

Question 1: How do you understand the regulatory framework? Does the draft presented below appear to respect the spirit of Directive 2007/58/EC and/or national texts (Transport Code and Decree No. 2010-932)?

Commentaire [A1]:

Overall, the draft is quite similar to the Dutch PP/EE procedures and in line with the Directive.
PP-criteria are also quite clear.

However, the application and interpretation of the EE-criteria, as mentioned in art 43/44, seems to be missing in the draft.

In the interest of the market, we think it is acceptable and necessary to apply some kind of threshold. Although a decision can not be based on the sole application of such a threshold instrument (as indicated in the interpretative notice) the market parties need some legal certainty and transparency on the application of the criteria.

If ARAF has the authority to do so, a balanced threshold could be developed.

Also, an explanatory note to the draft (procedures and criteria) would be meaningful in a better understanding of the mechanism.

Furthermore, in the draft text, a description of –or referral to– the obligatory appeal procedures is missing. (Dir 91/440, 3 ter)

III. Framework

Section 1 – General

Article 1 The following definitions are for the purposes of this document:

- a) “Public service contract”: a contract as defined in Article 2 i) of Regulation (EC) No 1370/2007 of the European Parliament and of the Council of 23 October 2007 regarding passenger public transport services by rail and by road and repealing Council Regulations (EEC) Nos 1191/69 and 1107/70;
- b) “Organising authorities”: region, Ile-de-France transport association, and “départements” and public entities which have concluded a public service contract for the operation of a passenger rail transport service;
- c) “International passenger rail transport service”: a passenger rail transport service where the train crosses at least one border between France and another Member State and where the principal purpose of the service is to carry passengers between stations located in different Member States; the train may be joined and/or split, and the different sections may have different origins and destinations, provided that all carriages cross at least one border;
- d) “Domestic service”: a service run by a passenger rail company with a route running between two stations located on national territory;
- e) “Applying railway undertaking”: a railway undertaking wishing to operate an international passenger service involving domestic services.

Section 2 - Notification procedure

Pre-notification

Article 2 Applying railway undertakings have the option to pre-notify the Authority of their wish to operate an international passenger service involving domestic services.

Article 3 The pre-notification mentioned in Article 2 au-dessus is optional and of an informal nature. It aims to alert the Authority to the railway undertaking's intentions even before the information package is submitted.

Assembling the information package

Article 4 Every applying railway undertaking assembles an information package to be sent to the Authority. The package must contain the following information:

- a) The originating station and the final destination of the international passenger rail transport service;
- b) The domestic services intended;
- c) The schedules planned and the applicable rates;
- d) The number of passengers expected and the forecast turnover. Forecasts will be for a period of five years, broken down by origin-destination;
- e) The lengths of the longest domestic service and the longest international service.

Commentaire [A2]: Suggest to refer here already to requested information as indicated in Appendix I

Commentaire [A3]:

It would be more clear to indicate what is the minimum information required. (Stations, frequency, starting date?)

Article 5 The applying railway undertaking candidate indicates in the information package the information it considers to be of a commercially confidential nature.

Submitting the information package

Article 6 The information package is to be submitted at the latest five months before the date when the service is scheduled to start, in accordance with Article 2 of Decree No. 2010-932. However, the Authority encourages railway undertakings to anticipate this deadline and to submit the package with the corresponding train path request.

Article 7 On receipt of the information package, the Authority shall verify the completeness of the package within eight days. If the package is complete, the Authority shall confirm receipt of the package; otherwise it shall inform the applying railway undertaking of the missing aspects.

Article 8 After receiving the information, the Authority shall inform about the project of international service on its website: www.regulation-ferroviaire.fr. In order to protect the confidential commercial data of the railway undertaking concerned, the information published on the website shall be the stations served by the service and the domestic services intended. Interested railway undertakings are invited to regularly consult the Authority's website.

Article 9 The information published on the Authority's website shall be communicated to the other regulators concerned.

Section 3 - Principal purpose test

Section 3 aims to describe the procedures followed by the Authority to verify the international nature of the service.

Question 2: Do you think the procedures are clear, complete and compatible with your operations?

