

**2nd MEETING OF THE NETWORK OF EUROPEAN RAIL
REGULATORY BODIES**

2nd and 3rd July 2013, Le Mans

SUMMARY MINUTES

Present:

Rail Regulatory Bodies from the following Member States were represented: AT, BE, BG, CZ, DK, EE, RO, DE, ES, FI, GR, IT, FR, HR, HU, LV, LT, LU, NL, PL, PT, SK, SI, SE, UK, Channel Tunnel,

Together with observers from: Former Yugoslav Republic of Macedonia, Norway and Switzerland

EU Commission (chair)

The Chair welcomed the participants to the 2nd meeting, including the Croatian RB, now sitting as a member and not as an observer, and thanked the FR RB for the invitation to Le Mans.

1. Adoption of agenda

The agenda of the 2nd meeting was adopted.

2. Adoption of the minutes of the 1st ENRRB meeting

A MS asked for some corrections to the explanation of the HKX case, which it would forward to the Commission.

The Chair declared the minutes adopted further to the inclusion of these comments.

3. Address of the meeting by the President of ARAF, followed by a presentation on ARAF's role and powers

See presentation.

4. Implementing measures under Directive 2012/34/EU

a) Update by the Commission on the timeline and on the SERAC session of June.

Chair reported on the last meeting of the SERAC and invited delegates present at SERAC to complete, if necessary.

The Chair reported on the consultation of the SERAC as regards the procedure - based on article 61 of the Recast - against the PSO economic equilibrium measure in the Netherlands. A number of MS considers that Article 61 can only apply for specific administrative measures. However, the position of the Commission is rather that

nothing in the Recast restricts the scope of the measures and the administrations to which it can apply - and a number of MS supported this position.

The Chair informed about the schedule and working groups of implementing acts: the calendar had been circulated to all delegations and working groups were announced for some of the measures. The measure most advanced in terms of preparation is the economic equilibrium of public service obligations (PSO). In accordance with the Recast, an impact assessment will only be conducted for 2 measures (infrastructure charge incentives to equip trains with ETCS and noise-reduction mechanisms).

The Chair further explained the rationale of Article 61, which has been considered important to accelerate the implementation of the Recast, as it also allows Regulators to ask the Commission to check specific measures 12 months after the adoption of the Recast. The Chair indicated that the Commission's draft acts under the Article are sent to the SERAC in order to obtain its (non-binding) opinion.

A MS Regulator inquired about the implementing measure on the criteria for authorised applicants, as it is important for the rail freight corridors. The Chair insisted on the difference between criteria for financial fitness and criteria on the ability to ask train paths.

A MS regulator asked if there will be decisions as regards cross-border agreements and expressed the wish to have a copy of the agreements. The Chair responds affirmatively for the first question and negatively to the second question, since no such communication is foreseen in the legal framework.

A MS regulator enquired whether there would be working groups of SERAC for licences, charges and access to service facilities. The Chair explained that sub-groups of SERAC can be created, but so far no working group for service facilities exists. He also explained that questions from regulators can be integrated in the discussions with Member States in the working groups.

b) RMMS implementing act

See presentation.

A MS regulator emphasized the importance of comparisons between Member States. It considers the work on punctuality, congestion and investment to be important.

c) Discussion on the responses of the regulators as regards the questionnaire on the procedure and the criteria used for the test on the economic equilibrium of public service obligations

The Chair gave an outline of discussions on the PSO economic equilibrium implementing act and explained that there will be a further working group. He also explained that Member States have formulated few remarks and that it is mostly regulators that are involved in the work on the substance.

A MS regulator reported that discussions in that working group were very useful, but underlined that the impact of a new service must be viewed not only in relation to other railway operators, but in relation to the competent transport authority.

The Chair agreed that discussions in that working group have been very useful.

d) Discussion on the responses of the regulators as regards the questionnaire on the procedure and the criteria used for the calculation of direct costs

The Chair explained the state-of-play of the preparatory work on the implementing act on direct costs. He explained that the Recast does not expressly require the Commission to consult regulators, but that it was the wish of the Commission to consult them, which explains why a questionnaire has been sent to all regulators.

A MS regulator explained that it would be wary of attaching a specific (ballpark) figure to direct costs. A MS regulator enquired whether the Commission intends to describe in detail the calculation methodology.

The Chair explained that given the different methodologies and approaches to calculate costs and the fact that the Recast asks for a “straightforward” and “easy-to-control” methodology, the Commission intends to take the approach of defining direct costs by taking out in a negative way all cost positions which are not direct costs. This also corresponds to the case law of the ECJ. The Chair also indicated that the Recast foresees long transitional periods (up to 4 years after the adoption of the implementing act, hence most likely 2018) and that the direct cost principle has existed since 2003.

The Chair also highlighted that if track access charges have to decrease further to the implementing act, then Member States should take advantage of the possibilities in terms of mark-ups (definition of segments, methodology to calculate mark-ups). It seems that only one MS has implemented mark-ups.

