

Position Paper on the “Proposal for a Regulation on rail capacity management”

Brussels, 16th November 2023

1. Introduction

The European association of rail infrastructure managers, EIM, welcomes the proposal of the European Commission (EC) for a Regulation on the use of railway infrastructure capacity in the single European railway area (Regulation). The Regulation shall help making rail more competitive by optimizing the utilization of capacity of rail infrastructure via the rollout of the Time-Table Redesign (TTR) as well as other measures.

To achieve this objective, the EC introduces a new legal framework, which regulates a large number of aspects, such as

- a) the scheduling, allocation and management of infrastructure capacity;
- b) the adaptation and rescheduling of infrastructure capacity after allocation;
- c) compensation principles;
- d) performance review;
- e) governance including deadlines for their delivery.

The EC entrusts the development of this framework to the European Network of Rail Infrastructure Managers (ENIM) which is supported by a Network Coordinator (NC). Regulatory bodies will work together in the European Network of Rail Regulatory Bodies (ENRRB) and there will be a newly set up Performance Review Body (PRB). The EC also intends to adopt non-legislative acts based on some of the deliverables of ENIM.

EIM welcomes the holistic approach to capacity management on a European level and the fact that it builds on the projects and processes developed by rail infrastructure managers, in particular in the area of timetabling. Nevertheless, EIM considers that some criteria and requirements need to be addressed further.

With this note, EIM seizes the opportunity to give input to the proposed Regulation. For that purpose, EIM has identified, together with its experts, the most relevant **key success factors**. They are meant to contribute to a genuine Single European Railway Area from a capacity management perspective and bring this Regulation to life.

EIM remains at the entire disposal of the EC to provide further input.

2. Key success factors

2.1 General provisions

☞ Article 1 (1) - Subject matter and scope

EIM considers that the proposed Regulation overlaps with other existing legislation, which must be addressed. This concerns in particular

- Implementing Regulation 2017/2177 as regards capacity allocation rules to train paths and service facilities;
- Implementing Regulation 2016/545 as regards procedures and criteria concerning framework agreements.

☞ *EIM advocates to ensure the necessary adaptation of the existing implementing regulations with the proposed Regulation.*

☞ Article 4 (1) - Definitions

Furthermore, EIM considers that numerous definitions in the proposed Regulation are either missing or not in line with already existing definitions, such as:

- 'any charge' – definition to include in art 23 (4) that this term refers to scarcity charges;
- 'assurance of the capability to prepare compliant bids for infrastructure capacity'¹ – further clarification is needed;
- 'capacity specification' – definition should be completed with the fact that this is a reply of the IMs;
- 'compensation' - definition to be provided in the sense that this is not a penalty but a fee to be paid by a contractual party in the case of an amendment / cancellation of an allocated capacity and that the amount of the fee is limited to the actual amount charged by one contractual party to another within the context of the relevant capacity allocated;
- 'confidential information' – a clear minimum definition is needed, which is in line with the relevant national definitions²;
- 'continuous update of working timetable' - further clarification is needed;
- 'day' – add definition that this refers to 'calendar day';
- 'digital tools' and 'digital services' – definition needed;
- 'force majeure' – to be brought in line with the definition in the SERA Directive;
- 'infrastructure capacity'³ – to be brought in line with the definition in the SERA Directive;
- 'impartial (network coordinator)' – to be explained further;
- 'major works' – definition missing;
- 'relevant' stakeholders' – definition to be added to the Regulation;
- 'rolling planning' - definition needed;
- 'simultaneous capacity allocation' – definition unclear;
- 'strategic guidance' – further explanations needed;
- 'systematic train paths' – definition unclear.

¹ See Implementing Regulation (EU) 2015/10 of 6th January 2015 on criteria for applicants for rail infrastructure capacity and repealing Implementing Regulation (EU) 870/214

² Confidential information is interpreted and regulated differently across Europe. In some countries, it is decided in public law, which will not be overruled by European legislation. The transparent government approach is also to some extent laid down in the national constitution. Therefore, a clear definition must be a "minimum definition" rather than a single, European standard.

