POSITION PAPER

Feedback to the Public Consultation on the Proposal for a Regulation on the Use of Railway Infrastructure Capacity in the Single European Railway Area (SERA)

17th November 2023

Feedback submitted by ***ALLRAIL, the Alliance of Passenger Rail New Entrants in Europe****.*

Introduction

We would first like to thank the European Commission for the opportunity to give feedback to this proposal. We value the European Commission's efforts to engage with stakeholders in shaping effective policy.

ALLRAIL, the Alliance of Passenger Rail New Entrants, is a non-profit association representing independent passenger rail companies (e.g. rail operators, ticket vendors, and rolling stock lessors) in Europe. ALLRAIL advocates for faster market opening in passenger rail in order to accelerate modal shift to rail and achieve the ambitious climate change reduction goals of the EU Green Deal in the transport sector.

ALLRAIL welcomes the EU Commission's Proposal for a Regulation on the Use of Railway Capacity in the Single European Railway Area (SERA). This proposal comes at a timely juncture to amend and complement Directive 2012/34/EU in order to take into account major developments that have occurred in European rail transport since the adoption of the aforementioned Directive.

Moreover, **ALLRAIL commends the EU Commission's choice of the legislative instrument** to achieve the abovementioned objectives, namely a Regulation. We believe that the establishment of a SERA can only be fulfilled by means of uniform rules across the Union.

ALLRAIL asbl
Washingtonstraat / Rue de Washington 40
B-1050 Brussels

e-mail | info@allrail.eu
web | www.allrail.eu
phone nr. | +32 479 07 08 06

On capacity allocation

On the overhaul of the capacity allocation process

ALLRAIL welcomes the proposed recast of the capacity allocation process, whose aim is to improve efficiency, flexibility, and preparedness for various contingencies. However, ALLRAIL would like to convey some concerning points in this regard:

First, the proposed organisation of capacity management around the **Strategic Capacity Planning with three successive phases (Capacity Strategy, Capacity Model, Capacity Supply Plan) will allow railway undertakings (RUs) to have better overview and foresight of the available infrastructure capacity**. In addition, the consultative and informational nature of the first two phases (capacity strategy and capacity model), if carried out correctly, can lead to a better inclusion of operators' needs and concerns, and therefore can contribute to fairer capacity allocation in the passenger rail market.

However, we believe that operators (also known as railway undertakings 'RUs') possess the best knowledge of the passenger rail transport market given the fact that it is at the core of their business, in addition to the input received from the railways infrastructure managers ('IM's).

Therefore, it is crucial to add to the proposed Regulations **provisions enabling the active input of operators into all the phases of the Strategic Capacity Planning**. We fear that without such active input from RUs, IMs might define capacity that does not match with the market's needs as best identified by RUs.

In the same vein of thought, **we recommend deleting the provision granting IMs a right to reject outright capacity requests from RUs that do not match the needs identified in the Capacity Supply Plan**. Indeed, we believe that capacity requests made by RUs will most often be closer to the market's needs than what has been identified by IMs in the Capacity Supply Plan. Instead, the non-alignment of capacity requests and the Capacity Supply Plan should be addressed through RU-IM dialogue and the conflict resolution mechanisms provided by the proposed Regulation.

ALLRAIL would also like to stress once again that the concept of Strategic Capacity Planning in its entirety only works if RUs can trust the independence of IMs. **It must be prevented at all costs that sensitive information shared as part of this process is shared beyond the relevant stakeholders at the IM and particularly must not be shared within vertically integrated companies to the advantage of the incumbent RUs.**

ALLRAIL asbl
Washingtonstraat / Rue de Washington 40
B-1050 Brussels

e-mail | info@allrail.eu
web | www.allrail.eu
phone nr. | +32 479 07 08 06

This also means that **employees of the IM who are involved in the process of Strategic Capacity Planning and therefore get insight into the current and future business plans of RUs must be banned from switching positions within vertically integrated companies**. We have noticed several instances in some Member States where employees that were part of the team dealing with Strategic Capacity Planning suddenly switched positions, working for the direct competitor of the RUs that originally submitted the sensitive information in good faith in order to facilitate the planning.

