

**5th MEETING OF THE NETWORK OF EUROPEAN RAIL  
REGULATORY BODIES**

**1<sup>st</sup> and 2<sup>nd</sup> July 2014, Bonn**

**MINUTES**

**Present:**

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

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

**Commission:** chair

The Chair welcomed the participants to the 5th meeting.

**1. Welcome speech by Vice-President of BNetzA**

The Vice-President of BNetzA welcomed the ENRRB Members to the meeting and highlighted the key role of independent regulators for the functioning of the EU rail market, the importance of the further strengthening the regulators as required by the recast Directive and the increasing need for cooperation between regulatory bodies to face upcoming challenges.

**2. Approval of agenda**

The agenda of the 5th meeting was adopted.

**3. Approval of the minutes of the 5th ENRRB meeting**

BE + HR asked for some corrections to the minutes of the 4<sup>th</sup> meeting. The Chair declared the minutes adopted further to the inclusion of these comments.

**4. Roundtable on regulatory bodies' decision-making practices**

Member State 1 (MS1): The complaint of an open access operator, that was denied access to a service facility using its own servicing staff, is envisaged to be settled by an agreement. The open access operator should be granted access to service facilities using its own service personnel under certain conditions, which include the presence of a supervisor of the operator of the service facility.

A complaint on denial of access to the incumbent's ticket sales systems might be brought to the competition authority by an open access passenger services operator.

MS2: The project of a direct train between The Hague and Brussels was withdrawn as it was not yet mature (e.g. missing safety certificate); alleged problems to get capacity in the Brussels area were not primarily decisive for abandoning the project.

MS3: National law defining the methodology of calculation of charges was amended to align it with the ECJ judgement (C-152/12); staff salaries and social security contributions are no longer included in the direct costs charged to railway undertakings. Charges were reduced to € 0,99 for a passenger train/km and € 2,32 for a freight train/km.

MS4: As a result of lowering infrastructure charges for passenger and freight transport, rail freight has become more competitive to other modes of transport. The Czech regulator signed the cooperation agreement on corridor 7.

MS5: A revision of the Danish railway act implementing the recast is envisaged to enter into force on 1 January 2015; the requirements on independence of the regulator create difficulties.

MS6: The regulator has competence to control the charges set by the technical surveillance authority, but a check is not done on a regular basis. There have been no cooperation activities between the Estonian regulator and other regulators of corridor 8 so far.

MS7: In discussions on the recast implementation, the incumbent, who operates most service facilities, argues that the obligation to grant other operators access to these service facilities would result in an obligation to invest. DG MOVE explained that following the implementation of the recast an applicant that is refused access to the incumbent's service facilities may complain to the regulator, who shall ensure that an appropriate part of capacity is granted to the applicant (Article 13(5)). This concept should allow regulators to e.g. attribute capacity covered by a contract between an operator of a service facility and a railway undertaking, but not used by the railway undertaking, to new entrants. The future implementing act on access to service facilities may provide for further clarifications on how to proceed in such situations.

MS8: ARAF gave an update on the state of play of on-going enforcement procedures on cases concerning fuel and refuelling facilities, freight and combined transport terminals (cf. questionnaire) and suggested to provide an overview on the case on fuel and refuelling facilities at the next meeting.

Follow-up on ARAF's decisions on path allocation adopted in October 2013 included a public consultation on incentives on path restitution and timetabling stability (cf. questionnaire). In July, ARAF will issue a decision on chosen incentives.

The new French railway law was adopted in the national assembly at the end of June and will be discussed in the senate at the beginning of July; it contains provisions that strengthen the role of ARAF. The new law implements parts of the recast; the remaining provisions of the recast will be implemented by "ordonnances" in 2015.

The French infrastructure manager will be in a holding with SNCF; safeguards have been implemented to guarantee a wide autonomy for the infrastructure manager in performing its duties.

MS9: Freight terminal operators in inland navigation ports refuse to issue network statements as they don't consider themselves to be operators of railway infrastructures, even though under national law they undoubtedly are. Proceedings will therefore be launched on a number of cases.

