

**3rd MEETING OF THE NETWORK OF EUROPEAN RAIL
REGULATORY BODIES**

25th November 2013, 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, LU, NL, PL, PT, RO, SE, SI, SK, 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 3rd meeting.

1. Approval of agenda and the minutes of the 2nd ENRRB meeting

The agenda of the 3rd meeting was adopted.

A MS asked for some corrections to the minutes of the 2nd meeting. The Chair declared the minutes adopted further to the inclusion of the comments of this MS.

2. Roundtable on regulatory bodies' decision-making practices

Comments/questions on a 1st MS questionnaire

The MS regulator announced that an agreement could be reached on the complaint concerning the train wash (cf. questionnaire) and that the IM did not appeal against the RB's decision rejecting the levying of a mark-up for high-speed trains running at 160km/h and above.

Following a question by the Chair, the MS regulator explained that the bonus-malus system for motive power is linked to the direct cost principle in so far as it takes into account the impact different types of locomotives have on the rails, based on which a bonus/malus is applied. The investigation of the bonus/malus system has shown that it is applied to all RUs in a non-discriminatory manner. There was hence no reason for the regulator to prohibit this system.

Following a MS regulator's question, the MS regulator explained that it could not accept the planned introduction of a mark-up for high-speed trains running at 160km/h and above, as according to the respective TSI a significant change in maintenance cost can only be demonstrated for trains running at 200 km/h and above.

Following a MS regulator's question, the MS regulator announced that the framework on capacity allocation of corridor 7 was published at the beginning of November; the capacity allocation framework for corridors 3 and 5 has not yet been published as these corridors will only become operational in 2 years.

Comments/questions on a 2nd MS questionnaire

The MS regulator informed that a decision on the pending case concerning access to marshalling yards is to be adopted in December.

Following a request for clarification by a MS regulator, the MS regulator explained that a royal decree intends to confer upon the regulator some new tasks; their precise scope will have to be determined in a separate law and shall include competence to control the 'transportation agreement' between the incumbent NMBS and Infrabel, access to stations, ticketing systems etc.

A MS regulator asked for details on the implementation of the 4th railway package and the case of Arriva. The MS regulator explained that Arriva (= The Hague-BXL train, which additionally requested capacity for the section between Schuman and Zaventem airport that is not yet in operation) had withdrawn its path request, as it could not get capacity due to fact that it didn't meet the requirements concerning the safety certificate and the MS operating licence. Arriva has meanwhile applied for a safety certificate.

Comments/questions on a 3rd MS questionnaire

The MS regulator reported that following its recommendation, the IM reduced the infrastructure charges for 2014 to 0,79€ per km for a passenger train and to 1,69€ per km for a freight train. The network statement was modified accordingly.

The Chair asked for details concerning the price for traction power distribution and whether the price for power corresponds to the costs the IM has to pay. The MS regulator replied that the price would remain at 75€ per kWh. The MS regulator will verify whether this price corresponds to the costs incurred by the IM and inform the Commission in writing.

Comments/questions on a 4th MS questionnaire

The Chair asked for further information concerning the case reported where the IM refused to conclude a track access agreement with a RU. The MS regulator explained that the regulator had to help IM and RU to agree, but in the present case an agreement could not be reached. Under this MS legislation, the regulator had, however, no means to force the IM to conclude the track access agreement, which is a preliminary condition for access to the infrastructure.

Comments/questions on a 5th MS questionnaire

The MS regulator reported on the cases concerning access and operation problems caused in 2013 by an insufficient manning of railway control centres (cf. questionnaire) which it is investigating under the aspect of access rights.

Following 2 MS regulator's requests for further information on this case, the MS regulator explained that it issued administrative actions, ordering that the obstacles that led to the problems in Mainz and Bebra had to be removed and that DBNetz had to report on the measures taken. Although administrative actions were only taken as regards Mainz and Bebra, an overall overview of the situation is ongoing, under which DBNetz reports every week the status of its control centres to the regulator.

The MS regulator further informed about discussions with DBNetz on amount and structure of charges, which shall be adapted to requirements set out under Union law. Results are expected by mid-2014.

The other investigations reported in the questionnaire (cf. 73 ex officio investigations) mainly concerned lesser complaints on access problems aimed at different IMs.