³ According to the SERA Directive, infrastructure capacity relates to train paths only and is defined as "the potential to schedule train paths requested for an element of infrastructure for a certain period". As this definition is applicable also to this Regulation, the usage of the term shall be coherent with the one in the SERA Directive. The requested "capacity for TCRs" referred to in this Regulation is thus a contradiction in terms and the usage of the term "infrastructure capacity" should be revised throughout the Regulation.

☞ *EIM suggests that these definitions shall be developed in cooperation with the EC as soon as possible in order to provide for the smooth development of the deliverables foreseen in the proposed Regulation. It is important to benefit from the work carried out within RNE.*

2.2 Management of Infrastructure Capacity

☞ Article 8 (4) – Management of scarce infrastructure capacity

The EC foresees that IMs are to solve capacity conflicts by applying socio-economic and environmental criteria. However, these criteria require substantial upfront coordination and a harmonised approach to the level necessary.

- ☞ *EIM underlines that the socio-economic and environmental criteria must a) be flexible enough to adapt to different market realities (segments), b) not create any discrimination among these segments and c) be easy to use for the timetablers of IMs;*
- ☞ *EIM also advocates that if rail infrastructure managers (IMs) are to apply socio-economic and environmental criteria for multi-network capacity offers or cross-border offers, they need to be based on a harmonised approach to the extent possible;*
- ☞ *EIM reminds that these criteria require substantial upfront coordination and efforts to harmonise them and welcomes if ENIM, with the support of the NC, works towards that objective to the extent possible and that the output shall be applied in a harmonised manner by all Regulatory Bodies (RB) on national level;*
- ☞ *EIM also stresses that the Strategic Guidance of the Member States must not lead to national rules which make international allocation as impossible as today;*
- ☞ *EIM also suggests to foresee a pilot / testing phase, given the different level of experience of IMs with these criteria;*
- ☞ *To conclude, EIM requests to amend the article in the sense outlined above.*

☞ Article 9 (1) – Information about infrastructure capacity

The EC foresees that IMs are to provide interested parties with accurate and up to date information on the availability of infrastructure capacity throughout the entire capacity management process, including the strategic planning phase.

- ☞ *EIM underlines that such information shall be provided through the IT applications and other tools normally used by the IMs, with specific ad hoc publications only in the case of a significant change:*
 - a) *Information to be provided with specific ad hoc publications **in the case of a significant change**.*
 - b) *Allowing the use of processes and IT systems already put in place in IMs to avoid additional costs and complexity (as stated in article 62).*
 - c) *Flexibility for adaptation of IT systems (as stated in article 77)*
- ☞ *EIM considers that one group of 'interested stakeholders' may be too large and that the scope of the stakeholders;*

- ☞ *EIM underlines that the administrative burden on the IMs to provide accurate and up to date information at every stage of the capacity management process requires massive upfront investments of the IM as not all information is generated automatically and fed into the different (new) capacity documentation;*
- ☞ *EIM underlines that IMs must prepare and provide relevant information to all potential applicants, enabling them to apply for capacity. When preparing such information, the IMs must keep in mind that these applicants may not necessarily be Railway Undertakings' or existing 'Applicants', but new 'End Customers'. Complex or missing information may cause potential rail customers to choose other modes of transport. The IMs must therefore be enabled to deliver the information necessary to increase the market attractiveness of rail;*
- ☞ *EIM recognises that the IMs have to provide transparent information on planned, booked and allocated capacity in relation to the capacity available. At the same time, it is important that IM has effective processes and IT-system to reduce the administrative burden;*
- ☞ *Therefore, EIM suggests to amend the article in the sense outlined above.*

☞ Article 12 (8) – General requirements for strategic capacity management

According to the draft Regulation, IMs are to update the results of the strategic capacity planning, taking into account several aspects.

- ☞ *EIM advocates to delete this requirement or align it with the TTR.*

☞ Article 14 (2) – Coordination on strategic capacity planning between infrastructure managers

According to the draft Regulation, ENIM shall take into account any relevant complaint by (potential) applicants on the planning documents.

