

II

(Non-legislative acts)

REGULATIONS

COMMISSION IMPLEMENTING REGULATION (EU) 2016/545

of 7 April 2016

on procedures and criteria concerning framework agreements for the allocation of rail infrastructure capacity

(Text with EEA relevance)

THE EUROPEAN COMMISSION,

Having regard to the Treaty on the Functioning of the European Union,

Having regard to Directive 2012/34/EU of the European Parliament and of the Council of 21 November 2012 establishing a single European railway area ⁽¹⁾, and in particular Article 42(8) thereof,

Whereas:

- (1) When concluding framework agreements, infrastructure managers should make optimum effective use of the available infrastructure capacity. At the same time, in order to invest in services, applicants for framework capacity may need greater legal certainty as regards available infrastructure capacity for more than one timetable period.
- (2) Infrastructure managers have to reserve capacity for the annual timetabling procedure to organise prearranged train paths in accordance with Article 14(3) and (5) of Regulation (EU) No 913/2010 of the European Parliament and of the Council ⁽²⁾. Moreover, they might have to provide for reserve capacity for ad hoc requests in accordance with Article 48(2) of Directive 2012/34/EU. In addition, framework agreements should not preclude annual timetabling in accordance with Article 42 of Directive 2012/34/EU. Therefore, infrastructure managers should at least plan these capacity reserves and consider these limitations before allocating part of the remaining capacity through framework agreements.
- (3) Potential applicants need transparency concerning the allocated framework capacity and the remaining indicative capacity on a line. With a view to avoiding administrative burden related to framework agreements, potential applicants should get a first impression of how likely it is that their applications will be approved. Therefore infrastructure managers should publish the framework capacity statements in their network statements. The framework capacity statement should specify, where relevant, whether framework agreements are valid for freight or passengers or for both.
- (4) Infrastructure managers and applicants should enjoy a certain flexibility as regards the time to lodge applications for framework capacity. At the same time, criteria to ensure optimum use of available infrastructure capacity are most effective when they are applied to as many applications as possible simultaneously. Therefore, before concluding a framework agreement, infrastructure managers that do not apply a fixed annual or multiannual deadline should consult applicants who could be interested in framework agreements.

⁽¹⁾ OJ L 343, 14.12.2012, p. 32.

⁽²⁾ Regulation (EU) No 913/2010 of the European Parliament and of the Council of 22 September 2010 concerning a European rail network for competitive freight (OJ L 276, 20.10.2010, p. 22.)