Two MS regulators asked for details on the performance scheme for passenger stations. The MS regulator explained that this scheme follows the approach of contractual fines which can be imposed on IM or RU, depending on who is responsible for the disturbance. The implementation of the performance scheme is based on a consultation process involving the market; the managers of train stations shall then agree to commit to this performance scheme. The regulator will control the effectiveness of the performance scheme. If it does not help to improve the performance, a new consultation process shall be launched after a few years or regulatory action shall be taken.

Upon a question of a MS regulator on the removal of the progressive element in the service facilities statement, the MS regulator informed that this element was removed as due to operation-related circumstances tracks are often blocked and thus an increase in charges of 20% for RUs that need to request tracks at short notice was considered as unreasonable by the regulator.

The Chair asked for details on the developments concerning station charges. The MS regulator explained that the new system is based on a performance related factor; the length of the train is no longer cited as calculation parameter, as no reason could be provided for it. The regulator ordered that a differentiation according to traffic categories should be made. Currently a mix of the old and the new approach is applied. The concept of the performance related factor still reflects the old system (differentiation between regional and long distance transport). As the regional passenger transport is publically funded, the system cannot be changed overnight without creating problems related to the public funding. In the future the system shall be based on costs and market can bear; station services will be more cost-based. The Chair asked the MS regulator to give a presentation at the next meeting on the new charging system and the relation to the performance scheme under the recast.

A MS regulator asked for explanation concerning the difference between freight and passenger transport charges. The MS regulator explained that the charging system of DBNetz was supply-side oriented. For the use of better equipped tracks, higher charges have to be paid. Passenger tracks/lines are often better equipped than tracks for freight transport, which do not need the same level of equipment. The weight of trains is only somewhat taken into consideration under the current charging system. The MS regulator added that the current system may, however, have to be changed and be adapted to the requirements set out under the Recast (marginal costs and market can bear criteria).

The Chair pointed out that besides the weight of a train its speed should also be taken into consideration under the direct cost approach, as e.g. passenger trains running at higher speed can cause higher costs than heavier freight trains that normally run at lower speed. If the charges are only based on the weight of trains, this can result in tremendous burden for freight transport. The current level of charges (€ 5,58 for a

long distance train) indicates that the charges are above the direct costs. However, market can bear aspects could play a role.

The MS regulator explained that the current charging level is certainly connected to the willingness to pay. As long as the incumbent is willing to pay the prices set out, this may affect new entrants in long-distance traffic.

Comments/questions on a 6th MS questionnaire

The MS regulator reported that in a case concerning the infrastructure charging system, the RB rejected a train km charge on rail freight introduced on 1/1/2013.

The Chair asked who was competent for setting charges, as the ministry had laid down a charging methodology by statutory order. The MS regulator explained that the IM sets the charges; the IM's decision was, however, rejected by the RB.

Following a MS regulator's request, the MS regulator explained that it had started ex officio investigations on supervisory measures concerning the separation of the incumbent (cf. questionnaire). Sanctions could possibly be imposed but so far there was no need.

No comments/questions on a 7th MS questionnaire

Comments/questions on a 8th MS questionnaire

The MS presented the new organisation of the regulatory body. The regulatory body's tasks were transferred to the national commission for market competition (CNMC), which operates since 7/10/2013 as single regulator (supervisor) for all markets. As regards the rail sector, the competences of regulator include to ensure non-discriminatory access, supervise negotiations between RUs and IMs, resolve conflicts on charging issues and capacity related issues, verify PSO if they affect international services etc. Following the implementation of the recast, the regulator's competences in the rail sector might be extended.

Following the Chair's question on the regulator's competences with regard to safety issues, the MS explained that the regulator was (only) in charge of conflict settlement also with regard to safety issues. Besides, there is an initiative in parliament to create a safety agency dealing with issues regarding safety certificates, etc.

Comments/questions on a 9th MS questionnaire

The MS regulator reported that in the context of the implementation of the recast the state owned IM is reassessing its method for the calculation of charges. The regulator is involved in this process with the Ministry of Transport.

Comments/questions on a 10th MS questionnaire

On request of the Chair, the MS regulator offered to provide more information on the issue of cross-subsidies (ABE-SNCF) reported in the questionnaire in writing.

Comments/questions on a 11th MS questionnaire

The MS regulator reported that the process of diversification of the incumbent should be completed in 2014.