3 MS regulators indicated that there is also the possibility to use mark-ups in their respective countries.

Further to a proposal from a MS regulator to hold a meeting on direct costs, 8 Member States Regulators indicated their wish to participate in such a meeting. 2 MS regulators indicated that such a meeting would be very helpful, not least to understand the content of direct costs case law.

The Chair explained that the implementing act will contain costs categories, in order to allow the calculation.

5. Roundtable

Comments/questions on a first MS questionnaire

The Chair asked this MS regulator to present the access decision on Grand Central. This regulator explained that West Coast Trains has asked to run additional services on the West Coast main Line. Based on Network’s Rail modelling indicating that these additional trains would be detrimental to the existing services, West Coast Trains has filed a complaint to this regulator.

The Chair indicated that the definition of the concept of congestion will keep both the Commission and the regulators busy for years to come.

In response to a question from the IGC regulator, this regulator said that framework agreements should not block the enhancement of infrastructure.

A MS regulator asked this regulator its opinion as regards alliancing. This regulator explains that alliancing is nothing else than cooperation between a railway undertaking and its supplier (the IM).

Comments/questions on a second MS questionnaire

A MS regulator asked whether a conventional trains replacing Fyra have to undergo an economic equilibrium test. The regulator indicated that so far there was no request on the new Fyra train. Another MS regulator wondered whether this would not be discriminatory since the incumbent would not undergo any economic equilibrium test, whereas the latter would be inflicted on new entrants.

The regulator explained that the path request has been for the Amsterdam-Roosendaal line – if it were for the Amsterdam-Brussels line, nothing would have prevented the BE regulator to do such an assessment- and it has not been notified by NS. The Chair wondered whether NS and NMBS-SNCB are not basically deciding for themselves, although the concept of “international grouping” had been deleted already in Directive 91/440. For this regulator, the path request remained national, whereas for the Chair this would be a case falling under Article 40 and he insisted that incumbents and new entrants must be treated equally.

Comments/questions on a third MS questionnaire

A MS regulator asked if path rejection for failure of adequate ETCS equipment had been a theoretical exercise or happened in reality in the TX Logistics case. The regulator explained that rejection was applied. A MS regulator indicated that the network statement should actually spell out what happens when capacity is not used.

Comments/questions on a fourth questionnaire

This regulator explained the reform of RENFE and its splitting into 4 companies.

No comments/questions on the SK/RO/PT questionnaires

Comments/questions on a fifth questionnaire

This regulator explained that it has to qualify a company as a railway undertaking or as an infrastructure manager to be able to obtain information on fees and charges.

Further to a question from a MS regulator, this regulator explained that it took an ex officio decision on access to freight terminals as they received market signals that PKP Cargo blocks access to marshalling yards. Hence, it has to qualify PKP Cargo as an infrastructure manager. This regulator explained that it has a two-step approach to determine whether a company is an infrastructure manager, in particular until the Recast enters into force.

No comments/questions on the LU questionnaire

Comments/questions on a sixth questionnaire

A MS regulator asked this regulator how it computes efficiency and if there is a common agreement on what “inefficiency” would be. This regulator explained that it is still working on it.

Two regulators and Chair asked this regulator about “precarious paths”. This regulator explained that this concept is linked to maintenance.

The Chair also asked why Thello needs to apply economic equilibrium tests since it’s a night service. This regulator explained that the Marseille-Milan service is a day service.

Further to a question from a MS, another MS regulator explained that it is not making any economic equilibrium tests on Thello, as the latter does not have any stops in Italy.

Comments/questions on a seventh questionnaire

Further to a question from the Chair on mark-ups, this regulator explains that all IM funds must be covered by track access charges, but indicated that this will be changed once the Recast is transposed in national law.

Comments/questions on a eighth questionnaire

A MS regulator explained that NTV has complained that RFI, the IT IM, has been making station announcements linking some delays explicitly to NTV. This is under investigation, as providing wrong information is forbidden. This regulator considers this to be a very delicate situation and is concerned about finding a neutral way to make announcements. The Chair considers that this could amount to a discrimination.

This regulator indicated that the problem of Italy is that trains are prone to defects that lead to delays.

Comments/questions on a nineth questionnaire

This regulator explained that it is applying different rules for different applicants to avoid “fake licensing”.

Comments/questions on a tenth questionnaire

A MS regulator asked this regulator why this MS decreased TACs for freight. This regulator explained that all TACs are being reviewed.

A MS regulator asks about these MS framework agreements. This regulator explained that these are only about capacity. The problem is that sometimes railway undertakings need to secure a line. DB provided all necessary information to show that it’s not obstructing competition. This regulator explained that windows are tight - with 15 minutes intervals – and it is therefore required to monitor the situation very precisely and give itself the possibility to re-open any case.

No comments/questions on the EE/DK/CZ questionnaire

Comments/questions on an eleventh questionnaire

This MS thanked the Chair and the regulators for welcoming him and for all that the Regulator learned in the Regulatory group.

