

DISCUSSION PAPER ON ACCESS TO SERVICE FACILITIES AND RAIL RELATED SERVICES

Disclaimer: This discussion paper does not prejudice the existing or future positions of the European Commission and its services on the topics covered in this document.

Footnotes contained in this document provide explanations; they are not as such meant to be part of the final text.

(1) The basic rules of the Directive concerning access to services facilities, such as access rights, core procedural rules on handling of requests and requirements on publication of information apply to all service facilities without distinction as to whether they are essential or -non-essential facilities or publicly and privately financed facilities. The Directive defines some additional requirements concerning aspect such as accounting, organisational and decision-making independence or justification of rejection of access requests for service facilities under direct or indirect control of a body or firm which is also active and holds a dominant position in national railway transport services markets and between different types of services provided in service facilities. This distinction should thus also be reflected at the level of this implementing regulation. Moreover, it seems appropriate to provide a possibility for regulatory bodies to exempt service facility operators from some of the obligations of the Regulation, when the regulatory body considers that the facility is without strategic importance for the functioning of the market and would not have detrimental effects on the competitive situation in the rail transport services market. Such exemptions should not undermine the applicability of the rules set out in the Directive.

(2) Transparency on access conditions to service facilities and charges is a prerequisite to enable all applicants to access service facilities on a non-discriminatory basis. Hidden discounts that are negotiated individually with each applicant not following the same principles would undermine the principle of non-discriminatory access to the infrastructure.

(3) Directive 2012/34/EU requires operators of service facilities to provide non-discriminatory access to facilities and services supplied in the facilities. The Directive applies in cases of self-supply of services as well as in case that services are supplied by an operator of a service facility. Where necessary to correct market distortion or undesirable developments in the market, the regulator might request the operator of a service facility to open the facility for self-supply, provided that this does not endanger safety of the operations and is in line with the principle of optimum effective use of capacity.

(4) Where it is necessary to pass through a private branch line or siding to access a service facility, the operator of the service facility should provide information about the private branch line and siding that enables the applicant to understand where to turn to in order to request access to this line in accordance with the provisions of Article 10 and recital 12 of Directive 2012/34/EU.

(5) Information on access to services facilities, even if provided through a link to a website included in the network statement, constitutes an integral part of the network statement and should thus meet the requirements laid down in Article 27 of the Directive, including in terms of consultation and language requirements for its publication. Compliance with language requirements can be ensured by publishing the information requested in the template in at least two languages of the Union.

Kommentar [F1]: Comments on the recitals may be provided at a later on. We believe they will still evolve.

Kommentar [F2]: TS does not agree. See TS letter.

(6) The infrastructure managers should facilitate collection of information on service facilities by providing a template in an easily accessible place, such as their website. Operators of service facilities are under an obligation to supply all relevant information to the infrastructure manager in accordance with Article 31(10) and Annex IV point 6 of the Directive.

(7) Different entities may be in charge of deciding on access conditions for a service facility, allocating capacity in the service facility and supplying services in the facility. In such cases, all entities concerned are to be considered operators of a service facility in the meaning of the Directive; each of them should meet the requirements of this Regulation for the part it is responsible for.

(8) Current practice shows that in many cases applicants such as shippers and freight forwarders request access to service facilities, whereas the railway undertaking appointed by the applicant often does not have a contractual relationship with the operator of the service facility. Therefore, it should be clarified that not only railway undertakings but also other applicants should have a right to request access to service facilities under the conditions set out in this implementing regulation. Operators of service facilities should be bound by the provisions of this regulation regardless of whether they are in a contractual relation with a railway undertaking or another applicant.

(9) Given that train paths and capacity in service facilities are often allocated by different entities, it is important that these entities communicate in order to make sure that scheduled train paths and scheduled slots in service facilities match in order to guarantee smooth and efficient train operations. The same holds true for situations where an applicant requests services in a facility which are provided by different providers.

For services, which are not directly linked to a train path, such as ticketing services in stations, such alignment would not be required.

(10) The requirement to publish indicative information on available capacity could be met by providing information on whether the facility is full, has limited remaining capacity or has sufficient remaining capacity to accommodate any type of request. A web-based tool, where such information could be provided, should be developed by the Commission in cooperation with the sector. Maximum operational capacity may be lower than maximum theoretical capacity, as appropriate buffers may be needed to ensure reliable services also in situations such as delayed arrival of a train in the facility or operational disruptions. The indication of capacity should refer the available operational capacity.

(11) Operators of service facilities should not force applicants to purchase services offered in a facility, which the applicant does not need. This principle does, however, not imply that the applicant can force the operator of a facility to accept self-supply, where the operator is offering the respective service at conditions that are in compliance with the Directive.

(12) Building a service facility requires significant investments and the network character of railways implies that there are limitations on where facilities can be constructed; as a result, many service facilities cannot easily be duplicated. For this reason it is of great importance to ensure that existing facilities are optimally used. Optimum use could be incentivised through measures such as charges for capacity that was reserved but not used. Where better use of the facility would only be

achievable at a cost that would outweigh the potential benefits, the operator of a facility should be free to decide on whether to implement such measures.

(13) An acknowledgement of receipt of a request can go hand in hand with answering of a request, if a request is answered within a short period of time after receipt of the request. The acknowledgement of receipt can be provided by the same technical means as those used by the applicant to submit the request.

