

Position Paper

Timetabling

Amendments of Annex VII of Directive 2012/34/EU on the “Schedule for the allocation process”

Version #2 of the EC’s draft Delegated Act

16 November 2016

Executive Summary

- As a matter of principle, EIM members **support the goal of the Commission** of setting up a more flexible and transparent capacity allocation process, in order to better meet the needs from different market segments;
- EIM members believes, however, that the Commission should **not go beyond the scope of the delegation** set by Article 43 (2) of the Recast Directive which puts the emphasis on the efficiency of the allocation process and the operational concerns of the infrastructure managers;
- EIM members urge the Commission to take into account the **work that is currently being developed by the RNE** within the TTR project. Most notably, the work on Temporary Capacity Restrictions (TCRs) should be taken into account as it reflects the experience made of the sector;
- EIM members support the idea of giving applicants the opportunity to submit late requests for capacity but believe that the two-round procedure proposed by the Commission will fail to serve this purpose and risks creating an **inefficient allocation process**;
- EIM members support the goal of giving applicants a chance to prepare and adapt to capacity restrictions in due time but believe that **imposing concrete thresholds will merely increase the costs and the administrative burden** on both the IMs and applicants without necessarily delivering on the desired goal; the implementation of such a system would also pose significant operational concerns notably for IMs facing severe cuts in the public funding of infrastructure investments;
- EIM members **welcome the proposal that caters for those situations where** capacity restrictions are needed for interventions which, if not started as soon as possible, would lead to major financial losses; this flexibility is key for an efficient asset management;
- EIM members support the need to ensure that applicants have **access to information** regarding capacity restrictions but call for a more proportional approach as to the type of information that should be disclosed (and to whom it should be disclosed);
- EIM members call on the Commission to **reassess the proportionality** of the measures proposed regarding the obligation of IMs to inform applicants on alternatives and defining criteria for divertibility;
- EIM members believe that IMs should be given the **opportunity to address any concern related to the capacity restrictions among themselves** before being obliged to set up a task force with stakeholders;
- Finally, EIM members believe that a transition period should be foreseen that would enable IMs to adapt to the new rules.

Introductory Remarks: the power delegated to the Commission

Article 43 (2) of the Recast Directive empowers the Commission to adopt delegated acts concerning some amendments of Annex VII regarding the “Schedule for the allocation process”. According to this provision, the Commission may amend Annex VII after consultation of all infrastructure managers (IMs). In addition, amendments should be “based on what is necessary in the light of the experience in order to ensure an **efficient allocation process** and to reflect the **operational concerns of the infrastructure managers**” (emphasis added).

EIM members understand and support the goal of the Commission of making capacity allocation more open and transparent. We believe however that the Commission should not go beyond the scope of this delegation of powers which specifically puts the emphasis on the **efficiency of the allocation process** and the **operational concerns of the infrastructure managers**.

EIM members believe that these two concerns should be properly taken into account in the proposal of the Commission.

An **efficient allocation process** means the ability to meet demand with the capacity available, while at the same time considering aspects such as safety, performance and journey times. To this end, IMs need to have the necessary tools and flexibility which allow them to take the best decisions, based on relevant information (e.g. operational impact) and within a reasonable period of time.

Infrastructure Managers face a number of **operational concerns** during the allocation process such as the need to ensure a timetabling process that is operationally sound with regards to safety (level crossings, signaller workload etc) as well as performance (signaling capability) etc. Where international services are involved, IMs also need to ensure all the practicalities of supporting border crossing such as change of gauge, locomotive, train length restrictions or, in some cases, customs.

Other constraints stemming from the EU regulatory framework include the obligation on IMs balance accounts, the obligation to ensure fair and non-discriminatory access to the infrastructure or the obligation to ensure that infrastructure capacity is allocated in a way which reflects the need to maintain and improve service reliability levels.

EIM further suggests that a specific reference to these concerns in the introductory considerations of the Delegated Act should be added.

