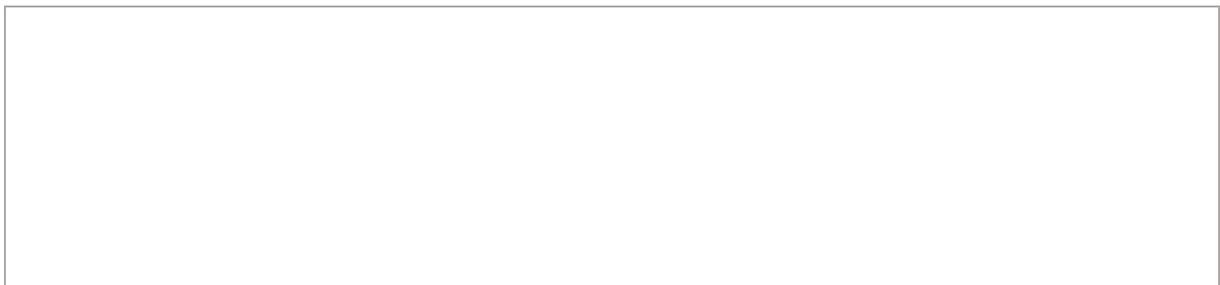


IRG-Rail (5) 23

## Independent Regulators' Group - Rail IRG

Views on the European Commission initiative to better  
manage and coordinate European rail capacity and  
traffic management

23 May 2023



## I. Introduction

1. In its 2023 work programme the European Commission (EC) highlighted its initiative to develop a legislative instrument on “international freight and passenger transport – increasing the share of rail traffic”.
2. This EC initiative aims at improving the management and allocation of rail infrastructure capacity and is based on the EC’s observations that the corridor-based approach has failed to establish a true ‘one-stop shop’ process facilitating cross-border traffic, and that the existing fragmentation of rules and procedures for capacity and traffic management hampers seamless management of cross-border rail traffic.
3. In this context DG MOVE has been considering repealing and replacing regulation 913/2010/EU with a new regulation that would also incorporate rules in particular on capacity allocation and governance, which would accordingly be deleted from directive 2012/34/EU.
4. DG MOVE has formulated four policy options:
  - Option 1: strengthening the corridor approach;
  - Option 2: introducing a network approach based on common rules and cooperation between infrastructure managers (IM);
  - Option 3: introducing a network approach based on common rules defined and monitored by central entities
  - Option 4: introducing a network approach based on common rules defined and monitored by central entities at the European level and with certain operational responsibilities.
5. IRG-Rail members have examined the policy options. This paper provides IRG-Rail’s reflections on certain points of the proposed reform to inform the EC’s current work.
6. In the light of the information and documents that DG MOVE has made available thus-far, in what follows it is assumed that the legislative proposal will be developed along the lines of policy options 3 and 4, as outlined above.
7. Remarks on the Impact Assessment for better capacity and traffic management were already published by IRG-Rail during the EC public consultation<sup>1</sup>, as well as a Statement on IRG-Rail observations on TTR<sup>2</sup>. These initial comments covered the necessary measures under a new capacity and traffic management process in order to protect non-discriminatory access. With this and future papers IRG-Rail will further elaborate on the new process as and when details of the rules and procedures become clearer. IRG-Rail’s considerations in this paper are therefore not final and may evolve once the legislative proposal is made by the EC.
8. Operational and technical barriers to market opening also exist. Harmonisation of capacity allocation and traffic management processes alone will not be sufficient to ensure competitive and effective cross-border rail services. Constraints presented by inconsistent and not harmonised national safety rules and lack of interoperability are but some of the obstacles to cross-border rail services that still hamper the operation of the European railway market.

