Minutes
13th meeting of the European Network of Rail Regulatory Bodies
20 and 21 June 2017, Barcelona

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

The agenda of the 13th meeting was adopted with the following modification: the title of agenda item 5 was changed to 'presentation by a regulator on ex ante approval of tariffs and conditions for access to service facilities'.
The minutes of the 12th meeting were approved without changes.

2. Nature of the meeting

The meeting was not public.

3. List of points discussed

Presentations by regulatory bodies on service facility charges and on ex ante approval of charges and conditions for access to service facilities

One regulatory body provided an overview of a series of investigations carried out as regards charges for supply of additional services referred to in point 3 of Annex II of Directive 2012/34/EU with a view to approving such charges, as required under national law. Article 31(8) of the Directive requires that where such services are offered by only one supplier, the charge imposed should not exceed the cost of providing it plus a reasonable profit. According to national law transposing the Directive in that case, this ceiling applies to all additional services regardless of whether they are supplied by only one supplier or by more than one supplier.

When assessing the charges proposed by the service facility operators, the main challenge encountered by the regulatory body was the limited availability of information required for checking whether charges are cost-based, including problems of incorrect cost-allocation and unavailability of data concerning traffic and income forecasts. In addition, the regulator had to choose a methodology for calculating the reasonable profit; it opted to apply the WACC method, which it also applies to other regulated sectors such as telecom or airports.

Another regulatory body provided an overview of its experience in performing ex ante approval of charges and conditions for access to service facilities. The national law in that case foresees such a role for the regulatory body for facilities needed to operate passenger services under PSO contracts, which are awarded by competitive tender (e.g. passenger stations, cleaning facilities, refuelling facilities) to the extent that such services are provided by only one supplier in a location.

The regulatory body chose a step-wise approach to this task: before launching the official procedure, which must be concluded within very short timeframes, it organised an informal procedure lasting almost one year, consisting of an online consultation followed by dialogue with interest groups to ensure that the needs of the entities concerned can be taken into account. Main challenges encountered by the regulatory body included the question of how to assess the reasonable profit for service facility operators (the CAPM methodology was finally

chosen), including the identification of the average rate of return for the sector, the fact that not only a methodology for calculating charges but the charges as such should be approved and a short timeframe to decide on the proposals for charges and access conditions submitted by service facility operators.

The regulatory body concluded that national decision makers should reflect on whether it would not be more appropriate to request regulatory bodies to approve charging methodologies instead of (levels of) charges, given that methodologies of charges could remain stable for a longer period of time, while the level of charges might evolve over the duration of a PSO contract. Moreover, the regulatory body also expressed doubts as to whether it is appropriate to link the timelines for ex ante approvals of charges and access conditions for service facilities to timeframes for tendering procedures, which can put regulatory bodies in a very difficult position not allowing them sufficient time to carry out an in-depth assessment of the proposals submitted by service facility operators. Measures to increase transparency of access conditions could, in the view of the regulatory body, already allow moving a significant step towards ensuring fair and non-discriminatory treatment of all applicants interested in submitting a bid in a PSO tendering procedure, which was the objective of the national legislator when introducing an ex ante approval requirement for charges and access conditions.

Fellow regulatory bodies showed great interest in both presentations and asked a number of questions related to the subject.

Roundtable - follow up on RNE-ENRRB meeting

In April 2017, the annual meeting between RailNetEurope (RNE) and ENRRB took place in Vienna. Regulatory bodies from 12 Member States participated in this meeting, which provided an opportunity to discuss ongoing work of RNE in the area of redesign of the timetabling process, common structure and texts of network statements and corridor information document, traffic management, follow-up to the sector statement on rail freight issued during the TEN-T days in Rotterdam in 2016, rail freight corridors and development of IT tools. At that meeting it was also agreed that during the June ENRRB meeting regulatory bodies would take a look at the common structure and texts of the network statement developed by RNE in order to provide RNE with some informal, preliminary feedback on that document. Moreover, it was envisaged to discuss at the June ENRRB meeting whether in the view of regulatory bodies the existing Memorandum of Understanding between regulatory bodies and RNE would need to be extended.