Introduction

Article 10 The principal purpose test aims to ensure that the introduction of new international services involving domestic services shall not “*be used to bring about the opening of the market for domestic passenger services, but*” shall instead “*merely be focused on stops that are ancillary to the international route*”. However, these services must make it possible to “*ensure that such operations have a realistic chance of being economically viable and to avoid placing potential competitors at a disadvantage to existing operators*”.¹⁾

Article 11 This section aims to present the procedure and criteria used by the Authority to carry out the principal purpose test. In accordance with the recommendations of the European Commission's interpretative communication regarding some provisions of Directive 2007/58/EC, the Authority conducts an analysis which is both quantitative and qualitative.

Referral procedure of the Authority regarding the principal purpose test

Article 12 As a reminder, Decree No. 2010-932 specifies that the minister for transport shall be given a period of two months starting from the date of receipt of the package referred to in Article 2 of the above decree to refer a case to the Authority regarding the principal purpose test.

Article 13 The request for the Authority to verify the principal purpose of the service shall be lodged by the applying railway undertaking once the information package has been submitted.

1) See recitals 7 and 8 of Directive 2007/58/EC.

Commentaire [A4]:

Dir 2007/58 art 2, sub 3 adds a paragraph 4 to article 13 of Dir 2001/14.

This art 13 par. 4 states:
” When an applicant intends to request infrastructure capacity with a view to operating an international passenger service [...] it shall inform [...] the regulatory bodies concerned”

Subsequently, the submission of information should be done before (or at the same time as) the (annual) capacity request..

Commentaire [A5]: Is there any legal consequence on exceeding this term?

Commentaire [A6]: Only inform or also request to complete within specified term?

Commentaire [A7]: The publication should contain enough detail for authorities/holders of an PSC to decide whether or not to request a PP/EE test
(Dir 91/440, art 3.bis+ter)
See also remark A3

Commentaire [A8]: See individual remarks at the articles.

Commentaire [A9]:

Decree states one month or two months?

Commentaire [A10]:

Presumably ‘submit request to run a PP test’?

Commentaire [A11]: Not quite clear what is meant here. Is a PP-test (always) automatically done? Or does it depend on what is submitted indicated on the Appendix I form?

Suggestion to refer here to Appendix I.

Question 3: Is it desirable to fix a deadline by which the applying railway undertaking must refer a case to the Authority?

Article 14 aims to specify the referral deadlines set by the Authority so as to allow the principal purpose of the service to be verified within a time-scale compatible with the operational restrictions for the applying railway undertaking.

Article 14 Every interested railway undertaking, excluding the applying railway undertaking, shall be given a period of one month starting from the publication date laid down in Article 8 to refer a case to the Authority regarding the principal purpose of the service intended.

Question 4: Is a fixed time-scale like that described above desirable? Do you think the one-month deadline is sufficient?

Article 15 Those referring a case shall be requested to use the form provided in Appendix I of this document. Three original copies of the form should be sent to the Authority's headquarters as a registered letter with acknowledgement of receipt.

Article 16 The minister for transport and interested railway undertakings shall specify in their referrals the aspects that shed doubt on the international purpose of the service. In addition, interested railway undertakings shall specify in their referrals the aspects that prompt them to think that the new service could have an impact on their operation.

Article 17 The Authority shall inform the applying railway undertaking and the minister for transport of every case referred. The Authority shall publish the subject of the case referred on the website: www.regulation-ferroviaire.fr.

Article 18 As part of this referral, the Authority shall communicate with the other European regulators concerned, while ensuring commercial confidentiality is respected.

Article 19 The Authority shall return its decision, on the basis of the information gathered, within two months of the date of receipt of the referral.

Article 20 The person referring the case and the applying railway undertaking shall be informed of the Authority's decision. It shall also be forwarded to the minister for transport and the infrastructure manager. It shall be made publicly available, subject to legally protected confidential aspects.

Methodology and criteria used

Article 21 The Authority shall analyse the function of the service based on five-year forecasts. All data provided must comply with this time frame.

Article 22 After receiving the referral, the Authority shall request the following information from the applying railway undertaking in order to complete the information package:

- Competitive situation of the service proposed (origin-destination already offered by another operator or not);
- Intended modal shift intended (if relevant);
- Type of service (type of interior fittings, marketing, etc.);
- Populations of the towns or areas served.

