



THE NEW LEGAL FRAMEWORK FOR RAILROAD AUTHORIZATIONS REQUIRES ADJUSTMENTS TO STRENGTHEN THE SOCIO-ENVIRONMENTAL, GOVERNANCE, AND TRANSPARENCY ASPECTS OF PROJECTS

AN ASSESSMENT OF MP NO. 1,065/2021 AND PL NO. 261/2018



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On August 30, 2021, Brazil's Federal Government enacted Provisional Presidential Decree (*Medida Provisória* - MP) no. 1,065/2021 to allow for the possibility of privately operating railroads by means of authorizations.¹ By creating this system, which did not previously exist at the federal level, the MP was meant to facilitate the operation of rail transport infrastructure by the private sector without the need for complex concession bidding procedures, thereby enabling a simpler and more agile type of grant. As an example of this authorization system, a company could be granted the right to operate a railroad by its own initiative, upon request, or through competition with other companies in a public call initiated by the government.

Shortly after the MP was published, several companies released statements that they would be applying for railroad authorizations.² While the new authorization system attempts to streamline and simplify the process, **the MP, however, goes against global trends to promote sustainability** in all sectors of the economy, including – and especially – in the infrastructure sector. As such, **adjustments must be made to rectify procedural, governance, and transparency issues, all of which currently have the potential to jeopardize the analysis of projects' social and environmental aspects.**

Previous analyses from Climate Policy Initiative/Pontifical Catholic University of Rio de Janeiro (CPI/PUC-Rio)³ have highlighted the **lack of procedural clarity** in the viability phase of federal railroad and highway concessions and demonstrated how the lack of clarity can be detrimental to the assessment of social and environmental aspects at the beginning of a project. They have also noted a **lack of transparency** at different stages of concession life cycles with potential impacts on effective compliance with the criteria for obtaining green financing, such as green bonds and green loans. Lastly, they have identified **governance problems** that can affect the way projects' social and environmental aspects are considered. **In this Technical Note, CPI/PUC-Rio researchers draw off previous work and outline how the legal framework for railroad authorizations suffers from similar problems, as described in Table 1.** As such, if the original MP were to prevail, the opportunity to strengthen the viability phase of authorization projects and therefore to improve their socio-environmental analysis may be lost.

¹ Diário Oficial da União. *Medida Provisória nº 1.065*. August 30, 2021. bit.ly/3luxExD.

² Agência Brasil. *Com nova MP, governo recebe pedidos para 10 ferrovias*. September 2, 2021. bit.ly/3EhOfOa.

³ Cozende, Gabriel and Joana Chiavari. *Viabilidade Ambiental de Infraestruturas de Transportes Terrestres na Amazônia*. Rio de Janeiro: Climate Policy Initiative, 2021. bit.ly/35tBfo2.

Table 1. Problems with the Legal Framework for Railroad Authorizations

	NATURE OF THE PROBLEM	PROBLEM
	Lack of a clear definition for the procedures	Grave uncertainties about project studies
	Governance	Questions about the competence to analyze requirements for authorizations
	Transparency	<p>There is no obligation to publish requirements for authorizations</p> <hr/> <p>There is no obligation to publish the annexes to public notices for authorizations</p> <hr/> <p>There is no obligation to publish georeferencing for railroad trajectories</p> <hr/> <p>There is no obligation to publish project financing conditions</p> <hr/> <p>There is no explicit obligation to publish the reasoned approval of authorizations</p>

Source: CPI/PUC-Rio, 2021

It should be noted that the MP about railroad authorizations was published despite the existence of **Senate Bill (Projeto de Lei - PL) no. 261/2018**,⁴ currently under consideration, which focuses on the very same topic. As such, the assessment of the viability phase of railroad authorizations, set forth in this document, should consider the MP and the PL. First, because the authorizations granted while the MP is in force will, in principle, be governed by it.⁵ Second, because the PL, if passed into law, will become a more definitive landmark from a regulatory standpoint. Third, because there are relevant distinctions between the MP and the PL with respect to the aforementioned problems, even though the Federal Government has stated that the language of the MP and the PL are very similar.⁶ Finally, the government and the Senate struck an agreement to enable the MP to remain in effect until the PL is approved with expediency, to enable the first few authorizations to be granted while the MP is still in force.⁷

Table 2 (below) provides more detail about the problems outlined in Table 1 and the legal provisions they are most directly related to, in addition to potential solutions. This analysis considers the original text of the MP and the latest version of the PL submitted on August 30, 2021, to replace the original bill.