- ☞ *EIM reminds that ENIM is a network which is not a legal person. By this very nature, it does not have any legal powers and it is tasked with issuing non legally binding decisions which are subject to implementation by its members (IMs). As a consequence, ENIM should not be tasked with any (legal) complaints;*
- ☞ *EIM also reminds that according to this requirement, the members of ENIM (IMs) would be tasked with commenting strategy capacity planning decisions of its members. Therefore, EIM advocates that this task remains within the remit of the RBs and their European network, the ENRRB;*
- ☞ *EIM underlines that the same principle also applies under article 18 (9) related to the capacity supply plan;*
- ☞ *However, EIM considers that there is an added value related to this coordination.*
- ☞ *Therefore, EIM suggests to amend the article in the sense outlined above.*

☞ Article 17 – Capacity model

According to the draft Regulation, IMs are to establish a capacity model that refines the capacity strategy.

- ☞ *EIM reminds that the binding character of the capacity model needs to be further defined. In fact, the model must be stable but also allow for possible changes to provide the greatest added value for the applicants;*
- ☞ *EIM also suggests that the capacity model and the strategy could be referred to in the Network Statement, even much less detailed;*
- ☞ *EIM reminds that not all Network Statements have a legal value;*
- ☞ *EIM also underlines that the capacity model is stricter and less flexible than the current requirements of the SERA Directive;*
- ☞ *EIM suggests to amend the article in the sense of the requirements outlined above. In particular, EIM underlines the need to either delete or adapt the requirement regarding the regular update of the capacity model.*

☞ Article 18 – Capacity supply plan

The EC foresees that the IMs shall document and justify any divergence between the capacity supply plan and the capacity model concerning the same working timetable period.

- ☞ *EIM reminds the same concern here as regarding article 17, i.e. the massive work load for IMs to report any deviation and the bindingness. Furthermore, this principle does not offer any added value for applicants but only in the case of substantial deviations, which are to be defined in the text;*
- ☞ *EIM reminds that the role of the RB should consist in proposing but not requiring changes to the IM, given the technical and objective scope of the document and in order to not unduly encroach the powers of the IM (see also article 32);*
- ☞ *EIM suggests, therefore, to amend the article in the sense of the requirements outlined above.*

☞ Article 21 – Highly utilised and congested infrastructure

According to the draft Regulation, IMs are to declare an element of infrastructure either to be highly utilised or congested if one out of three conditions are met.

- ☞ *EIM considers that the requirement to provide a capacity enhancement plan for highly utilised infrastructure, as foreseen in article 23 entails an excessive burden for IMs as highly utilised infrastructure can be temporary but not necessarily create a congestion. EIM suggests to reduce it (see below);*
- ☞ *EIM requests that temporary capacity restrictions (TCRs) must not be included in this requirement but only ‘white times’;*
- ☞ *EIM advocates to either increase the threshold of highly utilised infrastructure (> 65% of theoretical capacity), to delete it (in articles 21, 22 and 25) or to task ENIM with fixing a threshold, thereby reducing the complexity and administrative burden of the requirement.*

☞ Article 27 – Methods of capacity allocation

The proposed Regulation requires IMs to grant capacity rights to applicants by means of four allocation processes (framework agreements, annual allocation process, rolling planning process, ad hoc process).

☞ *EIM underlines that only the IMs have the systematic view and the operating and technical capability to ensure the most efficient use of capacity in a transparent and non-discriminatory manner. Therefore, EIM requests to amend this article in the sense that a) IMs are provided with flexibility when choosing the capacity allocation method and b) not all capacity allocation methods are a right of the applicant;*

☞ *EIM also requests to complement the article by providing further definitions or clarification on the term 'confidential information' (see also comment under article 4).*

☞ Article 29 – Cooperation in the allocation of rail infrastructure capacity and service facilities

The article requires operators of service facilities to cooperate with IMs for offering train paths that include rail facility capacity.

☞ *EIM considers that the additional task for IMs to distribute capacity at service facilities that it does not manage (where it is not the operator) is complex and difficult. In addition, in most cases the RU is not the applicant of the terminal capacity but the shipper or the intermodal operator;*

☞ *EIM reminds that this complexity and difficulty are also due to the fact that these facilities have different timelines to manage their assets (week, day) and on the tracks. The 'golden rule' in logistics consists in adding time buffers between two different modes of transport;*

☞ *Therefore, EIM suggests to amend this article in the sense that a) IMs are flexible in offering capacity of such facilities and b) that these service facilities provide IMs with almost 'real time' delivery of information so that the IM can fulfil this requirement.*

☞ Article 31 – Capacity allocation through framework agreements

The proposed Regulation obliges IMs to offer capacity via framework agreements (FAs).

