

Minutes
11th meeting of the European Network of Rail Regulatory Bodies
6 and 7 December 2016, Brussels

1. Approval of the agenda and of the minutes of previous meeting

The agenda of the 11th meeting was adopted without changes.

The minutes of the 10th meeting were approved, including changes requested by one Member of ENRRB.

2. Nature of the meeting

The meeting was not public; three external experts were invited to participate in the discussion on clearance gauge and the European Union agency for railways was invited to participate in the discussion on cooperation with national safety authorities.

3. List of points discussed

Roundtable discussion on audits under Article 56(12) of the recast

MOVE provided an introduction to the topic, summarising the feedback gathered from regulatory bodies and including some guidance on application of Article 56(12) of the Directive. Given that this provision has been introduced by Directive 2012/34/EU, only few regulatory bodies seem to already have experience in auditing accounts of infrastructure managers and/or operators of services facilities and/or railway undertakings; however, a number of regulatory bodies are planning activities in this area in the near future and asked questions about the scope of powers under Article 56(12).

Some regulatory bodies have in-house expertise and resources to perform such audits, while others make use of the possibility to contract external auditors. In some countries, regulators do, however, not have a budget to contract external experts for audits.

DAREBO training session

MOVE provided an update on DAREBO, the platform for exchange of information between regulatory bodies (access restricted to regulatory bodies and Commission). A DAREBO testing phase took place in autumn; based on the feedback received from users, MOVE is implementing a number of improvements to the system and intends to launch the final version of DAREBO by the end of 2016.

The update was followed by a training on how to use DAREBO.

Update of Commission on implementing and delegated acts, infringements, work of other expert groups and upcoming initiatives

MOVE provided an update on the state of play of discussions on the draft implementing act on access to service facilities (consultations held with various stakeholders on the first draft in Q4/2016; stakeholder workshop on revised draft planned to be held in early 2017) as well as the delegated act on amendments to Annex VII concerning timetabling and state of play of the recast transposition in Member States. MOVE also informed that work on the implementing

act on the economic equilibrium test required under the 4th railway package would start in 2017. MOVE further reported on the activities of SERAC (incl. SERAC RFC), PRIME and RU dialogue.

Presentation by a regulatory body on revision of the track access charging scheme

One regulatory body reported about its assessment of an infrastructure manager's proposal for a revised track access charging scheme, implementing the requirements of Directive 2012/34/EU as regards mark-ups as well as direct cost calculation.

For the calculation of charges, an engineering model was used. One of the main challenges encountered by the regulatory body when verifying the level of mark-ups was the limited availability of data required for assessing the ability of market segments to pay mark-ups. For mark-ups, where the critical loss value would be above 1%, it was decided to apply a phasing-in period for the price increase.

MOVE underlined the importance of coordination between infrastructure managers on mark-ups, as required under Article 37 of the Directive, which currently does not yet seem to take place.

Roundtable discussion: How do regulatory bodies check compliance with charging principles of the recast?

Due to time constraints the discussion was moved to the roundtable discussion on recent developments in Member States on the second day of the meeting.

Workshop with DG COMP

COMP provided an overview of legal framework, activities and competences of COMP and national competition authorities concerning the railway market (antitrust, state aid, restructuring aid, merger control) and it was discussed in which areas there might be potential for closer cooperation with regulatory bodies with a view to ensuring effective enforcement of EU acquis in the railway sector.

Discussion on clearance gauge

MOVE introduced the topic: railway undertakings have repeatedly encountered problems with intrusive gauges on short stretches of a line (e.g. tunnels); infrastructure managers often apply very cautious margins between vehicle and infrastructure and prevent trains from running on these stretches even in cases where measurements might prove that the vehicle actually fits. Also, some infrastructure managers only provide most recent measurement data to railway undertakings with huge delays and do not allow railway undertakings to measure themselves/refuse to recognise measurement data provided by RUs.

Railway undertakings have a right to complain to regulatory bodies if they believe that information on the infrastructure to be published in the network statement as referred to in Annex IV point 1 of the Directive is incomplete or wrong; such complaints may also relate to information on clearance gauge.

A common decision making principle and practice of regulatory bodies specifying the steps, the information to be exchanged and the deadlines for cooperation between applicant and infrastructure manager would enable regulators to rely on a given practice allowing the applicant to respond to his client and the regulatory body to meet the deadlines for decision set out in the Directive.

A number of clarifications on the topic were asked and MOVE as well as the invited experts provided explanations.

Some regulatory bodies explained that they were aware of such problems, which could constitute significant obstacles for market access.

It was concluded that the discussion should be continued at the next ENRRB meeting in view of the possible development of a common decision making principle of regulatory bodies.