4 Senado Federal. *Projeto de Lei do Senado nº 261*. 2018. bit.ly/3nLGmKu.

5 "(...) National Congress has the prerogative of disciplining, by legislative decree, the legal relations arising from the enactment [of the MP]. If the aforementioned legislative decree is not published within 60 days, the legal relations established during the period of effectiveness will continue to be governed by the MP" (Congresso Nacional. *Entenda a Tramitação da Medida Provisória*. bit.ly/3zhNErN).

6 Poder 360. *MP das autorizações ferroviárias está pronta, diz Tarcísio de Freitas*. August 19, 2021. bit.ly/3CcNvre.

7 Valor Econômico. *Governo fecha acordo e MP das ferrovias deve ser enterrada no Senado*. September 1, 2021. glo.bo/2XptfUU.

Table 2. Problems with the Legal Framework for Railroad Authorizations: MP no. 1,065/2021 and PL no. 261/2018




	LEGAL PROVISIONS	PROBLEM EXPLAINED	WHY IS IT A PROBLEM?	SUGGESTED SOLUTIONS FOR THE PL
 <p>LACK OF A CLEAR DEFINITION FOR THE PROCEDURES</p>	<p>MP Art. 7º, § 1º, II, 'b'</p>	<p>GRAVE UNCERTAINTIES ABOUT PROJECT STUDIES</p> <p>In terms of regulating authorization requirements, the MP and PL only mandate that requests be accompanied by studies or technical reports on "relevant environmental aspects".</p>	<p>The following aspects of the study or technical reports specified in the MP and PL lack clarity around:</p> <p>a. The kind of studies required, compared to those typical for the sector, for example: preliminary technical studies, the Technical, Economic and Environmental Viability Studies (<i>Estudo de Viabilidade Técnica, Econômica e Ambiental</i> - EVTEA), etc.</p> <p>b. The criteria by which studies or reports will be evaluated; and</p> <p>c. Its necessary relationship with other studies related to the project - for example, preliminary technical studies, EVTEA and Environmental Impact Studies (<i>Estudos de Impacto Ambiental</i> - EIAs).</p>	<p>a. Mandate that requirements are accompanied by EVTEA;</p> <p>b. Provide detail about key technical criteria that the Public Administration should use in the reasoned evaluation of EVTEA, including the social impact of projects;</p> <p>c. Mandate that EVTEA should serve as a basis for preparing EIA;⁸ and</p> <p>d. Include provisions about projects authorized on the basis of the MP, stating, for example, that complementary socio-environmental studies must be conducted in order to set or review the conditions for the environmental licensing.</p>
	<p>PL Art. 22, § 1º, II, 'd'</p>			
 <p>GOVERNANCE</p>	<p>MP Art. 6º, head provision, and Art. 7º, § 2º</p>	<p>QUESTIONS ABOUT THE COMPETENCE TO ANALYZE REQUIREMENTS FOR AUTHORIZATIONS</p> <p>Under the MP, the Ministry of Infrastructure is tasked with evaluating authorization requirements. Under the PL, this responsibility falls upon the National Land Transportation Agency (<i>Agência Nacional de Transportes Terrestres</i> - ANTT).</p>	<p>As a regulatory agency, ANTT has the necessary autonomy to make decisions based more on technical factors and less on politics when issuing authorizations. The MP's requirement that the Ministry should consult with the agency prior to deciding about the authorization is insufficient, as the agency's opinion does not necessarily have to be heeded.</p>	<p>a. Ensure the ANTT maintains jurisdiction to analyze authorization requirements; and</p> <p>b. Include provisions mandating that requirements granted on the basis of the MP are submitted to the Federal Court of Accounts (<i>Tribunal de Contas da União</i> - TCU) and the Federal Prosecution Office (<i>Ministério Público Federal</i> - MPF), for an assessment of whether the approval is valid based on technical criteria.</p>
	<p>PL Art. 16, § 1º, and Art. 22, § 2º</p>			
 <p>TRANSPARENCY</p>	<p>MP Art. 7º, § 2º, II and IV</p>	<p>THERE IS NO OBLIGATION TO PUBLISH REQUIREMENTS FOR AUTHORIZATIONS</p> <p>According to the MP and PL, only summaries from the requirements and the respective contracts must be published.</p>	<p>a. The publication of summaries is not enough for civil society to oversee the terms under which authorizations are granted;</p> <p>b. All other documents related to the authorization - such as studies, projects, licenses, etc. - must also be published, as they are necessary for civil society to evaluate and inspect the projects' social and environmental impacts.</p>	<p>When regulating requirements, mandate the publication (in full) of requirements, contracts and all other documents pertaining to the authorization in question, such as studies, projects, licenses, etc.</p>
	<p>PL Art. 22, § 2º, II and IV</p>			

Table 2 continues in the next page.

