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**Independent Regulators' Group – Rail**

**IRG–Rail**

**2<sup>nd</sup> Position Paper**

**on considerations for an implementing act on procedures and criteria for access to  
service facilities.**

**15 April 2015**

## **I. Introduction**

1. This second IRG-Rail position paper concerning the upcoming proposal by the European Commission for an implementing act on access to service facilities intends to explore further topics that have arisen in discussions with the Commission since the publication of the first position paper<sup>1</sup>.
2. IRG-Rail's objectives with this paper are:
  - to highlight further areas of importance that might be included in the above mentioned implementing act;
  - to provide input on this matter based on best regulatory practice and a common understanding on access issues for service facilities, drawing on regulatory bodies' experience.
3. This paper focuses on the following points:
  - independence requirements for operators of service facilities
  - procedures concerning the "use it or lease/rent it" rules;
  - further clarification of IRG-Rail's position regarding the concept of viable alternatives.
4. Furthermore, IRG-Rail's paper reiterates its remarks and suggestions concerning the scope and the need for transparency of access arrangements as detailed in its first position paper.

## **II. Independence requirements for operators of service facilities**

5. Article 13(3) of Directive 2012/34/EC establishing a single European railway area ("the Directive") introduces independence requirements for service facility operators (passenger stations, freight terminals, marshalling yards, storage sidings, port facilities and refuelling facilities)<sup>2</sup> where such service facilities are operated by an entity which is under the direct or indirect control of a body or a firm holding a dominant position in the national railway transport services market for which the service is used. The operator of these service facilities has to be independent in organisational and decision-making terms from the dominant entity or undertaking.

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<sup>1</sup> Published at <http://www.irk-rail.eu/app/download/5805406336/IRG-Rail+%2814%29+10+-+Position+Paper+on+Art+13+%289%29.pdf>

<sup>2</sup> listed in Annex II, point 2 (a), (b), (c), (d), (g) and (i)

**Scope and role of regulatory body**

6. Article 13 implies that regulatory bodies will have a role in assessing whether operators of service facilities are under direct or indirect control of a body or firm which is also active and holds a dominant position in national railway transport markets for which the facility is used.
7. First, with regard to the scope, IRG-Rail considers that article 13.3 covers both “**bodies or firms**” which also hold a dominant position in national railway transport services and that it covers both private and public entities.
8. Secondly, the regulatory body will have to assess whether the service facility operator is under “**direct or indirect control**” of a body or firm that is also active and holds a dominant position in national railway transport market services. This will include in particular any contractual relationship between the facility operator and the railway undertaking that establishes a “de facto” control<sup>3</sup>. IRG-Rail considers that there needs to be a case by case analysis, in particular in countries where there are integrated governance structures<sup>4</sup>.
9. Thirdly, the regulatory bodies’ assessment of the dominant position will need to focus on the relevant **railway transport service market for which the facility is used** which will be determined by the regulatory body. The regulatory body will then have to examine whether the operator is integrated with a firm or a body that has a dominant position in the transport services for those relevant markets. Such an exercise requires a detailed analysis for each specific market in which the facility operator is active<sup>5</sup>.
10. IRG-Rail considers that this assessment can be initiated ex-officio or upon request. The regulatory body should be able to require, at any time, all relevant information. Whereas ex-ante tests can be conducted for new service facility providers, for existing service facility operators, the regulatory body could perform an ex-post analysis which may result in a decision asking for measures to be put in place, including organisational changes. IRG-Rail suggests a two-step approach: First regulatory bodies could issue guidelines on compliance. Secondly, if necessary, regulatory bodies could conduct a dominance test and specify any additional requirements.
11. With regard to the **responsibility of the regulatory body for assessing the dominant position**, IRG-Rail notes that some regulatory bodies are also competition authorities and will therefore have the necessary expertise to run the analysis. However, some regulatory bodies underline the fact that they do not yet carry out such work and when this is the case the European and national legislators have to ensure

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3 Commission Consolidated Jurisdictional Notice under Council Regulation (EC) No 139/2004 on the control of concentrations between undertakings (2008/C 95/01); in particular, see paragraphs 16 - 27.

