

# **Royal Decree-Law 23/2018: A new and definitive milestone towards the total opening of the passenger rail transport market to competition (?)**

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Royal Decree-Law 23/2018 of 21 December was published in the Official Journal of Spain on 27 December, thereby transposing Directive (EU) 2016/2370 of the European Parliament and of the Council of 14 December 2016 amending Directive 2012/34/EU as regards the opening of the market for domestic passenger transport services by rail and the governance of the railway infrastructure. In carrying out this transposition, the aforementioned Royal Decree-Law makes important amendments to the Railway Sector Act 38/2015 of 29 September and the Spanish Competition and Markets Authority Act 3/2013 of 4 June.

The main novelty introduced by this rule is the change in the model for the opening of passenger rail transport to free competition. Whereas a model based on a 'quota' system had been previously established, which provided for the granting of a limited number of licences for the provision of passenger transport services on certain lines and sections in competition with RENFE, the current system provides for the total opening of the market to all operators interested in providing these services, so that from 1 January 2019, in time for access to infrastructure in the working timetable starting on 14 December 2020, all railway undertakings shall have the right of access to railway infrastructure for the operation of passenger transport services by rail, under fair, non-discriminatory and transparent conditions, being able to pick up passengers at any station and drop them off at any other station. The Royal Decree-Law repeals, for this purpose, Order FOM/1977/2015 of 29 September on the tendering procedure for the granting of licences authorising the passenger rail transport provided for in the Decision of the Cabinet, of 13 June 2014, determining the number and

validity of licences authorising the provision of passenger rail transport services on a competitive basis on certain lines and sections of the railway network under the state's stewardship (*Red Ferroviaria de Interés General*).

In order to enable this opening of the market under fair, non-discriminatory and transparent conditions, this piece of primary executive legislation contains a series of measures aimed at: ensuring the independence of the infrastructure manager from the influence of and possible conflicts of interest with railway undertakings, establishing and regulating the category of vertically integrated undertakings, in accordance with the definitions of the Directive; strengthening the position and powers of the Spanish Competition and Markets Authority ('CNMC'), as the body responsible for the supervision and control of the rail market; enabling the coexistence of open services with public service routes; simplifying access to the market by European railway undertakings licensed in their respective countries; refining the definitions of the elements of railway infrastructure; and, finally, improving the regulation of both the procedure for allocating train paths or service slots, completing the obligatory content of the network statement, as well as of the access to basic, supplementary and ancillary services and its financial and tax system.

The most noteworthy developments are as follows:

- A new Schedule IV to the Railway Sector Act is included in which the elements that make up the railway infrastructure are exhaustively defined.
- The infrastructure manager is forbidden from using income from its network management activities to pay dividends to undertakings which are part of a vertically integrated undertaking and which exercise control over both a railway undertaking and that infrastructure manager.
- The possibility of collaboration agreements between the infrastructure manager and railway undertakings with a view to delivering benefits to potential customers is regulated.
- New mandatory content of the network statement is provided, such as the need to incorporate the criteria according to which non-use in allocated slots will be determined.
- Railway licences granted in third countries of the EU, and which are valid, will have full effect in Spain, eliminating the obligation to register such licences in the Special Railway Register.
- The Minister of Public Works may require railway undertakings operating domestic passenger services to participate in a common information and integrated ticketing scheme for the supply of tickets, through-tickets and reservations.

- The prohibition in respect of the granting of slots for services that overlap, in whole or in part, with other services subject to public service obligations is removed. Instead, it is provided that the right of access to the network may only be limited in such cases where it would compromise the economic equilibrium of the contract with public service obligations based on a decision by the CNMC. In addition, it is provided that the CNMC must indicate the possible changes that must be made to the service in order to ensure the granting of the right of access.
- The collaboration between the CNMC and the Spanish Railway Safety Agency is developed.
- The manner in which the companies RENFE *Alquiler de Material Ferroviario* and RENFE *Fabricación y Mantenimiento* shall provide their services to third parties is left to subsequent regulatory implementation.
- New criteria are provided which must be taken into account in order to include additions to railway charges.
- New definitions are included in Schedule I to the Railway Sector Act, some of which are of crucial importance, such as that of *rail infrastructure manager*, *vertically integrated undertaking* or what is to be understood by *high-speed passenger transport services*.