MOVE asked regulatory bodies ahead of the ENRRB meeting for feedback on both topics. Some regulatory bodies identified shortcomings in the draft common structure and texts of the network statement (e.g. as regards information on service facilities requested), which were discussed during the meeting. It was concluded to provide feedback to RNE on the relevant points, which should, however, not be considered as binding with regard to any potential future procedures (to be) launched by regulatory bodies.
Concerning the revision of the Memorandum of Understanding, a number of regulatory bodies indicated that it would appear useful to extend the scope of the existing Memorandum of Understanding to cover all work of RNE relevant for regulatory bodies' tasks. It was agreed to share this initial position with RNE and to then launch more intense discussions

with RNE after the summer in view of revising the text, which should ideally be available for signature during the first half of 2018.

Work on both topics should be pursued in a smaller group (e.g. task force) after the summer in order to develop more elaborated views.

In addition, it was discussed how the work on a common template to provide information on access conditions and charges for service facilities could be taken up, given that the draft implementing act on access to service facilities suggests that regulatory bodies and RNE should be involved in drafting this template. A number of regulatory bodies underlined the importance of also involving service facility operators in this work; it was envisaged that regulatory bodies and RNE might start reflecting in parallel over the coming months on how such a template should look like and then (a) joint meeting(s), ideally involving also service facility operators, should be organised later this year to develop a common view. Some regulatory bodies indicated that they would not want such a template to be of a legally binding nature. Some regulators also stressed the importance not to develop a too detailed template in order to facilitate the use of it even for smaller service facility operators and in that way increase the use of it.

Roundtable discussion: recent developments in Member States

A short roundtable discussion took place, which allowed for an exchange of information about ongoing work and recent decision-making practice, main issues of pending/recent procedures and problems of transposing Union railway law. One regulatory body asked fellow regulators how they carry out market consultations required under Article 56(7) of Directive 2012/34/EU; a number of regulatory bodies provided feedback on how to identify relevant stakeholders and topics addressed in such consultations and offered to share the questionnaires they have developed for that purpose.

DG MOVE also used this opportunity to remind regulatory bodies about the upcoming deadline for infrastructure managers to submit to regulatory bodies their methods for the calculation of direct costs and a phasing-in plan in accordance with Article 9 of Commission implementing Regulation (EU) 909/2015 and called upon regulatory bodies to take the necessary measures (where relevant) to ensure compliance with this requirement.

Presentations by regulatory bodies on incentive/performance regulation of the IM and assessment of performance of infrastructure managers, followed by a roundtable discussion

One regulatory body gave a presentation on the implementation of the requirement to set incentives for the infrastructure manager to reduce the cost of providing infrastructure and the level of access charges laid down in Article 30(1) of Directive 2012/34/EU. In the case in question, the Member State concerned opted for a combination of regulatory incentives and incentives defined in a contractual agreement. While the regulatory body does not have any role as regards the contractual agreement, it is involved in the definition of the regulatory incentives. The regulatory incentive consists in setting a ceiling for the costs of the infrastructure manager for a 5 year regulatory period (costs are predetermined according to base year + price increase – productivity increase), which is not adapted to the actual cost level nor to actual amounts of traffic throughout the regulatory period. The regulatory body is

required to determine the base level of costs used to define the ceiling of costs for the infrastructure manager for the 5 year regulatory period.
Subsidies paid by the State on the basis of the multi-annual contract are not subject to the regulatory incentives, but keep a specific contractual incentive regime.

Another regulatory body reported about its duties as regards monitoring the performance of the infrastructure manager. The Member State in question has entrusted the regulatory body with extensive competences in this field, including regulation of funding and stewardship of the infrastructure and performance monitoring. For the purpose of performance monitoring the regulatory body can request any information from the infrastructure manager necessary to carry out its duty. Certain data can also be requested from railway undertakings and other stakeholders; while some of that data has to be provided to the regulatory body, additional data is often provided on the basis of good will of the undertakings concerned. In the context of performance monitoring, the regulatory body looks at elements such as cancellations and significant delays, cost and capability of enhancement measures undertaken, renewals, maintenance volumes, network availability but also at compliance with performance strategies agreed between infrastructure manager and railway undertakings. Every six months the regulatory body publishes a report showing the progress made towards the performance targets defined for the current regulatory period.
The industry is involved in the performance monitoring process and regular joint meetings between the infrastructure manager, the regulatory body and the sector are held, which allow discussion on areas of concern. If problems persist, the regulatory body can take enforcement measures, which can, if necessary and appropriate, also involve fines.

