

ACCESS TO SERVICE FACILITIES AND RAIL RELATED SERVICES

ERFA input to the European Commission's draft implementing act

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ERFA, representing new entrants in the rail market, very much welcomes the draft implementing act on access to service facilities and rail related services.

The European Commission's draft published in October responds to the concerns raised by many small railway undertakings from both passenger and freight sectors in Europe. Ensuring a non-discriminatory, transparent and fair access to facilities is one of the prime conditions needed for developing an open rail market and to improve rail's competitiveness.

Today the facility market is still dominated by Incumbent operators and State-owned companies, which have inherited key assets from their former monopolies. Many facilities are often managed by sister companies, being part of one and the same holding company as the incumbent railway undertakings. Consequently,

there is strong evidence that discriminatory practices still exist in the facility market e.g higher charges, refusal of the access by pretending that the facility is full, intentional low quality of services, which provide a competitive advantage to their 'own' operator.

Therefore, ERFA is convinced that an implementing act is now needed in order to best implement EU rules on access to service facilities in all Member States. It should bring a transparent and predictable framework for all companies (i.e facility operators, RUs, IMs), and give all the necessary tools to the Regulatory Bodies in order to best ensure that the facility market is fully functioning in a non-discriminatory manner.

By introducing transparent access conditions, pricing and clear procedures for handling requests and solve conflicts, the implementing act will optimise the effective use of facility for all railway undertakings. It will help facility operators to accommodate all requests through a transparent and proactive coordination process, avoiding long appeal procedures to the Regulator.

Hence ERFA believes that the draft implementing act will contribute to unlock the great potential of the rail market by bringing fair conditions in the market.

ERFA recalls that this proposed implementing act covers a very wide range of facilities, in both the passenger and freight sector, from very large passenger stations and intermodal terminals in ports, to maintenance facilities and sidings, to smaller facilities where there is only the occasional traffic. However, there is merit in having one set of regulations that fit all types and sizes, since it imposes a discipline of transparency which benefits in particular the smaller operators who are, after all, the ones most likely to introduce greater competition to the sector.

Thus, we think that the draft presented by the European Commission respects the spirit and the provisions of the Recast Directive (Directive 2012/34/EU). Therefore, it will support stakeholders and Member States in implementing the Recast directive, creating European standards for accessing to service facilities.

ERFA would like to draw attention to certain aspects of the text, which are crucial to have a fully and well-functioning facility market, contributing to rail's growth.

Article 1. Subject matter

ERFA strongly supports that the legislation should apply to all facility operators without distinction concerning the degree of competition in the facility market. Discriminatory practices to access to a facility exist in all Member State regardless the competitive environment. In addition, the implementing act aims at clarifying the Recast directive's implementation and therefore should apply to all facilities without distinction regarding the competitive situation of the market.

However, a **differentiation** can be made between a “*facility under the direct or indirect control of a body or firm which is also active and holds a dominant position in national railway transport service markets for which the facility is used*” (Recast Article 13 para 3), and other facilities. **Dominant players** should be required to apply more requirements than small facility operators, for which some aspects of the current draft might be difficult to apply.

However, this differentiation can only support competition in the facility market if all the requirements of the **article 3 are fully applied by all facilities**. The differentiation should only occur to mitigate the administrative work and the independence requirements for small facility operators.

Article 2. Definitions

ERFA supports the introduction of the definition of ‘facility owner’, as in some cases it is difficult to know who is the owner of the facility, in particular as regards the application of the provisions under article 15.

It could be the following:

‘Facility owner’ means a body or a firm owning a majority of shares of a facility.

Article 3. Service Facility Statement

ERFA is strongly convinced that the article 3 of the current draft implementing act is the necessary condition to ensure that the access and the supply of a service facility is **non-discriminatory for all applicants** and **transparent**.

The list of information to be published by the facility operator (Para 1) provides all the information and requirements to apply to a service facility. It will improve the **marketability of the facility sector** and boost the facility market. In addition, it brings transparency on the conditions to access to a service.

ERFA believes that the **list is comprehensive** and responds to the applicants’ needs, but would like to highlight some points:

Article and para	Current text	Proposed changes & comments
<p>Art. 3 Para 1, Point 7</p>	<p><i>all other relevant documents for the access and use of the service facility and/or supply of a rail related service including model access contracts, specific contractual conditions and, where applicable, the terms of use of the operator’s IT-systems for access to and use of the facility and the rules concerning the protection of sensitive and commercial data;</i></p>	<p>ERFA would like to insist on the fact that ‘model access contracts’ are particularly beneficial to support small applicants and applicants from another EU Member States to access to service facilities.</p> <p>Facility operators should be incentivised to elaborate such modal access contracts.</p>
<p>Art 3. Para 1, Point 10</p>	<p><i>Charges for gaining access to the facility and for each rail related service supplied therein, including any discounts granted</i></p>	<p>ERFA supports the inclusion of charges and discounts in the list of information to be publicly available in the Service Facility Statement or the Network Statement.</p> <p>As a major source of discrimination in the facility market in Europe, discounts as well as their objectives and applicability should be fully transparent for all applicants, meaning that the facility operator should also indicate the goal of discounts. Discounts should be part of a transparent strategy of the facility operator (e.g attract more volume, customers, optimise the use of the facility, improve loyalty), and not be a hidden tool for discriminations.</p> <p>ERFA proposes to add: “any discounts granted and their objectives and applications for the facility operator”.</p>

