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Summary of analysis of framework agreements[1]

1. General information

According to Article 3 (Definitions) and point 23 of Directive 2012/34/EU[2] "framework agreement" *means a legally binding general agreement under public or private law, setting out the rights and obligations of an applicant and the infrastructure manager in relation to the infrastructure capacity to be allocated and the charges to be levied over a period longer than one working timetable period"*.

Article 42 of Directive 2012/34/EU gives further advices on framework agreements; especially:

- They shall specify the characteristics of the infrastructure capacity
- It is not allowed to specify a train path in detail (see also Article 38.2 of the Directive)
- They shall meet the legitimate commercial needs of the applicant
- But framework agreements shall not be such as to preclude the use of the relevant infrastructure by other applicants or services
- Depending on the national implementation, prior approval of a framework agreement may be required by the regulatory body
- They might be amended to enable better use of the railway infrastructure
- Penalties are possible in case of modification or termination of the agreement
- In principle, they cover a period of five years, but longer periods are possible if they are justified by commercial contracts, specialised investments and risks or for services using specialised infrastructure referred to in Article 49 of the Directive which requires substantial and long-term investment (then a period of 15 years might be possible)
- The general nature of each framework agreement shall be made available to any interested party. Therefore, Network Statements of infrastructure managers shall contain information if framework agreements are offered or not and if, a model agreement shall be contained in the Network Statement (see Annex IV number 7 to the Directive).

Based on Article 42, the European Commissions in 2016 has adopted the details of the procedure and criteria to be followed for the application of framework agreements in an implementing regulation ("IR 2016/545").

2. The legal nature of Framework agreements and its binding character

a) *What is the legal nature of framework agreements in accordance with Article 42 of Directive 2012/34/EU: is it declarative, aiming at cooperation between infrastrucutre managers and railway undertakings, or is it legally binding?*

According to an evaluation made by the CIT's CUI Committee in May 2020 it can be concluded that framework agreements are legally binding. Firstly, article 3 (Definitions) and here point 23) explicitly stipulates that *"framework agreement" means a legally binding general agreement under public or private law (…).* Therefore, legally binding must be considered as contractual commitment between the parties that concluded the framework agreement, i.e. the infrastructure manager and the railway undertaking.

[1] Please note that the information contained in this analysis is summarized by the CIT based on the feedback of the CUI Committee in May 2020. It is for informational purposes only and should not be construed as specific legal advice.

[2] In the following referred to as "the Directive".

In addition, the idea behind framework agreements is to ensure railway undertakings that they would receive the capacity provided for by the agreement, enabling them to safely invest in rolling stock and to conclude long-term contracts with their customers[3].
At the same time, a framework agreement is in the interests of the infrastrucutre manager as it ensures regular income.
Where, in Member States, prior approval of a framework agreement by the Regulatory Body is required[4] and if a framework agreement foresees penalties and these were agreed by the Regulatory Body, the penalties are also supposed to be binding.
Note, however, that also if framework agreements can be considered as legally binding, IR 2016/545 imposes on the parties a certain flexibility in adapting the capacity as agreed under the framework agreement[5]. In that way, the obligation to modify the agreed capacity can prevail the applicant's right to maintain the originally agreed capacity.

b) *Can a railway undertaking reserve a certain amount of capacity in accordance with a framework agreement and be sure that it would receive the capacity even if there were conflicting applications?*

In principle, this would be always the case if article 8 number 2 of IR 2016/545 applies and the capacity usage by framework agreements is significantly below the possible maximum[6]. Besides, there are a lot of limits the parties have to respect in cases of conflicts as set out in IR 2016/545: specifically, article 10 (Coordination of conflicting requests for train paths under framework agreements), e.g. because of priority of a conflicting train path over the framework agreement if this generates additional income or “better use”.

3. Penalties used in a framework agreement

a) *What are the level of penalties for path days unused by the railway undertaking that an infrastructure manager can levy from an railway undertaking?*
What is an “appropriate” level for such penalties? How can this be limited?