Fellow regulatory bodies asked a number of questions on the two presentations. A short roundtable discussion followed, based on feedback provided by participants on a number of questions submitted by MOVE prior to the meeting. The replies to the questionnaire showed that in a significant number of Member States regulatory bodies do not have any role as regards monitoring performance of the infrastructure manager or defining performance targets in accordance with Article 30 of Directive 2012/34/EU. Moreover, the answers indicated that most Member States envisage to implement the requirements of Article 30 of the Directive by means of a contractual agreement; however, in a number of Member States such agreements still remain to be concluded. Only a small number of Member States that have already concluded contractual agreements have consulted their regulatory bodies on the draft contractual agreement.

Roundtable discussion on approach to ex-ante vs. ex-post action

One regulatory body proposed this topic for discussion as it was interested to learn from fellow regulatory bodies about their approach regarding performance of ex ante and ex post regulatory action. MOVE collected information about experience of regulatory bodies in performing ex ante/ex post regulatory supervision ahead of the meeting; the regulatory body having suggested the topic introduced the topic by presenting an overview of the feedback received.

Feedback showed that there was no common understanding of the concept of ‘ex ante regulation’. While some regulatory bodies mainly understood ‘ex ante regulation’ as assessment (and approval or rejection) of e.g. track access charges or the provisions of the network statement before these take effect, other regulatory bodies understood the term in a broader sense, covering any regulatory action determining the future behaviour of the

regulated entity (as opposed to 'ex post' action sanctioning/remedying past behaviour). The discussion was finally based on the broader understanding of 'ex ante regulation'.

Not all regulatory bodies are free to choose between ex ante and ex post regulation. Where regulatory bodies can choose, certain situations were identified where an ex post approach seems more appropriate (e.g. in case of complaints; significant violations of law that require strict enforcement) and others where an ex ante approach may be more adequate (e.g. ex post intervention would not allow to remedy the problem; no repeated violation; regulator further develops an approach taken in a previous case with aggravating effects for the regulated party). However, choice is usually made on a case by case basis, taking into account the specificities of each concrete case. Some regulatory bodies also cautioned that ex ante regulation can limit the margin for manoeuvre for regulatory bodies for future investigations.

Discussion on article 57(8) – development of common decision making principles

Some regulatory bodies had asked to have a general discussion on the scope of Article 57(8) of Directive 2012/34/EU; MOVE provided an introduction, indicating that on the basis of Article 57(8) in principle regulatory bodies could develop common decision making principles and practices on any topic falling within their competence. Where appropriate/necessary, these decision making principles could then also become implementing acts.

Given that Article 57(8) put an obligation on regulatory bodies to develop common decision making principles and practices, MOVE underlined that it would be time for ENRRB to start working on such common principles and practices. In preparation of the meeting MOVE had invited regulatory bodies to suggest topics for which they consider that common principles and practices should be developed. A broad range of different topics was suggested and discussion during the meeting should allow identifying two or three topics to start with.

A few regulatory bodies raised concerns over MOVE's broad interpretation of the scope of Article 57(8) and expressed reservations on the idea of starting to work on common decision making principles and practices within the ENRRB, arguing that IRG Rail is already be doing this. Other regulatory bodies, however, shared MOVE's reading of the Directive and showed a real interest in starting to work on developing such principles and practices.

After some discussion it was agreed that ENRRB would make an attempt to develop common decision making principles and practices concerning performance monitoring in rail freight corridors, service facility charging and mark-ups and performance schemes for international rail transport services. Independently from that work, (procedural) provisions concerning cooperation between regulatory bodies on cases that require a decision by two or more regulatory bodies should be developed in 2018.