- (5) Applicants should be aware that infrastructure managers are under obligation to make an optimum and effective use of the available infrastructure capacity, both on their individual networks and jointly throughout the single European railway area. This obligation should apply throughout the duration of a framework agreement and also to train paths allocated under framework agreements. As a result, when they decide to conclude a new framework agreement, both parties to that agreement should already have considered the criteria set out in this Regulation to ensure optimum use of the available infrastructure capacity.
- (6) Framework agreements should not specify a particular train path, but should provide a time frame giving sufficient flexibility until the annual scheduling of train paths. At the same time, train services may have different needs for precision in terms of when their service would run which should be reflected in different widths of the time frames.
- (7) The introduction of new railway services requires prior technical and safety authorisations or procurement of rolling stock or both which may take a number of years. Investors need certainty on available capacity before deciding on such investments. This justifies a certain time for applicants between the conclusion of the framework agreement and the start of services under the agreement, during which they can, inter alia, gather the necessary authorisations and certificates and procure the rolling stock. Applicants that demonstrably need this time before they can start operations should not be penalised by having the duration of their framework agreements shortened.
- (8) The setting of criteria for the concluding framework agreements should allow the infrastructure manager to market and make optimum effective use of the available infrastructure capacity in accordance with Article 26 of Directive 2012/34/EU.
- (9) Framework agreements should enable a successful coordination of conflicting applications and therefore meet certain criteria as regards allocation of available capacity to other applicants, the modification and the surrender of framework capacity.
- (10) Coordination and consultations with applicants who are already party to a framework agreement may create a burden for infrastructure managers and applicants. This burden could be disproportionate on lines and at times of the day where capacity usage by framework agreements is anyway significantly below the maximum. Consequently infrastructure managers should, in such cases, be given the option of derogating from the procedures or criteria set out in this Regulation. At the same time, where the calculation of such a maximum or the implementation of thresholds is found to be difficult or arbitrary, Member States might wish the infrastructure managers not to make use of this derogation. In the latter case, the regulatory body should approve all framework agreements before they are concluded in an attempt to reduce administrative burden.
- (11) Conflicts can arise between applications for new framework agreements and existing framework agreements or between train paths requested pursuant to a framework agreement and train paths requested outside a framework agreement under the annual scheduling. In such cases, the infrastructure manager should coordinate between the parties inviting them to modify their requirements with a view to reconciling them. Reconciliation may include a modification of the allocation of time frames or re-routing. Article 46 of Directive 2012/34/EU sets out a procedure to resolve conflicting applications for train paths and should also serve as a model for framework agreements.
- (12) Where priority criteria under the timetabling set and published in accordance with Article 47(3) to (6) of Directive 2012/34/EU prevail over whether or not an application under the annual timetabling procedure is submitted under a framework agreement, the infrastructure manager should not have to apply criteria established for framework agreements, but should rather apply the priority criteria established for the annual timetabling procedure.
- (13) It is important to maximise the flexibility available to the infrastructure manager with regard to the allocation of infrastructure capacity, but this should be consistent with satisfying the applicant's reasonable requirements. Infrastructure managers should take into account transparent criteria before concluding new framework agreements.
- (14) Applicants should only request framework capacity that they really need. If all or part of the requested framework capacity is not used over a certain period of time, the framework agreement should be reviewed with a view to the applicant surrendering the unused capacity ('use-it-or-lose-it'), unless he is able to justify that not using the capacity resulted from reasons beyond his control.

- (15) Infrastructure managers should develop their cooperation in such a way that framework agreements for services using more than one network are coherent and lead to train services of quality that applicants can reasonably expect. Such coherence is needed when concluding framework agreements up to the moment when the train paths are allocated.
- (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.
- (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 should not allow the infrastructure manager to waive a penalty payment when the applicant concludes another framework agreement.
- (18) In addition, Member States should have a possibility not to apply, for a limited period of time, certain provisions of this Regulation to framework agreements concluded on or after 15 March 2003, that is to say the date set for the transposition of Directive 2001/14/EC of the European Parliament and of the Council ⁽¹⁾ or in the case of Member States that acceded to the European Union after this date, the date of their accession to the European Union. However, as Article 17(3) of Directive 2001/14/EC provided that it should be possible to amend framework agreements or limit their terms to enable better use of railway infrastructure, those provisions of this Regulation should apply to amendments to such framework agreements, where those amendments are substantial and agreed after the date of entry into force of this Regulation.
- (19) The Commission might review the present Regulation in the light of the experience gained through its application or through the application of Regulation (EU) No 913/2010 on European Rail Freight Corridors.
- (20) The measures provided for in this Regulation are in accordance with the opinion of the Committee established by Article 62(1) of Directive 2012/34/EU,

HAS ADOPTED THIS REGULATION:

Article 1

Subject matter

This Regulation sets out the procedure and criteria to be followed for the conclusion of framework agreements.

Article 2

Definitions

For the purpose of this Regulation and in addition to the definitions in Article 3 of Directive 2012/34/EU, the following definitions apply:

- (1) 'framework capacity' means infrastructure capacity allocated under a framework agreement;
- (2) 'framework capacity statement' means an overview of both the framework capacity allocated on the lines of a given network and an indication of the volume and nature of the available capacity on such lines, and may include a graphical view, with the purpose of informing potential applicants for framework agreements;

⁽¹⁾ Directive 2001/14/EC of the European Parliament and of the Council of 26 February 2001 on the allocation of railway infrastructure capacity and the levying of charges for the use of railway infrastructure and safety certification (OJ L 75, 15.3.2001, p. 29).

