

**4th MEETING OF THE NETWORK OF EUROPEAN RAIL
REGULATORY BODIES**

27th and 28th March 2014, Brussels

MINUTES

Present:

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

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

Commission: chair

The Chair welcomed the participants to the 4th meeting.

1. Approval of agenda

The agenda of the 4th meeting was adopted.

2. Approval of the minutes of the 3rd ENRRB meeting

Five MS asked for some corrections to the minutes of the 3rd meeting. The Chair declared the minutes adopted further to the inclusion of these comments.

3. Roundtable on regulatory bodies' decision-making practices

MS1 (Member State 1): The regulator explained that the exclusion of any liability of IMs for delays and disruptions of service was not in line with national law. Respective clauses of terms and conditions of infrastructure usage contracts were therefore declared null and void by the RB.

DG MOVE remarked that the capacity mark-up charged in this MS does not fulfil the requirements of the recast. Instead of lowering the mark-up, it should therefore rather have been deleted.

MS2: The regulator explained that the ex-officio investigation on transfer of capacity is an investigation in the margin of the train accident in Wetteren. The train that derailed was a train of a train service on which DB Schenker rail NL and NMBS Logistic cooperated. The RB examines if there was a possible transfer of capacity.

MS3: The regulator explained that despite having corrected non-market oriented clauses of the network statement, a lack of market orientation reflecting the 'historical' situation of the railways remains. The RB expressed its concerns in its annual report, which was adopted by the Parliament.

MS4: The Chair welcomed the regulator's decision on the use of service facilities, which is supplementing the legislation in line with the position taken by the

Commission, whereas the IM/operator of a service facility has to allow RUs to perform shunting activities themselves if/when it does not offer them.

Upon DG MOVE's question on the capacity charge, the regulator explained that in October a new charging scheme shall be introduced and a withdrawal of the capacity charge seems to be envisaged.

The regulator offered to give a presentation on its decision on use of service facilities at the next ENRRB meeting.

MS5: The regulator confirmed that a better timetable and the use of new trains have improved the attractiveness of railways and resulted in a growth in passenger transport volume of 121% compared to the previous year.

MS6: The regulator clarified that upon implementation of the Recast it will remain part of the national safety authority but probably gain more independence in its decision making.

MS7: The regulator provided details on the renegotiation clauses to be included in framework agreements defining the conditions under which RUs would have to surrender capacity already reserved under framework agreements (cf. case in questionnaire), if capacity bottlenecks occur in terminals.

Following a question of one regulator on the cases relating to marshalling yards, the regulator explained that the costs incurred by RFF for operating these yards are much higher than the revenues; currently the prices for the use of the marshalling yards, which doubled in the last year, are not cost-related.

DG MOVE explained that if a service is underutilised, the total cost plus profit should not (only) be spread over the actual RUs who use it, but over all potential users according to the capacity available. DG MOVE suggested that the regulator could give a presentation on this issue at one of the next ENRRB meetings.

MS8: The question of whether different charges can apply to different parts of the network was discussed. DG MOVE clarified that under EU law, the infrastructure manager must apply the same charging rules over its entire network. For different/separate networks managed by different infrastructure managers, however, different charges may apply. The charging principles set out under EU law have to be respected by all IMs.

The regulator provided details on the cases relating to the (terms of) use of service facilities and optimal capacity allocation (cf. questionnaire).

The regulator proposed to provide details on the definition of market segments under the new charging scheme as soon as they are available.

MS9: The question of deadline for the publication of the network statement was discussed. DG MOVE offered to clarify this issue bilaterally.

The regulator added that it would try to force IM and RU to finally conclude an access agreement for 2014.

MS10: DG MOVE remarked that charges for traction energy should be calculated according to the respective provisions of EU law. The regulator explained that under national law the charges are to be calculated based on the price-level of traction energy in place 2 years before; under approval of the RB, a deviation is, however, possible.

Following a regulator's question, the regulator indicated that the market segments defined in the ministerial decree follow the recast.

MS11: The Chair welcomed the representatives of the new regulator to the ENRRB.

The regulator provided information on the cases launched since taking up its duties (cf. questionnaire); moreover it suggested giving a presentation of its new organisational structure at the next ENRRB meeting.

MS12: A regulator asked for details on the case where the procedure is suspended; the regulator explained that the case relates to issues of capacity allocation and the division of tasks between the two bodies sharing responsibility for the management of one infrastructure.