(14) When an operator of a service facility receives a request that is in conflict with another request or allocated slot, he should, in a first step, verify whether it would be possible to accommodate the additional request by proposing a different slot, modifying the allocated slot subject to agreement by the applicant concerned, or measures allowing to increase the capacity of the facility. The operator should not be obliged to undertake measures that would lead to conflicts with trade Unions nor measures that would require investment in order to increase the capacity of a facility; where an applicant offers to cover costs of investment, the operator of a service facility should, however, consider this option.

(15) Where such a coordination has not allowed to reconcile the conflicting requests, the operator of a service facility can apply priority criteria in order to decide between conflicting requests. These criteria should be published in the service facility description, which is subject to review by the regulatory body.

(16) Viability is made up of different elements, including in particular physical and technical characteristics such as location of a facility, access by road/rail/waterway/public transport, gauge clearance, length of track and electrifications; operational characteristics such as opening hours, capacity in and around the facility, driver training requirements, scope and type of services offered; attractiveness and competitiveness of [transport](#) services such as routing, connections to other modes of transport, transportation time; and economic aspects such as impact on operational costs and profitability of the envisaged services.

(17) In service facilities with a significant number of different entities supplying services, such as ports with a number of terminal operators, it can be difficult for an applicant to get an overview over the variety of operators and services offered by different suppliers. For such facilities, a single contact point should be set up, where an applicant can request information on the suppliers of services. In cases where suppliers offer competing services in one facility, the single point of contact should only provide information on how the applicant can get in touch with the different service providers concerned.

(18) Operators of service facilities should not be obliged to offer or maintain ticketing services, such as staffed ticket offices or machines in stations; where such services do, however, exist, the ticket sale should be provided as ancillary services in accordance with Article 13(8) of the Directive.

(19) Ensuring compliance with the accounting separation rules and the charging rules for service facilities and rail related services set out in the Directive might require separate accounts per type of facility and/or type of service.

Article 1

Subject matter and scope

(1) This Regulation sets out the details of the procedure and criteria to be followed by operators of ~~service facilities~~ rail related services and applicants as regards access to ~~and use of service facilities~~ and rail related services.

This regulation is without prejudice to Article 2(3) of Directive 2012/34/EU.

(2) Upon request of the operator of rail related services, ~~the service facility~~ concerned, regulatory bodies may exempt rail related services ~~service facilities~~ which do not have any strategic importance for the functioning of the rail market from the application of Articles ~~5(6), 6, 11 and 12~~. When evaluating the strategic importance of the service facility concerned, regulatory bodies shall take into account in particular the level of use of the facility, the type and volume of traffic potentially impacted and the type of services offered in the facility. ~~Facilities~~ Rail related services operated by the main infrastructure manager or an operator referred to in Article 13(3) of the Directive cannot be exempted from the application of these Articles.

Kommentar [F3]: The revised definitions below + Annex II point 2 ensures that rail related services encompass all kind of services in service facilities (access to tracks and installations in service facilities as well as supply of any kind of services). Without the proposed changes we cannot understand when articles apply, or not, for different actors in different occasions. Updates need to be done throughout the document. See TS letter.

Kommentar [F4]: A step in the right direction, but not sufficient. TS suggest that all articles except art. 3 could be exempted. See TS and SE letters.

Kommentar [F5]: This is problematic and does not work on the Swedish market. Small non-strategic service operators that supply their services on tracks in service facilities managed by these entities should be possible to exempt, since they typically offers their services on IM's tracks. We suggest that the text is deleted and that RB is granted the right to make decisions on exemptions. See TS and SE letters.

Article 2

Definitions

For the purposes of this Regulation the definitions provided for in Article 3 of Directive 2012/34/EU shall apply.

The following definitions shall also apply:

(1) 'service facility description' means a document which sets out in detail the ~~general rules, deadlines, procedures and criteria for charging and allocation of service facility capacity and other~~ information required to enable applications for access to and use of service facilities and rail related services; it can either be part of the network statement of the infrastructure manager or published on a common web-portal or on the website of the service facility operator, provided that the network statement contains a link to the relevant web-portal/website.

(2) 'basic service' means all services referred to in point 2 of Annex II of Directive 2012/34/EU;

(3) 'additional service' means ~~all services a service provided by the operator of service facility and referred to~~ in point 3 of Annex II of Directive 2012/34/EU;¹

(4) 'ancillary service' means ~~all services a service provided by the operator of service facility or the infrastructure manager and referred to~~ in point 4 of Annex II of Directive 2012/34/EU;²

(5) 'rail related service' means a basic service, additional service or ancillary service covered by points 2 to 4 of Annex II of Directive 2012/34/EU;

Kommentar [F6]: Three *and* makes it impossible for us to understand if both "hardware" (access to tracks and installations in service facilities) and "software" (supply of services in these facilities) are affected by the rules and in what way. For example we cannot understand how/if "software services" are affected by *service facility capacity*. Throughout the document there is a need for clarity, so that markets with independent "software" providers can understand how the content of the IA are to be interpreted. For us this article gets clear when this text is deleted. Nevertheless, we think that the text is superfluous since art. 3 is very detailed.

Kommentar [F7]: Fine! This definition is better than before.

Kommentar [F8]: Simple...and functional.

¹ May be deleted to avoid repetition of provisions of the Directive at the level of the implementing act.

² May be deleted to avoid repetition of provisions of the Directive at the level of the implementing act.

(6) 'service facility capacity' means the potential to use a service facility over a given period of time (slot);

Kommentar [F9]: Capacity is relevant for all kind of rail related services ("hardware" and "software").