<sup>1</sup> <https://www.irg-rail.eu/download/5/934/220615-IRG-RailPublicConsultationImpactAssessmentfinal.pdf>

<sup>2</sup> <https://www.irg-rail.eu/download/5/933/220615IRG-RailStatementonTTRofrelevanceforcross-borderIAfinal.pdf>

## II. Considerations

### Scope of the reform

9. While the rail freight corridors defined in Reg. 913/2010/EU are important, they still only represent a fraction of all cross-border routes. A legislative and procedural approach covering the entire European railway network instead of just specific corridors would contribute to further harmonisation of cross-border capacity management and train operation.
10. IRG-Rail observes that European rail networks are, in accordance with Art. 10 Dir. 2012/34/EU, largely mixed-use networks and are open to domestic and international freight as well as passenger traffic. The different capacity needs on this railway infrastructure must be assessed and balanced. To the extent that they are mixed-used and open to all types of traffic, a common set of rules on capacity allocation to facilitate the creation of viable cross-border capacity would be desirable.
11. Traffic management for cross-border services would also benefit from common rules for cross-border traffic.
12. Service facilities are also a vital part of the European rail system and better alignment between rules for network capacity allocation and allocation of capacity in service facilities should be considered.
13. Furthermore, if a new system for capacity allocation and traffic management model inspired by TTR is included in the reform, the transition to this new system would need to be managed. It would bring major changes to capacity management. Consideration of how such a new system will be introduced is required, including the advantages or disadvantages of a short or long transition period. In any case, the transition between the old and the new system would need to be laid out in the law.

### Common set of rules

14. DG MOVE initiative indicates that capacity allocation processes are currently insufficiently harmonised between Member States. The allocation of capacity and traffic management are governed, at the European level, by high-level principles and the rules are detailed, in particular, in section 3 of Directive 2012/34/EU, transposed into national law and applied operationally, at the domestic level, by each infrastructure manager.
15. For the purpose of increasing the harmonisation of capacity allocation processes between European countries in order to facilitate cross-border traffic, a common European set of capacity allocation rules could be designed to ensure compliance with the principles of transparency, non-discrimination and opening up to competition.
16. Further common rules and procedures for capacity and traffic management should be developed through railway sector stakeholders' engagement subject to regulatory scrutiny. This could be achieved with a common European Network Statement drafted by a "European Network of

Infrastructure Managers" (ENIM). This document would include technical details on the common, harmonised rules and procedures for rail capacity allocation and traffic management. Each infrastructure manager would need to develop their domestic network statement based on the European Network Statement.

17. Based on EU legislation, the European Network Statement should cover those areas where infrastructure managers need to work together to the same conditions and timescales. The European Network Statement should define principles in areas that require harmonisation and provide a framework for the process of aligning cross-border capacity needs between the networks and the roles of infrastructure managers, at least for cross-border traffic.
18. Individual network statements will need to be consistent with the framework for common rules and procedures set out in the European Network Statement. The proposed regulation would need to state clearly which rules should be part of the European Network Statement to avoid any ambiguity with those that will be limited to domestic services. Responsibilities, competences, rights and obligations and the corresponding linkages between them need to be assigned clearly, and in accordance with the principle of subsidiarity. Whenever interfaces are necessary (e.g. with exempted infrastructure or domestic traffic), it is essential that they are clearly defined, promoting the goal of harmonisation and supporting cross-border traffic.
19. With regard to commercial conditions, they should be focused on encouraging optimal use of capacity. As IRG-Rail commented in June 2022, they need to strike a careful balance between on the one hand being robust enough to create incentives and, on the other hand, not pushing traffic off rail, penalising innovation, or decreasing the competitiveness of the railway sector. To benefit best from commercial conditions, there should be a common set of applicable and enforceable rules with a focus on better capacity and traffic management.