- (3) 'time frame' means the period of time specified in a framework agreement within which one or several train paths are intended to be allocated under the timetable procedure;
- (4) 'control period' means a period of time of two hours maximum as defined by the infrastructure manager for comparing the allocated framework capacity and the remaining free capacity with the purpose of informing potential applicants for framework agreements of the indicative framework capacity allocated and the capacity available.

Article 3

Framework capacity statement

1. The infrastructure manager shall draw up a framework capacity statement indicating for every section of line per control period and, if applicable by type of service, the following information:
 - (a) the framework capacity already allocated and the number of train paths;
 - (b) the indicative capacity still available for concluding framework agreements on infrastructure for which framework agreements are already concluded;
 - (c) the maximum capacity available for framework agreements for every section of line, where applicable.
2. The framework capacity statement shall respect commercial confidentiality.
3. In accordance with Article 42(7) of Directive 2012/34/EU, the infrastructure manager shall include a framework capacity statement in the network statement or provide a link in the network statement to a public website where that framework capacity statement, or as a minimum the general nature of each concluded framework agreement, is made available. Article 27(1) of Directive 2012/34/EU regarding fees and languages of the network statement shall also apply to the framework capacity statement.
4. The infrastructure manager shall update the framework capacity statement no later than three months after the conclusion of a framework agreement, a substantial amendment to it or its cancellation. It shall make that information available in a way which respects commercial confidentiality.

Article 4

Alignment of network statements

Infrastructure managers shall align their network statements with the requirements of this Regulation and publish the framework capacity statement at the date of the first timetable change following the publication of the Regulation in the *Official Journal of the European Union*.

Article 5

Allocation of framework capacity

1. The infrastructure manager may invite potential applicants to submit requests for framework agreements by an annual or multiannual deadline. Once the relevant deadline has expired, it shall process the requests submitted without delay. If the infrastructure manager invites for framework agreements by a multiannual deadline, it shall publish annual deadlines by which it shall process the requests received after the multiannual deadline without undue delay.

2. Where the infrastructure manager does not impose an annual or multiannual deadline and receives a request to conclude or modify a framework agreement, it shall take reasonable steps to inform other potential applicants about its intention to conclude a framework agreement and give them one to four months to reply. The infrastructure manager may decide not to inform the other potential applicants if it receives a request for a minor modification to a framework agreement that does not impact other framework agreements.

The infrastructure manager shall decide on the requests for framework agreements without delay.

3. If two or more new requests for a framework agreement are submitted for the same capacity, the infrastructure manager shall examine and decide on them simultaneously.

4. If a framework agreement that is to be concluded or substantially modified concerns rail lines of a rail freight corridor and if the management board had requested to be informed thereof, the infrastructure manager shall inform the management board of the rail freight corridor(s) concerned as referred to in Article 13 of Regulation (EU) No 913/2010. The infrastructure manager shall provide this information at least one month before concluding or substantially modifying the framework agreement.

5. Notwithstanding a decision to conclude framework agreements, the infrastructure manager may decide on a non-discriminatory basis and, where applicable, with prior approval of the regulatory body not to offer framework agreements on all lines that have been declared congested in accordance with Article 47(1) of Directive 2012/34/EU. The infrastructure manager shall indicate the lines where it does not offer framework agreements in the framework capacity statement before inviting applicants to submit requests for framework agreements for other lines in accordance with paragraph 1. The approval of the regulatory body, where applicable, shall be valid for a maximum period of two years and shall not be automatically renewable.

6. The infrastructure manager shall justify its decision to refuse, to conclude or to modify a framework agreement. The reasons shall be justified in writing to the applicant that requested the conclusion or the modification.