4 For example, in France it could be necessary to assess whether SNCF Réseau, which is both the infrastructure manager and an operator of marshalling yards is under indirect control of the holding company, SNCF which, through its subsidiary, SNCF Mobilités, holds a dominant position in the national railway transport services market. A comparable holding structure exists in other MS such as Germany and in Italy.

<sup>5</sup> For example, there may be a case where refuelling facilities are used by both freight and passenger trains whereas for a freight terminal provider, the regulatory body may conclude that the analysis should only cover its dominance in rail freight transport.

adequate resources for this new function. Nevertheless it could be possible for regulatory bodies to cooperate with the competition authority.

12. In order to assess market dominance in the railway transport services market, IRG-Rail believes that principles of competition law should be relied upon. No additional railway-specific requirements are needed in the implementing act.

***Independence requirements according to Art 13.3***

13. IRG-Rail acknowledges that market structure and the level of liberalisation for service facilities differ across Europe. Therefore, the requirements for independence should be balanced and should reflect the need for tailor-made regulation. Currently, the level of protection with regard to independence requirements for operators of service facilities is very low in some markets. Strong independence requirements would be particularly relevant in markets with service facilities owned or managed by dominant providers and/or vertically integrated incumbents. On the other hand, such detailed requirements may not be appropriate where the market for service facilities is open with several providers.
14. IRG-Rail has taken note of the challenge to find the right balance between the need for clearer requirements on the one hand and, on the other, the need to take into due account the heterogeneity of service facilities across different market situations, their high number and the differences between the needs of the applicants. IRG-Rail is of the opinion that the need to distinguish between different operators of service facilities should not create disproportionate administrative or economic burden to some service facilities. The fact that different service facilities would require different approaches in this regard should not lead to a "least common denominator".
15. IRG-Rail would suggest a flexible and asymmetric approach in the implementing act, with a competence for the regulatory body to exercise and decide on the appropriate independence requirements.
16. Accordingly, regulatory bodies should have the necessary powers to assess, decide on and supervise the independence requirements (appropriate supervisory and enforcement powers) and receive all relevant data and information, e.g. with regard to the decisions structure of vertically integrated firms in order to control compliance.
17. Non-discriminatory access to service facilities, such as passenger train stations or freight terminals are essential for market opening. Entities affected by Art. 13 Para 3 shall organize themselves in a way that ensures the independence of the operator of the service facility in decision-making terms.
18. In the case of a dominant position and the integrated set up of an entity a number of independence requirements in decision making must be demonstrated and published. Decision-making independence requirements cover, for example, management, appointment, suspension rules, cooling off provisions. The requirements may also include that the management of a service facility provider shows administrative (including responsibility for recruitment, appointment and dismissal of staff), financial and budget autonomy.

19. IRG-Rail believes that a level of guarantees should be foreseen in the implementing act, but some of criteria could be amended by the regulatory body either ex-officio or in case of the failure to achieve the required independence by themselves.
20. With regard to organisational independence required under the Directive, this implies setting up so-called Chinese walls, in order to protect commercially sensitive information in addition to the foreseen accounting separation measures under legislation. IRG-Rail recommends that the implementing act should impose an obligation for service facilities operators to establish, where necessary:
  - a separate department for the management of service facilities with its own staff ;
  - separate information systems for the use of service facilities;
  - a code of best practice for handling confidential information.
21. To ensure the effective monitoring of these measures, IRG-Rail believes that additional compliance mechanisms could be envisaged if appropriate, by requiring facilities to report annually on compliance with the independence requirement.
22. In any case, IRG-Rail considers that any independence requirements should be aligned with and reflect those imposed on the infrastructure manager.