(7) 'facility service coordination process' means a process through which the operator of a rail related service facility and applicants will attempt to resolve situations in which there are conflicting applications for access to and use of a service facility and/or rail related services;

Kommentar [F10]: The IA focuses on SFO:s managing "hardware". Independent software suppliers are being forgotten.

Kommentar [F11]: Adjustment for independent software suppliers.

(8) 'linked service facilities' means service facilities which are adjacent to one another requiring passage through one to reach the other;

Kommentar [F12]: Or provider? See comment F18.

(9) 'controlling entity' means a body or firm within the meaning of Article 13(3) of Directive 2012/34/EU, which exercises direct or indirect control over an operator of a service facility and is also active and holds a dominant position in national railway transport services markets for which the facility is used;

Kommentar [F13]: If the facilities are located in line A-B-C-D, then passage through A is required to reach the others. A is thus linked to all others, whereas, for example, D is not linked to someone else? The definition cannot be based on **passage through**. If A is in the middle and B,C,D located like petals - which facilities are then linked to each other? A-B, A-C, A-D but not B-C? Perhaps it would be better to talk about **linked services OR linked service providers** – covering both hardware and software services and defining them (somehow) as having dependencies between each other?! (Text in the articles would need to be updated.)

(10) 'self-supply of services' means a situation where a rail related service is not supplied by an operator of a service facility but where a railway undertaking is performing itself the rail related service on the premises of a service facility operator [*provided that access to and/or independent use of the facility is legally and technically feasible and the possibility for self-supply is offered*]³;

Kommentar [F14]: Fine!

(11) 'owner of a service facility' means an entity, body or firm with the right to control of possess the facility;

Kommentar [F15]: Defined differently in different MS' national law. Cannot be modified here.

(12) 'ad hoc request' means a request for access to a service facility rail related services that relates to an ad-hoc path request for an individual train path in the meaning of Article 48(1) of Directive 2012/34/EU and a last minute request for access to a service facility that is caused by specific unforeseen circumstances;

Kommentar [F16]: We do not like the idea of introducing a "last minute" category of requests. It seemingly encourages bad planning and does not correspond to the allocation rules for train paths.

(13) 'freight terminal' means installations for the loading, unloading and transshipment of goods from and to trains, such as sidings, loading tracks at railway stations or inside ports, railports and intermodal transshipment terminals.

Kommentar [F17]: Services should not be specified in the IA. New definitions might limit the scope of the service and harm RB's freedom of interpretation. See SE letter.

Article 3

Information on conditions for access to service facilities and the supply of services

Kommentar [F18]: In this article we cannot understand which rules that apply to hardware and/or software providers. When all service providers are affected we suggest to use **operators/providers of rail related services** (which in fact could be the definition of **service providers** in this act). See SE and TS letters. Changes in the text below indicate the problem – but may not fully solve them, since we do not know your intentions.

(1) Operators of rail related services OR service providers (see general comment for article 3) service facilities shall make publicly available, to the extent applicable to the facility they are operating or services they are supplying, at least the following information on conditions for access to and use of their rail related services - service facilities and the supply of services in their facilities:

1. the list of all installations they are responsible for, in which services referred to in points 2 to 4 of Annex II of Directive 2012/34/EU are supplied, including information on their locations (address) and standard opening hours;
2. key contact details, including the operator's phone numbers and e-mail addresses;

Kommentar [F19]: Covered by key contact details...can be deleted.

³ The clarification in square brackets might be deleted in the definition and instead be inserted at the level of the specific provisions referring to self-supply.

3. a description of the facility including its technical characteristics such as number, length and accessibility of platforms, sidings or shunting/marshalling tracks, technical equipment for loading/unloading, washing, available storage capacity;
4. an individual ~~and precise~~ description of all rail related services which are supplied in the facility, ~~and indication of the type: basic, additional or ancillary services~~;
5. the possibility for and conditions applying to self-supply of rail related services, where legally and technically feasible and ~~offered~~⁴;
6. information on procedures for requesting access to ~~rail related services the facility and/or services supplied in the facility~~, including in particular deadlines for submitting requests, ~~[and where relevant]~~ acknowledgement of receipt of requests and timescales for handling of requests; in service facilities with more than one operator, the service facility description shall specify whether separate requests for ~~access to the facility and/or for~~ (various) rail related services need to be submitted;
7. information on the minimum content and format of a request or a template for requests for ~~access to the facility and/or~~ rail related services;
8. all other relevant documents for the access and use of ~~the service facility and/or supply of a~~ rail related service; in case of ~~service facilities operated and~~ rail related services provided by operators under direct or indirect control of a body or firm which is also active and holds a dominant position in national railway transport services markets for which the ~~rail related service facility~~ is used, this shall include model access contracts and general terms and conditions; where relevant, operators of ~~rail related services facilities~~ shall also provide information on the terms of use of the operator's IT-systems, if applicants are required to use such systems to request access to and use of the ~~service facility~~, and the rules concerning the protection of sensitive and commercial data;
9. description of the ~~facility~~ coordination process referred to in Article 8, including priority criteria referred to in Article 9;
10. charges for gaining access to ~~and use of the facility and for~~ each rail related service supplied ~~therein~~, and discount schemes offered to applicants, ~~including information on their principles and levels of discounts for access to the facility and supply of basic, additional and ancillary services~~, while respecting commercial confidentiality requirements;
11. in case of services provided by only ~~one supplier~~, the methodology, rules and where applicable scales used for calculating charges as well as the charging principles and information on changes in charges already decided upon or foreseen ~~in the next five years~~, if available, ~~while respecting commercial confidentiality requirements~~;
12. information on private branch lines and sidings that are not part of the railway infrastructure as defined in Annex I of Directive 2012/34/EU, but are needed to get access to service facilities referred to in point 2 of Annex II of the Directive.