MS13: The regulator announced that the latest edition of its national market monitoring report, that is done every two years, will soon be published.

In response to DG MOVE's question, the regulator explained that the increase of charges was related to the introduction of a new calculation method and the fact that freight trains had previously received subsidies. The new calculation method appears to be compliant with the legal framework; the regulator will observe how the development will affect the freight traffic.

DG MOVE asked to be informed about the envisaged cooperation agreement between NS and ProRail once detailed information on this issue is available.

MS14: The regulator explained that the decisions on granting open access to specific lines related to issuing licenses for new open access operators.

The regulator confirmed that under the new calculation system of the IM the charges decreased by 20% on average.

MS15: The regulator indicated that currently it does not appear that there would be any problems related to the rights and competences of the new RB.

MS16: The regulator provided clarification on the figures showing a decrease in transport.

MS17: DG MOVE highlighted that the charges for freight traffic have been significantly reduced, which should encourage freight transport. The regulator added that a first impact can already be observed during the first months of 2014, where rail freight transport increased by 10% compared to the same period of 2013.

The SKregulator also announced that it is now part of the transport authority, which is responsible for all modes of transport except road; its powers and competences have remained unchanged.

MS18: The regulator announced that the Ministry is planning to open the domestic passenger market, but has not yet revealed concrete plans on the timing and the envisaged model to be followed.

MS19: The regulator offered to explain further the content of the two on-going complaints mentioned on page one of the questionnaire in writing.

MS20: Following a question, the regulator confirmed that in some cases the government may prescribe to bidders which rolling stock they have to use.

The regulator announced it would provide an updated table on access charges.

Channel Tunnel: DG MOVE asked whether a potential appeal against a decision of IGC would have suspensive effect. The IGC explained that currently a case on the question of suspensive effects of an appeal is pending with a Paris Court, but will not be decided before Oct./Nov. 2014.

Following a question of a regulator on the market development, IGC explained that only about 50 % of the available capacity is currently being used; there is only one passenger operator; in freight, the situation is similar. DB has encountered problems with signalling equipment, etc., and therefore plans to operate services through the Tunnel have been put back.

Norway: The NO regulator informed that in the case of scarcity referred to in the questionnaire the line was declared congested in 2007.

No Comments/questions on the BG, CZ, LT, LUX, SI and MAC questionnaires.

4. Implementing measures under Directive 2012/34/EU

DG MOVE gave an update on the state of play of implementing acts under the recast.

A concept paper on the implementing acts on RMMS, ERTMS and noise charges will be presented at the next SERAC meeting in June; in autumn draft legal texts shall be presented, to be voted in February 2015.

A further working group on the implementing act on economic equilibrium and principle purpose, in which also some RBs participated, was held; the vote will take place in June.

A SERAC subgroup on the implementing act concerning applicants for infrastructure capacity took place in March, in view of a vote in June.

DG MOVE provided information on envisaged rules on fees (to be appropriate in relation to the efforts of licensing authorities) and possibilities of the licensing authority to consult RBs under the implementing act on licensing of RUs.

The implementing act on infrastructure capacity/framework agreements will take into account the concept of a start of operation not immediately after the entry into force of a new timetable. Diverging views still exist on the ceilings of capacity that can be allocated under framework contracts.

A SERAC subgroup on the implementing act on direct costs was held in February, with MS, RBs and sector organisations being present. The legal framework and court rulings and questions related to the calculation based on a negative list, the costs of traffic management, the review period and the date of entry into force were discussed.

Following a question of a regulator on how to take account of State subsidies when calculating the direct costs and distinguishing between marginal costs and fixed costs and whether - like mark-ups - marginal costs should be defined per market segment, DG MOVE clarified that only the depreciation of assets that were financed in previous periods by State grants cannot be taken into account when calculating the track access charges. DG MOVE further explained that according to the Recast, the level of charges can vary between different market segments, but has to be the same within one market segment. Different train categories that are active in the same market segments may cause different direct costs to the infrastructure, but, in case mark-ups are levied on this market segment, the overall charge, including the mark-ups, must be the same for all railway operators. This means that the mark-ups (the difference between the direct cost and the overall charge) are different for train operators using trains which cause different levels of direct costs.

