway undertakings whose activity is limited to the provision of solely urban, suburban or regional services, insofar as those services do not involve the joint use of infrastructure with undertakings subject to this Directive.

ARTICLE 2

DEFINITIONS :

For the purpose of this Directive:

- (a) "railway undertaking" means any private or public undertaking whose main business is to provide rail transport services for goods and/or passengers with a requirement that the undertaking must ensure traction, with traction equipment owned, leased or rented;
- (b) "operating licence" means an authorization granted by a Member State to an undertaking, by which its capacity as a railway undertaking is recognized. This capacity can be limited to the provision of specific types of services;
- (c) "business plan" means a detailed description of the railway undertaking's intended commercial activities for the period covered, in particular in relation to market developments and investment to be carried out, including the financial and economic implications of these activities;
- (d) "train path" means the infrastructure capacity needed to run a train between two places at a certain time;
- (e) "licensing authority" means the authority charged by the Member State with the granting of railway operating licences.

ARTICLE 3

Each Member State shall designate the authority responsible for granting of railway operating licences and for the carrying out of obligations under this Directive.

ARTICLE 4

OPERATING LICENCE

1. A railway undertaking established in the Community has the right to apply for an operating licence.
2. Member States shall not grant operating licences or maintain their validity where the requirements of this Directive are not complied with.
3. A railway undertaking meeting the requirements set out in this Directive shall be entitled to receive an operating licence and to apply for access to railway infrastructure.
4. Notwithstanding paragraph 3, the operating licence does not in itself confer any rights of access to specific train paths. These rights of access are granted according to Community and national legislation in the form of :
 - a safety certificate which is issued to a railway undertaking by the national authority responsible for safety and which affirms that the railway undertaking has fulfilled the safety conditions laid down by that authority;
 - a train path allocation under the conditions defined by Community and national legislation.
5. A railway undertaking shall not be permitted to carry out rail transport services covered by the scope of this Directive unless it has been granted the appropriate operating licence for the type of services to be provided.

ARTICLE 5

CONDITIONS FOR AN OPERATING LICENCE

1. Any railway undertaking which is granted an operating licence must be able to demonstrate to the licensing authorities of the Member State that it can meet at any time certain requirements in relation to good repute, financial fitness and professional competence set out in Articles 6 to 8.
2. For the purpose of paragraph 1, each applicant shall provide all relevant information, in particular that referred to in the Annex.

ARTICLE 6

Member States shall define the conditions under which the requirement of good repute is met to ensure that as regards the applicant railway undertaking or the persons in charge of management, they

- have not been convicted of serious criminal offenses, including offenses of a commercial nature;
- have not been declared bankrupt;
- have not been convicted of serious offenses against specific legislation applicable to transport.

ARTICLE 7

1. The requirements in relation to financial fitness are met when the applicant railway undertaking can demonstrate that it will be able to meet (at any time) its actual and potential obligations, established under realistic assumptions, for a period of twelve months.
2. For the purpose of paragraph 1, each applicant shall provide all relevant information, in particular a business plan for at least the first year of operation and the data referred to in the Annex.

ARTICLE 8

1. The requirements in relation to professional competence are met when:
 - (a) the applicant railway undertaking has a management organization which possesses the experience necessary for exercising satisfactory operational control and supervision of the type of operations specified in the operating licence;
 - (b) the applicant railway undertaking can demonstrate that it will be in a position to provide appropriate rolling stock including traction and maintenance arrangements necessary to operate the services according to the terms of its operating licence;
 - (c) its staff, who are critical to safety, notably drivers, are suitably qualified for their field of activity; and
 - (d) its personnel, equipment and organization can ensure an appropriate level of safety of the operations to be undertaken.
2. Member States shall take all appropriate steps to ensure that adequate staff training arrangements are provided. Where certain essential training facilities are under the exclusive control of a single undertaking, the Member State where these facilities are located shall ensure that access is granted to other railway undertakings on a non-discriminatory, commercial basis.

ARTICLE 9

A railway undertaking must be insured or have made equivalent arrangements to cover liability in case of accidents, in particular in respect of passengers, luggage, freight, mail and third parties.

ARTICLE 10

VALIDITY OF THE OPERATING LICENCE

1. An operating licence shall be valid as long as the railway undertaking meets the obligations of this Directive. However, the licensing authority may make provision for a review one year after a new licence has been issued and shall review the situation every five years thereafter.
2. Specific provisions for suspension or revocation of a licence may be reflected in the licence itself.

