

Measures and laws adopted by EU Member States to address inflation challenges

1. Background

The European Rail Supply Industry has been and is still facing the consequences of the COVID-19 pandemic, namely:

- Delays and prevention caused by the various public health measures;
- In the aftermath of the measures, fast-growing inflation and various supply disruptions.

At a time when the economy seemed to be slowly recovering from the effects of the pandemic, the Russian invasion of Ukraine has generated a new wave of disruptions, for example significant (i.e. double digit) price increases for raw materials, energy and logistics. Furthermore, the full effects of the political sanctions can be expected to be far-reaching for European rail suppliers.

In the railway sector, projects are often large and run for a very long time, while customers are mostly public authorities (railway undertakings, infrastructure managers, local authorities). Solutions for adequate burden sharing of the increasing costs have been called for at national level because the situation could jeopardize ongoing and future rail projects, and ultimately the achievement of the ambitious EU objectives to become climate neutral by 2050. This is particularly the case for projects that are already ongoing.

2. Role of UNIFE and aim of the briefing

Since the breakout of the COVID-19 pandemic, UNIFE has been acting as a platform of exchanges on this increasingly important topic of inflation.

In March 2022, UNIFE sent a letter to the Community of European Railways (CER) in order to raise awareness of European railway undertakings and infrastructure managers on this challenge and its potential long-term impact on the European Rail Supply Industry.

At the request of the UNIFE Strategy Committee, UNIFE has been tasked to prepare a **briefing note on the main measures and laws that have been adopted by EU Member States in order to alleviate the impact of inflation and provide financial relief to the industry**. The objective is for members to have an overview of the situation in other countries in order to organise themselves at national level. As such, this note aims to be evolutive and to be updated depending on new developments at national level.

3. Measures and laws adopted by EU Member States

UNIFE has observed that some EU Member States have taken the initiative to address at least partially the situation by publishing binding or non-binding guidance to national contracting

authorities that addresses the identification and quantification of cost-related claims. Some of these approaches are listed below.

FRANCE

On 30 March 2022, a circular was issued by the Prime Minister to invite the State's representatives in the regions (prefects) to make public buyers aware of the conditions for the execution of public contracts and concessions in the current context of increasing commodity prices.

The circular defines the current circumstances as those which could not have been foreseen by a diligent buyer and may make it necessary to modify current public contracts. Each modification can justify an increase of up to 50% of the initial price (without limit for contracting authorities). These changes may relate to:

- 1) prescriptions, quantities, scope of services;
- 2) the substitution of materials that have become unavailable or too expensive;
- 3) the extension of deadlines.

Contracting authorities are required not to apply late penalties if the party cannot obtain supplies under normal conditions. New contracts must be concluded with a revision clause without fixed term or stop clause. For the first time, an administrative circular specifies that the absence of an appropriate revision clause may make the public contracting authority liable.

However, certain entities such as SNCF and RATP claim not to be legally "public contracting authorities", creating concerns regarding the scope of application of the circular.

ITALY

Three Law Decrees have been adopted to face the exceptional increase of prices, dealing with ongoing contracts in 2021, in 2022 and with the new contracts¹:

- **The Law Decree 25 May 2021 no. 73** (converted into Law by Law 23 July 2021 no. 106) so-called "Decreto Sostegni-bis" provides for a compensation mechanism (increase or decrease) with reference to ongoing contracts for the first semester of 2021 and then extended to the second semester 2021. The compensation is recognised for increases or decreases of costs, exceeding 8% (10% in the case of multi-year contracts), of some specific construction materials. A decree issued by the Ministry of Sustainable Infrastructure and Mobility will establish the relevant variation every six months, year on year.
- **The Law Decree 27 January 2022 no. 4** (converted into Law by Law 28 March 2022, no. 25) so-called "Decreto Sostegni-ter", has established the mandatory insertion of a price adjustment clause in the "new" tender documents for works, services and supplies published after the entry into force of said decree. This obligation is foreseen until 31 December 2023. Regarding the nature of these price revision clauses, it will be the individual contracting authority to fix "the scope and nature of any changes as well as the conditions under which they can be used". Furthermore, the decree also introduces a compensation mechanism applicable only to works contracts. In case of price variation of single construction material higher than 5%, the contractor will be intitled to apply for compensation for a percentage exceeding 5% of said price variation and, in any case, not exceeding 80% of the surplus.