☞ EIM requests to amend this article to address the following aspects:

- the role of FAs vs other capacity allocation methods and in terms of priority rules (also related to works, commercial and government needs, PSOs);
- FAs must be limited by segment to allow for sufficient capacity for other applicants (e.g. new entrants) which are not part of FAs;
- the difficulties of contracting cross-border FAs;
- a clear socio-economic and environmental model reflecting FAs;
- coordination needs between IMs;
- alignment with implementing regulation 2016/545.

☞ Article 32 – Capacity allocation through the annual allocation process

The proposed Regulation requires IMs to give priority to requests that are consistent with the pre-planned capacity defined in the capacity supply plan. The applicant has the right to lodge a complaint with the RB in the case that the IM refuses its request if the latter is not consistent with the capacity supply plan and cannot be accommodated by the IM.

EIM reminds that the regulatory body may propose to the infrastructure manager to amend the draft capacity supply plan to a reasonable extent, given the technical and objective scope of the document in order to not unduly encroach the powers of the IM.

☞ Article 33 – Capacity allocation through the rolling planning process

The EC requires IMs to allocate capacity via the rolling planning process according to the ‘first come, first served’ principle. IMs shall also inform the RB of all capacity requests received that did not fit the parameters of the available capacity. IMs shall reserve capacity for the rolling planning process for a period of 36 months.

☞ *EIM proposes to amend the article in the sense that the principle ‘first come, first served’ shall be the criterion during this process but only in the case of capacity conflicts. IMs must analyse all requests at the same time and decide which one represents the most optimal and effective use of available capacity;*

☞ *EIM also suggests that socio-economic and environmental criteria shall only be applied if the principle ‘first come, first served’ did not produce the desired result;*

☞ *EIM demands further clarification about a) the role of RP vs other capacity allocation methods and in terms of priority rules and b) if the RP paths (36 months) are the same kind of FA paths, in the sense that they may not include capacity rights in the form of a train path and c) the required level of detail in strategic pre-planning of RP;*

☞ *EIM proposes to delete the information requirement of IMs vis à vis the RB as this will trigger applicants to involve the RB in the process itself.*

☞ Article 34 – Capacity allocation through the ad hoc process

The EC requires IMs to respond within a day to ad hoc requests.

☞ *EIM advocates to delete this deadline. In fact, replies within one day are unrealistic, not least due to the required one-day processing of the requests via the different IT tools at least within one network. This timeline is even longer in the case of multi-network capacity offers;*

☞ *EIM suggests to specify that the term ‘day’ refers to ‘calendar day’.*

☞ Article 37 – Formal conflict resolution mechanism on the basis of socio-economic and environmental criteria (auction)

The proposed Regulation requires IMs to apply a formal conflict resolution mechanism in the case that the consensual mechanism did not produce the required result. In the case of conflicts between similar rail services and socio-economic and environmental profile, the IM shall assign capacity on the basis of an auction.

☞ *EIM reminds that an auction can be discriminatory for some applicants as PSO operators have a natural advantage because of (financial) government support and that larger railway undertakings (RUs) have more means than smaller ones;*

☞ *EIM suggests to further limit its application, i.e. to train services with the same socio-economic profile in the same segment while adding safeguards to preserve fair open access.*

☞ Article 40 – Compensation for changes to capacity rights

The EC stipulates that changes to capacity rights after allocation shall give rise to compensation, which can total up to 3 times the cost of the capacity right.

- ☞ *EIM reminds that the proposal does not reflect public procurement timelines;*
- ☞ *EIM also requests further clarification regarding the scope, i.e. does the compensation equal 3 times the track access charge in one country or relate to an entire part. In this context, EIM reminds that the TACs for rail freight are already low in some Member States. If IMs are to pay high penalties, the IM may be incentivised to offer less capacity for this segment;*
- ☞ *EIM advocates to amend the article.*

☞ Article 55 (5) – Organisation of the European Network of Infrastructure Managers

The EC stipulates that ENIM shall take its decisions by a simple majority and that all members from one Member State shall together have one vote.