Article 6

Conclusion of framework agreements

1. Before concluding a new framework agreement or extending or substantially increasing the framework capacity of an existing framework agreement, the infrastructure manager shall take into account, among other things, the following:

- (a) securing optimum use of available infrastructure capacity, including the use of other networks, taking account of planned capacity restrictions;
- (b) the legitimate commercial needs of the applicant where the applicant has demonstrated that it has the actual intention and ability to use the capacity requested in the framework agreement;
- (c) the needs of passengers, the freight sector and investors, including State entities and other public and private entities;
- (d) ensuring non-discriminatory access to infrastructure and taking into account the availability of the related facilities and services supplied in these facilities as far as this information is made available to the infrastructure manager;
- (e) the funding of the infrastructure manager and the future development of the network;
- (f) promoting efficiency in the operation of infrastructure and as far as possible related facilities, including planned maintenance, enhancement and renewals;
- (g) the capacity requirements of international rail freight corridors as provided for in Article 14 of Regulation (EU) No 913/2010;
- (h) ensuring proportionate, targeted, transparent, fair and sufficiently resourced management of the network;

- (i) previous failure, if any, to use framework capacity and the reasons for that failure as set out in Article 11(2) and (3) of this Regulation;
- (j) the priority criteria applying to the path allocation in the timetabling procedure, as referred to in Article 47 of Directive 2012/34/EU and declarations of congested infrastructure;
- (k) if applicable, the need to ensure the long-term financial performance of public transport provided under a public service contract.

The infrastructure manager shall publish in the network statement, in addition to the items listed in points (a) to (k), the other items it intends to take into account.

2. A framework agreement shall contain the following:

- (a) provisions allowing requests for the modification of framework capacity in the circumstances provided for under Articles 8-11 and 13 of this Regulation;
- (b) provisions allowing requests for the modification of framework capacity in the case of permanent changes to the infrastructure that are necessary in order to ensure better use to be made of the railway infrastructure;
- (c) provisions allowing the surrender or shift of framework capacity on a voluntary basis.

It shall not contain provisions that would prevent the infrastructure manager, where capacity is available, from granting access rights to a different applicant on one or more lines of the infrastructure manager's network.

3. Applicants may request that the framework capacity allocated in accordance with the framework agreement starts at any given time, but no later than five years from the date of the request. Infrastructure managers shall not reject such requests where the time period needed before taking up the service, is justified by one of the following reasons:

- (a) the framework agreement is a prerequisite for financing rolling stock that is needed for a new service;
- (b) there is a need to complete the authorisation of the rolling stock as referred to under point (a);
- (c) the way in which the start of operations of shipping points or loading terminals or the opening of a connecting piece of infrastructure is scheduled;
- (d) investment has to be made in infrastructure where the increased capacity is not yet available;
- (e) a provision in an existing public service contract.

The infrastructure manager or the applicant may request the regulatory body to approve a longer period than the one referred to in the first sentence of the first subparagraph. The regulatory body may give its approval for other reasons than those laid down in points (a) to (e) of the first subparagraph. The capacity allocated under the framework agreement, but not used, as a consequence of the time needed before taking up the service shall remain available for use by other applicants.

4. A request for framework agreement shall not be rejected on grounds that the infrastructure manager received the request after the deadline as referred to in Article 5(1) but shall be processed under the next procedure on a non-discriminatory basis in accordance with Article 5. If the infrastructure manager invites the potential applicants to submit requests for framework agreements by a multiannual deadline and if it receives such requests after this deadline, it shall process them either by an annual deadline in accordance with Article 5(1) or in accordance with Article 5(2).

For requests that meet the criteria provided in paragraph 3 of this Article, the date of receipt of the request for framework agreement shall not be taken into account for setting the duration of the framework agreement. This shall not apply to the applicants who have already been allocated other framework capacity or train paths on the line concerned.