A MS regulator asked this regulator why the railway undertaking refused to pay track access charges to the infrastructure manager. This regulator explained that this was

related to the virtual bankruptcy of the HR incumbent. Since accession this situation is under control.

No comments/questions on the BG questionnaire

Comments/questions on a twelfth questionnaire

The Chair enquired about the complaint filed by a railway undertaking as regards access to marshalling yards. This regulators confirmed the case but indicated that the complainant had not filed its complaint properly.

Comments/questions on a thirteenth questionnaire

2 MS regulators enquired about the effects of the introduction of competition on the Vienna-Salzburg line. This regulator indicated that it does not have all the information, but explained that price competition created additional traffic.

6. Developments on the 4th railway package

The Chair presented the latest developments on the 4th railway package and explained that the Commission and the European Parliament want to keep the proposals as a package. The Chair explained that it is expected that the first reading still take place within this legislature. It also appeared that the Lithuanian Presidency was not against a first exchange of views on the market access pillar before the end of the year.

7. Internal rules of procedure

A MS regulator indicates that it can accept the formulation “*present members*” if “*documents are sent 15 days in advance*” is added at the end of Article 3 (2).

DG MOVE also explained the concept of “summary record” which is a short summary of topics covered, which does not cite individual regulators nor the details of the topics covered.

The Rules of Procedure of the Network of European Railway Regulators were then adopted by consensus.

8. Rail freight corridors

See presentation.

A MS regulator enquired about enforcement of complaints in other Member States when a problem affects several Member States along a rail freight corridor.

A MS regulator explained that this is still being negotiated. The Commission explained that the Rail Freight Corridors Regulation foresaw that the competent RB is the one which is on the territory of the one-stop-shop (OSS) which is taking the decisions. Otherwise there would also be an enforcement problem, since RBs only have the power to act against organisations on their own territory. A MS regulator explained that this MS is looking at this issue to find a good compromise.

A MS regulator pointed out that different cooperation agreements would jeopardize the success of the rail freight corridors.

A MS regulator explained that this MS courts are overloaded and that it is itself facing a problem of resources – hence, it asked 3 other regulators for help. The Chair proposes that those RBs could support the RB in the preparation of the decision, which would then only have to take the ultimate decision.

A MS regulator explained that RFC1 and RFC2 are working together to find a solution.

Chair and a MS agreed that the main characteristics of the RFC still need to be developed.

9. ARAF presentation on direct costs

See presentation.

Upon a question, a MS responds to a MS regulator that bridge maintenance has not been included in the charging system.

The Chair refers to the CATRIN study and indicates that FR figures for direct costs seem to be excessive. Freight direct costs are at 4 EUR/train-km and high-speed at 3,6 EUR/train-km, while according to the CATRIN study it's not so much the wear-and-tear caused by weight of the train than the speed itself that wears away rail (therefore it is not clear why freight should cause higher direct costs than high-speed). He added that signalling costs can normally not be taken into account for direct costs, since they belong to the normal infrastructure which the IM must make available independent of usage.

The Chair also referred to the 3 components of the FR infrastructure charging system and indicated that congestion charging cannot be imposed on all railway undertakings, but can only be imposed on lines where congestion has been declared. The principles of the Recast must be applied.

A MS explained that it fully agrees with that but indicated that only normal activities have been included and asked the Commission what it would see as a minimal cost. Another MS is sceptical with the results displayed as some pieces of the infrastructure - like switches – are not affected by the nature of the train running (high-speed or conventional).

The Chair indicated that not all renewals can be included and announced that direct costs will be discussed at a dedicated meeting.

10. Presentation on access to service facilities in Germany

See presentation.

The Regulator ICG indicated that there is already case law covering the issues raised by a MS regulator. DG MOVE announced that practices such as the ones explained will be dealt with in the implementing act.

This regulator asked about the timeline for the implementation of the Recast implementing measure on service facilities.

The Chair explained that these measures shall be adopted more towards the end of 2014 – and hence are not in the current calendar of implementing acts, which is already quite full.

Another regulator thanked this regulator for the presentation and indicated that the problem is due to the lack of separation between the railway undertaking and the infrastructure manager in this MS. This regulator says that more legal certainty is still needed.

11. Presentation on competition in the high-speed network in Italy

See presentation.

A MS regulator indicated in this context the problem of "use it or lose it", and the question of how to determine when a facility is no longer used. A MS regulator indicated that the UK IM needs approval for the disposal of a facility.

12. Presentation on mark-ups for high-speed trains in Austria

See presentation.

DG MOVE expressed concern that using speed and spare capacity to charge mark-ups could be ultimately detrimental to competition.

13. The Chair closed the meeting thanking the French RB for their generous hospitality.

14. A MS Regulatory Body explained that it was currently doing an impact assessment in the Commission's 4th RP proposals and that its results could be known in 2nd half of the year.