Kommentar [F20]: Useless information for RUs.

Kommentar [F21]: Fine!

Kommentar [F22]: See comment F11.

Kommentar [F23]: rail related

Kommentar [F24]: We suggest: services provided by IM + service providers as decided by the RB. See SE letter.

(2) The operator of ~~rail related a services facility~~ shall make available the information listed in paragraph 1, either by publishing its own service ~~facility~~ description or by providing the infrastructure manager with the relevant [and ready to be published] information to be included in the network statement. Operators of ~~rail related services facilities~~ may also decide to make available the information referred to in paragraph 1 on a common web portal.

⁴ This may include a decision of the regulatory body in accordance with Article 56(9) of Directive 2012/34/EU.

Where the operator of a ~~rail related service facility~~ decides to publish its own service facility description, it shall make it available free of charge on its web portal and provide the relevant infrastructure manager with the link to be included in the network statement. This also applies when the operator of a ~~rail related service facility~~ has decided to publish the information on a common web portal. Where the infrastructure manager to whose network the facility is connected, is exempted from the obligation to publish a network statement in accordance with Article 2(3) or (4) of Directive 2012/34/EU, the service ~~facility~~ operator shall provide the information to the main infrastructure manager.

In view of its publication by the date referred to in Article 27(4) of Directive 2012/34/EU, infrastructure managers shall inform operators of ~~rail related services facilities~~ in the network statement or on their webpage about the ~~deadline for receipt~~ of the information or the link to be published in the network statement. Infrastructure managers shall facilitate the collection of the relevant information by providing a common template to be developed by the association of infrastructure managers referred to in ~~Article 40~~ of the Directive in cooperation with the network of regulatory bodies referred to in Article 57 of the Directive by [December 2017] that operators of ~~rail related service facilities~~ can use for submission of the relevant information. ~~The right of the operator of a rail related service facility to provide the information via a link and to modify and update their service facility description as necessary remains unaffected.~~

(3) The information referred to in paragraph 1 shall be kept up to date. ~~Operators of service facilities shall inform railway undertakings having already subscribed to one or more services in the service facility in due time about any changes in the facility description.~~

(4) Notwithstanding paragraphs 1 to 3 and Article 27 and Annex IV of Directive 2012/34/EU, in case of service facilities with more than one ~~service facility operator~~, the ~~service facility operators of rail related operating the facility and/or supplying services~~ in the facility concerned shall coordinate to (also) make available information on access to the facility and the conditions for ~~use of access to all rail related services~~ provided in that facility in one single place ~~or to indicate in the service facility description all other service facility operators supplying rail related services in the same facility. In case the coordination process does not lead to an effective implementation of the requirement to publish information in a single place, the regulatory body may assign one of the service facility operators to implement it.~~

~~(5) Without prejudice to Article 56 of Directive 2012/34/EU, in addition to the information provided for in paragraph 1 the regulatory body may request from the operator of a service facility referred to in Article 31(7) and (8) of Directive 2012/34/EU information on the nature and method of allocation of costs taken into account for the calculation of the charges for access to the service facility and supply of rail related services.~~

~~(6) Without prejudice to Article 56 of Directive 2012/34/EU, the regulatory body may require the operator of a service facility to provide a justification on the qualification of individual rail related services as basic, additional or ancillary services.~~

Kommentar [F25]: Obsolete. See TS letter. General remark: Rules that affect IMs must be carefully considered since IMs are not comprised by the scope of the IA.

Kommentar [F26]: Supported by which mandate?

Kommentar [F27]: Fine! Important.

Kommentar [F28]: See TS letter. Higher requirements than on IM for NS updates. Up to the applicant to stay informed when the information is available.

Kommentar [F29]: Fine! Information on all other operators supplying services in the same facility should **always** be provided in the service descriptions - also when the actors choose to make available the information in a single place.

Kommentar [F30]: When commercial actors are involved, it is impossible for RB to impose demands that entail administrable burdens. To require IM to coordinate cooperation with commercial actors is not a solution, since IM is not in control of their actions. See TS letter.

Kommentar [F31]: Superfluous. RB possesses mandate in accordance with art. 56 of the Directive.

Kommentar [F32]: Superfluous. RB possesses mandate in accordance with art. 56 of the Directive.

Applicants

Requests for capacity in service facilities and supply of rail related services may be made by applicants in accordance with the provisions of this Regulation.

Kommentar [F33]: Good intentions, but out of scope. See SE and TS letters.

Article 5

Principles for allocation and use of service facility capacity

(1) Operators of rail related services in facilities referred to in point 2 of Annex II of Directive 2012/34/EU and infrastructure managers shall align-coordinate their processes with the aim of ensuring an efficient and harmonized allocation and use of capacity on infrastructure and in service facilities to the extent that harmonized allocation of capacity is necessary; railway undertakings concerned shall be involved in this coordination. The obligation of coordination shall also apply to operators of linked service facilities.

Kommentar [F34]: Still difficult to understand when hardware and/or software providers are affected. **Needs to be clarified.** (No more indicative changes made in the text.) Does capacity only refer to hardware services? In a terminal, for example, the capacity of the operators staff is of vital importance...