Commentaire [A12]:

It is obligatory for the applying RU to inform the RB before the capacity request.
(Dir 2001/14, art 13 par 4)

So, if there are closure dates fixed for capacity requests/allocation, then a deadline, taking these dates into account would be desirable.
(For transparency reasons, it might be linked to the annual allocation process)

Commentaire [A13]: Not clear if they are excluded from the right to ask for a PP-test.

Commentaire [A14]: Why is the referral term for a PP-test request by the Minister linked to 'receipt of package' (2 months, art 12 above) and for interested RU's linked to publication by ARAF (1 month)?

Commentaire [A15]: One month should be enough for a first examination. If extra info is needed, an additional term maybe given to complete the request/referral.

Commentaire [A16]: Excluding, or including the applying RU (see above, art 14)?

Appendix I suggests applying RU's can also submit request, but articles 14-16 suggest that the applying RU can not submit request.

Commentaire [A17]: What is the sanction if the form is not completed in full?

Commentaire [A18]: If referral is to be done before capacity requests, it might be advisable to inform the infrastructure manager also.

Commentaire [A19]: Directive states: 'within two months of receipt of all relevant information'. This might be later than date of first reception, i.e. ... [1]

Supprimé: in the medium term. It shall be

Commentaire [A20]: If medium term = 5 years?

Commentaire [A21]: Specify a deadline

Commentaire [SvS22]: and supporting/relevant documents? Also for information regarding the EE-test.

Commentaire [A23]: Why is this information necessary? It is not a new connection for these cities

Article 23 At the request of the Authority, the applying railway undertaking shall provide the following information within eight days:

- a) Models of the traffic forecasts and the forecast turnover, together with all the assumptions used (elasticities, projection assumptions, etc.);
- b) Description of every qualitative aspect suggesting that the service is primarily an international service.

Commentaire [A24]:

What determines whether or not the Authority will request information as stipulated by this art 23?

Commentaire [A25]: More relevant seems to be the number of passengers

Commentaire [A26]:

In what is this different from art 22 c) ?

Commentaire [A27]: passengers

Article 24 The Authority shall carry out a critical analysis of the data provided, focusing particularly on the traffic forecasts and the forecast turnover. It shall reserve the right to use different values for the principal purpose test than those provided by the applying railway undertaking, taking into account any corrections that it considers necessary.

Articles 25 and 26 aim to suggest criteria that could be used by the Authority for the principal purpose test. They provide for a two-tier system:

- firstly based on thresholds that specify the conditions sufficient (but not mandatory) to ensure the international nature of the service (Article 25);
- if these criteria are not met, then the Authority shall carry out an in-depth analysis, which is both quantitative and qualitative (Article 26).

Article 25 If, using the data resulting from Articles 23 and 24, the project simultaneously satisfies the following three threshold conditions:

- a) proportion of international passengers is greater than 60% of the total number of passengers;
 - b) more than 30% of the length of the longest service is operated outside French territory;
 - c) proportion of the turnover resulting from international passengers is greater than 60% of the total turnover;
- the international nature of the service is considered verified.

Commentaire [SvS28]: In France or on the whole route?

Commentaire [SvS29]: In France or on the whole route?

Article 26 Should this not be the case, the Authority conducts a multi-criteria analysis in order to reach a decision. The Authority's principal purpose test is based on the following criteria:

- a) Intended schedule (stops, timetables and days on which trains will run);
- b) Proportion of international turnover;
- c) Proportion of international passengers (in passengers and in passengerskm);
- d) Competitive situation of the service proposed (origin-destination already offered by another operator or not);
- e) Intended modal shift intended (if relevant);
- f) Type of service (type of interior fittings, marketing, etc.);
- g) Length of the domestic services and the international services;
- h) Populations of the towns or areas served.

Commentaire [SvS30]: How is this different from article 25 a and c?

Commentaire [A31]:

This information is requested as a standard (art 22a), but only needed when not fulfilling threshold test. So why not part of additional request, only when needed?

Commentaire [SvS32]: How is this different from article 25 b?

Commentaire [A33]:

See previous remark

Commentaire [A34]:

Approach seems correct; thresholds 25 seem reasonable; Criteria 26 are appropriate, but could be presented as a non-exhaustive enumeration. Priority, if any, could be indicated and justified as part of decision.

Commentaire [A35]:

PP-test is an observation at a specific moment in time. Any changes in int. passengers, length or turnover of the new service could be of influence. If changes are substantial, a new PP-test could be carried out on request.