*Article 7***Agreement on a time frame**

The infrastructure manager shall agree on a time frame with the applicant on a case-by-case basis and the time frame should be aligned as closely as possible to the control period in order to facilitate the assignment of the related framework capacity. The time frame shall reflect the needs of the train service.

The time frame shall be of up to 24 hours. In exceptional cases, upon request of the applicant and subject to prior approval by the regulatory body, the infrastructure manager may agree on a time frame of more than 24 hours.

In the case of a time frame of more than two hours, the infrastructure manager shall assign the framework capacity as close as possible to a two-hour control period.

Time frames under one framework agreement or under different framework agreements may overlap. The parties to a framework agreement may agree on a frequency of service.

*Article 8***Ceilings for the allocation of framework capacity**

1. The infrastructure manager shall divide each 24 hour period into control periods of no longer than two hours each. When allocating framework capacity the infrastructure manager shall assign the time frames to control periods.
2. Where the infrastructure manager allocates framework capacity of not more than 70 % of the maximum capacity in any given control period on a line, it may decide not to apply Article 9(3) to (6), Article 10 and Article 11(1) as regards those control periods. 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. The infrastructure manager shall publish in the network statement its methodology for calculating the maximum capacity for the purpose of this paragraph.
3. Where prior approval of framework agreements by the regulatory body in accordance with the second subparagraph of Article 42(1) of Directive 2012/34/EU is required, a Member State may decide not to apply any or all of paragraph 2 and Articles 9(3) to (6) and 10.

*Article 9***Coordination in case of conflicting requests for framework agreements for any time after the end of the next timetable period**

1. If the infrastructure manager encounters conflicts between existing framework agreements and requests for new or modified framework agreements or between requests for new framework agreements, the principles of the coordination procedure for path requests provided for by Article 46(3) and (4) of Directive 2012/34/EU shall apply.
2. The infrastructure manager shall attempt through the first coordination to ensure the best possible matching of the conflicting requests or of a request and existing framework agreements.
3. Where existing framework agreements and requests for new framework agreements or requests to modify agreements cannot be reconciled after a first coordination round, following the rejection by the interested parties of the solution proposed by the infrastructure manager, the latter shall assess those requests and, if relevant, existing framework agreements, taking into account the criteria provided in Article 10(2) to (4).

4. On the basis of the assessment in accordance with paragraph 3, the infrastructure manager shall perform a second round of coordination. If the second coordination round has proven unsuccessful and if the requested framework agreement provides for making a better use of the infrastructure, the infrastructure manager shall request the modification of framework capacity allocated under existing framework agreements.
5. If the second coordination round has proven unsuccessful and if a requested framework agreement does not provide for making a better use of the infrastructure than one or several existing conflicting framework agreements, the infrastructure manager shall reject the request.
6. The infrastructure manager may reject a requested framework agreement, if the additional income generated from concluding the new framework agreement would not at least offset possible penalties, as referred to in Article 13, pursuant to the modification referred to in paragraph 4 of this Article.
7. If it is not possible to satisfy requests for framework agreements for reasons of actual or expected lack of infrastructure capacity, the infrastructure manager may declare the section of infrastructure concerned to be congested in accordance with Article 47 of Directive 2012/34/EU.

Article 10

Coordination of conflicting requests for train paths under framework agreements during scheduling procedure

1. Where, because of a conflict with an existing framework agreement, requests for train paths cannot be satisfied in accordance with the scheduling set out in Article 45 of Directive 2012/34/EU, the infrastructure manager shall hold a first coordination round in accordance with Article 46 of Directive 2012/34/EU. This coordination is to be held even where parties to the framework agreement voluntarily waived or modified their time frames. If the infrastructure manager cannot reconcile the requests, it shall assess the framework agreements and the requests for train paths in accordance with the criteria provided in paragraphs 2 and 3.