Where an applicant is seeking supply of additional or ancillary services offered in the facility by a supplier other than the service facility operator referred to in the first sentence, the applicant may request involvement of the supplier concerned in the coordination.

(2) As long as the allocation process of the infrastructure manager is pending, requests for service facility capacity shall not be rejected on grounds that a corresponding train path has not yet been allocated. In such case, the operator of a service facility concerned referred to in point 2 of Annex II of Directive 2012/34/EU shall coordinate with the infrastructure manager in order to seek alignment of the allocation decisions.

Kommentar [F35]: Move text to recitals.

Kommentar [F36]: Covered by art. 5.1.

(3) Where applicable, operators of service facilities referred to in point 2 of Annex II of Directive 2012/34/EU shall give due consideration to priority rules of infrastructure managers for the annual scheduling.

(4) Operators of service facilities, infrastructure managers, railway undertakings and applicants shall coordinate to ensure efficient operation of trains from and to service facilities. In particular in case of trains using freight terminals, this coordination shall include exchange of operational information such as in particular the estimated time of arrival and departure in case of order to reduce delays and information on disturbances. For the exchange of operational information TAF and TAP TSI compliant messages shall be used.

Kommentar [F37]: Covered by the first sentence.

Kommentar [F38]: In a regulatory framework you should not tell which other regulations that apply. See SE letter.

(5) Operators of service facilities shall be able to demonstrate to the regulatory body that they have performed the coordination activities in accordance with this Article.

(6) Operators of service facilities shall keep a record of cooperation activities undertaken in accordance with this Article and make them available to the regulatory body upon request.

Kommentar [F39]: Totally superfluous given the text in art. 5.5.

Article 6

Information on available service facility capacity

The operator of a service facility referred to in points 2(b) to (g) of Annex II of Directive 2012/34/EU shall submit to the regulatory body indicative information on available spare service facility capacity on a regular basis. Wherever possible, for services provided by only one supplier, such information shall also be made available on a real-time basis through the use of a common web portal. Information on changes/temporary restrictions of the service facility which could impact on the capability or capacity of the facility, including in particular planned works, shall also be published.

Kommentar [F40]: Completely useless for RUs and RBs! There is no meaning asking a hotel for indicative capacity ... if you don't know the dates, numbers and preferences of the customers. To be able to evaluate the answer the question needs to be better expressed. We suggest to delete this text but **demand indicative information on available capacity from operators if contacted by a customer (complete application not needed).**

Article 7

Requests for access to a service facility and rail related services

(1) Applicants shall indicate in their application the services they are requesting; the operator of a service facility shall not oblige applicants to purchase other rail-related services it does not need. Information related to train paths shall be provided using TAF and TAP TSI compliant messages.

Kommentar [F41]: Services are not always connected to train paths.

Kommentar [F42]: See SE letter and comment F38.

(2) The operator of a service facility shall acknowledge receipt of a request for access to the facility and/or supply of a rail related service without undue delay. When the request does not contain all the relevant information needed in order to take a decision, the operator of a service facility concerned shall inform the applicant without undue delay and set an appropriate deadline for submission of the missing information. If the missing information is not submitted within the given deadline, the request may be rejected. For service facilities and rail related services used on a self-service basis, this provision shall apply to the request for conclusion of a framework contract to use the facilities.

Kommentar [F43]: Self-supply services are already included in the term rail related services and do not need to be mentioned separately. If you decide to keep the text – at least delete *framework* – since there is no difference between these and other contracts.

Kommentar [F44]: *Answer* is used in the Directive.

(3) After receipt of all necessary information, operators of rail related service facilities shall decide answer on the request in s for access to and supply of services in a service facility referred to in point 2 of Annex II of Directive 2012/34/EU⁵ within the reasonable timeframe defined by the regulatory body in accordance with Article 13(4) of Directive 2012/34/EU. The regulatory body assumes the offer of the operator of service facilities as irrevocable.

Kommentar [F45]: When an offer is binding or not is regulated in national law and according to the statements in the offer itself, usually x days.

Regulatory bodies shall define the timeframes prior to the publication of the network statement in accordance with Article 27(4) of Directive 2012/34/EU in order to ensure transparency and predictability for applicants. Different deadlines may be set for different types of service facilities and/or services.

Kommentar [F46]: Useless, must be set prior to IMs deadline for service descriptions to make sense. Probably these time limits will NOT change very often – so it would better be deleted.

Kommentar [F47]: Fine!

For ad hoc requests concerning access to facilities referred to in points (a) to (d) and (f) to (i) of point 2 of Annex II, these timeframes shall be aligned with the timeframe set out in Article 48(1) of Directive 2012/34/EU. For other requests for access to facilities referred to in points (a) to (d) and (f) to (i) of point 2 of Annex II concerning the ongoing timetabling period, the timeframe shall not exceed 10 working days following the receipt of all relevant information or be aligned with the timelines applied by the infrastructure manager for answering corresponding requests for access to the infrastructure.

Kommentar [F48]: Out of scope. See SE letter. Encourages bad behaviour. If you need the service in 6-9 days you'd better not apply until only 5 days remains.

(4) Requests for additional and ancillary services referred to in points 3 and 4 of Annex II of Directive 2012/34/EU shall be answered without undue delay. Where an applicant submits an ad hoc request

Kommentar [F49]: This text goes beyond the demands of the Directive (only point 2 services and within *reasonable time*). Out of scope. See SE letter.