Question 5: Do you think the approach chosen in Articles 25 and 26 is appropriate? Are the threshold conditions suggested in Article 25 sufficient? Do you think the criteria set out in Article 26 are appropriate? What other, if any, criteria should be taken into consideration? Should the criteria be organised in order of priority?

Article 27 The Authority shall specify the period of validity of its decision, as well as the data that the applying railway undertaking is required to provide for monitoring purposes.

Question 6: What do you think is an appropriate period of validity of the Authority's decision and what monitoring measures would you suggest?

Section 4 - Testing the economic equilibrium of public service contracts

Section 4 aims to describe the procedures followed by the Authority to evaluate whether the economic equilibrium of a public service contract is compromised.

Question 7: Do you think the procedures are clear, complete and compatible with your operations?

Supprimé: 3

Commentaire [A36]: See individual remarks at the articles.

Introduction

Article 28 The test shall aim to determine whether or not the introduction of new international services involving domestic services compromises the economic equilibrium of a public service contract.

Article 29 This section aims to present the procedure and criteria used by the Authority to carry out the economic equilibrium test.

Referral procedure of the Authority regarding the test of the economic equilibrium of a public service contract

Article 30 As a reminder, Decree No. 2010-932 states that when the applying railway undertaking confirms to the transport organising authority (Autorité Organisatrice des Transports – AOT) its decision to offer domestic services falling under its competence, the AOT shall immediately notify the holder of the public service contract and forward a certificate to the applying railway undertaking. The applying railway undertaking then forwards this certificate to the Authority and the infrastructure manager.

If they believe that an international passenger rail transport service involving domestic services may compromise the economic equilibrium of a public service contract, the AOT and the holder of the public service contract shall be given one month starting from the date on which the link is confirmed to refer a case to the Authority. The infrastructure manager shall be given one month starting from the date of receipt of the certificate referred to in the first paragraph of this article to refer a case to the Authority.

Commentaire [A37]:
Maybe explain the kind of certificate this is.

Commentaire [A38]: ?

Article 31 AOT, PCS-holder or IM, referring a case, cited to in Article 30, shall be requested to use the form provided in Appendix II of this document. Three original copies of the form should be sent to the Authority's headquarters as a registered letter with acknowledgement of receipt.

Supprimé: Those

Commentaire [A39]:
Appendix II suggests applying RU's can also submit request for EE-test, but article 30-33 only take into account AOT, PCS-holder and IM as parties which can submit a request for EE-test, just like art 3.ter of Dir 91/440/CEE.

Article 32 AOT, PCS-holder or IM, referring a case shall specify in their referrals the aspects that prompt them to think that the new service could compromise the economic equilibrium of a public service contract.

Article 33 The AOT, PCS-holder or IM who referred the case shall notify the parties referred to in Article 30 of this fact. The Authority shall publish the subject of the case referred on www.regulation-ferroviaire.fr.

Supprimé: Those

Supprimé: person

Article 34 The Authority shall communicate with the other inspection bodies concerned under this referral, while ensuring commercial confidentiality is respected.

Article 35 The Authority shall return its decision, after consultation with all the parties concerned, within two months of the date of receipt of all the relevant information.

Article 36 The Authority may propose restrictions regarding the domestic services.

Commentaire [A40]: In which situation?
What are the criteria for restrictions?

Question 8: If the analysis of the Authority concludes that the economic equilibrium of a public service contract will be compromised, do you think it is desirable for the Authority to recommend restrictions in its decision? If yes, what types of restrictions can be put in place? (Restricting the number of marketable tickets on domestic routes, a ban on some stops, etc.)

Article 37 The [AOT, PCS-holder or IM](#), referring the case and the applying railway undertaking shall be informed of the Authority's decision. It shall also be forwarded to the minister for transport and the infrastructure manager. It shall be made publicly available, subject to legally protected confidential aspects.

Data used

Article 38 The Authority shall verify the equilibrium of the public service contract based on forecasts for a period of five years or up until the end of the contract in question. All data provided must comply with this time frame.

Commentaire [A41]:

The Authority has knowledge of practical situation and is the appropriate body to give practical recommendations.

These should only aim at avoiding a possible disturbance of the EE. Restrictions should be limited to resolving the disruptional effects.