Under a new law, the regulator will be given new competences, including the tasks of the national safety authority and the ability to approve public hearing rules. So far, the regulator had no possibility to impose sanctions. Now it will have the possibility to monitor the incentive scheme of the IM and the contract between the IM and the State and tackle the issue that there is no access agreement between IM and RU. Moreover, the regulator will be able to impose sanctions if the network statement is not published in due time or contains omissions, as it was the case in the past.

Following a MS regulator's question, the MS regulator explained that the network statement 2015 should be published in December, but it still contained a number of omissions (e.g. terminal near Piraeus not included in NS) which need to be addressed.

With regard to the revenue data provided by the MS regulator, the Chair expressed its surprise that from 2010 to 2011 ticket revenues from passenger transport increased by about one third although passenger train kms decreased by about one third.

Comments/questions on a 12th MS questionnaire

The MS regulator reported that a big regulatory body (for different markets, including e.g. post, etc.) will be created and probably take up its work in 2014.

The Chair asked whether any link is seen between the IM doubling infrastructure charges between 2010/11 and 2013 and a considerable drop in ton kms that occurred at the same time. The MS regulator explained that the link between these figures had not been analysed, but the drop in ton-kms might be related to a huge decrease of the market in general. Research has shown that the railway sector is struggling with huge debts, which also led to an intention of selling HZ cargo or to find ways of rearrangement or strategic partners.

Following the Chair's question on whether the regulator had checked if the charges correspond to the direct costs, the MS regulator explained that the new charge is more connected to the direct cost approach than previous charges which were not related to direct costs.

Comments/questions on a 13rd MS questionnaire

The MS regulator explained that the figures provided in the last questionnaire are still valid.

Comments/questions on a 14th MS questionnaire

The MS regulator provided details on case concerning a cabotage service on the Paris-Milan line (cf. questionnaire). The applicants made an appeal against the regulator's negative decision to the administrative tribunal, which held that the case has to be reviewed by the regulator within 60 days.

Following a MS regulator's question, the MS regulator explained that its decision only prohibited the operation of the « snow train », which it considered as specific

cabotage service on Italian territory, being operated parallel to the existing international service and for which an Italian licence would be needed. The decision would, however, not prevent international trains operating on the Paris-Milan line from stopping at (new) stations on the Italian territory.

Following 2 MS regulator's questions, the MS regulator explained that SVI had appealed against the decision concerning the "snow-train" not only to the administrative tribunal, but also to the Competition Authority, which also issued a decision. The regulator now first has to comply with the administrative tribunal's decision. If it fails to do so, the competition Authority could appeal to the administrative tribunal.

The Chair clarified that as the train going from Paris to Milan is running on Italian and French tracks, it has to be considered an international train. It is therefore unclear why the envisaged cabotage service was not accepted. According to EU-legislation, there is no national licence, but only an EU-licence. The 3rd railway package opened the market for international passenger services with cabotage. The only reason to limit cabotage on an international service could be that following the results of a previous economic equilibrium test cabotage should not be allowed. If the economic equilibrium test was applied to the "snow train", this cabotage service should not compromise the economic equilibrium of public service contracts, as it would only be a tourist train running during the winter months and therefore not comparable with the other trains of Trenitalia that are running all year round.

If the decision to prohibit the cabotage service on the Paris-Milan line without a preliminary economic equilibrium test was based on national legislation (requiring a national licence for foreign RUs wishing to operate services in this MS), then this legislation seems to infringe EU law and the Commission would need to envisage launching an infringement procedure.

The MS regulator suggested that a bilateral meeting on the issue could be helpful and added that it is planned to introduce a new possibility for RUs to be granted a right to operate cabotage services on lines covered by a PSO contract without having to undergo an economic equilibrium test. Under the new approach, an international service that also stops in several Italian stations, which are at over 100 km distance, would be entitled to offer this cabotage service without economic equilibrium test, if its ticket prices are set at least 20% over those of RUs under PSO.

The MS regulator also provided details of the case in which a penalty of € 50.000 was imposed on the IM (cf. questionnaire). One of the problems that occurred in this case was that the management of many stations is outsourced to separate companies (belonging to the IM), and hence for the RU it was unclear whether it had to address its request for rooms/space in stations to provide customer information and sell tickets to the IM or the company running the station. The IM did not react to the request of the RU. The regulator considers that although the management of some stations is outsourced, the IM would have had an obligation to react to the request within a reasonable time limit and therefore the regulator imposed a fine on the IM for failure to react. The fine was based on fines issued in the past under provisions of competition law.