⁸ About the proposed procedure for evaluating EVTEA and coordinating these studies with EIAs, see: Cozendey, Gabriel and Joana Chiavari. *Como a Nova Lei de Licitações Abre Oportunidades para Melhor Prevenir os Impactos Socioambientais de Projetos de Infraestrutura?* Rio de Janeiro: Climate Policy Initiative, 2021. bit.ly/3zfWlgB.

LEGAL PROVISIONS	PROBLEM EXPLAINED	WHY IS IT A PROBLEM?	SUGGESTED SOLUTIONS FOR THE PL
<p>MP Art. 10, sole paragraph</p> <p>PL Art. 24, sole paragraph</p>	<p>THERE IS NO OBLIGATION TO PUBLISH THE ANNEXES TO PUBLIC CALLS FOR AUTHORIZATIONS</p> <p>Both the MP and PL establish the option (“may”), but not the obligation (“must”) for the Brazilian Government to publish studies, projects, and licenses when issuing public calls.</p>	<p>The publication of studies, projects and licenses related to the granting of authorizations is essential for civil society to assess and monitor the social and environmental impacts of projects.</p>	<p>When regulating public calls, mandate the publication (in full) of studies, projects, licenses, contracts and all other documents pertaining to the authorization.</p>
<p>MP Art. 7º, § 1º, II, 'a'</p> <p>PL Art. 22, § 1º, II, 'a'</p>	<p>THERE IS NO OBLIGATION TO PUBLISH GEOREFERENCES FOR RAILROAD TRAJECTORIES</p> <p>Only the PL includes a mandate that requirements for authorizations be accompanied by a georeferenced layout of the proposed railroad. However, it is not mandatory that this technical data be published.</p>	<p>The publication of georeferenced layouts of proposed railroads would allow academic and civil society organizations to assess and monitor, in detail, the socio-environmental impacts of the projects, including the ways these projects interact with specific ecosystems, protected areas and indigenous lands.</p>	<p>a. When regulating requirements and public calls, mandate the publication of georeferenced railroad trajectories;</p> <p>b. Include provisions to mandate the publication of georeferenced routes of railroads authorized on the basis of the MP.</p>
<p>PL Art. 22, § 1º, II, 'e'</p>	<p>THERE IS NO OBLIGATION TO PUBLISH PROJECT FINANCING CONDITIONS</p> <p>Though the issue at hand involves the operation of railroads by the private sector, the financing conditions may need to be more transparent depending on the type of financing involved.</p>	<p>a. For example, funds raised through incentivized debentures - where the government must bear the cost of the tax benefit - would demand the disclosure of information (even if only partially) on how the funds raised with the debentures will be allocated;</p> <p>b. Another example is financing through thematic titles, such as green bonds. To ensure greater transparency, information on the criteria for issuing the title should be given publicity, for each specific project.</p>	<p>a. When regulating requirements and public calls, mandate the publication of data (even if partial) about the share of government funding involved;</p> <p>b. When regulating requirements and public calls, mandate the publication of information on the criteria for issuing thematic titles, particularly when making use of green financing, such as green bonds, for each specific project;</p> <p>c. Include provisions that mandate the publication of these data and information about railroads authorized on the basis of the MP.</p>
<p>PL Art. 22, § 2º, IV</p>	<p>THERE IS NO EXPLICIT OBLIGATION TO PUBLISH THE REASONED APPROVAL OF AUTHORIZATIONS</p> <p>Only the PL mandates that authorizations be explicitly reasoned, but only in the PL’s regulation for authorization requirements – so there is no such provision for public calls –, and publishing this legal data is not mandatory.</p>	<p>The publication of the reasoned approval of authorizations is crucial for civil society to oversee the terms under which authorizations are granted.</p>	<p>When regulating requirements and public calls, explicitly mandate the publishing of reasoned approvals of authorizations, including an explicit provision on the need to justify the decisions.</p>

TRANSPARENCY



Source: CPI/PUC-Rio, 2021

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