⁵ These deadlines also apply to refusals of requests in accordance with Article 9.

for different rail related services supplied in one service facility or such a request concerning the ongoing timetabling period, and it indicates that only their simultaneous allocation is of use, all service facility operators concerned, including suppliers of additional and ancillary services referred to in points 3 and 4 of Annex II, shall decide within the maximum timeframe defined in accordance with paragraph 4.

Article 8

Facility coordination process

(1) Where an operator of a rail related services facility referred to in point 2 of Annex II of Directive 2012/34/EU receives conflicting requests for service facility capacity, it shall attempt, through coordination with the relevant applicants (facility coordination process), to ensure the best possible matching of all requests. This coordination shall also involve suppliers of additional and ancillary services referred to in points 3 and 4 of Annex II of Directive 2012/34/EU where such services have been requested.

The principles governing the consultation and facility coordination process shall be set out in the service facility description and shall aim at meeting all requests as far as possible and [thereby] ensuring an optimum effective use of available capacity in the facility.

(2) Operators of service facilities referred to in point 2 of Annex II of the Directive shall not reject requests for access to their service facility or refer the applicant to a viable alternative, when capacity that matches the needs of the applicant is available in the facility or may be expected to become available during the facility coordination process. For service facilities and services used on a self-supply basis, this shall apply to the request for conclusion of a (framework) contract to use the facility.

(3) In the context of the facility coordination process, depending on the service facility concerned, different options that could allow resolving the conflict shall be considered. These shall, when necessary, also encompass measures to maximise the capacity available in the facility, without investment in resources or facilities. Such measures may include

- proposing alternative timing that might allow to accommodate the different conflicting requests;
- modification of opening hours or amendments to shift patterns, where possible;
- allowing access to the facility for self-supply of services, where technically and legally feasible and provided that compliance with relevant applicable legislation can be ensured;
- proposing services that can be supplied in the facility and others that may be supplied elsewhere.

(4) Without prejudice to Article 56 of Directive 2012/34/EU, an applicant and the operator of the rail related service facility may request participation of the regulatory body as observer in the facility coordination process.

Kommentar [F50]: Coordination process for all rail related services?! Facility indicates that only hardware services are affected. Needs to be clarified.

Kommentar [F51]: What is a conflicting requests? We believe that "full is full" and that conflicting requests can only arise between applications, not involving capacity that has already been allocated. See TS letter.

Kommentar [F52]: Just hardware services or all services?

Kommentar [F53]: Out of scope. According to the Directive, these operators shall only provide services in a non-discriminatory manner.

Kommentar [F54]: Optimum effective use is out of scope. Effective use – is slightly better. See TS and SE letters.

Kommentar [F55]: Self-supply services are already included in the term rail related services and do not need to be mentioned separately. If you decide to keep the text – at least delete *framework* – since there is no difference between these and other contracts.

Kommentar [F56]: The number one task is to solve the conflict, not to make an optimisation analysis. For example, if two applicants want to use an empty terminal in the exact same time and one of them says that it's ok to change time – then no measures need to be taken in order to maximise capacity.

Article 9

Refusal of access

(1) Where after coordination in accordance with Article 8 a request for ~~access to a service facility and for rail related services supplied in these facilities~~ cannot be satisfied, the operator of the ~~rail related services facility~~ referred to in point 2 of Annex II shall inform the applicant concerned and, upon request, the regulatory body without undue delay. Member States may require mandatory notification of the regulatory body even in the absence of a request.

Kommentar [F57]: You need to clarify if hardware and/or software services are affected.

(2) In case of ~~several~~ conflicting requests, the operator of the ~~rail related service facility~~ may apply priority criteria to allocate capacity. Such priority criteria shall be published in the service ~~facility~~ description; the criteria shall take into account the purpose of the facility, the purpose and nature of the railway services concerned and the objective to secure an ~~optimum effective~~-use of available capacity.

(3) The operator of a ~~rail related service facility~~ referred to in point 2 of Annex II of Directive 2012/34/EU and the applicant shall, if ~~one or more~~ requests cannot be satisfied, jointly assess whether there are viable alternatives allowing to operate the freight or passenger service concerned to the extent that this is possible ~~without a requirement on the applicant to disclose business strategy~~.

Kommentar [F58]: Fine!

To this end the operator of the service ~~facility~~ shall indicate possible alternatives, including, where relevant, in other Member States, on the basis of ~~information published in accordance with Article 3 and provided by the applicant~~, taking into account in particular the following criteria:

Kommentar [F59]: Fine!

Kommentar [F60]: Fine!

- substitutability of operational requirements
- substitutability of physical and technical requirements
- impact on attractiveness and competitiveness of envisaged services
- estimated additional cost for the applicant concerned resulting from access to the alternative facility instead of using the initially envisaged facility.

In this context, the operator of a service facility shall ~~respect the commercial confidentiality of~~ information provided to it by the applicant.

Kommentar [F61]: Fine!

The applicant shall ~~consequently~~ ~~continuously~~ assess whether using the proposed alternative would allow to operate the envisaged service under economically acceptable conditions. Where information on capacity of the proposed alternative is not publicly available, ~~the applicant shall also verify availability of capacity~~. The applicant shall inform the operator of the service facility about the outcome of its assessment.

Kommentar [F62]: *Jointly* (above) indicates that they should do this together. *Continuously* stress a co-operative behaviour. Else, it seems as if each part is responsible for its own part of the process.

Kommentar [F63]: Fine!