A MS regulator asked whether for the new train between Vienna and Venice stopping in Tarvisio a principle purpose test was carried out. The MS regulator explained that it didn't know whether the RU had applied to offer cabotage service on this line. Last year investigations were carried out concerning a train running between Austria and Friulia and it was found that this train did not have an impact on public services.

No Comments/questions on the LT questionnaire (LT is absent)

Comments/questions on a 15th MS questionnaire

The MS regulator reported that the ex officio investigation on the independence of the capacity allocation body (cf. questionnaire) was ongoing.

Comments/questions on a 16th MS questionnaire

Following a MS regulator's request for details on the decision of the competition authority reported by this MS, the MS regulator explained that for 6-7 years there was a cartel on the market for train switches. Whenever the MS IM was asking for prices for switches, the MS company producing rail switches arranged itself with 2 German companies to set prices in a way that the MS company always got the projects. At the same time the MS company accepted not to take part in German projects. Finally the MS company informed the authorities of the cartel and benefitted from its whistleblower-status during the proceedings. A sanction of 1,13 mill € was imposed, which is the highest sanction issued so far by the MS competition Authority. The MS company would have had to pay 900.000€ but finally didn't have to pay due to its whistleblower status.

Comments/questions on a 17th MS questionnaire

The Chair commented on the information provided by the MS regulator concerning charging for (ancillary) services not covered by the recast (cf. questionnaire) and pointed out that e.g. access to stations/ticket services etc. are mentioned in the recast, which states that if an incumbent offers ancillary services to one RU, it also has to offer them to other RUs at the same conditions.

Comments/questions on a 18th MS questionnaire

The MS regulator issued a decision on freight terminals concerning the vertical integration of freight services and infrastructure managing on freight terminals. The recast has not yet been implemented; however, following the ECJ judgement, a new charging system is to be approved.

The Chair asked for details on PKP cargo's violation of railway legislation quoted in the questionnaire and the congestion charge based on auction. The MS regulator explained that PKP cargo had protected their terminals for their operations. Now PKP cargo will set up a new company for the management of the infrastructure, which will make it easier for the regulator to carry out ex officio investigations and to check the network statement, charging system etc. The congestion charge based on auction only exists on paper but not in practice.

Comments/questions on a 19th MS questionnaire

Upon the Chair's request the MS regulator offered to provide detailed information about the 10% price cap mentioned in the questionnaire bilaterally.

Comments/questions on a 20th MS questionnaire

This MS offered to discuss the Chair's question as regards possible actions of the regulator envisaged or taken with regard to controlling the level of charges and the performance scheme bilaterally.

No comments/questions on the SE questionnaire

Comments/questions on a 21st MS questionnaire

The MS regulator reported that following a decision of the RB of 2011, where the regulator stated that the IM should have the whole supervision of the freight terminal of the port of Koper as it is part of the public railway infrastructure, the terminal is now opened to the market. So only one terminal remains, which is not opened to the market; this is a terminal in Ljubljana where only one operator can use the shunting facility. Following the start of shunting services by a new entrant, the fees of the existing service provider dropped by 50 %.

Comments/questions on a 22nd MS questionnaire

Upon request of the chair, the MS regulator explained that following a significant lowering of freight charges, the market share of new entrants in the freight market increased to about 18%. There are no new trains but the market share is moving from incumbent to new entrants on long-distance passenger trains. Short-distance passenger trains continue to be only operated by the incumbent.

No comments/questions on the UK questionnaire

Comments/questions on the Channel Tunnel questionnaire

The Channel Tunnel regulator was not yet entitled to provide information on the decision to be taken on the pending complaint quoted in the questionnaire.

As regards the information on a safety certificate part B issued for DB Schenker, the regulator corrected its information specifying that the certificate regards passenger trains of DB (ICEs) and not DB Schenker. The purpose of the certificate is to recognize that the rolling stock fulfils the requirements to run in the Channel Tunnel; for the moment, however, Eurostar remains the only company operating passenger services in the Channel Tunnel.

No comments/questions on the CH questionnaire

Comments/questions on the MAC questionnaire

The MAC regulator reported that a new study on the calculation of track access charges was carried out, as compared to 2007 traffic decreased by almost 50%. The transport company will buy 150 freight wagons. Licences were checked last year by

the regulator but also this year; the regulator was, however, not provided with info regarding insurance issues.

