

South east European core transport network

Working Group Rail policy and intermodality

Meeting on 21 September 2006, Belgrade

Institutional setup and administrative capacity

The present note outlines the legal basis and the roles of the main institutions at both national and European Level in the European Railway area. In the times of national railway monopolies, these functions were often executed by the railways themselves. Now, this self-regulated system is replaced with a set of contractualised relationships between different actors, while certain functions of arbitration are taken over by the state and assigned to authorities.

Where the essential functions, ie. capacity allocation and infrastructure charging, are not separated from the provision of rail transport services, the state has to take them away from the infrastructure manager and confer them to an 'allocation body'.

With regards to all these institutions, the EU rail directives leave to Member States large decision making powers on the way they wish to organise them, and especially whether they set up different agencies or combine some or all of the following functions within a single authority. Member States should make use of this flexibility, but at the same time the experience made over the last ten or so years in the EU has shown that some set-ups work better, and others do not.

The working group recognises the establishment and functioning of the bodies described in this note as essential for the starting up of a competitive rail service market in the states of the west Balkan and their integration into the European Railway Area. Railway undertakings established in the EU should be allowed to lodge appeals with regulatory bodies in the west Balkans, where they feel unfairly treated, and the same should hold for Balkanic railways in the EU.

1. The regulatory body

Each Member State of the European Union and each state of the European Economic Area has to set up a Regulatory Body. Its main task is to ensure a fair and non-discriminatory access to the rail network and services. The legal basis for the creation and competence of the Regulatory Body can be found in Article 10.7 of Directive 2001/12/EC and in Articles 30 and 31 of Directive 2001/14/EC.

Organisational independence and administrative capacity

The Regulatory Body is a body independent from any infrastructure manager, charging body, allocation body or applicant. It is independent in its organisation, legal structure, funding and in its decision making. Decisions taken by the Regulatory Body are subject to judicial review.

For the functioning of the regulatory body it is important that it has sufficient staff number and a mix of different qualifications and an own budget. The Regulatory Body shall have the right to request relevant information from the infrastructure manager, applicants and any third

party involved within the Member State concerned, which must be supplied without undue delay.

Main tasks

The Regulatory Body shall be an appeal body in relation to decisions taken by an infrastructure manager or a railway undertaking regarding discriminatory access conditions.

Any applicant for infrastructure capacity or interested party may lodge a complaint with the Regulatory Body if it feels that it has been treated unjustly, has been subject to discrimination or injured in any other way.

The Regulatory Body shall ensure that the charges set by the infrastructure manager are non-discriminatory. It shall supervise any negotiation between an applicant and an infrastructure manager on the level of the charges and intervene if necessary.

The Regulatory Body shall monitor the competition in the rail services market. In its monitoring function it shall decide on complaints or on its own initiative on appropriate measures to correct undesirable developments.

Co-operation

At European level and with the help of the European Commission, the Regulatory Bodies shall exchange information about their work and decision-making principles and practices with the aim to develop a common approach in order to avoid conflicting decisions. So, do national competition authorities and both networks decided to cooperate with one another.

Regulatory bodies should cooperate with national competition authorities. In fact, a few Member States assigned rail regulation to their competition authorities. Nevertheless, both functions are different and agency will not make redundant the other. Regulation of the rail market is much more detailed than regulation of other sectors of the economy.

The right to launch procedures on the own initiative of regulatory bodies has shown to be very useful in opening the market for rail services. For fear of discrimination, new entrant rail operators will be reluctant to file complaints against the incumbent railway.

Attached to this note, please find the relevant annex to the Communication of the EU Commission on the Implementation of the 1st railway package.

2. The licensing body

In 1995 the Council of Ministers adopted directive ([95/18/EC](#)), which set common criteria for the licensing of railway undertakings established in the European Union. Railway undertakings are required to hold a license when operating trains. To obtain an operating licence the railway undertaking must meet a number of specific conditions (requirements in respect of good repute, financial standing and professional competence plus civil liability). Railway undertakings apply for a license in the Member States where they are established.

With the implementation of Directive [2001/13](#), Member States must notify the Commission of all [railway licences](#), be it the issuing of new license, the suspension or change or revocation of existing licenses. The Commission has adopted a standard format under which Member States should notify this data to the Commission, which then puts this information in a publicly accessible web site.

Operating licenses have to be valid all over the EU. When a railway undertaking that holds a license issues in another Member State, the licensing body does not issue a new license, but should only inform that railway undertaking about national insurance requirements and whether it considers a particular coverage as sufficient. This latter check is often carried out together with the infrastructure manager, when the latter receives an application for capacity.