<u>European law</u>

The CUI Committee in 2020 concluded that European law (especially IR 2016/545) gives some parameters (of what is reasonable and acceptable) in order to establish penalties but does not really help specifically to define the exact level of penalties:

The recitals of IR 2016/545 state that
Recital 16) *Penalties that are set at a reasonable level could create an incentive for applicants to make realistic applications for framework agreements and to communicate any changes in capacity needed under a framework agreement as soon as the applicant is aware of it.*

Recital 17) *Penalties for modification or termination of framework agreements, if agreed between the parties, should be non-discriminatory. Their level should be appropriate to reach the intended objectives, they should actually be paid and, if necessary, the payment be enforced. To maintain the incentive effect and avoid discrimination, the framework agreement*

3 See for example recital 1), sentence 2 of IR 2016/545.
4 See art. 42.1 sentence 2 of Directive 2012/34/EU.
5 See for example art. 6.2 as well as art. 9 and 10 of IR 2016/545.
6 The maximum capacity shall be calculated on the basis of existing and planned headways of trains and the estimated number of trains on the line concerned (see art. 8.2, sentence 2 of IR 2016/545.

should not allow the infrastructure manager to waive a penalty payment when the applicant concludes another framework agreement.

In addition, Article 13 "Penalties" of IR 2016/545 states the following:
Article 13.1: *If one party requests penalties to be foreseen in the framework agreement, it shall not reject comparable penalties requested by the other party.*

- ➔ Therefore, based on Article 13.1 it can be concluded that **mutuality of penalties** has to be established. It is important to note, that mutuality does not necessarily means "equality" of penalties and that the parties of the framework agreements are able (and sometimes obliged) to set different denominators of penalties.

Article 13.2: "*The framework agreement shall not set penalties at a level exceeding the costs, direct losses and expenses (including loss of revenue) reasonably incurred or (…) expected to be incurred by the party indemnified as a consequence of the modification or termination of the agreement (...).*"

- ➔ Following Article 13.2 it can be concluded that **realistic calculation of penalties** based on different denominators are to be made.

Article 13.3: *"The infrastructure manager shall not request the payment of penalties in excess of the administrative costs for modifying or terminating the framework agreement in any of the following cases: (...) c) the infrastructure manager could reallocate train paths and framework capacity in such a way that the losses incurred by the modification or the termination of the framework agreement have already been recovered."*

- ➔ In the cases stipulated under Article13.3, **only the financial damage** that has occurred (administrative costs) can be requested.

Article 13.4: "*The framework agreement shall not contain a provision waiving a penalty in the case where the applicant requests separately other capacity than the cancelled capacity. Penalties shall not be requested if a modification involves only a marginal change in the agreed capacity*"

- ➔ Thus, the system of penalties shall involve a certain flexibility while considering the necessary adaptation of the request for framework capacity to current business needs of the Applicant.
  On the other hand, in order to maintain the incentive effect of penalties in case of not only marginal changes, the infrastructure manager is not allowed to completely waive a penalty payment when the applicant concludes another framework agreement.

National practices

It should be noted that most infrastructure managers in Europe do not offer framework agreements anymore.

In **Greece,** non-use of pre-booked capacity was covered until 2018 by a vague and incomplete reference to Article 31 of Directive 2012/34/EU. This article referred to the payment of infrastructure charges in general, and mentioned RUs' duty to pay such charges, including in cases where the RU did not use pre-booked capacity. There was an exception to the rule in cases where the RU was not the cause of the non-use.

The **Italian network statement** ("PIR 2020") provides that "in accordance with the deadline for submitting path requests, modifications may be requested for restrictions totalling ± 10 %

compared to the capacity originally reserved as per the framework agreement (expressed in path kilometres)."
If the RU requests paths whose consequence is to reduce capacity by more than 10 %, the IM may apply conditions allowing it to terminate the framework agreement and withhold the deposit (no more than € 20 000 000). In practice, however, this has never occurred. These conditions seem to serve as a deterrent, stopping RUs from signing framework agreements containing much more capacity than they actually need and thereby disadvantaging other RUs.