Comments on single issues

1. The two rounds procedure

Proposal of the EC:

Point 3 shall be replaced by the following: "The final date for receipt of requests for capacity to be incorporated into the working timetable in a **first round** shall be no more than **12 months** and the **second final date** for receipt of such requests shall be no more than **6 months** in advance of the entry into force of the working timetable." (emphasis added)

EIM comments:

The Commission proposes setting up a two rounds application period. This is justified with the need to give applicants the opportunity to submit late requests for capacity to be incorporated in the annual working timetable (see first whereas of the Commission's proposal).

As a matter of principle, EIM members support the goal of setting a more flexible capacity allocation process, in order to better meet the needs from different market segments. We fear, however that, in practice, such a system substantially and unnecessarily increases the administrative and operational burdens for IMs during the allocation process and that it will not deliver on the desired goal. EIM support the idea of giving applicants the opportunity to submit late path requests, but late requests should be possible at any time after the deadline for annual requests.

We submit that, as it stands, the Delegated Act does not make it clear how the two rounds of applications are linked to each other. Besides, it disregards how the existence of the two rounds will impact on the decisions of the applicants. The proposal of the Commission seems to give IMs the option to coordinate or not to coordinate between the two rounds of applications. Two scenarios seem therefore possible:

- (i) **Scenario 1 ("now or nothing"):** The IM decides to adopt a final timetable after the first round; as a result, there will only be spare capacity left for the second round. It is therefore reasonable to predict that the great majority of applicants will continue to apply in the first round in order to safeguard the capacity needed; in this scenario, the second round procedure does not seem to add much value to the currently existing system.
- (ii) **Scenario 2 ("wait and see"):** The IM decides to coordinate the first and second rounds; in this scenario, it is reasonable to predict that the great majority of applicants will most likely "wait and see" until the second round to apply for capacity, as applying earlier on offers no advantages.

The flaws of a two-round system are exacerbated by the fact that under the existing EU regulatory framework, the IM seems not to be entitled to reserve capacity for the second round. EIM fails to see, how any benefit can be derived from a two round system under this scenario. Thus, for the IM to guarantee the capacity allocated in the first round it needs to compromise on the quality of the capacity available in the second round.

We wish to underline the fact that these points have been repeatedly raised by several stakeholders at both meetings of the Expert Group on Timetabling.

EIM members fail to understand how the creation of these two separate rounds of applications serves the objective of a more flexible and efficient allocation process. The freight providers who typically need more flexibility could actually be left in a worst position. Thus, the introduction of a two-round procedure could oblige IMs to conclude the first round before initiating round two; as a result, today's lead time for round one would, in practice, be shortened.

On top of that, this would also affect IMs capacity management teams as they would be obliged to work simultaneously on both first and second-round requests.

Finally, the Commission should not underestimate the potential negative effects of IMs choosing different approaches regarding the coordination or not coordination between the two rounds on the cooperation between IMs and cross-border traffic.

Having regard to the above considerations, EIM suggests that the Commission waits until the sector concludes the work which is currently being developed by the RNE within the TTR-project, most notably its "rolling planning" concept.

2. The two stage procedure and coordination

Proposal of the EC:

Point 5 shall be replaced by the following: "Four months at the latest after the **first deadline** for submission of bids by applicants, the infrastructure manager shall **prepare a first working timetable. Two months** at the latest after the second deadline for submission of bids, the infrastructure manager shall prepare an **updated draft working timetable**. As regards **conflicts** between requests submitted in the second round and train paths already allocated under the first round, the **infrastructure manager may decide not to apply the coordination** as referred to in Article 46." (emphasis added)

EIM comments:

This proposal should be reviewed in line with the suggestions made above regarding point (3). The wording proposed seems to suggest that IMs are to update the "draft working timetable" after the second deadline for submission of bids. This seems to imply that IMs are not supposed to allocate capacity to applicants in the first round (*i.e.* de facto, an option for Scenario 2 described above).

Under this scenario, the first deadline is legally irrelevant as it gives applicants no right or guarantee as regards the capacity requested; effectively, it amounts to imposing a new – considerably shorter – deadline on IMs to deal with the requests and to conclude the allocation process (including coordination of conflicting capacity requests, consultation of applicants, congested capacity declaration, etc.)