The national cartel authority continues to investigate the case on access to ticket distribution system of the dominant operator.

Work on draft legislation implementing the recast directive is ongoing; the regulator has provided the Ministry with its comments on the draft. Some rights of railway undertakings/ obligations of infrastructure managers, service facility operators and service providers contained in current German legislation (e.g. concerning access to service facilities) might be cut back to the minimum requirements provided for in the recast. The independence of the regulator will be strengthened; it might be given additional competences to supervise unbundling and to approve charges.

The case of an open access passenger operator, which is offering intercity services but intends to change its designation from long to short distance traffic in order to benefit from lower infrastructure/station charges and membership in the short passenger RU association, which grants access to the incumbent's ticketing system and allows to offer through tickets to destinations that are not part of its own routes, was discussed. DG MOVE pointed out that the attempts of the open access operator could indicate that the long distance passenger market might not be able to bear the charges currently applied. As regards station charges, it would need to be checked in how far long distance train cause higher charges than short distance trains. Criteria for such a test need to be developed; the issue should be continued at the next meeting.

MS10: The infrastructure manager was required to update the network statement, which contained omissions; the incumbent railway undertaking wants to conclude a combined framework and access agreement with the infrastructure manager; the regulator drew the parties' attention to the fact that the framework agreement should not determine specific paths.

DG MOVE underlined the importance of the implementing measure on framework agreements and emphasized that incumbents should not circumvent market opening legislation by concluding very vast framework agreements.

MS11: The regulator has carried out a series of consultations with stakeholders of the railway market and other modes of transport (cf. questionnaire); under the new Italian law, the regulator has extensive competences with regard to the control of PSOs.

MS12: Responsibility to distribute money for narrow gauge historical railways was given to the regulator. As regards the recast implementation, differences in the understanding of certain provisions related to inaccurate translation of the Directive into Latvian continue to pose a number of problems.

MS13: The regulator highlighted the good cooperation with other regulators at corridor level. On the organisational side, a new director of the regulatory body of Luxemburg will be appointed.

MS14: The regulator was involved in some parts of the recast implementation, but not on all the bye-laws; the regulator continues to advise the Ministry on a number of issues, including the recast implementation (cf. questionnaire).

On the requirement of account separation for dominant operators of service facilities, DG MOVE underlined that in a first step the Member States would be obliged to correctly implement this requirement; if a Member State fails to correctly transpose the provision, the Commission would need to act; the task of regulators will be to ensure access to the service facilities operated by dominant providers.

MS15: Following a decision of the regulator concerning joint performance of infrastructure manager's and railway undertaking's functions, a new company has been set up to operate service facilities, which shall ensure non-discriminatory access to all operators. The process of authorisation and approval of fees to be charged by the new service facilities operator is pending at the level of the regulator.

The law on access charges and incentives for infrastructure managers has been amended and a new penalty system for train delays has been introduced.

MS16: There are two new entrants on the Romanian rail market, one in the freight and one in the passenger market. The Romanian regulator has signed a cooperation agreement with the other regulators of corridor 7.

MS17: First consultations on the implementation of the recast will be held in July; the regulator will be involved. It remains to be seen whether the existing railway act will be amended or a new law drafted.

MS18: The railway market continues to grow in the UK; the competences of the regulator will be extended to cover also Northern Ireland.

MS19: The regulator has opened investigations concerning the application of equivalent charges for traction power to all freight trains, even though the energy consumption varies between long distance freight trains operating without stops and other freight trains that stop. Moreover, the regulator took a decision in a case of conflicting applications for paths for the operation of postal services (cf. questionnaire). The decision was appealed against, and therefore has not yet been enforced, but the regulator disposes of enforcement powers.

Norway: In a path conflict between the national incumbent operator and the airport express train, where the express train could not get the necessary paths for the operation of its service, the regulator concluded that the priority criteria are insufficient; following this decision, the IM is reconsidering its priority rules.

FYROM: The regulator can only act upon complaints; no complaints have been received over the last months. Recast implementation has started and is ongoing. There are no new entrants expected in the near future.