On framework agreements

Second, the proposed Regulation gives a greater importance to non-annual allocation processes, mainly to framework agreements (Article 31). Indeed, the provisions of Directive 2012/34/EU governing framework agreements were not effective enough given the fact that the conclusion of framework agreements remains up to IMs. In addition, the practice of framework agreements is not uniformly established across the Union.

Furthermore, we welcome the fact that the proposed Regulation provides that applicants **have "*a right to request infrastructure capacity over a period of time exceeding one working timetable period*"** and that the IM "*shall allocate such capacity through framework agreements concluded with the applicant*" (Article 31 §1).

However, this step forward is at risk of being **hampered by the possibility given to Member States to require prior approval of framework agreements. In this regard, ALLRAIL recommends transferring this role to the regulatory body.**

ALLRAIL also welcomes the possibility for **infrastructure managers (IMs) to conclude framework agreements for periods longer than that specified in point 5 of Annex I**, in the cases of dedicated investments by new entrant operators. Indeed, the conclusion of framework agreements by new entrants plays significantly in their favour when negotiating financial support and rolling stock purchase agreements during the early stages of their projects.

However, ALLRAIL remains wary of **framework agreements concluded between IMs and incumbent RUs in an unfair and unjustified manner**, which is the case in many Member States. The objective of such practice is to reduce available infrastructure capacity in order to hamper the entry of new RUs, especially the independent ones. In order to prevent this:

- The guard rail provided by Article 31(4) constitutes a first step in the right direction. It is indeed necessary that IMs set maximum shares of total

ALLRAIL asbl
Washingtonstraat / Rue de Washington 40
B-1050 Brussels

e-mail | info@allrail.eu
web | www.allrail.eu
phone nr. | +32 479 07 08 06

capacity that can be allocated through framework agreements. However, in order to ensure its fairness, **the repartition of such shares must be subject of guidelines to be included in the European Framework for Capacity Management (Annex III).**

- The EU Commission must be **receptive to the experience of RUs, especially the independent ones, when assessing the need to adopt an implementing act** setting out the maximum shares of framework agreements, in line with Article 31(11).
- We welcome Article 75(1), which provides that framework agreements concluded in accordance with Article 42 of Directive 2012/34/EU shall, after the adoption of the proposed Regulation, continue to apply until their expiration date. However, **ALLRAIL rejects any attempt to establish Grandfather Rights through the exemption of existing framework agreements from the provisions of the proposed Regulation**, even after their expiry. Otherwise, a significant part of infrastructure capacity risk being removed from the scope of this proposed Regulation, which would be detrimental to new rail services.

With regard to the maximum share of framework agreements, ALLRAIL recommends that the proposed Regulation includes a **provision that aims to ensure that such share is harmonised among adjacent Member States**. Indeed, it would make no sense for a long-distance cross-border applicant to be able to secure long-term capacity right in one country only to fail to secure similar rights in an adjacent country because the latter allocates a smaller share of capacity to framework agreements.

In addition, ALLRAIL insists on the need to ensure that the **initiative for framework agreements remains on the RUs' side rather than on that of IMs**. Predefined packages, like those defined by ADIF in Spain for high-speed rail, are too prescriptive. Such packages defeat the purpose of letting RUs adapt their offer to the market demand. In turn, there is the risk that the rigidity of such packages undermines the commercial viability of the service of the RUs concerned, which would lead to economic difficulties or even to unjustified Public Service Obligations (PSOs). For example, based on media articles[1], we understand that none of the high-speed operators in Spain are profitable.

[1] https://www.eleconomista.es/transportes-turismo/noticias/12505915/10/23/ouigo-aumenta-sus-perdidas-en-su-segundo-ano-de-operaciones-en-espana.html

ALLRAIL asbl
Washingtonstraat / Rue de Washington 40
B-1050 Brussels

e-mail | info@allrail.eu
web | www.allrail.eu
phone nr. | +32 479 07 08 06

On the cancellation of underutilised capacity rights

Third, ALLRAIL welcomes the introduction of a provision on the cancellation of underutilised capacity rights (Article 27(6)). This will help ensure that RUs do not request excessive capacity rights with the objective of preventing potential or existing competitors from offering competing rail services on the same network.