### **III. Use it or rent/lease it**

23. Article 13 also states that “where a service facility referred to in point 2 of Annex II has not been in use for at least two consecutive years and interest by railway undertakings for access to this facility has been expressed to the operator of that service facility on the basis of demonstrated needs, its owner shall publicize the operation of the facility as being for lease or rent as a rail service facility, as a whole or in part, unless the operator of that service facility demonstrates that an ongoing process of reconversion prevents its use by any railway undertaking.”
24. Any operator of a service facility has to comply with the provisions of the Directive, especially with the provisions of Article 13, which obliges the operator of a service facility to grant non-discriminatory access to the service facility and its services. If an operator of a service facility grants non-discriminatory access to its service facility, there is no need for a lease or rent of the service facility. Therefore IRG-Rail believes that the implementing act should clarify that this paragraph only applies to those service facilities which have not been in use for at least two consecutive years and remain unused even in presence of a formal expression of interest by at least one applicant.
25. The tenant or the owner should acknowledge receipt and process the expression of interest as quickly as possible. After receipt of an expression of interest, the owner/operator should not be allowed to initiate a process of reconversion.
26. Under the Directive, when not interested in directly operating the service facility, the owner of a service facility is obliged to publish the conditions for renting or leasing its service facility. These conditions should also cover the connection to the adjacent railway infrastructure. He should do so without undue delay.
27. The publication process should be subject to regulatory supervision. Therefore the regulatory body should be informed about the publication by the owner/operator of a service facility. To ensure a non-discriminatory process the regulatory body should be

able to investigate the process ex-officio. This is without prejudice of the right of any interested party to complain to the regulatory body.

28. The owner/operator of the facility should consider any reasonable offers made by interested parties without undue delay.
29. The whole provision is applicable (only) as far as there is no process of reconversion in progress. Reconversion in this context should be understood as a formal process such as construction works that aim at removing the current function of the facility and replacing it with a different one. The owner/operator of the service facility should demonstrate that the reconversion process has started.
30. The provision applies if the respective service facility has not been in use for at least two consecutive years. This time period should be measured starting from the first day after the last use of the service facility.

#### **IV. Viable Alternatives**

##### Procedure for access to services including viable alternatives

31. The objective of the Directive in relation to service facilities is to open a wider range of commercial and operational facilities in order to facilitate competition between railway undertakings, thus improving efficiency and resulting in lower prices, better level of services and encouraging greater use of the rail network.
32. Article 13 of the Directive establishes a general access right to service facilities. In its previous position paper, IRG-Rail asserted the principle of a presumption of a transparent right of access to service facilities as a starting point. The implementing act should therefore make it clear that the right to non-discriminatory access to service facilities means that operators of service facilities must grant access to a service facility as requested to all applicants<sup>6</sup> if capacity and the service are available. IRG-Rail fully supports the Commission's intention to further define in an implementing act the main elements of the procedure for handling requests. IRG-Rail would recommend in this respect that such main elements should be defined in line with the requirements listed in IRG-Rail's previous position paper (a three stage procedure including identification of conflicts, co-ordination of conflicting requests, and a resolution procedure). In this context, IRG-Rail stresses that any decision to turn down access or service requests must be fully explained in writing by the service facility operator. Such written explanation should be provided in all cases to ensure full transparency and a copy of the written explanation should be sent to the regulatory body for information. It is within the discretion of the regulatory body to start an ex officio procedure. This is without prejudice of parties being able to come and complain to the regulatory body should they still feel aggrieved or discriminated against.
33. IRG-Rail recognises that in cases where conflicting requests cannot be resolved after the coordination or dispute resolution phases due to lack of available capacity, the "viable alternative regime" serves as a further instrument for conflict resolution and

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<sup>6</sup> IRG-Rail understands that Article 13 of the Directive, with regard to its scope, is covering and addressing not only railway undertakings/operators but all relevant entities/parties which request access to service facilities or a related service. IRG-Rail therefore uses the term „applicants“ with its broad scope throughout the whole document.

granting access appropriately. According to Article 13(4), requests for access to service facilities and/or supply of services within them may only be refused if there is a viable alternative allowing applicants to operate the freight or passenger service concerned on the same or alternative routes under economically acceptable conditions.