If, on the basis of these criteria, the requested train paths would provide for making a better use of the infrastructure and if the additional income generated from allocating these train paths would at least offset the possible penalties as referred to in Article 13 and incurred by a modification or termination of one or several existing framework agreements, the infrastructure manager shall request the modification of existing framework agreements for the next timetable period.

2. The infrastructure manager shall take into account the following criteria:
 - (a) a modification would not endanger the viability of the business model of the applicant holding the framework capacity or the economic model of a public service contract;
 - (b) a modification would not endanger the viability of the business model of the infrastructure manager if it only manages the line concerned;
 - (c) the framework agreement has a lower performance when assessed against the priority criteria applied to the path allocation in the timetabling procedure in accordance with the rules for capacity allocation as referred to in Article 39 of Directive 2012/34/EU, including those established under Articles 47 and 49 of Directive 2012/34/EU;
 - (d) the total capacity held or requested by one applicant on the line concerned is significant;
 - (e) the legitimate commercial needs of the applicant where the applicant has demonstrated its actual intention and ability to use the capacity requested in the framework agreement;
 - (f) the length of the service, including stretches on other networks, of one of the conflicting requests is significantly shorter than that of the other;
 - (g) the remaining duration of the framework agreement or of the business plan is short and all or a large part of the investment has been written off.

Member States may define an order of importance of these criteria in the framework for capacity allocation as referred to in Article 39 of Directive 2012/34/EU

3. Subject to approval by the regulatory body, the infrastructure manager may decide to introduce additional criteria to those listed in points (a) to (g). If the infrastructure manager decides to give differing weights to the criteria, the weighting of the criteria shall be approved by the regulatory body.

4. For cross border traffic, the infrastructure managers concerned may jointly decide to apply additional criteria and on changing their weight.

5. By derogation from paragraphs 1, 2 and 3, the infrastructure manager may decide that in the case of conflicting train path requests, rules of capacity allocation as referred to in Article 39 of Directive 2012/34/EU, including the priority criteria applied under the annual timetabling procedure in accordance with Articles 47 and 49 of Directive 2012/34/EU shall apply both to path requests under a framework agreement and to all other path requests. If the infrastructure manager so decides and if conflicting requests cannot be solved after a first coordination as referred to in paragraph 1, it shall also apply those rules of capacity allocation as referred to in Article 39 of Directive 2012/34/EU, including the priority criteria established in accordance with Articles 47 and 49 of Directive 2012/34/EU. If the infrastructure manager decides to apply this paragraph it shall make this transparent in the agreed framework agreement.

Article 11

Adjustment of framework capacity in the framework agreement

1. The infrastructure manager shall periodically review the framework agreement with the applicants for the purpose of considering the framework capacity. Applicants shall without delay inform the infrastructure manager of any permanent intention not to use all or part of the framework capacity.

2. If during the annual scheduling, the applicant does not request train paths on the basis of the framework agreement in accordance with Article 44(3) of Directive 2012/34/EU, the infrastructure manager shall reduce the framework capacity accordingly for the current annual timetabling period. This is unless the applicant justifies without delay the failure to request the train paths and the reasons given are beyond the applicant's control.

3. The infrastructure manager shall establish and publish in the network statement requirements concerning the proportion of framework capacity that shall be used by the parties to framework agreements. That proportion shall be appropriate taking into account the capacity used on the line. The regulatory body may request the modification of the proportion if this is not the case.

Where the party to the agreement does not intend to use that proportion of framework capacity during a period of more than one month, it shall without delay and at least one month in advance inform the infrastructure manager thereof.

Where the party to the agreement does not use all or part of the framework capacity for a period of more than one month and has not informed the infrastructure manager of its intention not to use it at least one month in advance, the infrastructure manager shall reduce the capacity allocated to this party for the current timetable period, unless such failure to use the capacity is due to reasons beyond its control. The infrastructure manager may reduce the framework capacity allocated to this party for the time after the current timetable period.