- However, building upon the aviation sector's experience of "ghost flights" at the height of the COVID-19 pandemic, the **proposed Regulation must also include a disposition that prevents cases of "ghost trains".** In this regard, there should be criteria to define "ghost trains" in a fair and non-discriminatory manner, especially in the case of new passenger rail services that are in the process of increasing their ridership. Guidelines on defining these criteria should be included in the European Framework for Capacity Management.

- In addition, ALLRAIL would like to highlight that **this provision must not be applied until IMs have fully implemented the Strategic Capacity Planning and introduced the necessary digital tools**. In some Member States, IMs do not offer full transparency on available capacity and lack the necessary digital tools to enable RUs to plan paths reliably, RUs are forced to apply for significantly more capacity than required in order to receive paths from the IM that are operationally feasible, even if this creates unnecessary work for all parties involved.

On the resolution of conflicting capacity requests through auctions

Fourth, ALLRAIL is alarmed by the proposal to introduce an auction mechanism in case of unsolved conflicting capacity requests, despite the activation of the formal conflict resolution mechanism (Article 37(3)). **The proposed Regulation must take into account the significant differences between RUs in terms of resources, especially between state-backed and state-owned incumbent RUs and the independent ones**. If left as it stands, we run the acute risk of seeing the former systematically win auctions for conflicted capacity rights against independent RUs.

- The proposed Regulation must explore alternatives to the mechanism of auctions, in addition to the existing alternative of resolving the conflict in a way providing access to the largest number of applicants. An example of such an alternative would be to **allocate the capacity right to the party that has the least existing capacity rights in the network in question**. This will encourage the introduction and diversification of rail services and significantly contribute to passenger rail market opening.

ALLRAIL asbl
Washingtonstraat / Rue de Washington 40
B-1050 Brussels

e-mail | info@allrail.eu
web | www.allrail.eu
phone nr. | +32 479 07 08 06

- In case that no alternative can be agreed upon, the **words "*on the basis of an auction or*" should be deleted**.

On the limitation of the right of access and of the right to pick up and set down passengers

ALLRAIL regretfully notices that **the EU Commission did not seize the opportunity of the proposed Regulation to remove one of the main obstacles to passenger rail market opening and the achievement of the Single European Railway Area, namely Article 11 of Directive 2012/34/EU** on the "Limitation of the right of access and of the right to pick up and set down passengers".

Indeed, Article 11 allows Member States to deny access to new passenger rail commercial services if there is a belief that the latter would compromise the economic equilibrium of existing public service obligations on the same route. Unfortunately, given the fact that two-thirds of passenger rail in Europe is covered by PSOs, **Article 11 of Directive 2012/34/EU significantly hampers the emergence of new commercial services or the growth of existing ones**.

Furthermore, the Economic Equilibrium Test provided by Article 11 of the said Directive and further detailed in Implementing Regulation 2018/1795 is sometimes **used in some Member States to actively prevent the entry of independent RUs or the growth of existing ones**. The Polish rail regulator UTK is notorious in this regard [2] yet all the time claims that it is just following existing regulation.

Yet, experience shows that **new commercial services do not jeopardise the economic equilibrium of PSOs**. If anything, there have been cases, like in Italy, where the successful introduction of new commercial services has demonstrated the lack of necessity of having a PSO service on the same route at all, such as when our member Italo started serving Bari in Italy in April 2021[3], using the conventional long-distance infrastructure; this ultimately led to healthy open access competition and to significant savings for the taxpayer.

Therefore, ALLRAIL recommends that the EU Commission must go further than merely the encouraging removal of recital 20 in Article 74 (1) (c), which lays out the principle of Article 11, by **removing Articles 11 and 11a of Directive 2012/34/EU in addition to any references thereto.**

[2] See our Open Letter to the Polish rail regulator UTK: "ALLRAIL's response to the allegations of the Polish rail regulator UTK containing false information about the level of competitiveness in the Polish passenger rail market" (25th January 2023).
[3] https://bari.repubblica.it/cronaca/2021/04/23/news/italo_in_puglia-297731352/

ALLRAIL asbl
Washingtonstraat / Rue de Washington 40
B-1050 Brussels

e-mail | info@allrail.eu
web | www.allrail.eu
phone nr. | +32 479 07 08 06

Easier processes for international services

ALLRAIL welcomes the improved provisions on multi-network capacity rights. We believe that they will facilitate the creation of new cross-border services. More specifically, **the proposed Regulation sets up a one-stop-shop for applicants to request multi-network capacity rights for cross-border routes**. This effectively puts the onus on IMs to coordinate with each other to process such requests, rather than on applicants who, in many cases today, must run from one IM to another.