The Chair announced that three implementing acts had already gone through interservice consultation and would be uploaded on CIRCABC for SERAC Members by the end of next week.

5. Presentation by Dutch regulatory body on the role of RBs as set out in the corridor handbook and comments from the Commission

See presentation.

DG MOVE pointed out that the RBs have a very important role for the good functioning of the corridors and highlighted the following aspects:

- There is a need for harmonisation of the rules and procedures of corridors; the Commission welcomes that the cooperation agreements of RBs seem to follow the same model for several corridors.
- The decisions of the Executive Board of a Corridor have legally binding character and do not have to be transposed into national law.
- The allocation rules for corridors will be discussed at the next SERAC ad hoc group on Rail Freight Corridors on 30 April.
- RBs were invited to monitor the C-OSS functioning, including relevant rules of agreements/contracts between C-OSS and IMs and decisions on the functioning of C-OSS. Particular attention should be paid to rules on shared responsibility of IMs for C-OSS actions and application of priority rules.
- Some points of the corridor implementation plans were included in the CID without having been approved by the executive board; this makes it difficult to verify their compliance with the relevant legislation.
- From 15.6.2015 it will be possible for the authorised applicants to ask for paths on the entire EU network.

The regulator welcomed the corridor handbook as helpful tool for RBs and questioned whether a fine should be the primary aim if the C-OSS has taken an incorrect decision. DG MOVE explained that a fine could be a possibility in such situations, but that other measures can also be taken. DG MOVE invited the RBs to investigate about the rules governing the functioning of the C-OSS and their conformity with relevant legal provisions.

Following a regulator's question on the status of the handbook, DG MOVE indicated that it was a service document, providing guidelines and best practice, but that it had no legal status.

Discussion took place on the question of flexibility in the definition and allocation of PaPs. DG MOVE highlighted that the recast contains a clear definition of train path, which refers to a specific time and does not allow for flexibility. Two regulators explained that RUs and IMs argued that to make optimal use of infrastructure more flexibility (+/- 15 min) in the definition of PAPs would be needed.

6. Presentation of Director MOVE/B on economic regulation

The Director highlighted the important role of the RBs and the ENRRB for the functioning of the Single European Rail Area and thanked the RBs for their valuable work in making the legal framework live. The Director underlined the importance of a close and transparent cooperation and exchange of information between regulatory bodies and the Commission in implementing the legislation, and reflecting on which further improvements and measures may be needed. The Commission is content to see that all Member States have now established independent RBs and is committed to support the RBs in their national work and further strengthen the role of regulators. The 4th railway package contains proposals aiming at assigning the regulators a more prominent role.

The Director then gave an overview of state of play of the 4th railway package, pointing out the great progress achieved on the technical pillar and highlighting some important aspects of the governance pillar to be pursued such as the need for competition in regional markets, fully independent infrastructure managers and separation and transparency of financial flows. The Director underlined the need for clear and enforceable legislation, and appropriate powers and competences of regulatory bodies and invited the RBs to help render the debate on the 4th package more objective, which should provide stability and contain all the tools needed to achieve a single European rail market.

The Director also emphasized the importance of the ongoing work on implementing acts to be adopted under the recast, and called upon the RBs to help convince the national authorities to support the Commission's proposals.

The Director expressed his aim to, in addition to the ENRRB meetings, hold an open discussion in an informal setting at least once a year, where different aspects of economic regulation should be discussed to identify where further development is needed/possible to encourage the sector to grow. RBs were invited to reflect on whether they would be interested in hosting such a half-day meeting, maybe in the context of the next ENRRB meeting in June/July or in the late autumn.

A regulator thanked the Director for sharing his views of the rail market and the role of the regulators and expressed its concerns on the enforceability of exceptions from public tendering obligations that are being discussed (e.g. performance criteria).

7. Update on the 4th railway package

DG MOVE presented the latest developments on the 4th railway package, in particular the details of the vote in the European Parliament (see presentation).

Following a regulator's question on the timescale, the Chair indicated that it hopes that the Council would open discussions on the market pillar soon. Currently only 4 Member states are in favour of opening the negotiations, whereas 14 Member States want to continue discussions on the technical pillar. Should negotiations on the market pillar not be opened under the current Presidency, the IT presidency has announced its intention to open them. The Chair invited the RBs to motivate their Governments to start discussions on the market pillar in the Council and called upon the RBs for their support to achieve a good outcome of the discussions.

