

GUIDELINES FOR CONDUCTING THE ECONOMIC EQUILIBRIUM TEST

Version 1.0

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1. INTRODUCTION

The legislation of the European Union and the Republic of Croatia enable the opening of the European rail market and the competition promotion on the passenger rail market through a number of measures, including a comprehensive requirement to allow access to the network in a fair and transparent manner. However, the same legislation also lays down restrictions according to which an access to the rail infrastructure may be denied, referring to the situations where there is evidence that the new service could have a significant negative impact on the economic equilibrium of public service contracts.

Commission Implementing Regulation (EU) 2018/1795 of 20 November 2018 laying down the procedure and criteria for the application of the economic equilibrium test (“the Implementing Regulation”) pursuant to Article of 11 Directive 2012/34/EU of the European Parliament and of the Council, which shall apply from 1 January 2019 for the timetable beginning on 12 December 2020, determines how this restriction should be addressed. The Implementing Regulation describes the “economic equilibrium test” (hereinafter: EET) to be carried out by the regulatory authority in bringing decision approving open access requests, as set out in these guidelines.

Article 23 Chapter 1 of the Railway Act (OG 32/19) enables the right of access to rail infrastructure to provide passenger transport services between a designated starting point and a specific destination where one or more public service contracts cover the same or an alternative route and where the right of access would undermine the economic equilibrium of the public service contracts.

However, new services can bring benefits to users of rail passenger transport services. Nevertheless, in line with legal obligations, it is necessary to consider the impact on state resources as well as a number of factors affecting the decision of the regulatory body for granting the access.

Therefore, this approach should accompany the requirement set out in the Implementing Regulation in order to explicitly consider the impact of the new service on the profitability of the services carried out under the public service contract and on the net cost of the competent authority which assigned the public service contract.

1. Definitions

For the purposes and better understanding of this document, the following definitions should be applied:

- a) “**New rail passenger service (hereinafter: new service)**” means a rail passenger transport intended to be carried out on a regular basis, which is completely new or implies significant modifications to the existing passengers rail transport. Railway, in particular in terms of an increased frequency of transport or an increased number of stops, not provided by public service contract;
- b) “**Economic equilibrium test**” means the assessment procedure described in Article 11 Paragraphs from 1 to 4 and Article 11a of Directive 2012/34/EU as described in more details in Article 10. Implementing regulations, implemented by a regulatory authority upon the request of one of the entities referred to in Article 11(2) of Directive 2012/34/EU to determine whether a proposed new rail passenger service would jeopardize the economic equilibrium of public service contracts;
- c) “**Public service contract**” means a public service contract as defined in Article 2. (b) Regulation (EC) No 1370/2007 concerning rail transport;
- d) “**Competent authority**” means a competent authority as defined in Article, Item (b) of Regulation (EC) No 1370/2007;
- e) “**Net financial impact**” means the effect of a new rail passenger service on the net balance of costs and revenues resulting from fulfilling the obligations laid down in a public service contract, including a reasonable profit;
- f) “**Exclusive right**” means a right as defined in Article 2, Item of Regulation (EC) No 1370/2007;
- g) “**Public service operator**” means any public or private undertaking or group of such undertakings conducting public passenger transport services or any public body providing public passenger transport services.

¹Regulation (EC) No 1370/2007 of the European Parliament and of the Council of 23 October 2007 on public passenger transport services by rail and road, Regulation (EU) 2016/2338 of the European Parliament and of the Council of 14 December 2016 amending Regulation (EC) No 1370/2007 concerning the opening of the market for domestic passenger transport services by rail and Directive 2012/34/EU of the European Parliament and of the Council of 21 November 2012 establishing a single European railway area

1.2. Legal framework

Pursuant to Article 22 Paragraph 3 of Railway Act stipulated in a manner that, without prejudice to Regulation (EC) No 1370/2007 and Regulation (EU) 2016/2338, each railway undertaking, subject to equal, non-discriminatory and transparent conditions, must be granted the right of access to railway infrastructure for the purpose of providing rail passenger transport services. That right of access, in accordance with Article 22 Paragraph 5 of Rail Services Act meaning that a railway undertaking, providing passenger transport services, has the right to embark and disembark passengers in an official place intended for the entry or exit of passengers.

However, Article 23 Paragraph 1 of Railway Act provides the possibility of refusing access to the infrastructure in cases where the economic equilibrium of public service contracts would be jeopardized by new rail passenger services.

