

*Please note: This is a translation of the authentic German version of EET-methodology (Methodik für die Durchführung der Prüfung des wirtschaftlichen Gleichgewichts). The translation serves purposes of information/orientation only.*

## **Methodology according to Commission Implementing Regulation (EU) 2018/1795 of 20 November 2018 laying down procedure and criteria for the application of the economic equilibrium test pursuant to Article 11 of Directive 2012/34/EU of the European Parliament and of the Council**

### **§ 1. Subject matter and scope**

- (1) Pursuant to Art 14(1) of the Commission Implementing Regulation (EU) 2018/1795 of 20 November 2018 laying down the procedure and criteria for the application of the economic equilibrium test pursuant to Article 11 of Directive 2012/34/EU of the European Parliament and of the Council (hereinafter: IR), the methodology applied by the regulatory body in conducting the test shall be clear, transparent and non-discriminatory and shall be published on its website.
- (2) When Schienen-Control Kommission receives a request from a body referred to in Art 11(2) subpar (1) of Directive 2012/34/EU to examine the economic equilibrium of an existing public service contract, it shall carry out this examination on the basis of the present methodology.
- (3) Pursuant to Article 2, the IR shall apply if a Member State has decided to restrict the right of access referred to in Article 10(2) of Directive 2012/34/EU for new rail passenger services pursuant to Article 11(1) of that Directive between a point of origin and a point of destination, if the route or an alternative route is the subject of one or more public service contracts.
- (4) Pursuant to Art 3 No 3 of the IR, "public service contract" means a public service contract within the meaning of Art 2 lit i of Regulation (EC) 1370/2007 in the field of rail transport. "Public service contract" within the meaning of Art 2 lit i of Regulation (EC) 1370/2007 means one or more legally binding acts showing the agreement between a competent authority and a public service operator to entrust that public service operator with the management and provision of public passenger transport services subject to public service obligations; in accordance with the respective legal systems of the Member

- States, these legally binding acts may also consist of a decision by the competent authority:
- which may take the form of a law or an administrative regulation applicable to the particular case; or
  - which contains the conditions under which the competent authority provides these services itself or entrusts an internal operator with the provision of these services.
- (5) If the place of departure or the place of destination of a passenger transport service is located on a main railway or an interconnected secondary railway or if these places can be reached via an alternative route, and if these railways are the subject of one or more public service contracts within the meaning of Art 2 lit i of Regulation (EC) 1370/2007, the right of access to these railways for the purpose of providing passenger transport services shall be restricted pursuant to § 57c par 1 EisebG if the exercise of such access would jeopardise the economic equilibrium of this service contract or these service contracts.
- (6) As can be seen from Recital 2 and 3 of the IR, the economic equilibrium test procedure is designed to ensure that the right of access to railway infrastructure for the purpose of providing new rail passenger services is restricted where the new rail passenger service competes with public services, is thus aimed at the same group of customers and is likely to draw away a not insignificant proportion of the passengers of the service provided in fulfilment of the public service contract. The assessment should take into account that the new passenger rail service may generate positive network effects for public service operators, net benefits for passengers or benefits for society as a whole.
- (7) The present methodology describes the procedure for the notification of the new rail passenger service, the submission of an application for the economic equilibrium test and the principles of the economic equilibrium test on the basis of which Schiene-Control Kommission decides on the right of access to the railway infrastructure.
- (8) Pursuant to Art 11(2) of Directive 2012/34/EU, to which Art 11(1) of the IR refers, the regulatory body shall assess whether the economic equilibrium of a public service contract would be jeopardised on the basis of an objective economic analysis based on predefined criteria. According to Art 10(2) of the IR, pre-determined thresholds or specific criteria may be used, but may not be applied strictly or in isolation from other criteria. The economic equilibrium test is thus based on a case-specific analysis and a weighing of different criteria.
- (9) Pursuant to Art 14(2) and Recital 22 of the IR, regulators shall share their experience in applying their respective methodologies and adapt them over time as necessary.

## **§ 2. Procedure for the notification of a new rail passenger service**

- (1) Pursuant to Art 4(1) of the IR in conjunction with Art 38(4) of Directive 2012/34/EU, the applicant intending to operate a new rail passenger service shall notify the infrastructure managers and the regulatory bodies concerned of this intention at least 18 months before the start of the relevant working timetable period.