- ☞ *EIM calls on the EC and IMs to prepare the operational phasing in of ENIM and to tackle all relevant governance aspects, including the voting principle;*
- ☞ *EIM also calls on the IMs to work towards striking a balance between a) deployability and acceptance on IM level, b) market expectations and c) political expectations*

2.3 European network for coordination

☞ Article 62 – Digitalisation of capacity and traffic management

The EC stipulates that IMs shall ensure that capacity and traffic management processes are implemented by means of digital tools and digital services.

- ☞ *EIM reminds that national capacity planning and allocation systems require substantial upfront investments;*
- ☞ *EIM advocates that IMs must have the possibility to use existing systems whenever it is interfaced with the European digital capacity planning and allocation process through TSIs;*
- ☞ *EIM suggests that any requirement to change the systems should be based on a cost-benefit analysis while investments are to be protected;*
- ☞ *EIM also alerts that not all IMs will be able to shift to a new digital system within the short timeframe foreseen by the EC, due to the lack of necessary funding or other resources as MSs may find it difficult to finance measures if the IM does not comply with the regulation;*
- ☞ *EIM reminds that the terms ‘digital tools’ and ‘digital services’ are not further defined in the proposed Regulation;*

☞ To conclude, *EIM* advocates to amend the article in the sense that a) existing systems can be allowed to exist under certain conditions; b) the deadline for shifting to a digital system is postponed until 2035 (see also comment under article 77) to allow proper testing and piloting of the system across Europe and c) to include the missing definition.

☞ Article 76 – Repeal

The EC withdraws Regulation 913/2010 by 9th December 2029.

☞ *EIM* identified that all tasks provided by the corridors today are not included in this new regulation neither in the ETCs. Coordinating activities, involvement of stakeholders at different levels and topics and the market perspective would be even more important to fulfil within the new Regulation. Nevertheless, the new Regulation is mainly based on national tasks;

☞ *EIM* reminds that the tasks currently performed by the Rail Freight Corridors, and which are not reflected in this Regulation or in the proposal for a revised TEN-T Regulation are:

- Forum for cooperation with member states (Executive Boards);
- Advisory Boards with RU & terminals, ports, freight forwarders, transport buyers;
- Harmonisation of capacity offers;
- Facilitating regional and stakeholder cooperation whatever the size of the region or joint challenges;
- Facilitating pilot projects and deploy innovations;
- Addressing interoperability issues (taillights, ERTMS, 740m trains).

☞ *EIM* believes that the future frameworks should include the possibility to maintain specific RFC tasks among those mentioned, where a more in depth analysis conducted within ENIM and the NC would prove that these will bring continued added value to the system while avoiding redundancies with the new set of provisions and their operational description by the NC;

☞ Therefore, *EIM* underlines that these tasks should be somehow reflected in the Regulation to make them mandatory while a reflection is needed on how to streamline them to avoid redundancies and create additional administrative burden;

☞ *EIM* also considers that these tasks should not be voluntary as there must be an obligation to cooperate to serve the ‘blue banana’ transports as they represent some 95% of the international rail freight traffic. Furthermore, lot of operational problems are mainly or fully falling in the responsibility of the MoT or at least partly (e.g. taillights, drivers, etc.);

☞ *EIM* calls on the EC to prepare the phasing out of the Rail Freight Regulation and to address the issue of the tasks performed by the RFCs today.

☞ Article 77 – Entry into force and application

The EC foresees the entry into force of different articles at different dates, among which digital tools and digital services from 1st March 2026.

☞ *EIM* underlines the complex nature of this digitalisation which needs to be deployed across entire Europe in a synchronised and interoperable manner to ensure a high added value for the applicants and the owners of rail freight and rail passenger services;

☞ *EIM* also reminds the substantial upfront investments of all IMs across Europe, which may be an issue if the relevant financial resources have not been provided to them.

2.4 Aspects not covered in the proposed Regulation

EIM has identified further key performance indicators and elements which should be addressed in the final Regulation.

a) Cross-border perspective

Cross-border and multimodal rail transport has a great potential to contribute to the desired reduction of transport's climate impact and at the same time strengthen the economy and competitiveness of Europe and the member states. This applies to both rail transport and intermodal transport where rail transport is included as part of the transport solution.