<p>Art 3. Para 1 Point 11</p>	<p><i>Information on charging principles, i.e. the methodology of for calculating charges, the typology of costs taken into account for the calculation of charges, and indexation formulas; the information shall enable an applicant to understand how the charges for access to the facility and rail related services are determined and may evolve, while respecting commercial confidentiality requirements;</i></p>	<p>ERFA believes that the information to be provided under the point 11 is not commercially sensitive, and is in line with the Recast directive (Annex IV).</p> <p>Commercially sensitive information on the methodology for calculating charges and costs should at least be provided to the Regulatory Body in order to facilitate controls and ensure non-discriminatory charging principles.</p>
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ERFA disagrees with the idea that the list of information to be provided by facility operators represents a burden because it only concerns **the basic information**, which should be necessarily published in order to attract more customers in the facility. In addition, facility operators can use a template provided by IMs (Para 2).

Once the information is provided in the Service Facility Statement or the Network Statement, it just needs some regular updates, unless there is a change of purpose of the facility. Thus, the **burden is very limited**.

ERFA supports the publication of the information under paragraph 1 in at least two languages in order to facilitate cross-border operations and to contribute to the Single European Railway Area.

Last but not least, ERFA really appreciates the intention of the European Commission to oblige facility operators to keep up to date the information provided under paragraph 1, but would like to stress the following aspect:

Article and para	Current text	Proposed changes & comments
<p>Art 3. Para 3</p>	<p><i>The information referred to in paragraph 1 shall be published in at least two languages of the Union and shall be kept up to date. Operators of service facilities shall make public without delay any changes in charges for accessing the service facility and supply of rail related services, works preventing a railway undertaking from accessing a facility or the termination of supply of a rail related service.</i></p>	<p>Making public changes in charges and discounts without delay is necessary to avoid discriminations in the access to facilities.</p> <p>Therefore, we propose to add: <i>without delay any changes in charges, including discounts, for accessing the service facility</i></p>

Article 5. Principles for allocation and use of service facility capacity

ERFA fully supports the aim of the article 5, but would like to underline that the coordination between the facility operator and the IM should also include the applicant in order to ensure that its needs are well understood by all parties.

Requiring the facility operator and the IM to include RUs in the coordination of capacity allocation will be the first step for an important **dialogue** between IMs – Facility operators – RUs. This can also boost rail's competitiveness and reduce delays.

Article 6: Information on available service facility capacity

Although there is no clear definition of capacity, we think that the article 6 of the current draft is crucial to avoid some operators preventing their competitors from accessing to the service facility by pretending that the facility is full. The obligation to **regularly provide information on the spare capacity** will also help to ensure the optimum use of the facility.

Article 7. Requests for access to a service facility and rail related services

ERFA believes that the article 7 is a step towards a **more user-orientated facility market**.

The obligation for facility operators to acknowledge receipt of a request without delay is important since many applicants never receive answers to their requests and do not know whether the facility operator is dealing with the request.

Regulatory Bodies expressed their need for **clarification concerning the timeframe**. The current text fixes an EU standard concerning the response time, which will help Regulatory Bodies to define "*the reasonable time limit*" (Recast article 13 para 4). The response time mentions in paragraph 4 brings predictability and clarity for applicants and flexibility for the Regulatory Body. This is a good balance based on best practices from some Member States.

A harmonised approach of the response time is needed at the EU level to avoid divergent practices in different EU Member States. It will contribute to improve operational conditions for cross-border traffic.

Article 8. Handling of conflicting requests

Today, many RUs are facing discriminations in terms of priority to access to the facility or in terms of quality of the service supplied. This is a common practice to prevent competitors from accessing the facility, whereas the commercial interest of facility operators should incentivise them to accommodate as many requests as possible.

Therefore, going hand in hand with the article 7, the article 8 is needed to oblige facility operators to do their best in order to **accommodate all requests in a transparent and non-discriminatory manner**. This article should **apply to all facilities** without differentiation.

ERFA strongly supports the three steps for handling conflicting requests: consultation, facility coordination process and, if the coordination process failed, the use of the priority criteria. This will enable facility operator to best meet all requests in a non-discriminatory manner and a pro-active way. Once again, it **meets the market's needs**, and **optimises the use of facilities**.