Regulation (EC) No 1370/2007 of the European Parliament and of the Council as amended by Regulation (EU) 2016/2338 of the European Parliament and of the Council of 14 December 2016 enables that financial compensation or exclusive rights, or both, can be granted to public service operators for fulfilling their obligations by providing rail passenger transport services. However, the granting of exclusive rights to railway undertakings should not result in the closure of the domestic rail passenger market.

Such exclusive rights should not exclude the right of access of other railway undertakings, unless EET demonstrates that, taking into account the value of exclusive rights, the new rail passenger service would have a significant negative impact on the profitability of the services carried out under a public service contract or the net cost of providing them to the competent authority or both, depending on the risk-sharing arrangements provided for in a public service contract.

EET should only be implemented in respect of rail passenger transport services which are not provided under public service contracts and which are completely new or imply a substantial modification of the existing service. This term also covers the commercial services of an undertaking carrying out a public service contract.

The regulatory authority should assess whether the proposed modification of the passenger rail service should be considered significant.

2. METHODOLOGY FOR APPLYING THE ECONOMIC EQUILIBRIUM TEST CONDUCTED BY HAKOM

2.1. Requirements for which an economic equilibrium test may be applied

The Implementing Regulation specifies that EET may be applied to new rail services in passenger transport, referring to a completely new service or to a substantial modification of an existing rail service for passengers, in particular as regards an increased frequency of services or an increased number of stops, which is not provided by a public service contract, exclusively for new rail passenger services between a given departure and a given destination, where one or more public service contracts covers the same or alternative route. On the other hand, the price should not be considered a substantial change unless it is in line with normal market behavior.

This means that EET can be applied to applications for new services and requests for significant modifications to existing services in passenger transport. Therefore those are the passenger transport services based exclusively on a commercial basis, i.e. not being provided within the scope of public service contract.

EET may also apply to commercial services provided by an undertaking operating under a public service contract, for services not covered by that contract, if requested by an authorized authority.

Requests to extend the duration of existing access rights will not be considered a new service or a “substantial” modification and will therefore not be subject to EET.

2.2 Methodology and evaluation criteria

Article 10 of the Implementing Regulation describes the EET and content and the assessment criteria quoting that the economic equilibrium will be considered endangered if the new service would have a significant negative impact on:

- a) Profitability of services provided by the public service provider and/or
- B) A significant increase in the net cost for the competent authority.

The economic analysis will assess the impact of the proposed new service on the public service contract as a whole, over the entire period of time, taking into account the value of all existing exclusive rights granted to them.

The Implementing Regulation provides that predetermined thresholds or specific criteria may be applied, but not strictly or isolated from other criteria, nor may such thresholds be set in national legislation. The assessment should be based on an objective methodology adopted by the regulatory

authority, taking into account the specificities of rail transport in the Member State concerned, as well as an assessment of the net benefit for users resulting from the new passenger transport service by rail.

The method to be used by HAKOM is based on the experiences of other regulatory authorities of the EU Member States.

HAKOM will analyze several elements in bringing the decision on jeopardizing the economic equilibrium of public passenger transport contracts as described below, and each request for EET implementation will be considered individually, which is in line with the Implementing Regulation stating, it is necessary to “balance the legitimate interests of operators performing public service contracts and competent authorities on the one hand and the main objectives for creating a single European railway area and exploiting wider social benefits, on the other hand”

In particular, the following elements will be considered when carry the EET, in accordance with Article 10 of the Implementing Regulations:

1. The impact on the profitability of the services that the railway undertakings operates under a public service contract - traffic forecasts, revenue demand and finances according to which revenue estimates and passenger numbers are made, which are likely to reduce the supply of the existing domestic service pursuant to public service contract, i.e. the impact of the new service on the takeover of part of passengers and revenues to be proven. HAKOM carries out an analysis of the substitutability of new and public passenger transport services.

2. Impact on the net cost of the competent authority which granted the public service contract - analysis of the impact of the new service on the net cost for the competent authority. It is necessary to observe the new service according to the execution time (driving calendar), it is also necessary to check whether the new service affects only one or more trains (train departures and alternative paths). The new service may have an impact on the current financial indicators of the public service contract, but also in the following period and it is necessary to demonstrate the impact of the new service on the net cost paid by the competent authority through analysis.