(4) In a case where, following this assessment, the operator of the service facility and the applicant conclude that no viable alternative exists⁶, and it is not possible to accommodate the request for capacity following the procedure set out in Article 8, ~~the operator of a service facility may reject the~~

⁶ In particular for stations and for (certain facilities in) ports it may sometimes be impossible to identify viable alternatives.

initial request. ~~The applicant concerned may complain against the decision to the regulatory body in accordance with Article 13(5) of Directive 2012/34/EU.~~

Kommentar [F64]: Reasonable. Fine!

Kommentar [F65]: They may always complain to RB.

(5) In a case where it is not possible to accommodate a request for capacity following the procedure set out in Article 8, but the operator of the service facility and the applicant have jointly identified viable alternatives in accordance with the procedure set out in paragraph 2, the operator of the service facility may reject the request.⁷ Operators of a service facility referred to in Article 13(3) of Directive 2012/34/EU, shall justify in writing why the request could not be accommodated and why, on the basis of the information available, they consider that the proposed alternative meets the applicant's requirements and is thus viable within the meaning of Articles 3(10) and 13(4) of Directive 2012/34/EU and the provisions of this Regulation. ~~If the applicant concerned does not consider the alternatives proposed to be viable, he may complain to the regulatory body in accordance with Article 56 of Directive 2012/34/EU.~~

Kommentar [F66]: They may always complain to RB. Move text to the recitals or delete.

(6) An operator of a service facility rejecting a request for service facility capacity shall be able to demonstrate to the regulatory body and the applicant the needs preventing him from attributing the requested capacity to the applicant and the options examined in view of trying to accommodate the applicant's request.

Kommentar [F67]: Text from 2nd draft was deleted. Fine!

(7) Where an applicant informs the operator of a service facility on its own initiative and in writing that it does not wish the operator of the service facility to indicate viable alternatives, the operator of a service facility shall not be subject to the provisions of paragraphs 3 to 5.

Article 10

Regulatory intervention

When a regulatory body decides in accordance with Article 13(5) of Directive 2012/34/EU that an appropriate part of capacity shall be granted to the applicant whose request could not be accommodated after a facility coordination procedure, the regulatory body shall, where relevant, take account ~~in particular~~ the following aspects:

Kommentar [F68]: Do not match *where relevant* in the same sentence. Not exhaustive.

- impact on the viability of the business models of other users of the service facility possibly affected by the decision;
- overall amount of service facility capacity already attributed to other undertaking(s) possibly affected by the decision;
- investments made into the facility by undertaking(s) possibly affected by the decision, with the exception of investments covered by public funds;
- viable alternatives available to accommodate needs of other undertaking(s) possibly affected by the decision, including in case of international services alternatives in other Member States through which the service concerned is running;

⁷ In such a case, Article 13(5) of Directive 2012/34/EU does not apply. However, the applicant may complain to the regulatory body in accordance with Article 56(1) of Directive 2012/34/EU if he considers that he has been unfairly treated or discriminated against by the operator of a service facility.

- impact on the viability of the business model of the operator of the service facility.

Article 11

Single point of contact

~~In service facilities where services referred to in point 2 to 4 of Annex II of Directive 2012/34/EU are provided either by a supplier, which is not responsible for handling requests for access to the facility, or by more than one service provider, a single point of contact for applicants to request information on service facility operators providing services in the facility shall be established. Where the services provided by the various suppliers/service providers are complementary, the applicant may submit a request for different services to the single point of contact, which shall forward the request to the suppliers/service providers concerned.~~

~~Information on the contact point shall be published in the service facility description.~~

Kommentar [F69]: See TS letter. The benefits are small compared to the practical, commercial and administrative disadvantages.

Kommentar [F70]: Better for RU to send applications straight to the right operator.

Article 12

Measures to ensure optimum effective use of service facility capacity

(1) Operators of service facilities under direct or indirect control of a body or firm which is also active and holds a dominant position in national railway transport services markets for which the facility is used shall, [to the extent possible], put in place measures to encourage optimum effective use of the capacity available in their facility. Such measures shall be transparent and non-discriminatory; they may include penalty payments or an obligation to surrender capacity in case of disruption or repeated failure to use capacity reserved, unless the reasons are beyond the control of the applicant.

~~In case of non-payment of the capacity use, the operator of a facility may require the surrender of the relevant capacity and/or refuse further access. Information on the measures shall be provided in the service facility description.~~

(2) Applicants shall inform the operator of a service facility of any permanent intention not to use all or part of the allocated service facility capacity without undue delay.

(3) Where a service facility operator referred to in point 2 of Annex II encounters capacity constraints and has had a request expressed as per Article 7 or anticipates such a request, it shall put in place mechanisms enabling him to assess on a regular basis whether the capacity available is efficiently used. This may include periodical review of agreements concluded with applicants for the purpose of considering the service facility capacity. A summary of the assessment shall be kept.

Kommentar [F71]: The directive only requests that applications are met as far as possible. Optimization is a big step beyond the mandate. **Out of scope.** See SE letter.

Kommentar [F72]: Only hardware services?

Kommentar [F73]: Bara h/w?

Kommentar [F74]: New paragraph or deleted. When does this apply? Difficult to understand. Does the text refer to all operators or only dominant? Does the text refer to penalties or all payments? Non-payment clauses are usually handled in contracts.

Article 13

Kommentar [F75]: Art. 13.6 in the Directive is strange. Article 13 has improved in this draft. We can live with the text but suggest to keep it to a minimum and delete some more details where possible.

