

**TAIEX** MC Mobility Consultants

## Safety authority and rail regulator

Railway institutions can come under political pressure to foreclose new entrant and foreign operators.

**Sarajevo, 15 March 2012**

Klaus-Jürgen Uhl, Chief Transport Advisor  
Wolfgang Schausberger, Managing Partner

MC Mobility Consultants GmbH

1

**TAIEX** MC Mobility Consultants

## Safety authority – challenges & tendencies (1)

- The safety authorities in the EU have quite the same processes due to the detailed annexes of the Safety Directive 2004/49/EC.
- The ERA and the regular meetings of the safety authorities help harmonise the processes.
- Significant differences only in the organisation structure.
- Criteria:
  - the size of the network,
  - the historical organisation of the railway sector (some Member States started the reform earlier than others)
  - the power position of the Ministry of Transport in the Government,
  - the political will.

2

**TAIEX** MC Mobility Consultants

## Safety authority – challenges & tendencies (2)

- Integration of the Safety Authority into a larger Railway Directorate
- Integration of rail safety body with other safety bodies.
- Similar trend in some Latin American and Asian countries with liberal railway sectors.
- Reliable and transparent body for the customers, the RUs, lms and rail industry.
- Impact of behaviour of the NSAs on the research and development of the rail industry in Europe!

3

**TAIEX** MC Mobility Consultants

## Safety authority – challenges & tendencies (3)

- Recruitment of appropriate personnel taking into consideration the cool-on and cool-off processes.
- Avoidance of recruitment of former state railway employees in the first years of existence due to the historical monopoly of the incumbent state railway.
- Successful national recruitment for future non-state railway staff.

4

**TAIEX** MC Mobility Consultants

## Challenges for the regulatory body (1)

- **How should the market regulator deal with the disparity of power between the state railway and him?**
  - Basic disparity of power between rail regulatory body (e.g. Austria 10-15 staff, Germany 60 staff) and incumbent state railway (Austria 45,000 staff, Germany 276,000 staff).
  - Personnel of incumbents potential voters.
  - In case of severe conflicts between the regulator and the incumbent, the regulator might de iure be entitled to enforce his decision but de facto it is highly unlikely to implement it as long as the Government will back the incumbent.
  - The incumbent is "too big to fail" for the market regulator.
- **Best practice**
  - The regulator must have highly competent staff with civil courage to use the judicial process in the country and to appeal to the European Court of Justice.
  - Examples: The Regulators of Austria, Germany, the Netherlands and Sweden seem to have such civil courage.

5

**TAIEX** MC Mobility Consultants

## Challenges for the regulatory body (2)

- **What is the relationship with the Ministry of Transport?**
- Basic dilemma, if the incumbent integrated railway is not unbundled or dissolved:
  - The Ministry is the final "boss".
  - The Ministry has a vested interest in maintaining its power and influence on the incumbent railway.
  - The Ministry might become an obstacle for the regulator to fulfill the tasks delegated to him by the Law.
- **Best practice**
  - Shift all or parts of the tasks of the market regulator to other Ministries.
  - Total functional independence.
  - Responsibility to the legislative body, the Parliament (case of Croatia).

6

**Challenges for the regulatory body (3)**

- **How can the independence of the executive staff be guaranteed?**
  - The independence of the executive staff depends on the recruitment process decided by the Parliament or the Government.
- **Best practice**
  - Best solution: Nomination by the Parliament upon proposal by the Government, the Cabinet of Ministers (examples, Croatia, BNetzA).
  - Second best solution: Appointment by the Government upon proposal by a Ministry that is not the Ministry of Transport (example Austria: Ministry of Justice proposes the President of SCK).
  - Weakest solution is the nomination by the Ministry of Transport whenever the Ministry is stakeholder of any incumbent railway.

7

**Challenges for the regulatory body (4)**

- **What are the challenges of recruiting technical staff?**
  - Selection of technical staff with profound knowledge in the railway sector, who is simultaneously independent from the incumbent state railways or the MoT.
  - With smaller countries such as Austria or Serbia, the problem is aggravated by the fact that the market regulator cannot offer attractive career possibilities to the candidates.
- **Best practice**
  - Possible solutions are:
    - Recruitment of foreign staff. No limitation to nationals, at least temporarily.
    - Establishment of a national and international pool of experts (ad-hoc staff or Advisory Board).
    - If university professors are required, they should be recruited from foreign universities.
    - Very close cooperation with a certain division of tasks between two regulatory bodies, based on a bilateral agreement.
    - Establishment of a regional regulatory body with a division of tasks.
    - The best solution would be an autonomous EU market regulator.

8

**Challenges for the regulatory body (5)**

- **Acting ex officio vs. reacting to complaints?**
  - There are two basic types of European railway market regulators:
    - Legal competences for reacting to complaint.
    - Additional legal competence to act by mandate - ex officio -.
  - First model is ineffective.
  - Ex officio powers are elementary for a successful rail market regulation.
  - It gives the regulator the power to become active upon informal complaints or by thorough market observation.
- **Best practice**
  - Therefore, a railway regulator with ex officio powers acting pro-actively is clearly the preferable model for a successful market opening.