The Chair remarked that one year ago all applications for licences and safety certificates were declared void and the minister announced that the national company should be protected; the Chair asked whether a change in strategy was planned. The MAC regulator explained that the liberalisation of the market was a top priority of the government. The reasons for the decrease in traffic are related to the crisis, during which a lot of transit traffic was lost.

No comments/questions on the NO questionnaire

3. Implementing measures under Directive 2012/34/EU

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

The Chair reported on the last meeting of the SERAC. She informed the regulators that the implementing acts on economic equilibrium and principle purpose are to be combined. The Regulators were then given an overview of the state of play on the discussion on implementing acts that shall be brought to SERAC in February 2014 and the results of working groups of summer/autumn 2013:

ERTMS: Article 32(4) of the recast requires an implementing measure and also sets constraints on the content and procedural aspects. An impact assessment is to take place between January and November 2014. In this context, a consultation is planned, where the feedback of the regulators concerning their experience with track access charges will be very welcome. The consultant might also be asked to address the regulators on specific issues dealt with in the impact assessment. The Commission gave an outline of its ideas of the content of the implementing act, which might involve higher access charges for non-equipped trains or a bonus for equipped trains or a mix of a bonus/malus system.

RMMS: the working group on RMMS has prepared a non-paper containing an outline of statistical obligations under the implementing act on RMMS. The working group has gone through indicators; further work on definitions is needed. It needs to be seen how data collection can be automated.

Economic equilibrium and principle purpose: a concept has been circulated to all regulators; a discussion with the subgroup took place in the first half of October, which didn't change the concept or substance of the envisaged tests. SERAC was informed accordingly. 1 MS raised doubts on the combination of the acts. The current aim is to present a first draft to SERAC in February; substantial discussion on the draft is to be expected at SERAC level.

Applicants for infrastructure capacity: discussions have taken place at SERAC and its subgroup meetings. The recast gives clear rules that have to be followed for the content of this implementing measure, which concerns charges/financial guarantees that IMs can ask for allocating capacity.

Licensing of RUs: an exchange of views has taken place in two SERAC meetings. Three questionnaires were launched and feedback is analysed; interesting parallels might be drawn with air traffic (e.g. as regards financial fitness).

Infrastructure capacity/framework agreements: discussions have taken place in SERAC twice; recently there was also an exchange on the issue with the competent IRG group. A subgroup on the issue requested by SERAC will take place early next year.

Direct costs: the issue will be discussed in a special workshop in the framework of this ENRRB meeting.

Noise charges: an impact assessment should be ready in the first half of 2014.

Cross-border agreements: the Commission has received about 115 notifications so far and is currently examining the agreements.

A MS regulator supported by 2 other MS regulators, requested an ENRRB subgroup on the implementing measure concerning framework agreements, as the recast indicated that the implementing measure should be based on the experience of the regulators, which are not always involved in Serac subgroups. The Chair explained that the recast does not require a specific ENRRB subgroup and recalled that the issue was already discussed at regulators' working groups several times. Instead of organising a separate ENRRB subgroup on the issue, the Chair suggested to officially consider the next Serac subgroup arranged for early 2014 as ENRRB and Serac subgroup meeting. However, the draft of the legal text would only be transmitted through the SERAC members. Several regulators declared their interest to take part in the subgroup. The Chair also encouraged the regulators to get in touch with the representatives of their Member States in SERAC and share their experience with them to allow them gain a better understanding of the issue.

A MS regulator also suggested having a subgroup on the implementing measure on access to service facilities, where the experience of RBs should also be taken into account. The Chair explained that the issue of service facilities will not be treated right now, but next year in working groups; it noted that the regulators of several MS are interested in taking part in a subgroup meeting on this issue.

Upon a MS regulator's request, the Chair explained that the recast sets out for which measures a vote and for which an opinion is needed; as regards the implementing act on economic equilibrium, SERAC will have to vote. The Commission is only obliged to consult SERAC on the draft legal text and not other bodies.

4. Update on the 4th railway package

The Chair presented the latest developments on the 4th railway package.

On 26 November the TRAN committee in the EP should vote on all 6 parts of the package. The vote in TRAN was however postponed to 17/12/2013, and the Plenary will slip to late February in Strasburg.