Round table discussion on recent developments in Member States (relevant cases, changes to organisational set-up)

Regulatory bodies actively participated in the discussion, reporting about the state of play of transposition of Directive 2012/34/EU in their respective Member States as well as pending cases and recent decisions.

The round table discussion allowed exchanging information about ongoing work and recent decision-making practice, main issues of pending/recent procedures and problems of transposing Union railway law.

Exchange on pending cases and recent decisions concerned questions of procedures for access to service facilities and rail related services, capacity allocation process, verification of track access charges and charges for rail related services, network statements, application of rail regulation to private terminals, access to ticketing offices in stations, requests for information necessary to assess a complaint and fines to enforce such requests. Some regulatory bodies also provided information on recent developments regarding their organisational set-up.

A number of regulatory bodies explained how they check compliance with charging principles of the recast. In some countries (mainly those applying mark-ups) regulatory bodies approve the charging scheme of the infrastructure manager for a multi-annual period, while the exact level of charges is verified annually. The pre-approval of the charging scheme would not impede applicants from launching complaints with the regulatory body. In other MS (mainly those applying charges solely based on direct costs), verification of charges is undertaken on an annual basis. Experience shows that a complete assessment of the charging scheme is time and resource intense and may take several months.

Presentation by a regulatory body on access to service facilities

A regulatory body gave a presentation of its work concerning access to service facilities, including assessment of compliance of the organisational set-up of service facility operators with independence and accounting separation requirements under Article 13(3) of the Directive as well as charges for access to service facilities and supply of services.

One point of concern was that according to national draft laws, services supplied by the incumbent railway undertaking in maintenance facilities should not be regulated. Moreover, the regulator found that some entities in charge of managing certain types of service facilities only had very limited resources and would outsource most of the work to the incumbent railway undertaking; under such circumstances, fair and non-discriminatory treatment of all applicants might not be guaranteed.

The investigation concerning charges for access to service facilities had shown that in some cases it was difficult to verify compliance of the charges with the charging rules (cost of providing the service + reasonable profit) as there was no proper documentation of the relevant costs.

Discussion on scope of provisions on service facilities, with a specific focus on ports

One regulator presented a case highlighting the challenges of where to draw the line between installations covered by rail regulation and installations not subject to rail regulation in ports.

MOVE provided an overview of the relevant provisions of Directive 2012/34/EU and the Ports regulation and an assessment showing that these rules can be applied in a complementary manner to installations in ports which are used for rail related activities.

One regulator reported about a case where a tri-modal terminal operator contested the decision of the regulator requiring it to comply with railway law, in particular the obligation to publish a service facility statement.

It was also pointed out that many intermodal terminals complain that having railway access makes them subject to rail regulation, while without railway access they would not be subject to the obligations put on service facility operators under the recast. MOVE indicated that the difference in treatment might be justified by the different market structure of road, where there is competition between many operators and there are no dominant incumbent operators like in rail.

Discussion on cooperation with safety authorities

According to Article 56(3) of the recast regulatory bodies and national safety authorities (NSAs) are under an obligation to cooperate on topics of mutual interest and may also issue recommendations to each other. MOVE provided an overview of how such cooperation is currently done in different Member States, based on input from regulatory bodies. Formal cooperation arrangements have only been put in place in a limited number of Member States.

One regulatory body presented the cooperation agreement concluded between the regulatory body and the NSA which provides e.g. for regular meetings between regulatory body and NSA on topics of common interest; also, the regulatory body receives information on safety certificates and joint roundtables with stakeholders are being organised.

Other regulators also provided information on their respective cooperation arrangements and some enquired about examples of potential recommendations regulators could address to NSAs or vice versa.

One regulatory body gave an example of a case of opening the market for shunting services in a port. Given that the incumbent was arguing that this would cause safety issues, the regulator asked the NSA for its assessment of the safety related aspects.

The European Union agency for railways provided information on the new rules on vehicle authorisation and safety certification under the fourth package and related processes currently being defined.

Report of IRG-Rail

IRG Rail proposed to submit a presentation of its activities in writing.

A.O.B.

An ENRRB charging workshop is planned for 2 February and a joint ENRRB-PRIME charging workshop for 3 February 2017 in Brussels.

A workshop with stakeholders on access to service facilities is also planned to take place in February 2017.

4. Next meeting

The next ENRRB meeting will take place in March; the exact date will be communicated at the beginning of 2017.

5. List of participants

Rail Regulatory Bodies from 26 Member States and 3 observers were present at this meeting chaired by the Commission.

A representative of the European Union Agency for railways attended for the discussion on cooperation with safety authorities and three external experts attended for the discussion on clearance gauge.