## **European Network of Infrastructure Managers (ENIM) - Approach to capacity and traffic management**

20. While the rules on capacity allocation remain disparate between Member States, despite efforts to increase harmonization in recent years, the lack of coordination between infrastructure managers remains a particular weakness for the efficient allocation of capacity in the operation of international rail transport services.
21. A European entity including the infrastructure managers would be best placed to develop a common set of rules necessary for cross-border capacity and traffic management to be included in a European Network Statement. Such a European Network Statement would require a form of collaboration and decision making at a European level. The ENIM could also be tasked to initiate the development of common IT platform(s).
22. Establishing such an entity would preserve the infrastructure managers' independence and the benefits from their domestic expertise. An organisational structure to enable common decision-making by individual infrastructure managers may be the most effective approach. ENIM should be subjected to the same access, transparency and non-discrimination obligations as the individual infrastructure managers. In particular, it should uphold high standards of transparency and engage with applicants and operators of service facilities. In order to avoid

ambiguity and disputes, it is essential that competences and tasks are clearly defined, listed and assigned either to the ENIM or to the individual infrastructure managers, in accordance with the principle of subsidiarity. Individual infrastructure managers would have to comply with the decisions on capacity allocation taken by ENIM.

## Capacity allocation

23. Any reflection on increasing the efficiency of capacity allocation processes should include a component on capacity-work planning, for which coordination between infrastructure managers is today ineffective.
24. The development of common rules and procedures, monitoring of implementation, and resolution of non-alignment between individual infrastructure managers by a European IM coordination entity involves a comprehensive process with several decision-making stages including pre-planning, apportioning capacity to different types of traffic, finalising allocation and deciding on possible alterations before the start of train operations. DG MOVE has stated that it considers implementing a system inspired by the TTR project.
25. To ensure better planning and operation of cross-border traffic, the sequence of paths allocated across several infrastructure networks should become more coherent. When changes to cross-border paths need to be made, for example in the case of temporary capacity restrictions for engineering works which may affect cross-border traffic, all infrastructure managers involved in the path need to make the train run work instead of looking only at their (national) part of the cross-border path.
26. An effective and reciprocal economic incentive system to encourage infrastructure managers and applicants to fulfil their obligations, with financial penalties if needed, should be introduced in order to encourage both the infrastructure manager and applicants to stable and efficient utilisation of capacity.
27. The reform could strengthen the implementation of Article 44 of Directive 2012/34/EU and specify the responsibility of infrastructure managers in order to provide end to end paths to applicants.

## Traffic management

28. One of DG MOVEs' policy assumptions envisages ENIM to be able to make decisions on traffic management, covering the whole process from departure to final destination of the train run. This may include decisions requiring changes to train services to respond to delays or unplanned traffic restrictions.
29. Given the local nature of disruptions, real time traffic-management decision-making by ENIM is likely to be challenging. Cooperation between the individual infrastructure managers would still be required and enforced to ensure the feasibility of the train run across the networks, together with a clear set of common rules, defined according the principle of subsidiarity.

## Service Facilities

30. Service facilities need to be better integrated in the new capacity allocation process, which is subject to the legislative reform initiated by DG MOVE in all phases from pre-planning/strategy until allocation and traffic management. In particular, if capacity is scarce, the interface of train-path and capacity in service facility becomes even more important. Coordination requirements set out in Regulation (EU) 2017/2177 on access to service facilities and rail-related services and involvement of service facility operators in the capacity management set out in the Regulation (EU) 913/2010 need to be strengthened.
31. Service facilities are very heterogeneous. They serve different purposes for rail operation. While some service facilities and the services provided are crucial and critically important for the allocation of train-paths (e.g. terminal, storage siding) others are less so (washing facilities, maintenance depots).
32. For all service facilities, comprehensive and clear information in the service facility description is the basis for non-discriminatory access. For a sound harmonisation of capacity management, it is necessary to have a comprehensive picture of the available capacity not only on the infrastructure but also in service facilities.
33. For service facilities and rail-related services closely connected to train operation (i.e. train paths), infrastructure managers and service facility operators need to agree on harmonised capacity management, covering both procedures and priorities. In this case infrastructure managers and service facilities operators need to take coordinated approach and decisions throughout all the phases of capacity management. Notwithstanding the importance of non-discriminatory access to all service facilities, for those service facilities that are not critical for daily train operation, the introduction of new rules on capacity management must be carefully balanced to optimise the use of capacity both on the rail infrastructure and in the service facility without undue administrative burden.
34. Any pre-planning of capacity on service facilities must not prevent competitiveness of and in the rail market. Engagement of future applicants and operators of service facilities need to be preserved and strengthened. Capacity management in service facilities needs to consider the needs of the different market segments, especially newcomers, the same way as it needs consideration for the train-path planning and allocation.
35. The reform must recognize that regulatory powers must cover the whole oversight of the capacity management from “end to end”.
36. Having a similar status as infrastructure, including necessary exemptions, should be explored for service facilities, whilst recognising that access and charging rules may need to be different due to their specific nature. As addressed in IRG-Rail’s response to the public consultation<sup>3</sup>, rail transport runs along a logistic chain from “end to end” and the supply of capacity needs to reflect this.