- (2) According to Art 3 No 1 of the IR, a new rail passenger service is a rail passenger service which is to be operated as a regular service and is either completely new or involves a significant change to an existing rail passenger service, in particular due to a higher frequency of services or number of stops, and which is not to be provided under a public service contract.
- (3) The application shall be made using the form available on the website [www.schienecontrol.gv.at](http://www.schienecontrol.gv.at) and shall contain the information specified in Art. 4 (2) of the IR. The completed form together with the accompanying documents shall be sent to the email address [office@schienecontrol.gv.at](mailto:office@schienecontrol.gv.at).
- (4) The notification of the new rail passenger service shall be published on the website [www.schienecontrol.gv.at](http://www.schienecontrol.gv.at). Immediately, but no later than within ten days of receipt of the completed application form, Schienen-Control Kommission shall inform the bodies referred to in Article 4(4) of the IR.

### **§ 3. Request for the examination of the economic equilibrium**

- (1) Schienen-Control Kommission shall examine the effects of the new rail passenger service on the economic equilibrium of a public service contract on the basis of an application by one of the bodies referred to in Art 11(2) subpar (1) of Directive 2012/34/EU submitted within one month of receipt of the notification of the new rail passenger service by the body concerned (cf. Art 11(2) of Directive 2012/34/EU in conjunction with Art 5(1) of the IR).
- (2) The application shall be accompanied by the information referred to in Art 7(1) of the IR, in particular a justification for the assumption that the new rail passenger service may jeopardise the economic equilibrium. The impact of the new rail passenger service on the passenger volume of the services operated in fulfilment of the public service contract shall be presented, i.e. how many passengers will switch from this service to the new rail passenger service and how many passengers will be added due to the extended offer of rail passenger services. This can be shown by means of an analysis of the elasticity of demand.
- (3) In accordance with Art 8(2) of the IR, the body which has requested the economic equilibrium test shall justify the confidentiality of commercially sensitive information when it provides this information to Schienen-Control Kommission.

### **§ 4. Procedure of the economic equilibrium test**

- (1) Pursuant to Art 9(1) of the IR, the regulatory body may, within one month of receipt of the request, request from the body requesting the economic equilibrium test any additional information it deems necessary pursuant to Art 7(2) of the IR.
- (2) Pursuant to Art 9(3) of the IR, the regulatory body may, within one month of receipt of the request for an economic equilibrium test, also request the information necessary for carrying out the test from the other bodies referred to in Art 7(2) of the IR, in accordance

- with said Article, and set reasonable deadlines for doing so. To the extent necessary, the regulatory body may request further information.
- (3) In the event that incomplete information is submitted to the regulatory body, Art 9 of the IR regulates the following procedure:
- a. If the information provided by the entity requesting the economic equilibrium test is still incomplete six weeks before the deadline for ordering infrastructure capacity for the working timetable, the regulatory body shall carry out the test on the basis of the available information. However, if the regulatory body considers that the information is not sufficient for the assessment, it shall reject the request.
  - b. If the information provided by the undertaking intending to operate a new passenger rail service is still incomplete six weeks before the deadline for ordering infrastructure capacity for the working timetable, the regulatory body shall carry out the assessment on the basis of the available information. However, if the regulatory body considers that the information provided by the applicant is not sufficient for the assessment, it shall reject the access request.
  - c. Where the request has not been made by the undertaking performing the public service contract and the information provided by that undertaking is still incomplete six weeks before the deadline for ordering infrastructure capacity for the working timetable, the regulatory body shall carry out the assessment on the basis of the information available. However, if the regulatory body considers that the information provided is not sufficient for the assessment, it shall decide to grant access.
- (4) In accordance with Art 11(1) of the IR, the regulatory body shall decide, upon completion of the economic equilibrium test, to grant, modify, condition or refuse access to the railway infrastructure.
- (5) If the regulatory body comes to the conclusion that the economic equilibrium of a public service contract would be jeopardised by the new rail passenger service, it shall, in accordance with Art 11(2) of the IR, where appropriate, specify possible changes to the new rail passenger service and/or make recommendations to the competent authorities on other changes which do not concern the new passenger service and the implementation of which would ensure that the conditions for granting the right of access are met.
- (6) Pursuant to Art 9(6) of the IR, the regulatory body shall issue its decision within six weeks of receipt of all relevant information, but in any case before the end of the deadline for ordering infrastructure capacity for the working timetable. The regulatory body shall inform the infrastructure manager of its decision without delay.

**§ 5. Information to be provided by the parties to the proceedings**

- (1) Art 7 (2) of the IR specifies the information that the regulatory body may request from the competent authority, the railway undertaking performing the public service contract, the undertaking wishing to provide the new rail passenger service and the

infrastructure manager. The list of this information is not exhaustive, but presents mere examples of information that may be required in the context of an examination of the economic equilibrium. Pursuant to Art 7 of the IR, the regulatory body may request the above-mentioned parties to the procedure to provide any information necessary for the decision if the economic equilibrium would be compromised.