9

**Challenges for the regulatory body (6)**

- **Formal decisions vs. informal mediation procedures?**
  - Formal decisions and/or informal mediation procedures depend on the culture.
  - In Austria and in other rather southern-European countries the so-called "Kaffeehausmentalität" helps solve problems in a more human way.
  - The Northern European and more protestant countries prefer a transparent legal procedure.
  - It is the experience in the past 10 years that both systems have their advantages.
  - However the formal procedure has created tensions between the members of the regulatory body and plaintiff involving costly lawyers and establishing an atmosphere of mistrust and conflict behavior.
- **Best practice**
  - The so-called Kaffeehausmentalität seems have been less costly for both sides, does not require as many staff as the other alternative.

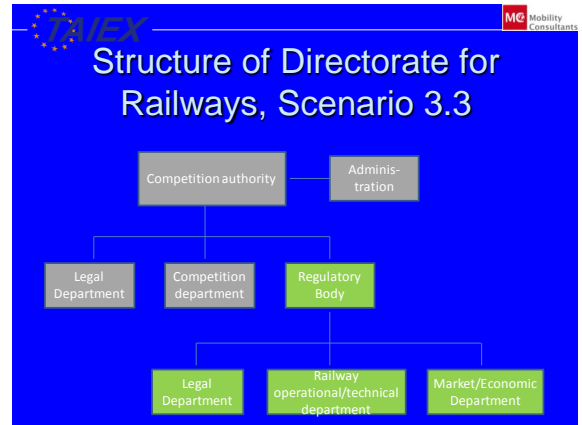
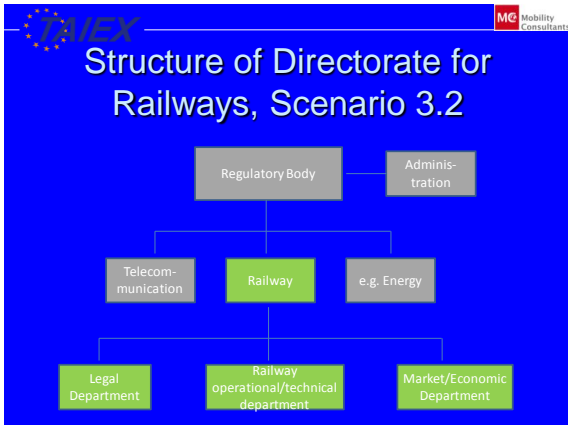
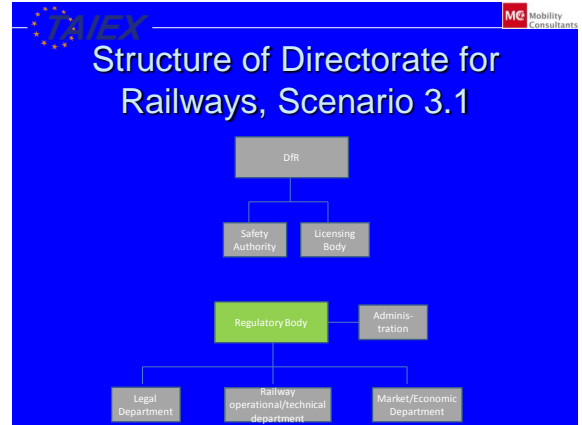
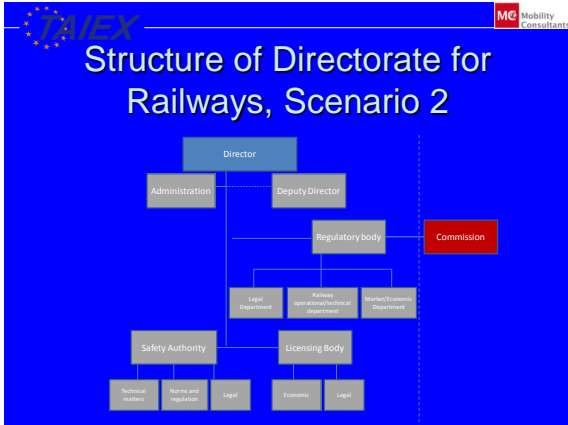
10

**Challenges for the regulatory body (7)**

- **Discrimination by the state or state authorities?**
  - The state itself or its authorities discriminate against new entrants.
  - Some regulators like the Austrian or the Croatian regulator have tribunal status.
  - In case of EU membership, the regulator can go to the European courts.
  - If a Safety Agency discriminates and it has no repercussion on international traffic the market regulator cannot appeal to the EU courts of justice.
  - He could only, in a first step, put the case into its annual report as a symbolic gesture.
- **Best practice**
  - The organisation of the regulatory body as a combined authority of various railway bodies is relatively weak against any discrimination by the state or state authorities.
  - It cannot file a discrimination case against itself.
  - Best practice is to establish a fully independent market regulator.

11





TAIEX Mobility Consultants

# Thank you.

17