Channel Tunnel: Slight changes on available capacity have been remarked, but growth of traffic in the tunnel is limited. IGC will organise a workshop in the second half of 2014 on non-tariff barriers (e.g. safety regulation, border controls, etc.). DG MOVE asked to be informed about this workshop.

No comments/questions on the HR, HU, PT, SI questionnaire.

## **5. Discussion on corridors**

DG MOVE gave a presentation on cooperation requirements at regulators' level in the context of the rail freight corridors. Regulatory bodies' cooperation both within each corridor and also between different corridors is becoming increasingly important (see presentation). DG MOVE will provide guidelines for organising the cooperation of regulatory bodies in the context of the corridors in the updated version of the corridor handbook to be published in the second half of 2014.

Regulators questioned the need for having a central contact point for each corridor, as complaints could be addressed to any regulator of a corridor, and asked to whom a decision concerning the allocation of a tailor made path should be addressed (C-OSS or management board), if PaPs are changed into tailor made paths following conflicting applications. They also expressed concerns regarding the current priority rules, and the way in which the length of PaPs is taken into account in applying the priority rules, as well as the envisaged method of Flag Paps. Positive experiences on good cooperation among regulators were also exchanged.

DG MOVE announced to provide clarifications on the questions raised by regulators in the context of the next ENRRB meeting and, in so far as appropriate, address some of the issues also in the Corridor handbook.

## **6. Information on the state of play of implementing measures:**

DG MOVE provided an overview of the state of play of implementing measures to be adopted under Directive 2012/34/EU, i.e. the acts on new rail passenger services, criteria for applicants and licensing to be voted at the upcoming SERAC-meeting in July, as well as the acts on noised differentiated track access charges, framework agreements and direct costs, which will be discussed at the upcoming SERAC and should be adopted later in 2014 and early 2015.

DG MOVE underlined the specific importance of a concrete methodology for the calculation of charges for the work of regulatory bodies, as their obligation to verify the charges has proven to be very difficult in the absence of a clear methodology. The methodology proposed by the Commission is based on the findings of the European Court of Justice and aims at providing a simple method to verify the calculation of charges.

Similarly, the implementing act on framework agreements will provide clear rules on the conclusion of framework agreements that should also facilitate the work of regulators. Railway undertakings should be able to ask for the conclusion of a framework agreement at any time and not only at fixed dates; opening up of framework agreements that have been concluded previously between the IM and another railway undertaking should in general not be required. Nevertheless, a clause on surrender of framework capacity shall ensure, that in specific cases, e.g. if a very high amount of capacity is covered by framework agreements, new entrants can be granted sufficient capacity to start their business at any time.

As regards the envisaged implementing act on service facilities, a first discussion and a workshop are planned to be held in autumn. The implementing act must be based on

experience and practice of the regulators; contributions of regulators, including the position paper of IRG rail, are thus very much welcome.

### **7. Presentation of the Danish regulator on a case concerning use of service facilities**

A series of cases on setting of charges for the lifting of trailers and containers have kept the regulator busy since 2010. The service operator has continuously set the charges for its services at a level, that is not based on the cost directly incurred plus a reasonable profit and has been reluctant to take into account the decisions issued by the regulator on a series of complaints concerning the level of these charges (cf. presentation).

Regulators exchanged views on possible follow-up measures and suggested that enforcement measures should be considered in order to ensure that the decisions of the regulator are respected and tariffs for these services are finally set according to the legal requirements. DG MOVE underlined, that the charges should be set by the infrastructure manager, and then be subject to a control by the regulator.

### **8. Presentation of the German regulator on recast implementation (direct costs and mark-ups)**

The German regulator gave a presentation on the envisaged implementation of the charging principles contained in the recast (see presentation).

DG MOVE underlined the importance of a simple methodology for the calculation/verification of charges, as proposed in the implementing act on direct costs, and also invited the regulator to closely observe the infrastructure managers approach to mark-ups, and to verify whether proposed market segmentation corresponds to the market reality.