- (2) Pursuant to Art 7(2) lit a of the IR, the regulatory body may in particular request the following information from the competent authority:
1. relevant revenue, demand and income forecasts, including the forecasting methodology, as well as
  2. if applicable, the method used to calculate the net financial impact in accordance with Art 6(1) of Regulation (EC) 1370/2007 and its Annex as well as the data used.
- (3) The regulatory body may request the following information in particular from the railway undertaking fulfilling the public service contract in accordance with Article 7(2)(b) of the IR:
1. a copy of the public service contract,
  2. the undertaking's business plan for the route covered by the public service contract or an alternative route,
  3. relevant revenue, demand and income forecasts, including the forecasting methodology,
  4. information on the undertaking's revenue and profit margins on the route or an alternative route covered by the public service contract,
  5. timetable information on the services, including departure times, intermediate stops, arrival times and connections,
  6. estimated elasticities of the services (e.g. price elasticity, elasticity with respect to the quality characteristics of the services),
  7. capital and operating costs for the services provided under the public service contract and changes in costs and demand associated with the new rail passenger service.
- (4) The regulatory body may request the following information in particular from the undertaking intending to provide the new rail passenger service in accordance with Art 7(2)(c) of the IR:
1. the business plan,
  2. a passenger volume and revenue forecast, including the forecast methodology
  3. pricing strategies,
  4. ticketing arrangements,
  5. vehicle specifications (e.g. load factor, number of seats, vehicle configuration),
  6. marketing strategy.
- (5) The regulatory body may request the following information from the infrastructure manager pursuant to Art. 7(2) lit d of the IR:
1. information on the relevant routes or route sections in order to ensure that the new rail passenger service can be operated on the infrastructure concerned,

2. information on the possible impact of the envisaged new rail passenger service on performance and resilience,
  3. assessment of the impact on capacity utilisation,
  4. plans for infrastructure development in respect of the routes covered by the new rail passenger service, including a timetable for the implementation of such plans,
  5. information on relevant framework agreements concluded or under discussion, in particular with the undertaking performing the public service contract.
- (6) The Schienen-Control Kommission shall analyse the information submitted by each party to the proceedings in its entirety. In particular, it shall subject submitted calculations and analyses of the elasticity of demand to close scrutiny.

## **§ 6. Criteria for the assessment of economic equilibrium**

### **§ 6.1 General**

- (1) Pursuant to Art 10 (1) of the IR, the regulatory body shall examine whether the economic equilibrium of a public service contract would be jeopardised by the envisaged new rail passenger service. The economic equilibrium shall be deemed to be jeopardised if the new rail passenger service would have a significant negative impact on at least one of the following aspects:
  - a. the profitability of the services operated by the railway undertaking under the public service contract,
  - b. the net costs of the competent authority awarding the public service contract.
- (2) Art. 10 (4) of the IR stipulates that the regulatory body shall assess the significance of the effects, taking into account in particular the contractual agreements between the competent authority and the railway undertaking performing the public service contract, including, where applicable, the amount of compensation set in accordance with the Annex to Regulation (EC) 1370/2007 or resulting from a competitive award as well as any risk-sharing mechanisms, e.g. with regard to traffic volume and revenue.
- (3) Art 10(2) of the IR provides that the analysis must relate to the public service contract as a whole, not to individual services provided within its framework, and to its entire duration. Pre-determined thresholds or specific criteria may be used, but must not be applied strictly or in isolation from other criteria.
- (4) Pursuant to Art 10(3) of the IR, the regulatory body shall assess the net financial impact of the new rail passenger service on the public service contract. The analysis of the costs and revenues associated with the operation of the services under the public service contract after the market entry of the new rail passenger service shall include the following aspects:
  - a. Changes in the costs and revenues of the railway undertaking performing the public service contract (including, where appropriate, cost savings, e.g. as rolling stock is no longer replaced at the end of its useful life or staff contracts end),
  - b. financial impacts within the network covered by the public service contract associated with the envisaged new passenger rail service (e.g. new passengers

- interested in connecting with a regional service offered under the public service contract),
- c. possible competitive reactions of the railway undertaking performing the public service contract,
  - d. Impact on relevant investments by railway undertakings or competent authorities, e.g. in rolling stock,
  - e. the value of possible existing exclusive rights.