The infrastructure manager shall offer to an applicant the framework capacity notwithstanding a possible right of the party to the agreement to request that capacity in accordance with the provisions on ad-hoc-requests referred to in Article 48(1) of Directive 2012/34/EU.

4. When offering new framework capacity to an applicant, the infrastructure manager shall consider any failure to use framework capacity or to request train paths on the basis of a framework agreement and the reasons for it.

*Article 12***Cooperation in the allocation of framework capacity on more than one network**

1. The infrastructure managers concerned with a service crossing more than one network of the rail system within the Union shall ensure as far as possible that:

- (a) if one or more framework agreements have been concluded for such a train service, the time frames requested match those agreed under the framework agreement or requested under it and the anticipated available capacity under each framework agreement matches with one another;
- (b) during the scheduling of the train paths, the train paths match with one another.

When a framework agreement is requested or is in operation for a train service crossing more than one network, upon request of the applicant, the infrastructure managers concerned shall designate one of the infrastructure managers concerned with a view to coordinating the requests for framework agreements or requests to modify framework agreements.

2. If it is not possible to match the time frames and train paths, the infrastructure managers concerned shall coordinate to provide an appropriate alternative or justify in writing where no appropriate alternative can be provided. The applicant shall inform the infrastructure managers that received the request about any possible or actual request for another framework agreement concerning the same train service.

During the coordination, the infrastructure managers shall take into account capacity restrictions such as those resulting from maintenance works, as soon as they are known.

3. For the purpose of implementing this Regulation, the infrastructure managers concerned shall cooperate in accordance with Article 40 of Directive 2012/34/EU, including when one or more of them do not propose framework agreements and when they associate for the purpose of capacity allocation.

*Article 13***Penalties**

1. If one party requests penalties to be foreseen in the framework agreement in accordance with Article 42(4) of Directive 2012/34/EU, it shall not reject comparable penalties requested by the other party.

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 which can reasonably be expected to be incurred by the party indemnified as a consequence of the modification or termination of the agreement. The party indemnified shall take reasonable steps to prevent or reduce the modification of the agreement, or to prevent its termination or to reduce its impact, and to recover any costs, losses and expenses or to otherwise mitigate the costs, direct losses and expenses (including loss of revenue).

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:

- (a) the cause for the modification or termination of the agreement was outside the applicant's control and the infrastructure manager had been informed thereof without delay;
- (b) the applicant had a complementary request for framework capacity rejected without which the envisaged train service was not viable;
- (c) the infrastructure manager could reallocate train paths and framework capacity in a way that the losses incurred by the modification or the termination of the framework agreement have already been recovered.

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.

5. Upon the request of the regulatory body, the infrastructure manager shall provide evidence that penalty payments have been made on time.

Article 14

Derogation

If an infrastructure manager does not propose framework agreements and does not have such agreements in operation, Articles 1 to 11 and Article 13 shall not apply to its network. A statement to this effect shall be published in the network statement.

Member States may decide not to apply Articles 1 to 11 to framework agreements concluded before 15 March 2003.

Article 15

Non-application of certain provisions

For framework agreements concluded before 28 April 2016, Member States may decide not to apply Articles 6(2), 7, 8, 9, 10, 11 or 13 for a maximum period of five years from the date of entry into force of this Regulation.

By derogation from paragraph 1, Member States shall not have the option referred to in the first sentence for amendments to framework agreements, which are agreed after 28 April 2016 and which would involve an increase of the allocated framework capacity or an extension of the duration of the framework agreement.

Article 16

This Regulation shall enter into force on the twentieth day following that of its publication in the *Official Journal of the European Union*.

It shall apply from 1 December 2016.

This Regulation shall be binding in its entirety and directly applicable in all Member States.

Done at Brussels, 7 April 2016.

For the Commission
The President
Jean-Claude JUNCKER