ARTICLE 11

1. If there is serious doubt that the requirements of this Directive, and in particular Article 5 thereof, are complied with by a railway undertaking licensed by them, the licensing authorities may, at any time, assess whether the railway undertaking is in compliance with those requirements. Where the licensing authority is satisfied that the railway undertaking can no longer meet the requirements of the Directive, and in particular Article 5, it shall suspend or revoke the operating licence.
2. Notwithstanding paragraph 1, where an operating licence is suspended or revoked by reason of non-compliance with the requirements of financial fitness, the licensing authority may grant a temporary licence pending the reorganisation of the railway undertaking, provided that safety is not put at risk.
3. When a railway undertaking has ceased operations for six months or has not started operations for six months after the granting of an operating licence, the licensing authority responsible may decide that the operating licence shall be resubmitted for approval.
4. In relation to a railway undertaking, the licensing authority may decide that the operating licence shall be resubmitted for approval in case of a change, affecting the legal situation of the undertaking and, in particular, in the case of mergers or takeovers. The railway undertaking in question may continue operation, unless the licensing authority decides that safety is at risk; in such a case, the reasons for such a decision shall be given.
5. When a railway undertaking intends significantly to change or extend its activities, the operating licence has to be amended accordingly.

6. A railway undertaking, against which bankruptcy or similar proceedings are commenced, shall not be permitted by the licensing authority to retain its operating licence if the latter is convinced that there is no realistic prospect of a satisfactory financial reconstruction within a reasonable period of time.
7. When the licensing authority has suspended, revoked or amended an operating licence, the Member State concerned shall immediately inform the other Member States notably those in which the railway undertaking concerned is operating.

ARTICLE 12

In addition to the requirements of this Directive, the railway undertaking shall also respect national laws compatible with Community law, in particular as regards specific technical requirements for certain rail services.

ARTICLE 13

Railway undertakings carrying out international transport services shall respect the agreements applicable to international rail transport in force in the Member States in which they operate.

ARTICLE 14

TRANSITIONAL PROVISIONS

Railway undertakings operating rail services at the date of entry into force of this Directive shall be granted a transitional period of six months to comply with the provisions of this Directive. This transitional period shall not cover any provision that might affect safety of railway operations.

ARTICLE 15

GENERAL PROVISIONS

1. The procedures for the granting of operating licences shall be made public by the Member State concerned and the Commission shall be informed thereof.
2. The licensing authority shall take a decision on an application as soon as possible, but not later than two months after all relevant information, in particular the data referred to in the Annex, has been submitted, taking into account all the available evidence. The decision shall be communicated to the applicant railway undertaking. A refusal shall indicate the reasons thereof.
3. Member States shall take the measures necessary to ensure that decisions of the licensing authority shall be subject to judicial review.

ARTICLE 16

1. Member States shall adopt the laws, regulations and administrative provisions necessary to comply with this Directive not later than 1 January 1995. They shall forthwith inform the Commission thereof.
2. When Member States adopt these provisions, they shall contain a reference to this Directive or be accompanied by such reference on the occasion of their official publication. The methods of making such a reference shall be laid down by the Member States.

ARTICLE 17

This Directive is addressed to the Member States.

Done at Brussels,

For the Council

The President,

Information for use in association with Article 4

A. Information which a first-time applicant may be require to present

1. Where available the most recent internal management accounts and audited accounts for the previous financial year.
2. A projected balance sheet, including profit and loss account, for the following year.
3. The basis for projected expenditure and income figures on such items as transport volume, fares and rates, and major cost elements.
4. Details of the start-up costs incurred in the period from submission of application to commencement of operations and an explanation of how it is proposed to finance these costs.
5. Details of existing and projected sources of finance.
6. Projected cash-flow statements and liquidity plans for the first year of operation.
7. Arrangements as regards availability and maintenance of rolling stock notably as regards the safety standards.
8. The qualifications of staff who are critical to safety and details of any staff training facilities.

B. Information to be provided for the assessment of applications from existing licence holders planning a significant change in their structure or in their activities

1. The audited accounts for the previous financial year.
2. Precise details of all proposed changes e.g. change of type of service, extension of service, proposed takeover or merger, etc.
3. A projected balance sheet, with a profit and loss account, for the current financial year, including all significant proposed changes in structure or activities.
4. Past and projected expenditure and income figures on such items as transport volume, fares and rates, salaries, maintenance, depreciation, infrastructure fees, insurance, etc.
5. Cash-flow statements and liquidity plans for the following year, including all significant proposed changes in structure or activities.
6. Details of changes, as regards availability and maintenance of rolling stock, in the qualification of staff who are critical to safety.