In addition, ALLRAIL welcomes the provisions related to the **performance of the process of allocating multi-network capacity rights**, to the need to coordinate changes to such rights in order to ensure their integrity, and to the minimum level of quality of multi-network capacity rights compared to single network capacity rights.

Finally, ALLRAIL welcomes the introduction of a **provision on compensation for changes to multi-network capacity rights.**

A fairer compensation framework

ALLRAIL welcomes placing of IMs and applicant RUs on equal footing in terms of contractual obligations pertaining to capacity rights. More specifically, the proposed Regulation creates a **robust framework for compensation**, in cases of changes or cancellation of capacity rights by the infrastructure manager. This constitutes a significant improvement from Directive 2012/34/EU, whose provisions related to compensation only concerned failure by applicant RUs to use granted capacity rights.

ALLRAIL believes that this improved compensation scheme will **strongly encourage IMs to improve their performance, to limit disruptions to the network, and to provide viable alternatives**. In addition, by being compensated for changes or cancellations to their capacity rights, RUs - especially the new entrants - can better safeguard the commercial viability of their business models and their reputation among passengers.

Social, economic and environmental criteria

The proposed Regulation gives significant weight to socioeconomic and environmental criteria in instances of decision-making or prioritisation when it comes to the allocation of capacity rights (management of scarce infrastructure capacity, partition of capacity on highly utilised or congested infrastructure, designation of particular infrastructure for use by specified types of traffic, and formal conflict resolution mechanism).

ALLRAIL asbl
Washingtonstraat / Rue de Washington 40
B-1050 Brussels

e-mail | info@allrail.eu
web | www.allrail.eu
phone nr. | +32 479 07 08 06

ALLRAIL agrees with the need of prioritising some rail services over others because of reduced infrastructure capacity or conflicting capacity requests in accordance with criteria, whose aim is to optimise the use of infrastructure capacity and improve the socioeconomic and environmental impact of passenger rail transport.

However, such criteria must be defined in a clear, transparent, and impartial manner. **They must not be defined in such way that unjustifiably favours one rail segment over other ones (passenger versus freight or long-distance versus regional/urban), one rail service type over another one (Open Access versus PSOs), or discriminate in terms of RU ownership (state-owned incumbents versus independent RUs).**

In this regard:

- ALLRAIL recommends that the proposed Regulation **includes an extremely clear definition of these socioeconomic and environmental criteria.**
- ALLRAIL recommends that the proposed Regulation includes provisions on the **transparency and the impartiality of the process of defining the details of these criteria.**
- ALLRAIL recommends that the proposed Regulation includes **provisions on the consultation of all operational stakeholders, including ALLRAIL and its members, on the definition of the details such criteria.**
- Building on the proven benefits of passenger rail market opening and on the provisions of Regulation (EC) 1370/2007, ALLRAIL recommends that the proposed Regulation include a provision whereby **such criteria shall not be used as an instrument to circumvent passenger rail market opening or to discriminate between Open Access services and subsidised services or between state-owned RUs and independent RUs.**

Infrastructure and services charges

ALLRAIL would like to highlight that while the proposed Regulation touches on several relevant aspects of Directive 2012/34/EU, it **fails to address a key market entry barrier in the EU rail market, namely excessive infrastructure and services charges.**

While ALLRAIL highly welcomes the Commission's announcement of new guidelines on this issue to be communicated in Q1 2024, it also stresses that **additional legislation on this issue is key to establish a functioning Single European Rail Market.** In particular, the role of mark-ups, which are used in some Member States

ALLRAIL asbl
Washingtonstraat / Rue de Washington 40
B-1050 Brussels

e-mail | info@allrail.eu
web | www.allrail.eu
phone nr. | +32 479 07 08 06

as an artificial market entry barrier, needs to be regulated at EU level urgently in order to allow new services to emerge and to achieve the desired modal shift.