Several of the shortcomings that the proposed Regulation tries to capture can only be solved with coordination and joint solutions on a European level and with rail users and transport owners with a cross-border and intermodal perspective. Without effective cooperation, coordination and solutions between different parties at EU level, there are obvious risks of ineffective solutions to be developed. Therefore, the entire Regulation needs to be imbued with this perspective. It should be as easy to establish, plan and run an international rail service as a national one. Organisational structures, processes and support systems must therefore support national as well as international rail transport. The rail users should in principle have the same easy access, rights and obligations as national rail transport. The extended mandate of IMs needs to be balanced by a sufficient involvement of stakeholders/applicants in the development of the rail market and by provisions allowing for effective supervision and needs to be ensured that it works in a transparent, competitively neutral and non-discriminatory manner.

b) Preparation of the Regulation via PRIME

The proposed Regulation implies numerous reforms on European level in terms of governance, decision-making, processes, reporting lines, etc. Furthermore, some deliverables require longer term preparations.

It's therefore important to benefit as much as possible from the work that takes place within RNE and to establish a good collaboration between PRIME and RNE. The ongoing development of frameworks should continue in order to meet the new regulation's timetable for implementation.

EIM suggests to the EC to entrust PRIME with launching the necessary preparatory activities so that PRIME together with RNE can develop them.

c) Stakeholder consultation

The EC refers to the consultation of applicants as well as terminals throughout the capacity planning and allocation process in the proposed Regulation.

EIM advocates to enlarge the concept of applicants to customers which represent the owners of rail freight services, service facilities, terminals, ports, end users, depots, etc. By doing so, IMs will be given the necessary long-term investment and market perspective. This consultation could be ensured via advisory groups.

d) Applicants' performance

The EC focuses almost exclusively on the IM in terms of capacity development and delivery. However, there are several factors influencing capacity, which are not reflected in the proposed Regulation:

☞ *EIM advocates to consider introducing in the final Regulation requirements to reduce the number and scope of several capacity reducing factors on the level of the applicants, such as:*

- shorter turnaround times of trains
- code-sharing between RUs
- choice of rolling stock
- punctual arrivals and departures (e.g. at stations / terminals / ports)

☞ *EIM also advocates to consider other factors on the level of infrastructure, such as:*

- funding to reduce the number of un-signalled level crossings
- funding to improve the resilience of infrastructure (less vulnerability, faster return to normal mode)
- operational conditions that offer less flexibility to increase capacity

e) Economic equilibrium test (EET)

The proposed Regulation does not contain any reference to EETs.

☞ *EIM welcomes to introduce such a reference with the aim to facilitate the market entry of new entrants in PSO segments. This reference should include the mandatory deadlines for guaranteeing legal certainty;*

☞ *EIM suggests that the Regulation should stipulate that the Regulator must take a decision on the economic balance before the end of the deadline for the submission of capacity requests, in line with the deadlines stipulated in the EET Regulation (RE 2018/1795) + art. 38 (4) of the Recast Directive 2012/34.*

f) Funding

The EC has not addressed the issue of funding for the necessary investments by IMs.

☞ *EIM underlines that the proposed Regulation can only be successful if the necessary investments can be made in terms of physical and digital capacity alike to avoid a highly complex management of scarcity at the expense of IMs;*

☞ *EIM reminds that this funding should be ensured via the Connecting Europe Facility (CEF) during the current and the next programming period.*

g) Regulatory Bodies

The proposed Regulation foresees a certain scope for RBs.

EIM expected a greater involvement and role of the RBs via their European Network (ENRRB). The reason is that it shall prevent discrepancies in the interpretation of the European framework by different national regulators and to avoid that recommendations taken by the ENIM are challenged in one Member State while being approved in another.

h) Commercial Conditions

It is positive to have commercial conditions that steer the behaviour of the parties of the contract to the desired effect, but the room for negotiation in the business relationship should be retained between the parties.

EIM underlines that balanced contracts between the parties should be ensured through supervision by regulatory bodies. The level of incentives or compensation for IMs should not be decided by RB.

<p>For further information, please contact: Monika Heiming Executive Director T.: +32 2 234 37 70 E.: monika.heiming@eimrail.org</p>	<p>EIM, the association of European Rail Infrastructure Managers, was established in 2002 to promote the interests of the infrastructure managers in Europe. EIM's primary goal is promoting growth of rail traffic and the development of an open sustainable, efficient, customer-oriented rail network in Europe. To find out more about EIM, visit www.eimrail.org</p>
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