Following a question of a regulator, DG MOVE indicated that separating the package is currently not an option for the Commission.

Discussion on the reciprocity clause took place, where a regulator expressed its concerns that the incumbent bidding on tenders in national markets may have an advantage due to its income already granted under the direct award. DG MOVE replied that the situation of intra-country competition is not dealt with in the Fourth Package, and that the only way to control this is under the transparency provisions of Regulation 2007/1370, which does not allow an excessive profit to the operator of a public service (which may then be used for undercutting prices of competitors in competitive markets). Another regulator raised the question whether the reciprocity clause would allow subsidiaries of nationally protected RUs to compete in other country's tenders. DG MOVE replied that, on the basis of the formulation of the EP, this would not be possible any more.

Following a question of a regulator on the understanding of role of RBs to control public transport plans, DG MOVE stated that the idea could be to have an efficiency control similar to what is done in the UK on the IM's efficiency. The RBs may have to check whether the performance requirements and objectives set out in the public transport plan were achieved by PSC operator.

DG MOVE offered to discuss any further questions bilaterally with the RBs.

8. Presentation by the Commission on the state of play of the implementing measure on ERTMS-related track access charged and the contribution of RBs

DG MOVE presented the legal basis for the implementing measure and requirements set out under the recast (e.g. impact assessment) and gave an outline of the possible policy options (see non-paper circulated to ENRRB Members).

DG MOVE asked the Members of the ENRRB to share their experience on penalties/discounts in track access charging, based on a number of concrete questions (cf. slide and non-paper) and for comments on the non-paper communicated to the ENRRB Members.

A regulator announced that problems with ERTMS were encountered in particular on the Brenner line, where ERTMS is available until the border, then at the border there is a signal of the traditional system followed by signals of a foreign system. Locomotives operating on the line hence need to be equipped with 3 different signalling systems. This MS has provided incentives for the retrofitting of locomotives, which is open equally to incumbents and new entrants.

Another regulator referred to experience with noise related charges, where in DE a malus has proven to have very negative intermodal effect. DG MOVE explained that it was also seeking consistency with the noise initiative, although it was important to underline that the latter was based on a scheme limited in time, whereas the ERTMS initiative had no time limit.

DG MOVE invited the ENRRB Members to share further experience during the stakeholder consultation process; the consultant will also contact some RBs upon request of the Commission. Moreover, the Chair invited the Members of ENRRB to take part in the stakeholder meeting which will take place on 21 May.

9. Discussion on the legal effects of implementing measures

See paper of a regulator circulated as basis for discussion.

DG MOVE gave only preliminary comments on the issue, without prior consultation of the Legal Service. DG MOVE clarified that in cases of golden plating, i.e. over accomplishment of minimum requirements defined in the recast in line with its objectives, there may be no scope for application of an implementing act further defining these minimum requirements to be met. Where the recast grants the Member States a possibility to choose between two (or more) different implementing options and the implementing act only refers to one of these options, in a Member State that has chosen the implementing option not covered by the implementing act there may also not be scope for its application.

Rules and criteria defined in an implementing act are in principle exhaustive, unless their formulation indicates the opposite. DG MOVE invited the RBs to share existing national provisions that might complete proposed rules of implementing acts, to allow the Commission to take such provisions into account when drafting the implementing acts.

In general, implementing acts contain a provision stating that they are directly applicable; this means that they are not to be transposed into national law. Implementing acts and national law transposing the recast therefore both have to be taken into account by practitioners.

As regards the empowerment of the Commission to adopt implementing measures on common principles and practices for decision making of RBs (Art. 57(8) of the recast), DG MOVE explained that the Commission is in principle free to determine, based on the needs identified in particular in the context of the ENRRB, which issues the implementing act should address. In any case, implementing acts cannot rewrite the recast and go beyond the empowerments contained therein. An issue to be addressed in an implementing act might be the verification of mark-ups.

10. Presentation of the German regulator on performance schemes for train stations

See presentation.

A regulator commented that the UK addresses this issue differently, trying to place responsibility with the party which is best able to manage the disruption; half of the delays are caused by the network or a third party operator, where the station operator has no influence. The regulator explained that performance schemes for the network and a responsibility of RUs for cancellation/delays of trains, under which RUs may have to pay penalties to station operators, also exist.