3. Net benefits for users – analysis of broader net benefits for users arising from new rail passenger service, and includes types of tickets and their benefits, travel time, travel information, timetable, quality of services in 2012 train, etc.

4. Other factors set out in Article 10 including the impact on the performance and quality of rail services - within this segment of the analysis, activities related to social responsibility and other positive effects potentially introduced due to the new service may be considered (lower number of passengers in passenger cars/buses, stimulation of bicycle use/multimodal passenger transport, etc.). This phase allows consideration of any other factor relevant to the specific case and, as such, is difficult to define in the general instructions.

2.3. Procedures

The Implementing Regulation sets out the procedure and time frames applicable to the requests for a new service.

2.3.1. Notice of planned new rail passenger service

An applicant planning to request infrastructure capacity for the performance of the passenger rail service shall submit to HAKOM and the infrastructure manager a completed form of the Notice on the planned new passenger rail service (hereinafter: the Notice) at least 18 months before the start of the timetable to which the request for infrastructure capacity relates. The form is available on the HAKOM website (link: <https://www.hakom.hr/default.aspx?id=10260>, Annex 1 to this document).

If the information in the Notice is incomplete, HAKOM will inform the applicant and give the possibility to complete the data within a reasonable period of time not exceeding 10 working days from the date of applicant's reception of the request to complete the data. Incomplete requirements will not be taken into consideration.

HAKOM shall publish the notification submitted by the applicant on its website without undue delay, and no later than 10 days after the receipt of the complete data and inform the competent parties referred to in point 2.3.2 of this document.

Information on the planned new passenger rail service shall cover at least the first three years of operation and, if possible, the first five years of operation. However, HAKOM may, in duly justified cases, agree to a shorter period of time.

2.3.2. Request for economic equilibrium test

HAKOM will carry out of the EET when requested by either of the following parties:

- The competent authority for the allocation of funds through a public service contract;
- Any other interested competent authority entitled to restrict access in accordance with Article 11. of Directive 2012/34/EU,
- Infrastructure manager,
- An undertaking providing a service under a public service contract.

1.) The interested parties may request HAKOM to implement the EET within 30 days from the day of receiving the information on the planned passenger service. The interested party should send its request electronically to the address of the zeljeznica@hakom.hr or to the address Roberta Frangeša Mihanovića 9, 10110 Zagreb.

2.) The entity requesting the implementation of the EET must provide HAKOM with the information referred to in point 2.3.3 (1) of this document, with relevant evidence that the new service may jeopardize the economic balance of the public service contract.

3.) If HAKOM does not receive a request to implement the EET within 30 days, it will not be implemented and any request received outside that deadline will be considered untimely.

2.3.3. Submission of Data to HAKOM

The entity trying to implement EET shall provide HAKOM with the relevant information necessary for bringing decision. In addition, HAKOM may also request information from the competent authority, the public service operator, the applicant and the infrastructure manager.

1. An entity requesting an economic equilibrium test shall provide the following information:

(a) The name, address, legal form, personal identification number (if applicable) of the applicant entity;

(b) Contact information of the person responsible for the inquiries

(c) Evidence on jeopardizing the economic equilibrium of public service contracts by a new rail passenger service;

(d) A copy of the public service contract, if the applicant entity is the competent authority or railway undertaking performing the public service contract.

2. In the process of conducting the economic equilibrium test, HAKOM may request the submission of additional data:

(a) From the competent authority:

(1) Relevant traffic, demand and revenue forecasting, including the forecasting methodology;

(2) Where appropriate, the methodology and data used to calculate the net financial impact pursuant to Article 6(1) of Regulation (EC) No 1370/2007 as amended by Regulation (EU) 2016/2338 of the European Parliament and of the Council of 14 December 2016 and the Annex thereto;

(b) From a railway undertaking performing a public service contract:

- (1) A copy of the public service contract if it has not been submitted in accordance with paragraph 1(d);
- (2) The undertakings business plan for a route covered by a public service contract or an alternative route;
- (3) Relevant traffic, demand and revenue forecasts, including the forecast methodology;
- (4) Information on revenues and profit margins acquired by the undertaking on a route covered by a public service contract or an alternative route;
- (5) The timetable for its services, including departure times, intermediate stops, arrival times and connections;
- (6) Assessment of the elasticity of services (e.g. price elasticity, elasticity in terms of quality of services);
- (7) Capital costs and operating costs for services provided under public service contracts, as well as changes in costs and demand caused by the new rail passenger service;

c) From the applicant, information regarding his plans to operate a new rail passenger service, including:

- (1) Business plan;
- (2) Passenger traffic and revenue forecasting, including the forecast methodology;
- (3) Pricing strategies;
- (4) Organizing the sale of tickets;
- (5) Rolling stock specifications (e.g. occupancy index, seat number, technical specification by type of vehicle);
- (6) Marketing strategy;

(d) From the infrastructure manager:

- (1) Information related to the relevant tracks or its parts to ensure that a new rail passenger service can be provided on given infrastructure;
- (2) Information on the potential effects in terms of performance and resilience of the proposed new rail passenger service;
- (3) Assessment of impacts on capacity utilization;

4) Plans to develop infrastructure as regards the routes covered by the new rail passenger service, including an indication of the time when the plans will be implemented;

(5) Information on the relevant framework agreements concluded or subject to discussion, in particular with the undertaking performing the public service contract.

3. All information should be sent to HAKOM:

• In the electronic form:

To the address: zeljeznica@hakom.hr or

To the address: Robert Frangeša Mihanovića 9, 10110 Zagreb

Further information may be requested by HAKOM within one month of receipt of the request for implementation of the EET.

2.3.4. Incomplete information

Pursuant to the Implementing Regulation, HAKOM shall take a decision within 6 weeks of receipt of all information, and in any event before the deadline for receipt of the capacity request set by the infrastructure manager. Depending on the availability of data necessary for making a decision, and within the stated deadline, the HAKOM may decide the following:

In case the applicant has not provided HAKOM with complete data six weeks before the final date of receipt of the capacity request, HAKOM will implement EET based on the available data or if it considers that the data is insufficient to perform the test, it will reject the application;

• In the event that six weeks before the final date of receipt of the capacity request, the entity requesting the EET did not provide complete data, the HAKOM will implement the EET on the basis of the available data, or if it considers that the data is insufficient to carry out the test, it will reject the request to implement the EET;

• In case that six weeks before the final date of receipt of the request for capacity, the carrier providing the public service is not the applicant entity and provided incomplete data, HAKOM will perform the EET on the basis of available data or if it considers that the data are insufficient to perform the test, make a decision granting access.

3. RESULTS OF THE ECONOMIC EQUILIBRIUM TEST

Based on the implemented EET, HAKOM shall take the appropriate decision according to Article 11(2). Of Directive 2012/34/EU.

1. In case the economic equilibrium of a public service contract would be jeopardized by a new rail passenger service:

(a) Where appropriate, HAKOM indicates possible changes in the new rail passenger service, such as changes in frequency, route, intermediate stop or timetable to ensure that the conditions are met for granting access rights according to Article 10(2) Of Directive 2012/34/EU and/or

(b) HAKOM may issue recommendations to the competent authorities, as appropriate, in view of the net benefits for users referred to in Article 10(5 (a) of the Implementing Regulation, on other changes unrelated to the new service of passenger transportation thereby ensuring that the conditions for granting access rights are met.

2. In the circumstances described of Article 5(2) (2) of Implementing Regulation, where the economic equilibrium test of an existing public service contract demonstrates that access can be granted, it shall be limited in time until the results of the economic equilibrium test carried out in accordance with Articles 5(2) and 9(7) have been obtained of the Implementing regulations.

3. HAKOM shall notify the entities referred to in Article 11(3). Directive 2012/34/EU on a non-confidential version of its decision and publishes it on its website.

4. PROCEDURE FOR THE ECONOMIC EQUILIBRIUM TEST DURING A PUBLIC SERVICE CONTRACT TENDER

If, at the time of carrying out the EET, a tender for a public service contract covering the same or an alternative route is carried out:

a) HAKOM may suspend the consideration of the proposed request for the implementation of the EET for a limited period of time until a new public service contract has been granted. The suspension will last no more than 12 months after the receipt of the application or until the tender procedure has been concluded, depending on what occurs first; or

B) HAKOM may implement a EET under an existing public service contract and if access can be granted, access will be limited in time until the expiry of the existing public service contract.

HAKOM will decide to suspend the examination or to continue considering the provisional approach after consulting the applicant and the relevant operators.

In the case of multiple access requests, HAKOM may take different decisions on the requests received on the basis of an analysis of their impact on the economic balance of public service contracts, competitive effects, net benefits for customers and infrastructure, etc.