Supprimé: person

Supprimé: in the medium term. It shall be

Question 9: What time frame should be used for verifying that the public service contract is not compromised, particularly in terms of the expiration of the contract?

Article 39 In order to carry out the test of the economic equilibrium of a public service contract, the Authority shall use the following details, provided by the AOT or by the holder of the public service contract (non-exhaustive list):

- Public service contract in question;
- Schedules of contract services (stops, timetables and days on which trains run);
- Past data for [traffic per line and for the whole of the public service contract in question](#) (annually, going back at least five years);
- Past data for turnover per line and for the whole of the public service contract in question (annually, going back at least five years);
- Charges;
- Traffic forecasts and the forecast turnover per line and for the whole of the public service contract;
- Cost data per line and for the whole of the public service contract in question.

Commentaire [A42]:

Only existing PCS should be taken into account, until their expiration. When concluding a new PCS, it can be taken into account that there is a (new) private RU, also offering domestic service on its international trains. This should be part of assessing the EE of a new PCS.

Commentaire [A43]:

Passengers?

Commentaire [A44]:

Passengers?

Commentaire [A45]:

This could be more specific. For the analysis of the economic equilibrium the change in cost is important (together with the change in turnover)

Commentaire [A46]:

Is this also a non-exhaustive list? Suggest to refer here to Annex II.

Commentaire [A47]:

Passengers?

Commentaire [A48]:

or 'collected'?

Commentaire [A49]:

more relevant seems to be the forecasts on the (quantity of) passengers.

Commentaire [A50]:

Passengers?

Commentaire [A51]:

Is provided under art 39, f. What is the use of all other info provided under art 39?

Article 40 The Authority shall specifically base its analysis on [the following data](#), provided by the applying railway undertaking:

- Intended schedule (stops, timetables and days on which trains will run);
- Estimated number of passengers on the link(s) in competition with the public service contract, segmented by fare category;
- Charges intended for this/these link(s);
- Models of the [traffic forecasts and the forecast turnover](#), together with all the assumptions used (elasticities, projection assumptions, rules for the distribution of passengers between the two operators, etc.).

Methodology

Article 41 The AOT and the holder of the public service contract shall send the information listed in Article 39 to the Authority when the case is referred.

Article 42 At the request of the Authority, the applying railway undertaking shall immediately send the information listed in Article 40.

Article 43 Firstly, the Authority shall carry out a critical analysis of the [data provided](#), focusing particularly on [the traffic forecasts and forecast turnover](#). It shall reserve the right to

use different values to carry out the analysis than those provided, taking into account any corrections that it considers appropriate.

Article 44 Secondly, the Authority shall perform an economic analysis, based on the data collected and according to the following criteria:

- a) Provisions laid down by the public service contract relating to its economic equilibrium;
- b) Possible losses in revenues and costs, in the short and medium term;
- c) Possible profits, in the short and medium term;
- d) Evolution of the profitability of the services operated by the holder of the public service contract.

Commentaire [A52]: .
or 'provided'?

The Authority shall determine if, according to its analysis, the economic equilibrium of the public service contract is compromised.

Commentaire [A53]:
What more precisely will be the effect of these criteria? What is the role of this in assessing the test of the economic equilibrium?

Question 10: Do you think that the suggested criteria are relevant? What other aspects should be taken into account?

Article 45 The decision of the Authority shall specify the time period during which the AOT, the holder of the public service contract and the infrastructure manager may not make another referral to the Authority for the domestic service in question, unless the facts or the legal circumstances on which the Authority's decision is based have significantly changed.

Commentaire [A54]:
The criteria are relevant, but for transparency it should be clarified how these criteria determine the outcome of the test (e.g. by thresholds).

Article 46 The Authority shall specify the data that the applying railway undertaking is required to provide for the purpose of monitoring its decision.

Question 11: What do you think is an appropriate period of validity of the Authority's decision and what monitoring measures would you suggest?

Commentaire [A55]:
Suggest to give a fixed decision for the duration of the PCS, unless substantial changes occur in domestic service of new int. RU. AOT, PCS holder or IM may request a new EE-test if able to demonstrate the substantial change.

Directive states:

‘within two months of receipt of all relevant information. This might be later than date of first reception, i.e. if additional information is to be provided. (see remark on your Question 4)