Update by the Commission on implementing and delegated acts (Annex VII, service facilities, economic equilibrium, clearance gauges)

MOVE provided an update on the state of play of the work on

- the draft implementing act on access to service facilities: second stakeholder workshop on revised draft with > 70 participants held on 3 May 2017; SERAC subgroup with Member

States representatives held on 14 June; public consultation to be launched in July; vote in SERAC planned for September;

- the delegated act on amendments to Annex VII concerning timetabling: public consultation ended on 14 April; last expert group meeting to take place on 23 June; adoption envisaged for Q3 2017);

- the draft implementing act on economic equilibrium test: first discussion on draft text in SERAC subgroup with Member States representatives and regulatory bodies on 5 May; meetings with RU dialogue and PRIME implementing acts subgroups held/scheduled; second round of discussion based on revised text envisaged for second half of 2017; adoption in 2018;

- the work on the topic of clearance gauges will not be pursued in the form of an implementing act under Article 57(8) of Directive 2012/34/EU but the topic will be taken forward in a different manner (e.g. with infrastructure managers in PRIME, possibly with a paper of the Commission providing guidance on the topic) in order to take account of the concerns of regulatory bodies and Member States' representatives as regards the legal basis for this act.

Report of IRG-Rail

IRG Rail provided a short update of its recent activities. IRG Rail has adopted a strategy document at its plenary meeting in May 2017, which is published on IRG's website. Ongoing activities include meetings with a range of different actors (such as ERA, EP) and presentations at conferences (e.g. European rail summit).

Working groups are looking at the revision of Annex VII of Directive 2012/34/EU (including a workshop on maintenance works), service facility charging, the potential role of regulatory bodies as regards independent review of performance based exemptions under the PSO regulation/4th railway package, providing input to the upcoming work on an implementing act on procedures for cooperation between regulatory bodies and preparing the IRG Rail market monitoring report 2018.

A.O.B.

The joint annual meeting between PRIME and ENRRB will take place on 12 October in Warsaw.

A meeting between the ECN (network of competition authorities) and ENRRB is envisaged for autumn 2017; date to be announced.

One regulatory body provided a short debrief of the first meeting of the newly created network of executive boards of rail freight corridors, to which two representatives of ENRRB were invited. The network of executive boards expressed the wish to have rotating representation of regulatory bodies, which should be coordinated at the level of ENRRB.

4. Next meeting

The next ENRRB meeting will take place on 28 and 29 November in Brussels; a workshop between ENRRB and ERA will be organised attached to that meeting or attached to an IRG-Rail meeting held in Brussels in autumn 2017 (date to be agreed between MOVE-ERA-regulatory bodies).

5. List of participants

Rail Regulatory Bodies from 23 Member States and 3 observers were present at this meeting chaired by the Commission.

AT	Schienen-Control GmbH (SCG)
BE	Service de régulation du Transport ferroviaire et de l'Exploitation de l'Aéroport de Bruxelles National
BG	Railway Administration Executive Agency (RAEA)
CH (Observer)	Railways Arbitration Commission (RACO)
CZ	Transport Infrastructure Access Authority (UPDI)
DE	Federal Network Agency (Bundesnetzagentur)
DK	Danish Rail Regulatory Body (Jernbanenaevnet)
FI	Finnish Transport Safety Agency (TRAFI)
FR	Authority for Regulation of Road and Rail (ARAFER)
HR	Croatian Regulatory Authority for Network Industries (HAKOM)
IE	Commission for Railway Regulation
IT	Authority for transport regulation (ART)
LT	Communications Regulatory Authority of Lithuania
LU	Institut Luxembourgeois de Régulation
LV	State Railway Administration
MK (Observer)	Railway regulatory agency (RRA)
NL	Authority for Consumers & Markets (ACM)
NO (Observer)	Norwegian Railway Authority
PL	Polish Office of Rail Transport (UTK)
PT	Authority for Mobility and Transport (AMT)
RO	Romanian Competition Council - Railway Supervision Council (RCC)
SE	Swedish Transport Agency (Transportstyrelsen)

SL	Agency for Communication Networks and Services (AKOS)
SK	Transport Authority (Dopravný úrad)
SP	National Commission for markets and competition (CNMC)
UK	Office of Rail and Road (ORR)