

Legal analysis TTR challenges and possible solutions

The TTR legal task force has assessed compliance of the TTR project as outlined in the TTR project description (v 0.19) with the current legal framework on capacity allocation set out in Directive 2012/34¹ (the Directive/recast), Regulation 913/2010 concerning a European rail network for competitive freight² (RFC Regulation) and Commission Implementing Regulation 2016/545 on framework agreements³ (FA Regulation).

The Members of the Legal task force consider that the current legal framework allows to accommodate parts of the envisaged TTR process, whereas some aspects appear incompatible with the rules currently in force. The main challenges are related to the introduction of the new capacity product ‘rolling planning requests’, especially in its “multi-annual version”.⁴ Nevertheless, the task force identified possible interpretations and approaches to overcome this incompatibility.

Capacity partitioning and safeguarding of capacity for rolling planning requests

To be able to offer rolling planning capacity that meets customers’ needs, it will be necessary to partition capacity according to market needs well in advance of launching the annual allocation process (between X-48 and X-18). Capacity required for rolling planning requests cannot be offered during the annual scheduling process but has to be set aside until up to one month before the start of operation.⁵ Such a process of partitioning and safeguarding of capacity is currently not foreseen as a general rule in the Directive.

The provisions of Annex VII on the schedule for capacity allocation include provisions on planning of temporary capacity restrictions which cover specific TCR-related aspects of the capacity partitioning process, but do not cover the safeguarding of capacity for rolling planning requests.

The Directive, the RFC Regulation and the FA Regulation contain some specific provisions allowing infrastructure managers to set aside/reserve capacity ahead of the annual scheduling phase.

¹ OJ L 343, 14.12.2012, p. 32.

² OJ L 276, 20.10.2010, p. 22.

³ OJ L 94, 8.4.2016, p. 1.

⁴ Rolling planning requests consist of a request for a train path to start operations within one to four months after the request and (optionally) for a capacity bandwidth for upcoming timetables (for up to 36 months in total).

⁵ The start of operation can be any day of the year.

These provisions refer to prearranged international train paths for freight traffic (see Art. 40(5) of the Directive and Art. 14(3) of the RFC Regulation), provisional international train paths (see point 4 of Annex VII to the Directive), framework capacity (Art. 42 of the Directive and Art. 2(1) of the FA Regulation), capacity for maintenance work/temporary capacity restrictions (Art. 53 and point 8 of Annex VII to the Directive and Art. 12 of the RFC Regulation) and to reserve capacity for ad hoc requests (Art. 48 and Art. 14(5) of the RFC Regulation). Apart from these cases, the approach followed by the Directive on capacity allocation is to offer all (remaining) capacity during the annual scheduling process and to allow railway undertakings to request whatever paths they need. Infrastructure managers are required to do their best to accommodate all requests (Art. 45), e.g. via coordination procedures in case of conflicting requests (see Art 46).

The safeguarding of capacity for rolling planning requests, which is not made available during the annual scheduling process, deviates from this approach and may thus at first sight appear incompatible with the Directive. However, some provisions of the Directive may allow for accommodating this process:

Article 48 of the Directive obliges the infrastructure managers to undertake an evaluation of the need for reserve capacity to be kept available within the final scheduled working timetable to enable them to respond rapidly to foreseeable ad hoc requests for capacity. The way this provision is drafted leaves it open whether reserve capacity for ad-hoc requests refers only to capacity in the form of individual train paths or whether capacity in the form of recurrent train paths (e.g. once per week) would also be set aside on this basis. While the services of the European Commission have issued a note suggesting that this provision should be understood as referring to individual train paths only, this interpretation is not binding and does not seem to be the only one possible.⁶ If Article 48 were understood in a broader sense, it would allow infrastructure managers to set aside capacity for foreseeable rolling planning requests that could be requested and allocated at any time during the year.

Given that the concept of rolling planning requests has been developed with the goal of addressing current problems of inefficient use of infrastructure capacity (caused by allocation procedures that are no longer fit to meet market needs), such a broad(er) understanding of Article 48 would contribute to meeting the principle of optimum effective use of infrastructure capacity stipulated in Article 26 of the Directive.

⁶ It needs to be noted that even today infrastructure managers receive requests not only for individual, but also for regular train paths after the deadline for submitting annual requests. For these requests infrastructure managers currently allocate capacity that was not requested during the annual scheduling process on the basis of 'first come, first served'. Given that this general practice has not been challenged by any stakeholders so far, it can either be considered as covered by the provisions of Article 48 or not governed by the provisions of the recast and at the same time not in conflict with them.

It should be noted that basing the implementation of capacity partitioning and safeguarding of capacity for rolling planning requests solely on a broader understanding of Article 48 of the Directive could lead to legal uncertainty about the application of some (other) allocation rules of the Directive. For this reason, it would be preferable to complement the rules on capacity partitioning already set out in point 8 of Annex VII by provisions relating to the rolling planning process.