C. Information to be provided for the review of existing licence holders

1. Audited accounts not later than six months after the end of the relevant period and, if necessary, the most recent internal management balance sheet.
2. A projected balance sheet, including profit and loss account, for the forthcoming year.

3. Past and projected expenditure and income figures on such items as transport volume, fares and rates, salaries, maintenance, depreciation, infrastructure fees, insurance, etc.
4. Cash-flow statements and liquidity plans for the following year.
5. Details of any changes proposed. Arrangements as regards availability and maintenance of rolling stock notably as regards safety standards, and the qualifications of staff who are critical to safety.

Impact Assessment Form

The Impact of the Proposal on Business with special reference to small and medium sized enterprises.

Title of the proposal : Draft Directive on the licensing of railway undertakings.

Document reference no : COM XXX (No. not yet allocated).

The proposal :

1. Taking account of the principle of subsidiarity, why is Community legislation necessary in this area and what are its main aims?

The need for Community legislation with regard to the licensing of railway undertakings has arisen from the Directive 91/440 on the development of the Community's railways¹⁾. This Directive created for the first time rights of access to the national systems to new entrants to the railway sector. Since the coming into force of this legislation (1 January 1993) both potential new entrants and the existing undertakings have requested the Commission to clarify and harmonise the conditions that Member States apply. In the light of the fact that one of the main markets of interest to new entrants is likely to be international traffic and also that rail undertakings based in one Member State are likely to be interested in operating in other Member States Community legislation is justified. The form of a Directive has been adopted to allow the Member States a certain flexibility in application even although a similar measure for aviation was adopted as a Regulation. The object looked for is to introduce clarity and a degree of uniformity in the application of Directive 91/440 without changing the scope of this Directive.

The Impact on business.

2. Who will be affected by the proposal?

Two main groups are concerned :

first : the existing railway undertakings;
second : potential new entrants.

The size of enterprise concerned varies from the large, typically the existing railway undertakings, down to the medium sized firm already involved in say, shipping. It is unlikely that small firms would have the financial backing and knowledge needed to apply for a rail licence.

The whole Community is involved.

3. What will business have to do to comply with the proposal?

In order to obtain a licence undertakings will have to submit a business plan and prove their professional and technical competence to the licensing authorities. This procedure is akin to what is accepted in other sectors of the transport industry.

¹⁾ Council Directive 91/440 on the development of the Community's railways. O.J. L 237/25
24 08 91.

4. What economic effects is the proposal likely to have?

On employment? None directly, although if the railway sector can attract new business as new entrants emerge this could improve employment prospects.

On investment and the creation of new business? The object of the legislation is to facilitate the entry of new firms into the sector by clarify their rights and obligations. New business for the railways would obviously boost investment.

On the competitive position of business? If new undertakings enter the sector this should lead to more competition and greater efficiency all-round.

5. Does the Proposal contain measures to take account of the specific situation of small and medium sized firms (reduced or different requirements).

The nature of the proposal and the fact that identical operations are involved does not justify special provisions of this type:

Consultation

6. List the organisations that have been consulted about the proposal and outline their main views.

A series of meetings have been held with parties that are likely to be concerned. The bodies involved are the existing railway undertakings, the combined transport operators, employers groups and the trade unions.

With regard to the existing railways operators they were particularly concerned to maintain the safety standards in the industry. As a result of discussions the Directive was modified to include the provision that a safety case had to be established for each application, which covered the specific routes over which services were to be operated. The Trade Unions broadly supported this view, whilst maintaining their opposition to new entrants into the industry which they considered would lead to a reduction in the level of salaries etc. for the staff. The Trade Union arguments lead to the inclusion of specific provisions in Article 7 regarding the need for new operators to make provision for staff training. The other provisions in this article follow closely those that have long been established in the road industry, and more recently adopted in the aviation field, and were generally accepted.

Contacts with users and potential new operators laid stress upon the need to adopt administrative procedures that were as non-bureaucratic as possible. Certain simplifications were made to the list of information requirements but, as it has been found that safety in other sectors of the transport industry is adversely affected by a poor financial standing, there was a majority body of support in favour of maintaining an effective financial test and this requires information to be provided. It should be noted that the final form of the licence proposal creates various forms of licence, which can vary from a complete national licence to operate any sort of service, passenger, freight, etc. to a much more restrictive licence for, say, heavy freight trains only. The information and other requirements are adjusted to suit the type of licence requested. As in other sectors of the transport industry there are no specific rights of appeal provided. A refusal to grant a licence has to be justified and the applicant has normal opportunities for appeal.