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<sup>3</sup> <https://www.irg-rail.eu/download/5/934/220615-IRG-RailPublicConsultationImpactAssessmentfinal.pdf>

## Socio-economic benefits

37. Directive 2012/34/EU mentions priority criteria based on the importance of a service to society in Article 47(4). This shall apply, where, after coordination of the requested train paths and consultation with applicants, it is not possible to satisfy requests for infrastructure capacity adequately. In the respective situation the infrastructure capacity is scarce as demand is larger than the supplied infrastructure. The infrastructure manager shall declare that section of infrastructure to be congested and may employ priority criteria to allocate the infrastructure capacity. The outcome of the application of the priority criteria could be the exclusion of one or more of the conflicting services. If priority criteria are applied, they shall take account of the importance of a service to society relative to any other service which will consequently not run.
38. It is to note that many infrastructure managers do not consider the criterion of socio-economic costs and benefits when scarcity of capacity occurs. Therefore there is not much experience on how to calculate socio-economic costs and benefits. In Sweden the infrastructure manager has a long experience of using a social cost-benefit priority model to solve all conflicts which cannot be resolved during coordination, including dispute resolution.
39. The TTR model includes strategic planning of infrastructure capacity usage well ahead of the timetabling process. As well in the modelling phases, congestion can be declared if the forecasted demand is larger than the available rail infrastructure capacity. The criterion of the socio-economic benefits could be a means in the new legislation to evaluate such situations of exceeding demand. In the allocation phase for infrastructure capacity, priority criteria can be used and would need to take account of the importance of service to society. The same approach should apply to the planning phase.
40. If priority criteria are applied based on socio-economic cost-benefit analysis, the method of calculation should be clearly stated in legislation, so that the criteria are objective, measurable and controllable. Any new rules on this subject should also be without prejudice to the efforts that need to be made in terms of investment to increase capacity in congested parts of the network.

## Central Regulatory Entity approach to capacity and traffic management

41. Regulatory bodies play a significant role in the implementation of access to infrastructure rules at the national level. In contrast, the modalities for collaboration between regulatory bodies provided for in Article 57 of Directive 2012/34/EU remain fairly general and should be strengthened to deal more effectively with the issues at stake in international traffic. Moreover, lessons should be learned from the problems faced by regulatory bodies due to the vagueness of legislative provisions such as article 20 of Regulation (EU) 913/2010. Regulatory bodies have highlighted this situation, and have addressed this by developing IRG-Rail memorandum of cooperation as well as specific corridor cooperation agreements.
42. Regardless of the outcome of the ongoing reform, there will be a continued requirement for independent oversight of capacity allocation and traffic management. If a European infrastructure managers' coordination entity is entrusted with certain tasks and decision making powers at the European level, a European structure composed of the regulatory bodies must

also be entrusted with powers to ensure that regulatory oversight occurs at the European level too. In the same way that national regulatory bodies currently ensure that applicants are treated fairly, equally and in accordance with the applicable legal regime by the national infrastructure manager(s), either ex officio or following an applicant's complaint, regulatory bodies must, together, be able to offer the same protection against the decisions of a European infrastructure managers coordination entity.