Following a question of a regulator, the regulator explained that the aim of the performance scheme is to encourage the repair of defects on existing installations; it does not allow forcing station operators to generally improve installations. DG MOVE added that the recast only contains a legal basis for performance schemes for networks, but not for stations. Similar effects could, however, be achieved through the passenger rights and the PSO regulation.

The question of whether passengers should also be involved in the system, as disruptions in stations mainly affected passengers, was discussed. The regulator indicated that under the DE system passengers had no possibility to report directly to the station operator, but could report to the RU, which could then inform the station operator.

A regulator asked whether other MS had already implemented similar measures. Another regulator offered to provide details of its experience bilaterally.

Following the regulator's question on whether pricing in of penalties would be acceptable for the Commission, DG MOVE explained that the recast did not contain any relevant rules. However, it should be taken into account that if others pay the penalty, then there won't be an incentive for a change of behaviour.

11. Presentation of the Austrian regulator on the state of play of the “Westbahn” complaints

See presentation.

A regulator shared its experience with provision of and charging for traction current. According to a German Court decision, the 110kv network is subject to energy market regulation and prices are defined according to the respective rules applying to the energy market. Converters are part of the network and as such to be covered by all RUs. So no specific costs occur for RUs using traction current of other providers than DBEnergie.

The regulator indicated that ÖBB is producing its own current. The regulator asked another regulator for details on how the issue is dealt with in his MS. The MS offers to provide details on the new AT model/solution at the ENRRB meeting in November.

DG MOVE highlighted that under the recast for traction current two new rules are introduced: traction current and electrical supply equipment have to be charged

separately, if they are covered by one bill; electrical supply equipment has to be billed at direct costs; it seems uncertain, whether the current German approach can continue to be applied following the implementation of the recast.

Discussion on the decision on station charges took place. A regulator indicated that in France different charges for regional and long distance passenger trains are applied as long distance passenger trains normally use passenger stations more/longer. Another regulator explained that during its investigations on station charges the station operator could not provide sufficient arguments to explain that/to what extent the costs vary with the length of a train.

12. Presentation of UK regulator on the model contract to connect facilities to the Network Rail network

See presentation.

A regulator asked whether a connection agreement between network rail and Eurotunnel had been concluded. IGC affirmed, adding that this agreement has probably been signed prior to the ORR model. The regulator added that some old agreements have not yet been revised and aligned with the ORR model, but have remained in place unchanged.

13. Presentation of German and Dutch regulator on ticket distribution issues

See presentation of the Dutch regulator.

DG MOVE indicated that some of the problems outlined in the presentation are addressed in the recast. A regulator explained that UK has established an independent organisation for revenue allocation (ATOC). The Chair added that ATOC runs very fast and efficiently and avoids discrimination between RUs.

Upon the regulators request to be provided information on the prices for ticket vending machines in other countries, a regulator offered to provide such information.

The regulator gave an outline of the ongoing investigation of „Bundeskartellamt“ concerning the distribution of tickets, which is focussing on the aspects of abusive linking of ticket distribution and tariff issues, potential discrimination regarding the amounts of commissions and obstruction of RUs in the area of ticket distribution.

Following a regulator’s question, the regulator explained that it considers the installation of ticket vending machines in stations as being part of the right of access to service facilities. Discussions are ongoing about the charges for such installations, in particular as regards the issue of energy supply.

DG MOVE added that the recast clarifies that service operators have to provide RUs a suitable location for ticketing services. Moreover, every entity that has a ticket selling box in a station is to be considered a service operator and Article 13 of the recast applies to him. Following the implementation of the recast, the RBs will have to decide on what can be considered a suitable location, the number of machines, etc.

14. Presentation of IRG Rail

See presentation.

IRG announced that a position paper on direct costs and a first paper on access to service facilities are to be adopted in May; a further paper on market segmentation shall be adopted in November. An additional paper on viable alternatives and criteria for assessment is also being prepared. The Chair thanked IRG for its important work and invited them to provide more information on the content of the position papers in the next ENRRB meetings. The Chair also offered that DG MOVE experts would take part in IRG meetings if invited to do so.

15. AOB

The Chair thanked the participants for the fruitful discussions and announced that a date for the next meeting around the end of June/beginning of July would be communicated. Regulators that might be interested in hosting this meeting or the late autumn meeting were invited to inform DG MOVE within the next three weeks.