Proposal for a

COUNCIL DIRECTIVEon the allocation of railway infrastructure
capacity and the charging of infrastructure feesExplanatory Memorandum

Introduction:

1. Council Directive 91/440¹⁾ on the development of the Community railways created new possibilities to develop services by granting certain access rights to railway infrastructure. Notably, international groupings of companies are permitted to provide passenger and freight services between their countries of establishment and combined transport undertakings have access rights to perform international movements. These access rights should help to overcome the long lasting segmentation of the European railways along national boundaries as regards both technical and commercial matters. These provisions change the traditional situation in the railways sector, which had existed for many decades, in two fundamental ways :

First, railway infrastructure can be used by trains which are managed separately from the undertaking which owns the infrastructure.

Second, there can be different users of the same railway infrastructure.

2. General Points : Justification of the action.
 - 2a. What are the objectives of the proposal in relation to the Community's obligations?

The consequences of the developments noted in paragraph 1 for the railways can be far reaching. Certain duties and obligations have to be imposed on new and existing undertakings²⁾ to ensure safety and a regime has to be created that ensures transparency and non-discrimination in allocating infrastructure capacity. In the absence of a common system there is a risk that applicants for infrastructure will be subject to discriminatory treatment by the infrastructure managers and that international operations will be handicapped by practices that vary between the Member States. The general objective of this proposal, and the associated draft Directive on licensing, is that railway undertakings and their clients can fully benefit from the opportunities of the internal market in the railways sector.

Directive 91(440) established two basic principles that should be applied to the allocation of railway infrastructure :

¹⁾ O.J. No L 237, 24/08/91 p 25.

²⁾ see the draft proposal on the licensing of railway undertakings COM XXX (circulated with this draft).

First, that there should be a non-discriminatory system applied in a common fashion throughout the Community. The absence of a Community system creates the risk that different approaches be adopted by the Member States, creating difficulties for new operations in particular. The creation of a certain set of common principles, whilst leaving the level of charges to be determined by the actual circumstances, will provide an adequate basis for ensuring the efficient operation of international rail services.

Second, that the available capacity should be allocated on the basis of economically efficient principles. However, the application of economic principles should not be taken to mean that the highest bidder has always to be given the first choice of capacity. Due to various deep seated imperfections in the transport market the price mechanism cannot always be relied upon to produce an allocation pattern that corresponds to society's needs. For this reason there are cases where priority access should be granted to certain services that are provided in the general public interest e.g. commuter services around the great conurbations of the Community. However, if the market is to be subject to such interventions by the public authorities such actions should be transparent, justified and give rise to a compensatory payment. This point being made it is also important to ensure that the allocation of infrastructure capacity is kept sufficient flexible to allow for the entry of new undertakings in the sector.

In general, the need for a Community Policy originates from the fact that in the absence of certain common guidelines each of the Member States would develop policies that could be substantially different and thus create problems for the development of new international operations. Such a situation would be likely to put in danger the success of the Community's efforts to stimulate the development of long distance rail transport where this is sensible and efficient.

- 2b. Does the proposal fall under the exclusive competence of the Community or is there shared competence with the Member States?

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

- 2c. What means of action are available to the Community?

In order that new railway undertakings can benefit from the single market in the transport sector, a broad Community system for the allocation of railway infrastructure capacity and the charging of infrastructure fees is called for. Legislative action is needed, therefore, to lay down the key elements of the system. However, the proposal is limited to those aspects of the allocation and pricing system that should be set down at the Community level and leaves the question of administration and fine tuning to the competent authorities of the Member States.

- 2d. Is a uniform Regulation necessary or would a Directive be sufficient?

The development of a coherent, non-discriminatory regime for railway infrastructure requires that action be undertaken to ensure a rational and harmonious approach by all the Member States. However, such an approach can be achieved by the use of a Directive which establishes the broad framework for such a regime, leaving to the Member States the responsibility for its practical implementation.