3. Safety authority and Accident Investigation Body

Railway safety is a new competence of the European Union, introduced by the [Directive 2004/49/EC](#) on safety on the Community's railways etc., a part of the so-called second railway package. The Directive establishes a framework for the regulation and management of safety on the railways of Europe.

It requires Member States to establish a national safety authority and an independent investigation body for accidents. Railway undertakings and infrastructure managers are granted safety certificates and safety authorisations by their national authorities. Common safety targets and common safety methods will be developed to allow for stronger harmonization, in particular of national safety rules.

The national safety authorities are established or are currently being built up with the implementation of the Safety Directive in national legislation. They have a variety of tasks related both to safety and to interoperability, for example:

- to authorise the putting in service of railway subsystems (such as vehicles);
- to issue, amend and revoke safety certificates for railway undertakings and safety authorisations for infrastructure managers;
- to check that railway undertakings and infrastructure managers are operating according to legal requirements;
- to monitor, promote, develop and enforce the safety regulatory framework.

According to the Safety Directive the safety authorities shall exchange experience to harmonise their decision-making criteria with the support of the Agency. This is the basis for the establishment of this network.

The investigation bodies are established or are currently being built up with the implementation of the Safety Directive in national legislation. They are obliged to exchange views and experience with the support of the Agency. The aims of this exchange are in particular:

- to develop common investigation methods;
- to draw up common principles for the follow-up of safety recommendations in investigation reports; and
- to adapt investigations to the development of technical and scientific progress.

The Network meets regularly to exchange information on ongoing investigations and on methodological issues. It will establish internal task forces to elaborate certain subjects in

more detail. The reports of the bodies on occurrences that are investigated and the investigation reports will be published on this website

4. National Notified Bodies

National notified bodies, among other things, accept rail equipment according to the technical specification of interoperability (TSI).

5. European Railway Agency

The Agency submits draft recommendations – on safety as well as on interoperability – to the Network of National Notified Bodies for discussions and opinions. Depending on the subject the Network will be convened in different configurations, for example for safety and interoperability, where detailed reports from the different working groups will be discussed. The Network may establish internal task forces to penetrate certain subjects in more detail.

ANNEX

Independent Regulatory Bodies

A national regulatory body is provided for in Article 30 of Directive 2001/14/EC, and these bodies are responsible in each Member State for guaranteeing that there is fair and non-discriminatory access to the infrastructure. They must be independent of all the parties concerned, but may be attached to the Transport Ministries. All the Member States are gradually establishing such bodies, but the various national approaches differ markedly. In some cases, it may be considered that, while a body has been formally set up, it is not operational and does not have enough human, administrative and financial resources to be able to play an active role in the operation of the market. However, it is essential that this body should have credibility with the market actors given that, when a railway undertaking encounters a problem concerning access to infrastructure or to ancillary services, it is important to it that the regulatory body is able to intervene to resolve the problem in question.

The Commission is concerned about the structural weakness of some national bodies. The fact that a body may be attached to the Ministry of Transport could, in practice, undermine its independence if the Ministry of Transport is also responsible for the incumbent undertaking. In this connection, Member States such as Germany and Spain, which have set up regulatory bodies that are independent of the Ministry of Transport where the latter is responsible for the national railway undertaking, should be commended.

Where the Commission considers that a regulatory body is unable to play its assigned role, it will bring this to the attention of the Member State concerned and will, where appropriate, take the measures provided for in the Treaty. The Commission would also like to see ever closer cooperation between the national regulatory bodies with a view to developing common approaches with regard to best practice at European level. It welcomes the cooperation between the bodies concerned with the Rotterdam/Genoa corridor as an example of good practice that should be emulated elsewhere in Europe. An assessment of the performance and capabilities of the existing regulatory authorities is set out below.

Objective of the Regulatory Bodies

The objective of the Regulatory Body is to ensure fair and non-discriminatory access to the rail network and to services. Its competences and functions are laid down in Articles 30 and 31 of Directive 2001/14/EC as well as Article 10 (7) of Directive 91/440/EEC (as modified by Directive 2001/12/EC)

Main tasks

The Regulatory Body shall be an **appeal body** in relation to decisions taken by an infrastructure manager or a railway undertaking regarding discriminatory access conditions, in particular regarding the network statement, criteria contained within the network statement; the allocation process and its results; the charging scheme and the level or structure of infrastructure fees. Any applicant or interested party may lodge a complaint with the Regulatory Body if it feels that it has been treated unjustly, has been subject to discrimination or injured in any other way.

The Regulatory Body shall **ensure** that the charges set by the infrastructure manager are nondiscriminatory.