Multi annual dimension of rolling planning requests

Another important aspect of TTR is offering the possibility to reserve capacity bandwidths (time frames) in the form of slots on a multi-annual basis, which are converted in concrete train paths on an annual basis (= multi-annual dimension of rolling planning).

While the new capacity product ‘rolling planning requests’ is as such currently not covered by EU rules on capacity allocation and allocation of train paths for more than one timetable period is prohibited (Art 38(2)), the Directive allows for the reservation of capacity (e.g. in the form of time frames) for more than one timetable period in the form of framework agreements (Art. 42). At the level of the Directive the rules governing framework agreements are not very detailed and would in principle allow to accommodate the multi-annual dimension of rolling planning requests. However, the Commission implementing Regulation on framework agreements adopted in 2016 contains very detailed provisions on framework agreements, which might make it difficult to implement the rolling planning concept as currently designed. A pragmatic understanding of key provisions of this implementing regulation (in particular Articles 3, 5(2) and (3), 6(1) and 8) could possibly allow overcoming some of the obstacles without a need for amending existing provisions. This approach, however, bears the risk of regulatory bodies or Courts not following the same pragmatic understanding.

On the other hand, Article 8(2) of the FA regulation also provides for possibilities to limit administrative burden by allowing IMs not to apply Articles 9(3) and (6), 10 and 11 as long as they allocate not more than 70% of the maximum capacity.

Wherever Article 8(2) of the FA Regulation cannot be applied, the allocation principle of ‘first come, first served’ to be applied to rolling planning requests would, however, be incompatible with the rules on coordination set out in Article 9 of the implementing Regulation on framework agreements.⁷ Also, the provisions of Article 10 of the implementing regulation, which require the infrastructure manager to request modification of existing framework agreements if this is needed to ensure optimum effective use of available infrastructure capacity, might prevent infrastructure managers to offer to applicants the certainty they are looking for.

⁷ To be noted that when the bandwidths granted as part of the rolling planning request process are converted into train paths during the annual scheduling phase, they will (within the bandwidth) be subject to the coordination rules of Article 46 of the Directive.

Therefore, changes to the current legal framework would appear necessary to accommodate the multi-annual dimension of the rolling planning process to its full extent in a legally correct way.

The TTR legal task force considers that the most appropriate and promising way of introducing the necessary changes and ensuring a harmonized implementation of TTR would be by means of amending Annex VII.

The Legal task force is aware that that certain stakeholders might also advocate tackling (some of) the issues at the level of the implementing regulation on framework agreements; however, the task force wants to underline that according to Art. 42(1) of the Directive and Art. 14 of the FA Regulation infrastructure managers cannot be obliged to offer framework agreements and might not be willing to do it voluntarily due to the heavy administrative burden. Therefore, this approach might not support a harmonized implementation of TTR.

The Legal task force therefore suggests accommodating TTR by amending Annex VII as follows:

(18) If based on the evaluation referred to in Article 48(2) an infrastructure manager concludes that it is necessary to keep available reserve capacity within the final scheduled working timetable to respond rapidly to foreseeable ad hoc requests for capacity, it shall define the capacity regarding working timetable requests, temporary capacity restrictions and ad hoc requests and publish this definition in due time in its network statement. Applicants may apply for the defined ad hoc capacity between four months and one month prior to the train run. Infrastructure managers shall respond to such requests as quickly as possible and in any event within four weeks. The possibility to apply at short notice for any remaining capacity remains untouched.

(19) The applicant may decide that his request for defined ad hoc capacity shall be handled as valid for up to 36 months (repeating request). In that case the infrastructure manager shall keep the requested capacity for the relevant period available as reserve capacity according to paragraph 18 in the form of bandwidths. The infrastructure manager shall handle the repeating requests and allocate a concrete train path within the bandwidth during the regular working time table scheduling. The allocated train path may differ from the repeating request within the bandwidth.

Shortening of the observation phase

The TTR project description suggests shortening the observation phase during the annual scheduling process from one month to two weeks. Such shortening would conflict with the obligation to grant applicants at least one month to present their views on the draft working timetable (Art 45(3)) and thus be in breach of the main body of the Directive.

Conclusions

Given that the provisions of Directive 2012/34 on capacity allocation are rather detailed, Member States could not simply adopt rules (e.g. as part of their framework for capacity allocation referred to in Article 39 of the Directive) to fully accommodate the TTR concept by themselves without breaching EU law.

The TTR legal task force therefore considers that in order to create a solid legal basis for the implementation of the key elements of TTR, amendments to Annex VII to Directive 2012/34 will be needed. Besides, it should be noted that some specific elements, such as in particular the envisaged shortening of the observation period from one month to two weeks could not be addressed by means of adopting a delegated act or an implementing act but would require amendments to the Directive as such.