Generally speaking about the level of penalties in connection with the cancellation (at short notice) of train paths by the infrastructure manager and the impact thereof, some railway undertakings expressed their opinion that penalties of IMs are not inappropriate, if they are limited de facto to the total cost of either the cancelled paths or a percentage less than 100% by the amount (e.g. 80% in France).
It is vital, however, not only that IMs are able to levy penalties on RUs due to the cancellation of paths but also vice versa. If RUs are obliged to pay penalties for cancellations (even in cases of force majeure) but IMs are not penalised for cancellations (even at short notice) this is inappropriate.
Any penalties and caps in respect of path days unused by an RU should factor in all the associated costs for the RU, not just the track access charge (for example, compensation payable to passengers, journey continuation by other means, accommodation of passengers, staff costs, etc).
RUs are often confronted with last-minute cancellations by the IM. The penalty system should correlate the amount payable as a penalty and the time of cancellation of a path. In practice, this would mean that the closer the date of cancellation to the planned date of departure for the cancelled path, the higher the penalty.

b) *What is a "reasonable penalty system" which is to apply in the event that the infrastructure manager did not make available the capacity already agreed under a framework agreement?*

<u>European law</u>

The CUI Committee in 2020 concluded that European law (especially IR 2016/545) - also regarding the aforementioned question - gives some parameters in order to establish penalties but does not really help specifically to define the exact level of penalties.

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Article 13.1: *If one party requests penalties to be foreseen in the framework agreement, it shall not reject comparable penalties requested by the other party.*

➔ Therefore, based on Article 13.1 it can be concluded that **mutuality of penalties** has to be established. It is important to note, that mutuality does not necessarily means "equality" of penalties and that the parties of the framework agreements are able (and sometimes obliged) to set different denominators of penalties.

Article 13.2: "*The framework agreement shall not set penalties at a level exceeding the costs, direct losses and expenses (including loss of revenue) reasonably incurred or (…) expected to be incurred by the party indemnified as a consequence of the modification or termination of the agreement (...).*"

➔ Following Article 13.2 it can be concluded that **realistic calculation of penalties** based on different denominators are to be made.

National practices

In **France**, the “penalty system” is outlined in the framework agreement and appended to the French Network Statement. The system is reciprocal (i.e. it applies to RUs as well as IMs) and depends on a defined threshold (expressed in number of train path-days either not requested by the RU or not allocated by the IM) which, once passed, would activate payment of compensation.

In **Italy** during a consultation with the Italian infrastructure manager RFI on penalties applied in the event that RFI does not make available the capacity agreed in the framework agreement, the Italian railway undertaking Trenitalia outlined its position vis-à-vis RFI as follows:
(i) penalties should be foreseen both in case of cancellation of the framework capacity already agreed and in case of changes to various parameters (e.g. time frame, route, stops, etc.). Modifying the capacity agreed in the framework agreement could already be considered as constituting damage to the RU since it has to reschedule. Trenitalia’s position is that excluding the application of penalties in this case too is unreasonable and contrary to the legislation (since IR 2016/545 refers to "modification" in Article 13.2 (Penalties));
(ii) the "better use of the rail infrastructure" (see Article 10 “Conflicting procedure” of IR 2016/545) has to be evaluated not only on quantitative parameters (e.g. train/km, trains/day), but also on quality parameters. For this reason, Trenitalia proposed a KPI system able to measure the quality of a better use of the rail infrastructure;
(iii) a penalty system has to be fully satisfactory in terms of redressing the damage suffered by the RU. A modification of the framework capacity over the course of two coordination sessions, which the RU then has to accept, would surely lead to a “suboptimal” use of said capacity. The penalty would have to compensate the losses incurred by the RU for the residual duration of the framework contract;
(iv) damages incurred by the RU has to be quantified on a case-by-case basis.

4. Possible simplification of the administrative burden of framework agreements

At the level of the Directive (Article 42) the rules governing framework agreements are not very detailed. However, the Commission's IR 2016/545 contains detailed provisions on framework agreements, which might make it difficult to use framework agreements in practice.
One possible “simplification” of the administrative burden is that Article 8(2) of the framework agreement regulation allows infrastructure managers not to apply Articles 9(3) and (6), 10 and 11 as long as they allocate not more than 70% of the maximum capacity[7].

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[7] The maximum capacity shall be calculated on the basis of existing and planned headways of trains and the estimated number of trains on the line concerned (see art. 8.2, sentence 2 of IR 2016/545).