In the Council, progress has been made on the technical pillar. A general approach was adopted on interoperability and safety. Three council working groups were held

on the ERA regulation and on 5th December the Council will adopt a progress report; then the Shift2Rail proposal will be discussed. The Greek presidency wants to open the revision of the market access part and maybe have a first reading and adopt a general approach by the end of its Presidency.

5. Presentation by a regulatory body on scarcity and congestion charges in the EU

See presentation.

The Chair explained that the distinction between congestion charge and scarcity charge drawn by the MS scheme seems not to comply with the requirements under the recast, as Article 31(4) only mentions a scarcity charge, which can be imposed if there is congestion (following a capacity check and the development of a capacity enhancement plan), but no separate congestion charge.

As regards the congestion charge, which in this MS shall apply when there is a risk of delay caused by a specific train, the Chair questioned why the RU still has to pay the charge, even if it does not cause a delay. The Chair suggests that a performance scheme, which would include IM and RUs and “punish” the one that causes the delay; would be a better incentive to avoid delays.

The chair acknowledged that some countries have higher charges on (all) main lines, which may, however, be linked to a higher ability to pay and the application of a system of direct cost + mark-ups allowing for such differentiation. It was underlined that mark-ups may not apply to lines but have to apply to market segments; if certain lines are only used by certain market segments, for which mark ups are levied (e.g. high speed trains), this can cause the impression that mark-ups are applied to a certain line.

The MS regulator explained that it has analysed the relations between density of traffic and delays, which are difficult to establish. It agreed that a RU should not have to pay for delays that it didn't cause. The regulator indicated that it would be in favour of a scarcity charge rather than a congestion charge.

The Chair added that the problem of the MS charging system is that it contains three types of charges, one being the scarcity charge, which according to the recast could, following a respective scarcity check/declaration, only be levied for congested lines, but not the entire network.

Following the Chair's question on results of the MS regulator's proceedings on the charging system, the regulator explained that last year in the context of its ex-ante control powers it issued an “avis non-conforme” as regards the charging system. The MS regulator in particular had concerns regarding the reservation charge which mixes up different objectives (fixed costs, congestion, market can bear) and is not transparent.

The Chair asked another MS regulator whether it had controlled if the lines, for which a capacity charge is being levied, have been declared congested and if the conditions for congestion are met. This MS regulator explained that an analysis of the degree of

capacity utilization by hours was presented for every section concerned, which was checked by the regulator. The IM argued that before developing a plan to enhance infrastructure capacity, a better distribution of capacity should be achieved, which should be supported by levying the capacity charge. The charge only applies to passenger trains; the idea is to move freight trains to slots where there is capacity left. The line, for which the charge is levied, is not congested as such, but at several hours of the day there is hardly any capacity, whereas on other hours capacity remains.

The Chair expressed concerns on the conformity of the Austrian capacity charge in so far as it only applies to some trains and without having declared the lines congested and developed a capacity enhancement plan. Under the recast, all trains should have to pay a scarcity charge if they run during congested hours; only then the charge has the effect of signalling to all operators that if they really want to operate at these hours, they have to pay the additional charge. If certain trains don't have to pay the charge, this signal cannot be communicated and some trains will never shift to other hours. Moreover, a capacity analysis has to be carried out, which leads to the conclusion that a line is congested, and a capacity enhancement plan has to be presented. If these criteria are not respected, the IM should no longer be entitled to levy a scarcity charge.

The MS regulator explained that there are priority rules which during peak hours grant priority to PSO lines over freight. In order not to be obliged to reject applications, the IM tries to encourage RUs to apply for paths outside the peak hours by imposing a scarcity charge during peak hours.

7. Presentation of the Commission on state of play of implementing measure on framework agreements

See presentation.

A MS regulator questions whether the Commission considers not to adopt an implementing act, as the envisaged rules seem to strongly interfere with existing systems.

The Chair explains that as the conclusion of framework agreements is not yet a widespread phenomenon, but an upward trend can be observed over the last years, this issue should be regulated now. As experience has shown that long running agreements cause problems, rules on framework agreements should be established which provide new entrants in passenger transport with a stable framework to make investments and avoid that framework agreements could be used to hinder new entrants to enter the market.

Another MS regulator indicated that it has very good experience with framework agreements; a model contract which guarantees that the core of all framework agreement is the same has proven to be useful in providing certainty to the market. The Commission proposal would however go beyond introducing essential elements; The MS regulator calls for sufficient flexibility of the rules on framework agreements.

