

NEW RAIL INDUSTRY ACT - ROCA JUNYENT

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The recent act 38/2015 of 29 September, 2015 concerning the rail industry satisfies various requirements. On one hand, it meets the need to implement Directive 2012/34 EU, recast, of the European Parliament and the European Council, by which a single European railway area is established, which consolidates in one document the directives of the first package of rail measures. On the other, it incorporates numerous tweaks and alterations to act 39/2003 of 17 November.

Thus, in the pursuit of legal stability, the legislator has chosen to unify in a single text the legal regime governing rail transport, albeit with many tenets of the act 39/2003 being retained on identical terms.

The new act brings with it major new developments. Firstly, there is a reinforcement of those

elements relating to the planning of railway infrastructure, in providing that the Spanish Ministry of Public Works and Transport shall publish its broad strategy for the development, maintenance and renovation of railway infrastructure integral to the public railway network, which shall cover a period of five years and establish a general framework of priorities based on economic and corporate efficiency.

Similarly, the administrator responsible for infrastructure shall approve a programme of activities including investment and financing plans, in accordance with the broad strategy set out by the government.

We hope that this strengthening of planning will serve to optimise investment in infrastructure by steering clear of the experiments of the recent past, whereby there was a lack of demand for the infrastructure created, a squandering of public resources and no improvement in public service. This led to the bankruptcy of those companies operating under a concession who opted for this operational model.

As for the process of liberalising the transport of passengers, this will be cautiously maintained by looking to strike a balance between the requirements of the sector and the slower rhythm apparent in other European Union states. Indeed, the fact is that many states keep their national markets in this sector closed to competition. On the same date, order 1977/2015 was passed which regulates the process concerning the authorisation of the enabling act, in accordance with the agreement of the council of ministers of 13 June, 2014.

Another novel aspect is the regulation of rail levies and fees. The regulations gather these together in a new structure removing, for example, the fee for access to the infrastructure that could represent a barrier to the entry of new operators into the market, and contemplating new fees, such as a fee for using the infrastructure for the conversion and distribution of electricity.

The act presides over a system of allowances whose aim is to incentivise railway transportation. For example, the fee for using railway lines envisages one allowance to incentivise railway transportation and another for the implementation of ERTMS (European Rail Track Management System) (a signalling system that greatly improves railway safety). Thus the provisions of the recast directive are accommodated, in which the systems of fees for the use of infrastructure shall incentivise railway companies in order to improve the performance of the network.

Furthermore, the prediction contained in the European legal framework – included in the judgment of the Court of Justice of the European Union on 28 February, 2013 – that the administrator responsible for (rail) infrastructure must set rail fees and that it runs contrary to their exempt status in our national law, is mitigated by the new act. The act contains tenets that attempt to make compatible the exempt status of the fees, which requires enshrining in law, with the involvement of the administrator in achieving this.

As a new feature regarding procurement, it is expected that it will be possible to set a maximum length of 40 years on public-private partnership agreements. Accordingly, this does away with the 20-year limit laid down in article 314 of the consolidated wording of the act concerning public sector contracts, making it an extremely useful measure for giving feasibility to this procurement system, making the latter more attractive given the value of the investment needed.

Finally, we point out the sensitivity of the legislator regarding those parts relating to security, in reinforcing the role of the Rail Safety Agency and the independence, however token, of the Commission for the Investigation of Rail Accidents.

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