Regarding the last sentence of the proposal, giving IMs the possibility to decide whether or not to apply the coordination procedure as referred to in Article 46:

Under Scenario 1 (“*now or nothing*”), the proposal makes little sense, as there are no possible conflicts between the first and the second rounds; applicants whose capacity has not been satisfied in the first round enjoy no priority rights over second-round applicants;

Scenario 2, (“*wait and see*”) effectively means that there is only one round; IMs are therefore legally obliged to coordinate any conflicting requests pursuant to Article 46 (1); however, as Article 46 is enshrined in a Directive from the European Parliament and the Council, it cannot be changed by a Delegated Act.

Furthermore, the provisions which apply following co-ordination (e.g. Congested Infrastructure) appear not to have been considered.

3. Thresholds triggering the obligation to consult applicants

Proposal of the EC:

As regards capacity restrictions of a duration of more than **one week** and affecting more than **40%** of the **estimated traffic volume**, the infrastructure manager shall consult the applicants and the main operators of service facilities concerned at least **18 months** before the beginning of the capacity restriction. As regards capacity restrictions of a duration of more than **three days** and affecting more than **20%** of the estimated traffic volume, the infrastructure manager shall consult the applicants and the main operators of service facilities concerned at least **9 months** before the beginning of the capacity restriction. As regards capacity restrictions of a duration of more than **one day** and affecting more than **10%** of the estimated traffic volume, the infrastructure manager shall consult the applicants concerned at least **6 months** before the beginning of the capacity restriction.

EIM comments:

As a general remark, EIM members support the goal of giving applicants a chance to prepare and adapt to capacity restrictions in due time, in consultation with applicants and the main operators of service facilities. We believe however that new rules should be introduced in respect of the existing legal framework.

The introduction of thresholds and the obligation for IMs to consult applicants and the main operators of service facilities seems to concern Article 53 of the Directive rather than Annex VII

of the Directive. Thus, Annex VII deals with issues such as *by when* the working timetable should be established or *until when* can requests for capacity be accepted (in essence, it is about harmonizing deadlines for allocation process); Article 53 deals with the obligation IMs have to deal with the unavailability of capacity due to maintenance work, be it scheduled or unscheduled.

The introduction of thresholds and the obligation for IMs to consult applicants aimed by the new provision seems to concern less the scheduling of the allocation process (Annex VII) and more the procedure IMs need to follow in case capacity is made unavailable (Article 53). For this reason, in our view, by proposing it, the Commission is largely exceeding the power conferred on it by Article 43 (2) of the Recast Directive.

As this could potentially be challenged before the Courts, and in the interest of legal certainty, we believe that such a change should rather be made by putting forward a new legislative proposal.

Should the Commission nevertheless decide to stick to its proposal, EIM members believe that the work done so far by the RNE within the TTR Project and, most notably, the Temporary Capacity Restrictions should be taken into account. The work of the RNE reflects the experience gathered so far as required by Article 43 (2) of the Recast Directive.

In addition, account should be taken of the fact that, in several Member States applicants are permanently consulted of any planned capacity restrictions. In these countries, the solution envisaged by the Commission would merely increase costs and bureaucracy, and it would be complex to administer without adding any additional benefit to the allocation process. Such a solution would be contrary to the Commission's own principles of Better Regulation and perhaps not even desirable from an applicant's perspective who would probably prefer being consulted on a "block" of planned capacity restrictions, rather than being consulted on each individual capacity restriction.

Regarding the reference to the "estimated traffic volume", EIM members wish to draw the attention of the Commission to the fact that today there is no common methodology for IMs to measure traffic volume. This could be contrary to the Commission's objective to increase harmonization and legal certainty.

EIM members would also appreciate some explanation as regards the thresholds and the deadlines proposed which overall seem unrealistic and excessively long.

Lastly, EIM members urge the Commission not to underestimate the operational difficulties such an obligation would pose on IMs both in terms of human resources and IT infrastructure which would still need to be developed, specifically in a context where some IMs are facing drastic reductions of public funding for investments.

4. Capacity restrictions leading to major financial loss

Proposal of the EC:

In case of capacity restrictions (1) necessary to re-establish safe train operations, (2) the timing of which is beyond the control of the infrastructure manager or (3) which, if not started as soon as possible, would result in a **major financial loss** for the infrastructure manager, the infrastructure manager may decide not to apply the lead times laid down under point (7) and consult the applicants concerned without delay.