The Chair explained that the implementing act needs to go into detail, where the recast remains vague; it still needs to be seen in how far the issue of capacity

allocation for international trains should be addressed in the implementing measure on framework agreements.

A MS regulator provided a recent example of problems with framework agreements concerning high speed services concluded for a duration of 10 years under which Trenitalia had reserved almost all peak time capacity on the Rome-Milan high speed network for which the new entrant NTV then requested capacity. The RB ordered the IM to review within the NS the percentage of capacity that can be assigned under a framework Agreement (currently 75%).

A MS regulator explained that there are hundreds of framework agreements in this MS, and requested that Member States' experience should be sampled before adopting the implementing act. The implementing act should take account of existing framework agreements.

This MS regulator further announced plans to introduce a model framework agreement starting from 2015, providing for penalties if reserved capacity is not being used.

The chair explained that as regards transition, experience and patterns that have been gathered in similar areas shall be taken into account. Penalties shall not be prohibited, however, one needs to be aware that in some countries (e.g. Germany) big companies avoid fines by saying that instead of the capacity reserved under framework agreement they can use other capacity of the same volume; this may have a discriminatory effect. A MS regulator shared this concern.

The Chair announced that a SERAC subgroup on this issue will take place early next year.

8. Presentation of the Commission on assessment of "market can bear", with comments of a MS regulator, and discussion

See presentation.

A MS regulator questioned whether it was the task of the regulator to carry out a market can bear study or rather the obligation of the IMs to submit information about market can bear. Taking into account that such studies can be costly and time consuming, the regulator might be prevented from reacting quickly. The Chair agreed that it should be the duty of the IM to provide information on market can bear, but one has to be aware that the IM will probably argue that it set prices which the market pays and so apparently can bear. In that case the regulator will have to present counter-arguments; moreover, it is important to know where the data come from, to understand if the model calculation provided by the IM is valid. The Chair suggested that as studies were costly, regulators might conduct joint studies with neighbouring countries.

A MS regulator shared its experience in carrying out market can bear studies. As these are indeed both costly and time consuming, with the exception of cases of severe problems this MS regulator reacts to the results of these studies every 5 years (when a new 5-year operation cycle starts).

A MS regulator asked for information on studies on price elasticity and detailed views on relevant markets. The Chair explained that a number of reports on elasticities, which are more recent than DG MOVE's reports of the late 90s, could be found on the internet. As regards the definition of market segments, the recast contains details (pairs), which the IM at least has to apply. The IM may also go more into detail, but IM and regulator should do that together.

It is pointed out, that so far 2 MS are the only countries that officially created a possibility of levying such mark ups; however, as with the implementation of recast and the application of the cost principle prices will go down, mark-ups are expected to be applied in more countries.

A MS has established 3 market segments: long distance passenger, regional passenger and freight. On the long distance, the problem occurs that in principle only the incumbent is operating; this means that the State pays the price that it is asked to pay; these circumstances make it, however, difficult to assess whether the market could bear mark-ups under competitive conditions. The Commission therefore sees a need to define market segments more in detail, as required by the recast. On the long distance, this could result in a differentiation between high speed trains and trains operating e.g. for touristic purposes.

Comments of a MS:

See presentation.

A MS regulator explained that it has proven helpful to involve the freight community in the process of the market can bear assessment, which helped for the mark-ups to be accepted by the market segments concerned and to avoid problems concerning the provision of the required information.

Upon request of the Chair, the MS regulator explained that in principle traffic and revenues were considered in the studies conducted. The Chair underlined that this MS followed exactly the intention of the recast; the definition of relevant markets as reflected in the segmentation performed by this MS, which looks at the demand side (e.g. clients have different demands and there are different cost structures, if iron/coal/biomass/etc. is transported) constitutes a good example on how to proceed.

The mark-up rules contained in the recast require a cultural change of mentality. Whilst so far network statements have set different prices for different lines and the differences between these prices were considered by some as mark-up, the recast determines that mark-ups shall apply on specific market segments, but not on specific lines. Lines can have an effect on direct costs (e.g. in relation to wear and tear) but not on mark-ups. Once the mark-ups foreseen in the recast are introduced, the network statement needs to be set up differently, consisting of one part concerning lines and one part concerning mark-ups for market-segments.