Scope of the proposal

3. The overall object of the Commission proposals in the field of infrastructure charging is to ensure that users pay in full the real costs of the facilities they require. In relation to railways, Directive 91/440 in creating a separate accountancy system for infrastructure made a first step towards achieving a equitable system of cost allocation and coverage in the sector. In the longer term it is hoped that modal competition can take place on a fair basis with all modes covering their direct costs and an appropriate charge for external factors. In relating to the charges that should be levied for railway capacity the application of the principles set out above implies that infrastructure fees plus contributions from the public authorities should cover expenditure on infrastructure over a normal accounting period. The aim should be to avoid that the infrastructure manager accumulates debts that are written to the capital accounts and thus make them unrealistic.
4. Infrastructure fees should be non-discriminatory as regards the charging for services of an equivalent nature in the same market. However, while operating in compliance with this principle the infrastructure manager should have sufficient commercial independence in order to be in a position to market efficiently the available capacity. This implies that the manager should be free to vary the fees on the basis not only of costs but also of the elasticity of demand for the particular train path that is requested. Clearly charges should not be allowed to drop below the marginal cost level but the overall principle should be to cover the total cost of the system and not necessary to ensure that every traffic flow makes an equal contribution. It should be up to the infrastructure manager to assess the situation on a case by case basis and to fix the fees accordingly.
5. Until such time as the situation regarding infrastructure cost coverage as a whole becomes clearer, the Member States should have the right to influence the general level of infrastructure fees in the context of the harmonisation of intermodal competition including the consideration of external effects. In the case of conurbations or other areas where arrangements under Regulation 1893/91³⁾ have been made to provide a public service contract the parties involved should be free to conclude a global agreement regarding the infrastructure fees that can be part of the contract.

REVIEW OF THE ARTICLES.

ARTICLE 1

No comment.

ARTICLE 2

As regards the definition of a "railway undertaking" it is recalled that the requirement to provide traction has been interpreted in the minute statements of the Council Meeting of 29 July 1991 as implying that arrangements have made to lease or rent in addition to owning the equipment.

³⁾ O.J. L169 p.1 29/06/91.

ARTICLE 3

This sets out the twin objectives to be followed of non-discrimination and efficiency.

ARTICLE 4

The exceptions to the rule of market based allocation are given notably to allow for social services to be provided and also a special category where for technical reasons the infrastructure is designed for a particular class of train e.g. the high speed (T.G.V.) lines in France.

This article also lays down the principle that any deviation from market pricing principles should be accompanied by a compensatory payment.

ARTICLE 5

This establishes that operators in certain areas or providing certain types of services can be given a priority right to access, however the competition provisions of the Treaty have to be satisfied.

ARTICLE 6

In order to facilitate the achievement of full coverage of infrastructure costs this article requires that the rail infrastructure manager covers the full cost of the system.

ARTICLE 7

The final responsibility to establish the detailed principles for the charging system is laid upon the Member States. The principles should be established through a process of coordination with the infrastructure manager who should thereafter be given executive responsibility.

ARTICLE 8

This lays down the basic principles for infrastructure charging. Market prices are to be adopted. No abusively high fees should be imposed. Prior notification of infrastructure charges is required, for good business relations between the infrastructure manager and the users.

The facility of grouped payment for a set of social services covered by State aid is introduced.

ARTICLE 9

No comments.

ARTICLE 10

This article establishes the procedures for allocating infrastructure capacity. Various time periods are laid down for national and international applications. A licence holder shall be granted an authorization to operate on specific routes when the specific safety criteria are met (e.g. driver's route knowledge).

ARTICLE 11

In order to facilitate the achievement of full coverage of infrastructure costs this article requires that the rail infrastructure manager covers the full cost of the system.

ARTICLE 12

This article establishes the right of applicants for infrastructure capacity to request an appropriate review of the decisions made by the infrastructure manager and the allocation body.

ARTICLES 13 and 14

No comments.

Proposal for a

COUNCIL DIRECTIVE

on the allocation of railway infrastructure
capacity and the charging of infrastructure fees

SYN 490

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⁽¹⁾,

In cooperation with the European Parliament⁽²⁾,

Having regard to the opinion of the Economic and Social Committee⁽³⁾,

Whereas greater integration of the Community transport sector is an essential element of the internal market, and whereas the railways are a vital part of the Community transport sector;

Whereas the application in the railway sector of the principle of the freedom to provide services needs to take into account the specific characteristics of that sector;