It shall supervise any negotiation between an applicant and an infrastructure manager on the level of charges and intervene if necessary.

The Regulatory Body shall **monitor** the competition in the rail services market. In its monitoring function it shall decide on complaints or on its own initiative on appropriate measures to correct undesirable developments.

The Regulatory Body shall have the right to **request relevant information** from the infrastructure manager, applicants and any third party involved within the Member State concerned, which must be supplied without undue delay.

Stakeholder views

The Commission has invited stakeholders to submit their observations on the way the Regulatory Bodies have been set up in the Member States, as well as on their day-to-day functioning. These discussions took place within the framework of a working group created under the Regulatory and Advisory Committee foreseen by Directive 2001/14/EC. The stakeholders that submitted the comments reported below are the Community of European Railways and Infrastructure Managers (CER); the European Infrastructure Managers (EIM) and the European Rail Freight Association (ERFA). The main difficulties they observed in the current functioning of the Regulatory Bodies in the Member States can be summarized as follows:

- Regulatory Bodies do not monitor the market and tend to turn to the incumbent for advice;
- Regulatory Bodies are not given clear guidelines and lack the appropriate and required competence to carry out their assignments;
- regulatory Bodies are often short of resources and can therefore not fulfil their tasks;
- they have no, or an insufficient, information policy – they are “invisible” and hence not possible to contact;
- the division of tasks of the Regulatory Body between several institutional entities complicates rather than facilitates their functioning: parts of the regulatory functions can be found in a Ministry, whereas other parts can be found in an authority that is not part of the Ministry;
- procedures are lengthy and time-consuming: it requires a long time before decisions and rulings are made;
- decisions and rulings given by the Regulatory Bodies should be made public.

Credibility

The Regulatory Bodies have a key role to play in ensuring a well functioning rail services market. The only way in which they can tackle this role is when they are given sufficient resources in terms of staffing and budget and when the institutional setting is clear.

The situation when it comes to Regulatory Bodies staffing varies significantly from Member State to Member State. The Commission has obtained from the Member States information on the number of staff employed by the Regulatory Bodies. However, in several Member States, this figure includes staff working on technical matters, issuing licenses or safety certificates or on regulatory functions for other network industries. This makes it difficult to assess how many resources are available for the regulatory functions foreseen by Directive 2001/14/EC, and whether these human resources are sufficient to allow the Regulatory Bodies to comply with the requirements under the Directive.

In all Member States, with the exception of Luxemburg and Ireland the Regulatory Body has been set up. Ireland has derogation in this respect until 15 March 2008 according to Article 30(3) of Directive 2001/14/EC. This derogation also applies to Greece, where the Ministry of

Transport and Communications has been appointed as Regulatory Body. As far as Luxemburg is concerned, the draft proposals for implementing the infrastructure package directives foresees this function to be allocated to the Minister of Transport, who can delegate it to a Committee of three independent experts examining the submitted complaints. In Belgium the Regulatory Body is expected to be operational on 1 March 2006 due to difficulties in recruiting. Before that date, complaints are handled by the Ministry of Transport.

Next step in assessing credibility

The need for credible and independent rail regulatory bodies is of outmost importance for the well functioning of the railway market and this must be strongly stressed. The Commission will continue to monitor the Regulatory Bodies and will assess their strength. The next step in this process will be to ask the Member States to make an in-depth assessment of their Regulatory Bodies. The activities of the National Competition Authorities in the field of railways shall be evaluated as well as the degree of co-operation and information exchange between National Competition Authorities and Regulatory Bodies with a view to come to a co-ordinated approach on regulatory and competition issues.

Based on the findings the Commission envisages making a case by case evaluation of the functioning of the Regulatory Bodies. When assessing the regulatory Bodies criteria such as the following ones shall be used:

- Regulatory Bodies must be in a position to monitor competition in the market and to independently and efficiently make decisions on measures to correct undesirable developments in the rail services markets. They must be able to take decisions themselves and, notwithstanding the requirements of judicial review of their decisions, they should not be confined to only propose measures to be taken by other state institutions;
- the independence required for the regulation of competition on the rail services markets includes that the Regulatory bodies must have a budget over which it is entitled to decide, and which allows it to recruit a sufficient number of competent staff in order to perform monitoring tasks and the investigation of all complaints brought before it within two months from receipt of all information (Directive 2001/14/EC, Article 30 (5));
- the Regulatory Bodies must have the power to request the information necessary to carry out its functions from any market player involved, and to enforce these requests (Directive 2001/14/EC, Article 30 (4));
- the Regulatory Bodies must be sufficiently accessible for the market players. They should publish regular reports about their decisions in order to create transparency in the market on the criteria for their decisions.