¹ <https://www.italiaoggi.it/news/revisione-prezzi-obbligatoria-2550672>
<https://www.gazzettaufficiale.it/eli/id/2022/01/27/22G00008/sg>

- **The Law Decree dated 17 May 2022 no. 50**, so-called "Decreto Aiuti", refers to ongoing contracts awarded according to tender procedures submitted by 31 December 2021 and for tender procedures launched after 18 May 2022 up to 31 December 2022. It has introduced, for the year 2022, the obligation for the Contracting Authority to update price lists based on the actual increased costs within 31 July 2022. Pending this update, it has been provided that previous price lists, updated on 31 December 2021, can be applied with an increase up to 20%. The amounts deriving from the above-described mechanism shall be paid to Contractors in the percentage of 90% of the ascertained increases.

GERMANY

The German Federal Ministries of Housing, Urban Development and Construction, as well as for Digital and Transport, published **decrees – which are currently being reviewed – at the end of March 2022**.

In the proposed decrees, the Ministries ordered that, with immediate effect, material price escalation clauses must be agreed for sensitive construction materials when awarding construction contracts for the Federal Government in order to make award procedures competitive again. Due to the rapid and highly variable price increases, binding calculations for contractors are scarcely possible at present. In addition, the decree contains explanations on how to deal with existing contracts due to the supply shortages and price increases.

Although the decree is only binding for federal construction sites, it will also have an impact on the entire construction industry and shows possible solutions on how clients and contractors can deal with the following difficult situations:

- 1) Delivery shortages due to the Ukraine conflict as a case of force majeure or other circumstances beyond control of the contractor within the meaning of Section 6 of Construction Tendering and Contract Regulations (VOB/B);
- 2) Price increases due to the Ukraine conflict as a case of disruption of the basis of the contract pursuant to Section 313 of the German Civil Code (BGB);
- 3) Adjustment of contractual practice in contracts to be concluded in the future by agreeing on material price escalation clauses.

The scope of both decrees covers only works contracts, i.e. **it excludes rail supplies and services**. Lobbying actions are therefore ongoing at national level to specifically address supply and services contracts.

SPAIN

The Spanish government published two royal decrees-law:

- **RD-L 3/2022**, notably regulating extraordinary price revisions in public works contracts;
- **RDL 6/2022**, by which urgent measures are adopted within the framework of the National Plan of response to the economic and social consequences of the war in Ukraine.

These two royal decrees-law are applicable to administrative or private contracts awarded by public authorities and to public works contracts that are subject to the provisions of Royal Decree-Law 3/2020, either in execution, bidding, adjudication or formalisation at the time of the entry into force of the royal decree-law, or whose announcement of award or formalisation is published on the public sector contracting platform within one year from the entry into force of the royal decree-law.

The conditions for the “extraordinary revision system” are that the increase in the cost of certain materials (e.g. iron and steel, aluminium) used for the works has had a direct and important impact on the economics of the contract during its term and until its completion. The system will be applicable when the increase in the cost of the above materials, calculated by applying to the amounts certified within a period, exceeds 5% of the certified amount of the contract in the same period and may not exceed 20% of the contract award price. The system is applicable to the increase in the certifications from 01 January 2021 until the review provided for in the clause is applicable.

The scope of both decrees covers only works contracts, i.e. **it excludes rail supplies and services**. Lobbying actions are therefore ongoing at national level to specifically address supply and services contracts. This could be done through the new law on the Railway Sector that the Government is developing, as it seems to be much more complicated through the above mentioned RD-L directly approved by the Government.

Although there are positive developments for European rail suppliers, particularly in Italy with mandatory price revision, this obligation could be circumvented by using stable or irrelevant indexes, or caps/floors. Therefore, implementation will be an important test.