34. In IRG-Rail's view, the viable alternative approach should only be triggered once the process of dealing with conflicting requests has been completed.
35. The definition of "viable alternative", according to Article 3(10)/13(4), means access to another service facility which is economically acceptable to the railway undertaking and allows it to operate the freight or passenger service concerned. IRG-Rail believes that the "viability" should not only depend on whether the alternative facility meets the applicant's direct needs, but must also allow the applicant to supply the relevant services to its customers on competitive terms.
36. Due to the heterogeneity of service facilities on Member States' networks and the differences between the needs of the applicants requesting access to service facilities and services within them, the implementing act should include only guidelines for operators of service facilities on what should be considered when assessing whether a viable alternative exists. IRG-Rail recommends therefore a case-by-case analysis on what may be the viable alternative based on objective criteria. The principles for the analysis as outlined below should be transparent and published on the service facility operator's website and in the network statement. A number of safeguards should be put into place to avoid (the potential for) discrimination while exercising this analysis. IRG-Rail would see a number of general obligations for service facilities operators as well as applicants as described below.
37. IRG-Rail considers transparency to be a key requirement during the whole procedure. In order to provide certainty to applicants and operators of service facilities with regard to their rights and obligations, operators of service facilities should set and publish general timescales for the handling of requests (these timescales may differ for different types of request) to ensure that regulatory bodies are not asked to set deadlines on a case-by-case basis. If the operator of the service facility is not able to reply in the timescale he has set, he can ask the Regulatory Body for an extension.

Viable alternative: obligations for service facility operators and obligations for applicants

38. IRG-Rail recommends that, where access to a service facility is restricted and is likely to affect an applicant, the operator of the service facility is required to justify in writing any decision of refusal and indicate any viable alternative in other facilities when refusing access. IRG-Rail recommends that such written justification is provided to ensure full transparency and that the copy of the written justification is sent to regulatory body.
39. Non-availability of capacity can justify a refusal under certain conditions. Where capacity is constrained, a service operator could reasonably refuse to grant, or impose restrictions on, access. However, where a service operator argues that it has reached full capacity, IRG-Rail would expect it to provide a reasoned case explaining the nature of the capacity constraints and demonstrating that it has examined all options for accommodating the applicant's request.
40. The service operator that intends to reject an applicant's request to a service facility or services, is asked to propose one or more alternatives. The service operator should demonstrate to the applicant why it considers that a viable alternative exists by

identifying those viable alternative(s), and providing an explanation on the extent to which those alternative(s) meet the applicant's requirements and match the characteristics of the facility, for which access is required, in terms of operational capabilities and geography and charges.

41. Concerning the condition "economically acceptable", IRG Rail considers that the applicant is probably the best/only party capable to determine whether the proposed alternative is viable "under economically acceptable conditions". One could also assume that service operators suggest alternatives to the applicant on the basis of information in the infrastructure manager's network statement or the different terms of use of the possible alternative service facility. An analysis on a case by case basis is likely to be required, since the economically acceptable conditions will differ from one situation to another.
42. The applicant can challenge the decisions made by the operator of an service facility in the forementioned process by filling a complaint to the regulatory body. IRG-Rail would expect the applicant to demonstrate its needs for capacity. Capacity at a facility is a function of a number of different constraints and IRG-Rail recognises that all of these will contribute to the overall limitations at the facility. The regulatory body would assess whether an appropriate part of the capacity has been granted to that applicant.