Whereas Council Directive 91/440/EEC of 29 July 1991 on the development of the Community's railways⁽⁴⁾ provides for certain access rights in international rail transport for railway undertakings and international groupings of railway undertakings; and whereas, in consequence of these new access rights, railway infrastructure can be used by railway undertakings which are managed separately from the undertaking owning the infrastructure;

Whereas, it is important to ensure that new entrants can fully benefit from the new access rights and whereas, to this end, it is appropriate to establish a system for the allocation of railway infrastructure and the charging of infrastructure fees which is non-discriminatory and uniform throughout the Community;

Whereas, having regard to the principle of subsidiarity, it is further, appropriate that the Community lay down the broad principles of such a system, leaving it to the Member States to put in place the detailed rules for the practical implementation of the system;

Whereas it is necessary to provide for the possibility that certain priority rights are granted with regard to the allocation of infrastructure capacity;

⁽¹⁾ OJ No C

⁽²⁾ OJ No C

⁽³⁾ OJ No C

⁽⁴⁾ OJ No L 237, 24.8.1991, p. 25

Whereas it is necessary that the infrastructure manager is compensated for any financial losses incurred due to the imposition of a certain infrastructure capacity allocation;

Whereas it is necessary to provide for the possibility that special or exclusive rights are granted in allocating infrastructure capacity if they are indispensable to ensure adequate transport services;

Whereas the Member States should ensure a reasonable flexibility as regards the allocation of infrastructure capacity;

Whereas the accounts of the infrastructure manager should be in balance under normal business conditions over a reasonable time period;

Whereas it is necessary to define non-discriminatory rules as regards the charging of infrastructure fees;

Whereas, in order to ensure an efficient use of infrastructure capacity, the fees shall be fixed according to the nature of the service, the time of the service and the market situation;

Whereas the Member States should have the possibility to influence the general level of infrastructure fees in the context of the harmonisation of intermodal competition including the consideration of external effects;

Whereas the procedures for the allocation of infrastructure capacity and the charging of infrastructure fees shall be transparent and non-discriminatory;

Whereas it is necessary to ensure arbitration facilities as regards the allocation of infrastructure capacity and the charging of infrastructure fees,

HAS ADOPTED THIS DIRECTIVE :

ARTICLE 1

This Directive concerns the principles and procedures to be applied with regard to the allocation of railway infrastructure capacity and the charging of infrastructure fees.

ARTICLE 2

For the purpose of this Directive :

- (a) "railway undertaking" means any private or public undertaking whose main business is to provide rail transport services for goods and/or passengers with a requirement that the undertaking must ensure traction;
- (b) "infrastructure manager" means an infrastructure manager within the meaning of Article 3 of Council Directive 91/440/EEC of 29 July 1991 on the development of the Community's railways;
- (c) "train path" means the infrastructure capacity needed to run a train between two places at a certain time.
- (d) "allocation body" means the authority designated by the Member State with the allocation of infrastructure capacity.

SECTION I : Allocation of railway infrastructure capacity

ARTICLE 3

Each Member State shall designate the authority responsible for the allocation of infrastructure capacity in accordance with the requirements of this Directive. In particular, the allocation body shall ensure :

- that railway infrastructure capacity is allocated on a fair and non-discriminatory basis, and
- that subject to articles 4 and 5 the allocation procedure is efficiently organized applying market principles.

ARTICLE 4

1. By derogation from Article 3 the allocation body may take the necessary measures to ensure that in allocating railway infrastructure capacity priority is given to the following rail services :
 - (a) services provided in the interest of the public, as defined in Regulation (EEC) No. 1191/69 of 26 June 1969 on action by Member States concerning the obligations inherent in the concept of a public service in transport by rail, road and inland waterway, as amended by Council Regulation (EEC) No. 1893/91 of 20 June 1991;
 - (b) services operated on infrastructure constructed for certain specific services, in particular, specialized high speed or freight lines, without prejudice to Articles 85, 86 and 90 of the Treaty.
2. With regard to services provided under paragraph 1 a), Member States shall compensate the infrastructure manager for any financial losses incurred due to the imposition of a certain infrastructure capacity allocation.

ARTICLE 5

The allocation body may grant special or exclusive rights as regards infrastructure allocation on a non-discriminatory basis to operators of certain types of services and/or in certain areas if they are indispensable to ensure adequate public services, without prejudice to Articles 85, 86 and 90 of the Treaty.

SECTION II : Charging of infrastructure fees

ARTICLE 6

The infrastructure related accounts of an infrastructure manager shall balance, under normal business conditions over a reasonable time period, income from infrastructure fees plus State contributions on the one hand and infrastructure expenditure on the other.