Some regulators expressed their scepticism concerning the Commission's approach on the direct cost implementing act, which they perceive as being too simplistic. At the same time, less than half of the regulators present at the meeting indicated to feel confident to be able to carry out a verification of the charges. It was suggested to find an approach that provides these regulators with tools allowing them to carry out the verification of charges, and at the same time permits to maintain more sophisticated approaches that have been developed in other Member states.

The Chair explained that the Commission is under an obligation to propose a methodology for calculation of charges and also feels that a common methodology is needed to provide a frame for discussion with infrastructure managers. The Chair suggested to look at the matter again with the regulators and called upon ENRRB Members to undertake work on finding a common methodology based on existing methodologies and the rulings of the Court of Justice in order to avoid that the Commission has to force through a proposal or continue with infringement procedures. The Chair further indicated that a technical working group might also be needed on the market can bear principle.

### **9. Presentation of the French Regulator “Mark-ups if the market can bear it: practical application to French high speed lines”**

The French regulator gave a presentation on the performance and results of a market can bear test concerning mark ups levied on French high speed lines (see presentation).

Regulators questioned whether the test would take into account that the value of paths varies throughout day and whether it would be sufficient to only apply the test to one market segment.

DG MOVE underlined that the recast does not oblige the imposition of mark-ups systematically; if an infrastructure manager imposes mark-ups only for one market segment, the market can bear test only has to be performed with regard to this segment.

## **10. Discussion on RMMS and key indicators (on the basis of IRG rail paper and Commission work)**

IRG presented its position paper on RMMS, calling in particular for clear definitions on indicators, a focus on key indicators, a close involvement of the regulators in the process, the accessibility of the data and avoidance of duplication of data collection (see presentation).

DG MOVE explained that a subgroup on the RMMS implementing act, to which RBs will also be invited, is planned to be held on 23 July; the questionnaire used for collection of RMMS data, which as Annex should become part of the implementing act, will be discussed in this working group.

DG MOVE also commented on IRG's position paper, explaining to what extent IRG's suggestions have already been taken up. As regards the discussion on definitions, a provisional agreement will have to be reached at some point; the proposed definitions may, however, be modified in the context of an amendment of the implementing act, if necessary.

The Chair underlined that the RMMS report provides a good picture of the market situation and announced that DG MOVE would further engage in work on defining key performance indicators, as discussions with infrastructure manager show the need for good definitions and accessibility of data. The Chair also shared with the ENBRB Members thoughts on possibilities of involving the regulators/IRG more actively in the process of data collection and compilation of the RMMS report and data exchange.

## **11. Discussion on the implementing act on ERTMS related access charges**

DG MOVE gave an update on state of play of the implementing measure, with a focus on comments received from regulators on the non-paper that has been circulated. Regulator have generally called for transparency in the charging system and suggested a malus approach, a steady increase over time of penalties for non-equipped trains, exemptions for trains running very short distances on ERTMS corridors and a differentiation between passenger and freight services should be put in place.

One regulator expressed its concerns about overburdening price incentives and questioned the added value of ETCS. DG MOVE explained that the idea is to provide

an incentive for the freight sector, where more than half of the transport is international and therefore needs ERTMS to cross-borders. Currently, models for cost calculation are being developed and an impact assessment is carried out.

The Chair explained that the Commission has an obligation to come up with an implementing act proposing a methodology for calculation, which might, however, not be mandated, but combined with other ways to incentivise the ERTMS deployment.

## **12. Discussion on network of infrastructure managers (PRIME)**

The Chair provided the regulators with an overview of the work of PRIME, the platform of rail infrastructure managers, which is to become the network of infrastructure managers proposed in the fourth railway package. The aim of PRIME is similar to the one of ENRRB, i.e. bringing together the European infrastructure managers to discuss issues of common interest and identify areas where common action is needed. PRIME has started to work on defining key performance indicators, beginning with KPIs for safety (based on the work of ERA) and ERTMS and will be moving towards KPIs for capacity and efficiency of the network and the overall quality of the service. Other areas of discussion have included the deployment of ERTMS (review of deployment plan, European specification), sources for infrastructure funding (new CEF, other available financial instruments), implementing measures and the long term development of infrastructure. The Chair suggested to organise a joint meeting PRIME – ENRRB in early 2015 to jointly identify areas for action; this suggestion was very much welcomed by the regulators. Regulators also suggested that PRIME might put forward to the ENRRB any questions they might have.