In addition, in solving conflicting requests, the three steps can **avoid the need to use a viable alternative**, which is in reality often difficult to find or to assess.

It also **prevents long appeal procedures to the Regulatory Body**, costing time and resources for the applicant. Appeal to the Regulatory Body should be considered as the last recourse and should be used in case the market failed to solve a conflict. We think this is a good approach in order to avoid any undue burden to the Regulatory Body, RUs and Facility operators. The mechanisms introduced under article 8 will benefit and save costs and time for all rail actors, in particular RUs and Facility operators.

ERFA believes that the possibility introduced by the paragraph 3, to request the participation of the Regulator as an **independent observer** of the coordination process will definitely facilitate the dialogue between applicant and the facility operator. This possibility also gives the facility operator a strong incentive to effectively use the facility coordination process.

As mentioned above the priority criteria can be sensitive and should be fully transparent for the applicants. ERFA appreciates that the current draft obliges the facility operator to publish the priority criteria in the Service Facility Statement or the Network Statement, and that it shall be subject to the approval of the Regulator. Since the priority criteria is published, the control of the Regulatory Body cannot be considered as a regulation ex-ante, but, similarly to the control of charging principles, as a control to check if the priority criteria are in line with the Implementing Act. This will result in more **certainty and transparency for applicants**.

Article 9. Refusal of access

First, it is important to recall that the facility operator should not reject requests or refer to a viable alternative if the capacity matches the needs of an applicant, and/or if the facility coordination process did not take place.

In case of refusal, ERFA believes that Railway Undertakings, in particular small ones, have no possibility to bear the burden of proof. Only the facility operator has the relevant information to justify the refusal. Therefore, the **asymmetry of information** fully justified the paragraphs 3 and 4. A written justification of the refusal is the only fair and balance way to refuse a request. It will also facilitate the work of the Regulator in case of appeal.

Article 10. Viable alternative

In the rail market, the concept of viable alternative exists only in few cases, which underlines the need to have all mechanisms to accommodate requests before.

However, when it exists and only in case of a justified refusal to access to a service facility, the facility operator should identify the ‘best available viable alternative’ based on the demonstrated needs of the applicants. The facility operator is the only one to be able to bear this task because:

- It needs to minimise the impact of its refusal on the applicant, especially when it concerns small RUs. The principles for assessing that an alternative is viable (para 2) should be respected by the facility operator.
- It has all the relevant information based on its knowledge of the facility market and the applicants’ needs to identify the best suitable alternative.

Due to the asymmetry of information, the facility operator is thus the best actor to identify a viable alternative. It should show **reasonable efforts** to meet the applicant’s needs. At the end, the applicant is the only one to decide whether an alternative is viable according to his own constraints and business model. Therefore, the applicant should provide the facility operator with the necessary information to define the **viability criteria** (e.g distance, additional costs, technical requirements) in order to help the facility operator. This dialogue between the facility operator and the applicant can improve the applicability of the ‘viable alternative concept’.

How to assess that an alternative is viable is a major question. ERFA thinks that the paragraph 2 already contains important aspects to assess viability. We would like to add other points:

Article and para	Current text	Proposed changes & comments
<p>Art 10. Para 2</p>	<p><i>In order to assess whether an alternative is viable, the operator of the service facility shall take into account in particular the following aspects</i></p> <ul style="list-style-type: none"> - <i>substitutability of operational requirements including available capacity on the access route and in the alternative installation, opening hours, scope/types of services offered (including additional and ancillary services)</i> - <i>substitutability of physical and technical requirements of the facility, including location, gauge clearance, length of tracks, electrification, road and rail access</i> - <i>additional cost for the railway undertaking concerned resulting from access to the alternative facility instead of using the initially envisaged facility</i> - <i>for freight services: impact on freight service concerned in terms of envisaged transshipment options, transportation time and envisaged delivery time</i> - <i>for passenger services: impact on attractiveness of services for travellers in terms of routing, travelling time, accessibility, connections with other rail passenger services or other modes of transport.</i> 	<p>The definition of ‘viability’ depends on the applicants’ needs and constraints, and should be defined in a joint dialogue between the applicant and the facility operator. However, ERFA supports the general approach highlighted by the implementing act and would like to add:</p> <ul style="list-style-type: none"> - <i>substitutability of physical and technical requirements of the facility, including location, gauge clearance, length of tracks, electrification, signalling system, road and rail access, and language requirements if it is in a different Member States.</i> - <i>additional cost for the railway undertaking concerned resulting from access to the alternative facility instead of using the initially envisaged facility such as track access charges, operational costs and price differential between the two facilities for instance.</i> - <i>for freight services: impact on freight service concerned in terms of envisaged transshipment options, transportation time, envisaged delivery time and distance.</i>

Concerning the procedure of seeking a viable alternative, we support three steps:

1. The service facility operator shall formally inform the applicant that he cannot satisfy the demand and will seek for a viable alternative. The applicant should then provide the facility operator with the necessary information concerning its needs and constraints.
2. Within a reasonable time limit, the facility operator should provide an alternative and justify its viability in a written format, on the basis of the available information and the applicants’ needs and constraints.
3. The applicant assesses if the proposed alternative is viable.