**§ 6.2 Assessment of expected significant negative impacts of the new rail passenger service**

- (1) The purpose of the economic equilibrium test shall be to determine the impact of the new rail passenger service on the demand for transport services under the public service contract. To this end, it shall be examined whether and to what extent the new rail passenger service serves the same demand as the transport service under the public service contract and, to that extent, competes for the same passengers.
- (2) In order to determine this, Schienen-Control Kommission shall compare the essential characteristics of the two services. These characteristics include in particular the routes served with departure and destination stations and intermediate stops, as well as timetables, journey times and pricing.
- (3) Where the new rail passenger service and the service under the public service contract do not serve the same demand or serve it only to a limited extent, the new rail passenger service is not expected to have a significant negative impact on the profitability of the service under the public service contract. It may even have a positive impact on that profitability by providing new connections to the service under the public service contract.
- (4) On the other hand, if the new rail passenger service competes to a significant extent for the same passengers as the service under the public service contract, it is comparatively more likely to have a significant negative impact on the profitability of the service under the public service contract.
- (5) The mere fact that the new rail passenger service partly serves the same demand as the service under the public service contract does not mean that the economic equilibrium is at risk. Also, it is obvious that a new passenger rail service serving the same customer groups as the service under the public service contract is very likely to lead to a decrease in the number of passengers of this service. However, if the transport capacity of the new rail passenger service is small compared to that of the public service contract, the impact of the new rail passenger service on the economic equilibrium of the public service contract shall be considered not to be significant.
- (6) If the new rail passenger service is expected to compete with the existing service under the public service contract, it must be examined whether this would have a significant negative impact on the economic equilibrium of the public service contract. Pursuant to Art 10 (2) of the IR, the effects on the entire public service contract are to be examined.

- (7) The impact on a transport service within the scope of a public service contract cannot be considered significant if the railway undertaking can be expected to achieve a reasonable profit within the meaning of the Annex to Regulation (EC) 1370/2007 for the provision of the entire transport service over the entire term of the contract. According to No 6 of the Annex, reasonable profit is to be understood as a reasonable return on investment customary in the sector concerned in a given Member State, taking into account the risk incurred or foregone by the public service operator due to the intervention of the authority. Art 6 (1) second sentence of Regulation (EC) 1370/2007 provides that any compensation, however procured, in connection with a public service contract which has not been awarded pursuant to Art 5 (1), (3) or (3b) or which is in connection with a general provision is subject to the provisions of the Annex. Pursuant to Art 4(1)(b) of Regulation (EC) 1370/2007, the public service contracts and the general regulations shall set out beforehand in an objective and transparent manner
- i. the parameters on the basis of which the compensation, if any, is calculated, and
  - ii. the nature and extent of any exclusivity granted, avoiding overcompensation.
- In the case of public service contracts not awarded in accordance with Article 5(1), (3) or (3b) of Regulation (EC) 1370/2007, these parameters shall be determined in such a way that the compensation cannot exceed the amount necessary to cover the net financial impact on the costs and revenues incurred in discharging the public service obligations, taking into account the revenues generated and retained by the public service operator and a reasonable profit.
- (8) The assessment of whether the new rail passenger service will have a significant impact shall be made on a case-by-case basis, taking into account all relevant circumstances.

### **§ 6.3 Further effects of the new rail passenger service and decision on the right of access**

- (1) Pursuant to Art 10(5) of the IR, the regulatory body shall, in addition to examining the economic equilibrium, review
- a. the short and medium term net benefits for customers associated with the new rail passenger service,
  - b. the impact of the new rail passenger service on the performance and quality of rail services,
  - c. the impact of the new passenger rail service on the timetabling of rail services.
- (2) If the regulatory body comes to the conclusion that the new rail passenger service will jeopardise the economic equilibrium but at the same time generate a net benefit for customers, it may, in accordance with Art. 11(2) lit b of the IR, make recommendations to the competent authorities on other changes which do not concern the new passenger service and the implementation of which would ensure that the conditions for granting the right of access are met.
- (3) In addition to the results of the economic equilibrium test, the regulatory body shall take into account the impact of the new passenger rail service on the net benefit to



customers, the performance and quality of rail services and the production of timetables. While these factors do not directly affect the economic equilibrium, they shall influence the importance given to the economic equilibrium in the decision of the regulatory body on the right of access.

- (4) One such factor may be the relief of existing rail passenger services and/or routes. The new rail passenger service may relieve congestion on very busy rail passenger services on the same route or on an alternative route, thus leading to an increase in the quality of service. Net benefits for customers may include lower fares, more frequent services and shorter journey times.

#### **§ 6.4 Changes to the new rail passenger service**

- (1) If the economic equilibrium of a public service contract would be jeopardised by the new rail passenger service, the regulatory body shall, pursuant to Art 11(2) lit a of the IR, specify, where appropriate, possible changes to the new rail passenger service, such as changes to the frequency, routing, intermediate stops or timetables, the implementation of which would ensure that the conditions for granting the right of access pursuant to Art 10(2) of Directive 2012/34/EU are met.