EIM comments:

EIM members welcome the introduction of this provision and wish to stress that this issue concerns the important task of effective asset management. Unpredicted asset maintenance outwith the timescales may sometimes be more effective than full renewal in the defined timescales. This needs to be considered particularly in times of financial constrains where IMs are increasingly called to do more with less.

5. IM to publish info in the Network Statement (NS)

Proposal of the EC:

The information to be provided by the infrastructure manager when acting in accordance with point 7 or point 8 shall include day and, as soon as it can reasonably well be predicted, the **hour of the planned beginning and of the planned end of the capacity restriction**, the section(s) of line affected by the restriction and, if applicable, the capacity of diversionary lines. The infrastructure manager shall publish this information in its network statement as referred to under point 3 of Annex IV in accordance with the lead times provided under point 7.

EIM comments:

The obligation for IMs to publish information related to capacity follows from Annex IV, Point 3 of the Recast Directive. The proposed wording would oblige IMs to change the Network Statement according to the lead times referred to under point 7. EIM members believe that this creates an unnecessary administrative burden on IMs and increase legal uncertainty for applicants.

Equally important is to ensure consistency with Article 27 and Annex IV of the Directive regarding the content and the deadlines for IMs to publish the NS.

EIM members nevertheless acknowledge the need to ensure that applicants and interested parties have access to information regarding capacity restrictions in a timely manner. In order to facilitate its consultation and to keep the information up to date, EIM members propose that IMs

publish in the NS information on how and where interested applicants can have access to detailed information on the TCRs (e.g. weblink).

Regarding the obligation for IMs to publish the capacity of diversionary lines, as pointed out previously, there is yet no common methodology for IMs to measure traffic volume. This could be contrary to the Commission's objective to increase harmonization and legal certainty.

6. Obligation for the IM to inform about alternatives

Proposal of the EC:

As regards the capacity restrictions referred to in the first sentence of point 7, the infrastructure manager **shall provide the applicants concerned with a comparison** of the conditions to be encountered under **at least two alternatives** of capacity restrictions. The infrastructure manager shall design those alternatives jointly with the applicants. The comparison should, for each alternative, include at least the duration of the capacity restriction, the expected infrastructure charges due, the capacity available on diversionary lines, the available transport alternatives and the indicative travel times. Before making a choice between the two options, the infrastructure manager shall consult the applicants concerned and take into account the impacts of the different alternatives on the applicants and users of the services.

EIM comments:

The current provision poses considerable challenges for IMs from an operational perspective. It implies that IMs need to do work which is outside their remit (most likely having to outsource its execution and therefore leading to increased costs). This seems to disregard the "operational concerns of infrastructure managers" as required by Article 43 (2) of the Recast Directive. In order to minimize its impact on the work of IMs, we suggest that the wording is changed so that IMs are required to provide not a comparison but merely information about two possible alternatives; the alternatives should not cover all transport modes but only the railway sector; in addition, such information should only be made available upon request.

7. Criteria for "divertibility"

Proposal of the EC:

Regarding the capacity restrictions on a railway line, the infrastructure manager shall **establish criteria for divertibility of trains** for each type of service taking into account the applicant's commercial and operational constraints. The infrastructure manager shall **publish those criteria** together with a preliminary allocation of the remaining capacity to the different types of train services when it acts in accordance with point 7. After the end of the consultation and without prejudice the obligations of the infrastructure manager as referred to in point 3 of Annex IV, the infrastructure manager, based on the feed-back it received from the applicants, shall

provide the railway undertakings concerned with an **indicative break-down by types of services to the remaining capacity**.

EIM comments:

EIM members endorse the Commission's goal to make remaining capacity available in a transparent manner taking into account the applicant's commercial and operational constraints.

However, imposing such a procedure regarding all capacity constraints seems disproportional. Short temporary capacity restrictions may be numerous and have a limited impact on applicants. We therefore propose that the scope of this provision be limited to the major capacity restrictions referred to in the first sentence of point 7.

EIM members would appreciate some clarification regarding the meaning of "indicative break-down by types of services" and a reference to the operational constraints faced by IMs.