43. Regarding the design of a central regulatory entity, it is essential that its responsibilities, powers and legal arrangements should be adequate to ensure regulatory oversight at the European level. An organisational structure to enable common decision-making by national regulatory bodies will enable *capitalizing* on their expertise. The central regulatory entity will need to be granted appropriate decision-making powers to function effectively. This includes the competence to enforce decisions. Moreover, one of the prerequisites of the future structure is that in matters not falling under the competence of the central regulatory entity, national regulatory bodies continue to operate as independent regulators. Rail regulatory bodies must remain independent from any national or European public entity; and so must any future central regulatory entity the reform might bring.
44. An approach to decision-making, where a board composed by members of national regulatory bodies take decisions, would preserve the necessary independence of regulatory bodies. Regulatory bodies must be in a position to make decisions that protect the rights of applicants to have non-discriminatory access to the rail network. Decisions taken by national regulatory bodies should not contradict the decision of the central regulatory entity.
45. The decision making process of the central regulatory entity must be designed so as to function effectively. For example with:
  - A board of regulators in which the head of each national regulatory body is represented. The board would adopt documents such as opinions, guidelines, reports, recommendations and common positions, taking its decisions by adopting effective voting rules and decision making procedures, unless otherwise provided for;
  - A strategic network would gather representatives of all members. It would prepare documents for the approval by the board of regulators;
  - Working groups which would be open to the participation of experts from all members;
  - An office which would provide administrative support.
46. Presently, IRG-Rail offers a multilateral platform of cooperation and exchange of regulatory practice, working for consistent application of the European regulatory framework. IRG-Rail has proven its capacity to change and adapt to new circumstances and challenges. In 2021 it adopted an organisational reform making qualified majority voting the rule while maintaining the principle of consensus only for a few matters such as the acceptance of new members. Already in 2018 IRG-Rail's members signed a Memorandum of Cooperation pursuant to Article 57(8) of Directive 2012/34/EU. These represent substantive (first) steps towards a more effective and transparent cooperation that could serve as a basis for a future European central regulatory entity.
47. Moreover, insofar as a centralised capacity allocation and traffic management process results in an ability for infrastructure managers to influence the strategic capacity management phase, the central regulatory entity as well as the national regulatory bodies must be empowered to

monitor and act early to preserve fair competition and safeguard the smooth functioning of the market. This requires ensuring that regulators have early and complete access to all relevant information and that they are provided with legal powers to reach binding decisions whenever necessary.

48. In addition, the central regulatory entity could help identify and analyse other barriers affecting cross-border traffic as part of its market monitoring activity and handling of capacity allocation complaints.
49. In its approach DG MOVE also envisages a role for delegated acts and implementing acts to provide detailed regulation of key issues. Under this scenario IRG-Rail considers it is important that regulatory bodies are given a key role in the work of detailing rules through these instruments. Through their work with complaints, ex-officio investigations and market monitoring with insights into national markets, regulatory bodies are likely to be in possession of valuable knowledge for the appropriate design of such delegated and implementing acts. Regulatory bodies are also likely to be the first entities to be aware of problems in the regulatory framework as well as their consequences for national markets.
50. Any extension of the national regulatory bodies' responsibilities would require increased attention to their funding and human resources sustainability. Cross-border rail traffic and European affairs would become even more central to the regulatory bodies' tasks than is already the case and would add to their workload. It is of the essence to ensure that individual regulators are funded accordingly and carry out their tasks in complete independence, applying effectively Article 56 Paragraph 5 of Directive 2012/34/EU.

## Annex; for information - Extracts of papers June 2022

### 1.1.1 220615 IRG-Rail response to ECU Public consultation:

(No 5) European rail networks are largely mixed-use networks. This means they are open to domestic and international freight as well as passenger traffic. Limited capacity on many rail networks indicates that shortage of capacity is one of the main problems of the European rail transport. Any new rules would therefore need to take into account how to analyse and balance legitimate capacity needs for all kinds of traffic. To enable smooth traffic flows across borders, a common view on the distribution of capacity between transport services or jointly binding criteria will need to be found reflecting adequate and balanced capacity apportionment of all different market segments. Socio-economic benefits of transport services could be a useful basis for such criteria.