ARTICLE 7

There shall be no discrimination between different railway undertakings and between national and international services in the charging for services of an equivalent nature in the same market.

After consulting the infrastructure manager, Member States shall lay down the rules for determining the infrastructure fees. These rules shall provide the infrastructure manager with the facility to market efficiently the available infrastructure capacity.

ARTICLE 8

1. Member States shall apply the following principles in laying down the rules for determining the infrastructure fees, charged by the infrastructure manager :
 - the fees shall be paid directly to the infrastructure manager;
 - the fees shall be fixed according to the nature of the service, the time of the service, the market situation and the quality of the infrastructure;
 - no abusively high fees shall be charged;
 - the infrastructure manager shall inform railway undertakings using its infrastructure capacity in good time of any changes in fees charged or in quality or capacity of the infrastructure concerned;
2. Without prejudice to Articles 77, 92 and 93 of the Treaty, Member States may provide financial assistance to the infrastructure manager insofar it is necessary to achieve distribution of infrastructure costs between modes and to take account of external costs and benefits.
3. As regards the procedures for the payment of fees, Member States may provide for the possibility that a global agreement is set up with the infrastructure manager as regards services provided in the interest of the public in accordance with Council Regulation (EEC) No. 1191/69 of 26 June 1969, on action by Member States concerning the obligations inherent in the concept of a public service in transport by rail, road and inland waterway as amended by Regulation (EEC) No. 1893/91 of 20 June 1991.

ARTICLE 9

In order to ensure that the principles set out in Articles 3, 7 and 8 are applied, the Member States may require the infrastructure manager to provide all necessary information on the fees charged.

SECTION III : General provisions

ARTICLE 10

1. Member States shall lay down the procedures for the allocation of railway infrastructure capacity. These procedures shall be made public by the Member State concerned and the Commission shall be informed thereof.
2. An application for infrastructure capacity shall be submitted to the allocation body of the Member State of establishment. The application shall be accompanied by evidence that the operational staff involved have the required knowledge to provide services safely over the routes concerned; this evidence shall be submitted to the authority responsible for safety.
3. If an application for infrastructure capacity concerns a train path outside the territory of the Member State of establishment of the railway undertaking, the application shall be submitted to the allocation body of the Member State in whose territory the place of departure or arrival of the rail service concerned is situated.
4. The allocation body shall take a decision on the application as soon as possible, but no later than one month after all relevant information has been submitted. The decision shall be communicated to the applicant undertaking. A refusal shall indicate the reason therefor.
5. If the train path requested concerns more than one allocation body, the allocation body to which an application has been submitted shall immediately inform the other allocation bodies concerned with this request. The latter shall take a decision as soon as possible but no later than one month after all relevant information has been submitted. They shall immediately inform the allocation body to which the request has been submitted.

The allocation body to which an application has been submitted together with the other allocation bodies concerned shall take a decision on the application as soon as possible, but no later than two months after all relevant information has been submitted. The decision shall be communicated to the applicant undertaking. A refusal shall indicate the reason therefor.

6. In addition to the procedure set out under paragraph 5 an applicant undertaking may directly contact the other allocation bodies concerned with this request.

The allocation body to which the application has been submitted shall be informed.

7. The allocation of a train path or paths shall be dependent upon the issue of a safety certificate by the authority responsible for safety. This certificate shall affirm that the railway undertaking has fulfilled the safety conditions laid down by that authority.
8. The railway undertakings to which railway infrastructure capacity has been allocated shall conclude the necessary administrative, technical and financial agreements with the managers of the railway infrastructure.
9. An application which has been refused on the grounds of insufficient capacity shall be reconsidered at the next time-table adjustment for the routes concerned if the applicant so requests. The dates for such adjustments and other administrative arrangements shall be available to interested parties.

ARTICLE 11

Member States may provide for the possibility that applications for infrastructure access are accompanied by a deposit. In the event that an agreement is reached or an application is refused the deposit shall be returned in its entirety.

If an applicant does not make use of an allocated train path an amount may be deducted from the deposit which represents the cost incurred in processing the application and any subsequent loss of earnings due to the non- use of the infrastructure capacity concerned.