Finally, we would advise against using broad concepts such as "commercial and operational constraints" which could lead to abusive interpretations by applicants to the detriment of the overall efficiency of the railway system.

8. Obligation to set up taskforce

Proposal of the EC:

In case of the capacity restrictions referred to in the first sentence of point (7) on one railway line and concerning train services crossing more than one network, the infrastructure managers shall **take into account the commercial and operational constraints of the applicants** concerned and the main operators of service facilities concerned in accordance with Article 53(2). To that end, if the impact of the capacity restrictions is not limited to one network, the infrastructure managers mainly concerned shall **set up a task force** and arrange a first meeting at least 18 months before the start of the capacity restriction. The task force shall help prepare timetables, including the provision of diversionary routes. The infrastructure manager shall **invite the main applicants** active on the lines concerned, the associations of infrastructure managers referred to in Article 40(1) and the operators of service facilities concerned to attend the meetings of the task force.

EIM comments:

EIM suggests that before setting up a task force involving main applicants, associations and operators of service facilities, IMs should be given the opportunity to solve the problem among themselves. Only where IMs are not able to address the concerns raised by the capacity

constraints would stakeholders be consulted. We believe a meeting could be an equally effective way to solve the issues.

Once again, we would advise against the use of broad terms such as “commercial and operational constrains” or “main applicants” which may lead to diverging views and therefore unnecessary disputes over interpretations.

Regarding the entities which need to be consulted, EIM members suggest that “interested applicants” are consulted instead of “main applicants”.

9. Cooperation across networks

Proposal of the EC:

In a case where trains **crossing from one network to another** arrive with a presumed **delay of not more than ten hours**, the infrastructure manager of the other network **shall not consider the train path cancelled** unless the railway undertaking informs the infrastructure manager that it will not cross to the other network.

EIM comments:

EIM members endorse the Commission’s goal to reduce operational constraints which may negatively affect trains crossing more than one network, in particular international train services. The proposal seems, however, to concern real time traffic management or, even, the contractual relations between RUs and IMs rather than operational considerations of the schedule for the allocation process. As such, the proposal seems to largely exceed the power conferred on the Commission in Article 43 (2) of the Recast Directive.

10. Access to service facilities

Proposal of the EC:

Operators of service facilities shall respond to **ad-hoc requests for access to and/or capacity in the facility** as quickly as possible within the time limit defined by the regulatory body in accordance with Article 13(4), which shall not exceed 24 hours of opening time of the facility. As regards capacity requested for a time of more than seven days after the request is submitted, the regulatory body may set a time limit for the operators of the service facility to respond which may be more than 24 hours."

EIM comments:

This proposal largely exceeds the power conferred on the Commission in Article 43 (2) of the Recast Directive. Operators of service facilities are not the addressees of the Delegated Act. Besides, *ad-hoc* requests for access to service facilities are out of the scope of the delegation which concerns merely operational considerations of the schedule for the allocation process. Such a proposal could perhaps be better dealt with within the Implementing Act on Access to Service Facilities. Furthermore, the delay proposed is too short and not in line with the TTR approach of RNE.

11. Transition period

EIM comments:

EIM understands the Commission's goal to have the new provisions adopted just on time for the Timetable 2019.

We believe however that the proposal contains several provisions which warrant a derogation from the rule proposed by the Commission, *i.e.* that the Regulation enters into force on the twentieth day following its publication.

Such a transition period is all the more necessary because the Commission intends to adopt a delegated act taking the form of a Delegated Regulation, which would be binding in its entirety and directly applicable. As a result, where IMs are not in a condition to ensure the respect of the said provisions, IMs would face the risk of applicants or other interested parties seeking compensation for damages before national Courts.

EIM members therefore call on the Commission to foresee a transition period for the application of the Delegated Act which would allow IMs to adapt to the new rules.

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EIM, the association of European Rail Infrastructure Managers, was established in 2002 to promote the interests and views of infrastructure managers in Europe, following the liberalisation of the EU railway market. It also provides technical expertise to the appropriate European bodies such as the European Railway Agency. EIM's primary goal is promoting growth of rail traffic and the development of an open sustainable, efficient, customer orientated rail network in Europe.