## **13. Presentation of the new Italian regulator**

The new Italian regulator gave an overview of its organisational structures and competences (see presentation). The regulator has a comprehensive set of tasks, including competence to control framework agreements, to set criteria for corporate separation within integrated structures and order separation, review of the network statement already before its publication, and control of PSOs.

## **14. Presentation of ORR on periodic charging review of HS1**

It was agreed to postpone the presentation to the next ENRRB meeting.

## **15. Discussion on the fourth railway package**

IRG presented its position paper on the EP first reading vote on the market access pillar (see presentation), and emphasized the need for a sound legal framework that can be applied by the regulators and grants them appropriate enforcement powers.

The Chair thanked IRG for their supportive position on crucial issues, such as strong and enforceable rules on separation of financial flows and independence requirements for infrastructure managers (“Chinese walls”). Especially the provisions on granting of loans by a holding, that have been adopted in the first reading at Parliament level go beyond the maximum compromise envisageable, which would require that



regulators have to approve loans before they are given (cf. TRAN vote). DG MOVE will continue to insist on a sound legal framework that allows regulators to enforce it.

Regulators asked for DG MOVE's position on the proposal of a European regulator and expressed their concerns about the Parliament's proposal on direct award of PSOs.

The Chair explained that for the moment DG MOVE would rather envisage an extension of the types of issues for formal cooperation at ENRRB level than the creation of a European regulator. At some point in time regulators might, however, ask for further institutionalisation of the ENRRB network.

As regards the direct award rules of the PSO regulation, a proportionate solution will have to be found as the Parliament's text is not workable.

The Chair announced that the IT Council presidency intends to open negotiations on the market pillar of the fourth package and to organise an orientation debate in October. The aim of DG MOVE is to find a text that is acceptable to all, and that allows to afterwards concentrate on implementing and enforcing the legal framework without the need for further legislative measures. The Chair called upon the regulators support to help objectivise the debate to achieve a good outcome of the negotiations.

## **16. Report of IRG-Rail**

IRG provided an outlook onto its planned activities for the second half of 2014, which will focus on drafting the 3<sup>rd</sup> IRG-Rail Market Monitoring Report to be published in early 2015, contributions to the RMMS implementing act, an initial review of implementation measures taken by IRG-Rail members to transpose the Recast Directive, development of guidelines on Regulatory Bodies principles and decisions making practices and adoption of a position paper on access to rail-related facilities in view of the upcoming implementing measures of the Commission, an overview of tendering procedures for rail public service contracts in Europe and different aspects of the cooperation between RBs in rail freight corridors (incl. review of cooperation agreements).

The Chair expressed his appreciation for the work of IRG rail.

## **17. Presentation of the Croatian regulator**

The new Croatian regulator presented its set-up, financing and competences (see presentation), which include control of the network statement already before its publication. The regulator is financed by contributions of the infrastructure manager.

## **18. AOB and conclusions**

The Chair thanked the participants for active participation in the discussions throughout the meeting and their openness to share their experiences. He called upon regulators to undertake a last minute effort to reach an agreement on the implementing act for direct costs and suggested to hold a working group on the market can bear principle.

Moreover, he invited regulators to cooperate in trying to get the best methodology for ERTMS TAC and repeated his offer to work on integrating IRG's market monitoring

report and the RMMS report, which could in a first step mean harmonisation of data collection and lead to conferring the task of drafting the report upon IRG.

The Chair invited regulators to further consolidate their cooperation in the framework of the rail freight corridors and asked them to continue to work together with the Commission on the fourth package in order to ensure a good outcome of the negotiations on the market pillar.

A date for the autumn meeting will be communicated by DG MOVE in the next weeks. A MS has kindly offered to host the ENRRB summer meeting in 2015. Another MS invited all participants of the meeting to a workshop on the fourth railway package scheduled to take place in Turin on 17/18 September.