Publication of unused facilities for lease or rent⁸

(1) The timeline for calculating the two year period referred to in Article 13(6) of Directive 2012/34/EU shall start on the day following the last day of supply of a rail related service in the service facility concerned.

(2) An applicant interested in using a facility referred to in Article 13(6) of Directive 2012/34/EU shall express its interest in writing to the operator of the facility concerned and inform the regulatory body; a request for access to the facility shall be considered as expression of interest. The expression of interest shall contain information on the needs of the railway undertaking.

Where the owner of a facility does not ensure the operation of the facility, the operator of a facility shall inform the owner of the facility about the expression of interest within 10 days.

Where, upon receipt of the expression of interest the operator of the service facility decides to resume operations within a timeframe and to an extent that satisfies the railway undertaking's demonstrated needs, the owner of the facility shall not be obliged to publicise the facility for lease or rent.

(3) Before publishing the facility for lease or rent, the owner of the facility may allow the operator of the facility to submit his observations on the envisaged publication for lease or rent within an appropriate delay not exceeding four weeks. The operator may object to the publication for lease or rent by submitting documents proving that there is an ongoing process of reconversion, which has been launched before the expression of interest in using the facility and which involves planning and construction works aimed at removing the current function of the facility.

The regulatory body may assess the documents concerning the reconversion process.

(4) [Without prejudice to applicable procurement rules], the owner of a service facility shall publicise a notice concerning the lease or rent of the facility on its webpage in at least two official languages of the Union and shall inform the infrastructure manager to whose network the facility is connected and the regulatory body. The publication shall include all information necessary to enable interested candidate to submit an offer for taking over the operation of the facility. This shall include in particular information on the technical equipment of the service facility, the award criteria as well as the address and time limit for submission of tenders. The infrastructure manager concerned shall also publish this information on its web portal. The minimum time limit for receipt of tenders shall be 30 days from publication of the notice.

(5) [Without prejudice to applicable procurement rules], the owner of a service facility shall select the new operator of the facility in a transparent and non-discriminatory selection process on the basis of appropriate criteria defined in the publication, taking into account the objective of ensuring an optimum effective use of the capacity of the facility, and shall make a reasonable offer without undue delay.

⁸ This provision is limited to facilities referred to in point 2 of Annex II; references to Article 13(6) of the Directive are intended to make this clear.

Article 14

Ticketing services in passenger stations

Ticketing services in passenger stations within the meaning of point 4(d) of Annex II of Directive 2012/34/EU shall comprise ticket vending services provided at staffed ticket offices and/or use of ticket selling machines installed in passenger stations.

Kommentar [F76]: Out of scope. See SE letter. We anticipate that RUs will remove their ticketing machines from stations if they cannot decide whose tickets to sell.

Article 15

Accounting

Without prejudice to Article 13(3) of Directive 2012/34/EU, any operator of a service facility shall keep its accounts in a way that allows the regulatory body to control whether the operator of a service facility has complied with the charging rules set out in Article 31(7) and (8) of Directive 2012/34/EU and enables the operator of the service facility to demonstrate, where applicable, that the service charges invoiced comply with the methodology, rules and scales in accordance with Article 31(2) of Directive 2012/34/EU.

Kommentar [F77]: Out of scope. See SE letter.

Article 16

Independence requirements for service facility operators

(1) Without prejudice to Article 13(3), third subparagraph of Directive 2012/34/EU^a, decision-making and organisational independence required for operators of service facilities referred to in Article 13(3), first subparagraph of Directive 2012/34/EU shall be ensured through measures including at least the following:

- (a) operation of service facilities shall be ensured by a distinct division;
- (b) where information systems are common to the controlling entity and the service facility operator, access to sensitive information relating to service facility access requests and charging shall be restricted to authorised staff of the division responsible for operating the service facility; sensitive information relating to service facility access requests and charging shall not be passed on to the controlling entity;
- (c) the controlling entity shall not exercise a decisive influence on decisions concerning service facility access requests and charging;
- (d) the managers of the division in charge of taking decisions on service facility access requests, conditions for access and charging shall not be affected by any conflicts of interest and shall not receive bonuses related to the performance of the controlling undertaking;

Kommentar [F78]: Out of Scope. See SE letter.

^a This is to clarify that when a service facility (operator) is under the direct or indirect control of an infrastructure manager, organisational and decision-making independence may be considered to be demonstrated by fulfilment of the independence requirements for infrastructure managers set out in Article 7 of Directive 2012/34/EU.

~~(2) Regulatory bodies shall assess whether the measures put in place are sufficient to achieve organisational and decision-making independence of operators of service facilities referred to in Article 13(3) of Directive 2012/34/EU. If this is not the case, the regulatory body may decide on additional measures necessary to ensure organisational and decision-making independence.~~

Article 17

Entry into force

This Regulation shall enter into force on the twentieth day following that of its publication in the *Official Journal of the European Union*.

Articles 3 and 6 shall apply from [...] in time for the working timetable starting on 8 December 2018.

Article 16 shall apply from 25 December 2018.¹⁰

This Regulation shall be binding in its entirety and directly applicable in all Member States.

Kommentar [F79]: To be discussed when the content of the IA has been settled. Network Statement och Capacity Allocation processes as well as needs for IT-systems etc. require longer transitional periods than suggested.

¹⁰ Aligned with deadline for transposition of provisions concerning independence of infrastructure managers under the 4th railway package.