Upon a MS regulator's remark, the Chair confirmed that the concept was already contained in the 1st package but no network statement reflected that idea so far. Charges that were higher than direct costs were simply described as mark-ups, but could not be considered as mark-ups within the meaning of the Directive.

A MS regulator warned of an overregulation of the rail market compared to other markets and called for less strict and detailed rules. The Chair pointed to the specific situation of the railway market, where the infrastructure is a national monopoly and therefore rules are needed to allow for competition. In addition, the Chair explained that a market can bear test only needs to be carried out if an IM wants to charge more than the direct cost and only for the market segments concerned.

A MS regulator asked, how - if PSO and non-PSO traffic are different markets - this could have an impact on the economic equilibrium. The Chair referred to different cost structures of the private and PSO traffic: whereas private traffic gets its revenues 100% from ticket prices, PSO may receive 60% from the State. For this reason, these markets are not comparable from a competition point of view, but may of course influence each other.

9. Presentation of a MS regulator on a market scan for Rail Related Services and the resulting problems, and discussion

See presentation. The MS regulator claimed that some of the problems it encountered in the course of the market scan could be solved following the implementation of the recast, whereas in other areas by-laws would be needed conferring upon the regulator additional competences, e.g. to carry out ex-ante checks.

The Chair pointed out that the Commission recognises the problems the MS regulator encountered under current legislation. Solutions to tackle these problems have, however, been included in the recast.

10. Presentation of a MS regulator on the RB cooperation agreements for corridor 1 and discussion

See presentation.

Following a MS regulator's question, the MS regulator clarified that English is applied as common language for communication between the regulators; applicants are not requested to hand in their applications in English.

As regards the MS regulator's competence, it was clarified that the MS regulator shall be competent to deal with cases concerning a decision of the corridor OSS concerns more than one country, in order to avoid having several decisions on one problem.

Following another MS regulator's question, the MS regulator explained that when an application is lodged with a regulator that is not competent, the regulator does not forward the application to the competent authority but informs it that an application was made and provides the applicant with information on where to lodge the complaint. Following the Chair's question, whether it would not be possible to take up the complaint ex officio instead of relying on a new complaint to be lodged, the MS regulator explained that it would open ex officio investigation if it got information on the complaint.

As regards traffic management issues that concern more than one country, the question arose why the regulator of the OSS should be responsible.

The MS regulator clarified that traffic management is in principle dealt with by national regulators of the countries where problems occur. The cooperation agreement covers situations that can arise in the context of capacity allocation and directly concern the OSS.

The Chair welcomes that in such cases the regulator of the country where the OSS is located shall be competent to deal with the issue.

As regards other corridors, it was announced that a MS regulator would be competent to deal with such cases for corridor 2, another MS regulator for corridor 4, a third MS regulator for corridor 6 and a fourth MS regulator for corridor 7.

11. Presentation of a MS regulator on a case concerning principal purpose and economic equilibrium

See presentation.

The Chair thanked the MS regulator for the presentation and asked whether in the event that due to the time needed to carry out the principle purpose and economic equilibrium test deadlines were missed access has to be granted once and forever and there was no possibility to do the test afterwards.

The MS regulator explained that the notification to operate a service had to be done 5 months before the start of the operation; afterwards, the regulator had one month time for taking a decision. If it doesn't (re)act, the operator would be free to operate its service.

The Chair pointed out that according to the recast, if there is a notification to operate a service but no request to carry out the principle purpose test, the service can be operated and there is no need for the regulator to take a decision. The RU does not have to be considered as requesting party for a principle purpose test, as legal certainty is granted, if after 1 month of the notification nothing happens.

The Chair asked for further clarification on the relation between quantitative thresholds and qualitative criteria applied by the MS regulator.

The MS regulator explained that if the quantitative threshold is met there is in general no more need to meet the qualitative criteria; if one threshold is not reached, it could, however, be compensated by qualitative criteria. There is a need for certain flexibility of the RB, as not all cases can be foreseen in the methodology.

The Chair added that as regards SNCF's reluctance to provide information, the regulators should carry on their work even if information is not provided and take the reluctance to provide the information into account when drawing its conclusions.

12. Report from IRG Rail

See presentation.

IRG invited the participants of the ENRRB meeting to its working groups, including participants that are not IRG members.

The Chair announced that a date for the next meeting in March will be communicated.