ENIM

The proposed Regulation expands the roles and responsibilities of the European Network of Infrastructure Managers, whose establishment was already provided by Directive 2012/34/EU. ENIM now has the potential to significantly improve the coordination between IMs and the harmonisation of processes and rules pertaining to rail infrastructure capacity management through the three European Frameworks. However, with great powers must come great responsibility (and oversight).

The proposed Regulation **does not seem to include provisions with regard to the oversight of ENIM**, or at least to its mirroring by another entity/body. This would be particularly crucial if ENIM fails to deliver on its responsibilities.

- ALLRAIL recommends that the proposed Regulation also include **provisions pertaining to the establishment of mechanisms to issue recommendations and opinions on the European Frameworks issued by ENIM**, in a similar way to the recommendations of the Performance Review Body on ENIM's European Framework for Performance Review (Article 52 (3) (a)). In this regard, ALLRAIL recommends giving the European Network of Rail Regulatory Bodies an oversight role over ENIM.
- ALLRAIL believes that it is necessary to establish a **permanent mechanism of consultation of operational stakeholders, including ALLRAIL and its members.** In this regard, ALLRAIL recommends a non-voting membership of representatives of operational stakeholders at ENIM.

Performance Review

ALLRAIL welcomes the Proposal's provisions relating to performance review, especially that of IMs. This has the potential to push the latter towards improving their capacity management processes and their railway network as a whole. In turn, better performance on the part of IMs will translate into more capacity and availability for RUs as well as more certain and stable operational and commercial conditions.

- ALLRAIL recommends mentioning the need for **consulting operational stakeholders, including ALLRAIL and its members, during the drafting of ENIM's yearly European performance review report.**

ALLRAIL asbl
Washingtonstraat / Rue de Washington 40
B-1050 Brussels

e-mail | info@allrail.eu
web | www.allrail.eu
phone nr. | +32 479 07 08 06

Furthermore, ALLRAIL highlights the need for an **impartial and competent Performance Review Body (PRB)** to monitor the performance of the different actors involved in passenger rail transport, for the same reason stated above in the first paragraph of this section. However, ALLRAIL believes that the action of the PRB can be more effective with the following changes:

- ALLRAIL recommends to change the wording of Article 52 (1) from "*the Commission may set up or designate an impartial and competent body to act as a Performance Review Body*" to "*the Commission **shall** set up or designate an impartial and competent body to act as a Performance Review Body*". Indeed, establishing a PRB in the passenger rail transport sector is crucial.
- ALLRAIL recommends the Proposal to **specify the criteria to be met by the PRB in order to be considered as "impartial"**, namely with regard to the PRB's composition.
- ALLRAIL recommends the Proposal to expand on the organisation and the responsibilities of the PRB, similarly to the case of ENIM (Articles 55 and 56).

Needs to be clarified

Simultaneous capacity allocation

ALLRAIL recommends the EU Commission to **clarify the definition of "simultaneous capacity allocation"** in Articles 4(6), 32(2), 36(1) and 41(2). The definition provided in Article 4(6) is not clear enough. Does it refer to annual allocation?

Clerical errors

- Article 29(7) should read "*…paragraph 6*" instead of "*…paragraph 7*".
- Article 33 (1) should read "*…deadlines set out in section 6 of Annex I*" instead of "*…deadlines set out in point 6 of Annex I*".
- Article 33 (2) (b) should read "*…specified in section 6 of Annex I*" instead of "*…specified in point 6 of Annex I*".
- Article 33 (3) should read "*…allocation principle set out in section 6, point 2 of Annex I*" instead of "*…allocation principle set out in section 5, point 2 of Annex I*"
- Article 41 (1), third sub-paragraph should read "*…on the procedures to be applied*" instead of "*…on the procedures to applied".*
  Annex I, section 1, row 'Capacity supply plan (Article 18)', second point should read "*Pre-planned…*" instead of *Prep-planned…*".

ALLRAIL asbl
Washingtonstraat / Rue de Washington 40
B-1050 Brussels

e-mail | info@allrail.eu
web | www.allrail.eu
phone nr. | +32 479 07 08 06