ARTICLE 12

1. Member States shall take the measures necessary to ensure that decisions by the infrastructure manager on the charging of fees shall be reviewed by the allocation body when so requested in writing by a railway undertaking. The allocation body shall take its decision on the review within two months from the submission of all relevant information.
2. Member States shall take the measures necessary to ensure that decisions of the allocation body regarding the allocation of infrastructure capacity or regarding the review of decisions of the infrastructure manager in accordance with paragraph 1 shall be subject to judicial review.

ARTICLE 13

1. Member States shall adopt the laws, regulations and administrative provisions necessary to comply with this Directive not later than 1 July 1994. They shall forthwith inform the Commission thereof.
2. When Member States adopt these provisions, they shall contain a reference to this Directive or be accompanied by such reference on the occasion of their official publication. The methods of making such a reference shall be laid down by the Member States.

ARTICLE 14

This Directive is addressed to the Member States.

Done at Brussels,

For the Council
The President,

Impact Assessment Form

The Impact of the Proposal on Business with special reference to small and medium sized enterprises.

Title of the proposal : Draft Directive on the allocation of railway infrastructure capacity and the charging of infrastructure fees.

Document reference no : COM XXX (No. not yet allocated).

The proposal :

1. Taking account of the principle of subsidiarity, why is Community legislation necessary in this area and what are its main aims?

The need for Community legislation with regard to the licensing of railway undertakings has arisen from the Directive 91/440 on the development of the Community's railways¹⁾. This Directive created for the first time rights of access to the national systems to new entrants to the railway sector. Since the coming into force of this legislation (1 January 1993) both potential new entrants and the existing undertakings have requested the Commission to clarify and harmonise the conditions that Member States apply. In the light of the fact that one of the main markets of interest to new entrants is likely to be international traffic and also that rail undertakings based in one Member State are likely to be interested in operating in other Member States Community legislation is justified. The form of a Directive has been adopted to allow the Member States a certain flexibility in application even although a similar measure for aviation was adopted as a Regulation. The object looked for is to introduce clarity and a degree of uniformity in the application of Directive 91/440 without changing the scope of this Directive.

The Impact on business.

2. Who will be affected by the proposal?

Two main groups are concerned :

first : the existing railway undertakings;
second : potential new entrants.

The size of enterprise concerned varies from the large, typically the existing railway undertakings, down to the medium sized firm already involved in say, shipping. It is unlikely that small firms would have the financial backing and know-how needed to apply for a rail licence.

The whole Community is involved.

3. What will business have to do to comply with the proposal?

In order to obtain a train path undertakings will have to submit an application to the allocation authorities. This procedure is akin to what is accepted in other sectors of the transport industry e.g. airport "slot" allocation.

¹⁾ Council Directive 91/440 on the development of the Community's railways. O.J. L 237/25 24 08 91.

4. What economic effects is the proposal likely to have?

On employment? None directly, although if the railway sector can attract new business as new entrants emerge this could improve employment prospects.

On investment and the creation of new business? The object of the proposal is to facilitate the entry of new firms into the sector by clarify their rights and obligations. New traffic for the railways would obviously boost investment.

On the competitive position of business? If new undertakings enter the sector this should lead to more competition and greater efficiency all-round.

5. Does the Proposal contain measures to take account of the specific situation of small and medium sized firms (reduced or different requirements).

The nature of the proposal and the fact that identical operations are involved does not justify special provisions of this type.

Consultation

6. List the organisations that have been consulted about the proposal and outline their main views.

A series of meetings have been held with parties that are likely to be concerned. The bodies involved are the existing railway undertakings, the combined transport operators, employers groups and the trade unions.

The various parties that were consulted expressed concerns of a differing nature. For the Member States and local authorities the priority was to ensure that the existing social services, provided under Community regulations, can continue and are not driven out of the market by new operators. To meet this concern the text allows for the protection of certain train paths for socially necessary services. In addition there are innovative ways of providing services now under discussion (e.g. concessions and franchises) and provisions were introduced to cover these also (Article 7). In the light of the absence of any agreement on the appropriate way to allocate and charge for infrastructure, existing private operators and potential new operators were concerned at the level of possible charges. For this reason a provision was introduced (Article 8) to ensure that "no excessively high fees are charged".

A major concern expressed by potential new operators was that there would be little capacity for them after the needs of existing operators had been met. To respond to this, the Directive requires that the Member States and not the operators of the infrastructure lay down the allocation rules, and that procedures are provided to review allocation and charging decisions. The allocation procedures have been discussed in some detail and, although some doubts have been expressed as to the practicality of the timing suggested the commercial imperatives of business require the delays to be as short as possible.

DOCUMENTS

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