ERFA suggests that in line with our comments made on article 5, the facility operators when assessing the availability of the viable alternative should coordinate with the IM(s), the other facility operator and the concerned RU in order to take into account the capacity on the route and the capacity in the facility. RU should be fully involved in the coordination process for capacity allocation.

A differentiation according to the dominant position as proposed in article 1 could apply concerning the procedure. A written justification of the viability could only be provided upon request when it concerns a non-dominant player. It would give more flexibility to smaller facility operators.

Article 12. Single point of contact for requests

The Single Point of Contact for requests is a very helpful tool for small applicants and applicants from another EU Member States. It will foster cross-border operations.

It might also help to apply the viable alternative concept by developing coordination mechanisms between facility operators. A better information flow can contribute to ensure the 'optimum effective use of capacity available in the facility'.

However, ERFA would like to draw attention to the fact that **coordination should not result in a cooperation** between the different facility operators in particular on charges, which would breach competition law. The European Commission needs to make sure that the Single Point of Contact is only an interface for requests.

Article 14. Continuous capacity management

ERFA supports the current article 14 aiming at improving the use of capacities in service facilities.

However, ERFA would like to go one step further: the performance of the service facilities should be measured and take the form of **comparable Key performance indicators** (KPIs) in order to steer improvements in the management of the capacity and bring customer-orientation in the facility market. The KPIs could be published in a 'common web portal', perhaps by the Regulatory Body, helping applicant to best choose their facility supplier. This proposal could concern all facilities under the Recast directive, Annex II, paragraph 2, but it should especially be the case for facilities under the direct or indirect control of a dominant player.

Article 15. Publication of unused facilities for lease or rent

ERFA supports the principles highlighted in the article 15 to introduce **transparent EU rules** in order to **regulate the easy selling/reconversion of facilities**. This will help to maintain activities in the facility market.

However, assessing the absence of use for 2 consecutive years is difficult. ERFA suggests to define the word 'use' (Recast directive art. 13 para 6) as 'supply of services'. It would clearly mean that concluding management contracts between a facility owner and a facility operator does not signify 'using' the facility. It would also **exclude the artificial use of the facility** (e.g once every two years or self-supply).

ERFA suggests to add the expression ‘*as a whole or in part*’ as mentioned in the Recast Directive (Art.13 para 6) in order to allow rail operators to express their interests to take over only a part of the facility.

Article and para	Current text	Proposed changes & comments
Art. 15, para 2	<i>Owners of service facilities envisaging a reconversion of their facility shall make public their intention in due advance in order to enable undertakings potentially interested in taking over the operation of the facility to express interest in accordance with paragraph 3</i>	<i>Owners of service facilities envisaging a reconversion of their facility shall make public their intention in due advance in order to enable undertakings potentially interested in taking over the operation of the facility, as a whole or in part, to express interest in accordance with paragraph 3</i>

The idea is also to avoid a reconversion of a facility when one part of it could be used by RUs based on the demonstrated needs.

The information that the facility is for lease or rent should be **widely publicised** in order to allow other operators to express their interests. The Regulatory Body can help by disseminating the information.

ERFA thinks that a clear definition of reconversion and process of reconversion are needed:
‘Reconversion of a rail facility’ means a transformation of the site of the facility for non-rail purposes.

The reconversion process should not include studies since they can be used as an easy tool to prevent the facility to be considered as available for lease or rent. The same goes for any intention to sell part or all of the facility, which might take some time before being concluded and therefore should not prevent the facility to be leased or rented.

In addition, the Regulatory Body should be able to assess, upon request, the effectiveness of the reconversion process and, if not satisfied, the RB can provisions of lease it or rent it to apply.

Article 17. Accounting separation & Article 18 Independence requirements for service facility operators

ERFA strongly supports the principles under article 17 and article 18. Separating accounts for each type of facility is a basic requirement, which can facilitate the work made by the Regulator, and above all, **avoid cross-subsidisation in a vertically integrated company.**

The same goes for the independence requirements: all the safeguards (art. 18, para 1) for preventing any discrimination in the daily operations are needed.

However, ERFA suggests to apply a differentiation in function of the dominant position of the controlling entity already mentioned in article 1, in order to avoid too much operational complexity for small facility operators.

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