5. DATA CONFIDENTIALITY

HAKOM will use the received data for the purpose of implementing EET and will not publish commercially sensitive data. The Implementing Regulation expressly enables that information included in the application is not considered commercially sensitive.

It is the duty of the entity submitting EET and the applicant to inform HAKOM on data representing a possible business secret at the time of submission of the request. Such information may include technical or financial data relating to enterprise expertise, business plan, cost structure, marketing strategy and prices, sources of financing, etc. HAKOM assumes responsibility for protecting confidentiality of submitted data.

In case HAKOM determines that the reasons for not giving the information are not acceptable, this will be communicated in writing to the entity requesting confidentiality, at least two weeks before the publication of HAKOM's decision.

6. COOPERATION BETWEEN REGULATORY AUTHORITIES

Upon receiving the request for a new service, HAKOM will inform other regulatory bodies competent for the proposed route. HAKOM and other regulatory bodies will exchange and verify the information received in order to respond promptly to any inconsistencies.

HAKOM will also inform other competent regulatory authorities if in case of a request for EET for this service. During the implementation of the EET at the proposed new service, HAKOM and other regulatory authorities will share the EET results so that everyone has sufficient time to comment on the results before it is completed.

During any exchange of information relating to the implementation of the EET, HAKOM and other regulatory authorities shall respect the confidentiality of commercially sensitive data received from the entities involved. The information will only be used for a specific EET implementation process.

ANNEXES

Annex 1

NOTICE OF PLANNED NEW RAIL PASSENGER SERVICE

Please fill in the FORM ON THE PLANNED NEW RAIL PASSENGER SERVICE that could require an economic equilibrium test to be carried out. For further information, see the guidelines on the economic equilibrium test on the HAKOM website.

The data provided in relation to the planned performance of the service should cover at least the first three years and, where possible, the first five years of operation.

The submitted forms will be published on the HAKOM website and all competent authorities will be informed.

The form with incomplete data will not be considered. In this case, HAKOM will inform the applicant to complete the form within ten working days.

HAKOM may request additional information in order to carry out an economic equilibrium test.

What to send:

Completed FORM on THE PLANNED NEW RAIL PASSENGER SERVICE

By e-mail or/and post.

Where to send:

E-mail address: zeljeznica@hakom.hr

Address: Robert Frangesša Mihanovića 9, 10110 Zagreb

A completed copy of this notification form should also be sent to the relevant infrastructure manager.

FORM ON THE PLANNED NEW RAIL PASSENGER SERVICE

Information on the applicant

Full name/name of the applicant
Abbreviated name/name of the applicant
Legal application form
Address of the applicant's seat
Applicant OIB
Persons responsible for representing the applicant
Name of the railway undertaking performing the required transport service for the applicant *

*If applicant is not a railway undertaking

Contact person information- applicant

First and second name	
Phone number	
E-mail	
Working place	
Working hours	

Contact person information-railway undertaking

Ime i prezime	
Phone number	
E-mail	
Working place	
Working hours	

Data on licences/certificates

License for carrying out rail transport services	
Safety certificates	

Rail path information

Planned starting date of service provision
Initial/final official place
Place of entry into the Republic of Croatia — border station
All places to stop the train due to passenger entry/exit on the territory of the Republic of Croatia
All stop points for technical reasons in the Republic of Croatia (specify which)
Departure time
Time of arrival
Frequency – driving calendar (period in which the service takes place) * *
Description of reasons for grounding that a new rail passenger service would jeopardise a public service contract

Means of transportation

Towing vehicle (name and batch)	
Towed vehicles (name and batch)	
Capacity of the place (structured according to the type of wagon and purpose * * *)	

NOTE!

* provide copies of the licences and safety certificates. Copies can be attached to the notification as a separate document, copies of the documents must be attached by the applicant (if not by the carrier) for the operating carrier. If it is in the process of obtaining the aforementioned documents, it is necessary to specify the deadlines and provide evidence of the initiated procedure.

* * indicate the timetable, when and when the service ends, frequency – driving calendar (whether every day, if not, what days)

* * * for each type of wagon it is necessary to specify the capacity (number of seats, number of beds, etc.)

YES	
NO	

IF THE ANSWER IS »YES«

Specify information classified as business secret	
Provide the basis for confidentiality of information	

Date

Signature