(No 6) The TTR Project developed by RailNet Europe and others has been suggested by stakeholders as a way forward. Its main feature is advance planning of capacity for all business and social needs as well as for temporary capacity restrictions. This reinforces the need to take into account all types of traffic.

(No 7) While advance planning might lead to a more efficient use of capacity, such a system would need to be designed carefully to avoid any negative impact on competition and the ability of railway undertakings to enter the market. Transparency in planning methodology and design parameters will be a key feature to ensure this. Since advance planning is done before applicants express their needs in the form of train path requests, clear procedures for consultation, coordination and dispute resolution at each stage of the TTR process will be necessary to ensure that the planning of capacity will be based on the real needs of applicants. Advance planning moreover raises the question of data-sharing and adequate treatment of confidential information between applicants and infrastructure managers.

(No 8) A necessary feature for the TTR allocation model is to create appropriate incentives through commercial conditions that cover cancellation, non-usage and modification/alteration of train paths, supporting transparent, fair and reliable capacity planning and allocation on the one hand and the efficient use of capacity on the other hand by means of reliable usage of train paths. IRG-Rail supports the harmonization of definitions of cancellation, modification, alteration, and non-usage.

(No 10) The current Rail Freight Corridor Regulation only considers the main cross-border Pre-Arranged Paths (PAPs). It fails to integrate the "end to end" journey and the full logistic chain. It does not take into account feeder-outflow-paths or the linking of paths to the service facilities and the endpoints of the journey. The current system, which provides rules for the whole railway network in the Directive 2012/34/EU and a separate set of rules for freight corridors under the Regulation, creates additional complexity with regard to capacity allocation for the same infrastructure. Harmonised processes for cross border traffic compatible with domestic traffic would make the system more transparent.

(No 11) There is a need for coordination and consistency of regulatory approaches for cross-border issues. Regardless of the outcome of the ongoing reform there will be a continued requirement for independent oversight of capacity allocation and traffic management. This can be simplified for all parties involved by creating a central IM entity. It would also require making the scope of the rules

and the roles of all parties, including the regulatory bodies, very clear. Regulatory competences for monitoring, ensuring transparency and non-discriminatory access as well as decision making need to mirror any future rules on the allocation process. Competences would need to apply to all stages of decision-making on planning and allocation of capacity.

(No 12) In a capacity management model inspired by TTR, this would include the recognition of The new system would need to recognise the fact that shifting large parts of the decision-making process on capacity allocation from the request phase to the planning phase would also shift the focal point of independent oversight to this phase. Any changes to the regulations legislative framework should take into account the consideration of new entrants and non-discriminatory access to railway infrastructure in the long-term.

(No 13) Depending on which policy option is presented by the European Commission, different interfaces between regulation of cross-border and domestic traffic will occur. These will need to be defined clearly in order to avoid disputes over competencies and jurisdiction. This includes the necessity to enforce decisions in individual member states.

## 1.1.2 220615 IRG-Rail observation on TTR for Smart Capacity management

(No 12) On the basis of a review of reservation charges, IRG-Rail in the 2020 report made a number of observations on the proposed Commercial Conditions intended to create incentives to avoid overbooking and unnecessary changes to the timetable.

(No 14) Commercial Conditions need to strike a careful balance between on the one hand being high enough to create incentives and, on the other hand, not being so high as to push traffic off rail, penalise innovation, or in other manners in some way, decrease the competitiveness of the railway sector. Given the similarity of the suggested solution to current reservation charges which have not proven effective, it is uncertain whether the suggested charges will be sufficient to reach the objective of encouraging stakeholders to use the allocation process and capacity products as efficiently as possible. For the required effects to be achieved, it may be necessary to base the charges for the Commercial Conditions on predictions of behaviour rather than agreeing on a proportion of Track Access Charges.