Criteria to determine an economically acceptable viable alternative – physical viability

43. An important starting point for a service operator making the case for a viable alternative will be for it to consider whether alternative sites are substitutable, that is to say operationally or logistically capable of replicating the amenity or service offered by the service facility to which access is being refused. This requires applicants for access to explain:
  - the precise operational characteristics it seeks (e.g. terms of access, technical characteristics, services offered), for example if specialist handling equipment is required or if access for road vehicles for loading and unloading is needed;
  - the geographical requirements of the service facility, for example a terminal's proximity to a particular port where the customer's cargo is being unloaded, or the requirement of a customer that a particular terminal is used or that the terminal is located in a particular region for its final distribution.

Criteria to determine an economically acceptable viable alternative – commercial viability

44. An alternative service facility which is operationally compatible with the requirements of the applicant must at the same time be commercially viable. IRG-Rail considers that if using another facility service was certain to impose such an increase in the applicant's costs, that the applicant could no longer operate the traffic or conduct its business, that facility would not be a viable alternative.
45. The difference in total cost for providing the service and length of travelling time occurring as a result of use of the other service facility should be taken into consideration when determining the viability of an alternative.
46. This commercial assessment needs to include consideration of relevant costs, not simply the price for accessing the alternative service facility. For example, an



alternative location might, due to the distances involved, incur additional track access charges. Or there may be route availability issues which require modification to the equipment used (e.g. certain routes may require sub-optimal use of wagon capacity) or an alternative service facility might impose additional handling costs on the customer, making the rail undertaking's proposed service uncompetitive. IRG-Rail would expect an applicant challenging an alternative proposed by the service operator to assess and to demonstrate that the proposed alternative is not viable in terms of financial impact.

Criteria to determine an economically acceptable viable alternative – availability

47. The availability of the alternative also plays an important role. There may be instances where there are a number of alternative service facilities that meet all the criteria required by the applicant but where the relevant service operators have refused access either successively or simultaneously. This would create an unsatisfactory position for the applicant and could introduce significant delay in the resolution of the access request. In each case, the respective service operator may consider previous recent refusals of access as an indication that this option may not be a viable alternative. If, in these circumstances, the applicant appeals to the regulatory body then he should nominate his preferred service facility.
48. The applicant should be required to consider the potential alternative facilities or services put forward by the facility operator against its requirements to assess whether they are viable alternatives. If the applicant does not consider that the proposed alternative is viable and no compromise solution is found, it can appeal to the Regulatory Body.

Role of the regulatory body

49. Concerning the role of the regulatory body, IRG-Rail considers that, under the Directive, the regulatory body should have the power and competence to monitor non-discriminatory access to service facilities and the supply of services within these facilities and therefore to gather all relevant information from all interested parties. The regulatory body also needs supervisory powers in order to make regulatory decisions. In the event of a complaint, or upon its own initiative, the regulatory body should be able to decide if access has to be granted to the preferred service facility or to an alternative or if it is justified that neither access to the original service facility nor to an alternative can be granted. Based on the principle of open access to service facilities and services and appropriate capacity allocation IRG-Rail considers that particular attention should be paid to the case where one service facility operator or one holding owns all alternative service facilities to ensure appropriate access.

**V. Conclusions**

50. This second position paper on considerations for an implementing act on procedures and criteria for access to service facilities outlines IRG-Rail suggestions and input for relevant measures and requirements on a number of issues for the upcoming implementing act.
51. Following its first position paper dated September 2014, IRG-Rail, in co-operation with the European Commission, has identified the following issues of importance for the

non-discriminatory access to service facilities as an integral part of a single transport market:

- independence requirements,
- access conditions including the concept of viable alternatives, and the
- “use it or lease/rent it” rule

as issues of importance for the non-discriminatory access to service facilities, which are crucial for fostering the development of a single transport market at EU level.

52. The need for clear and comprehensive rules concerning transparency and information about services is stressed once more, as well as the need for the necessary extended enforcement powers and resources of regulatory bodies.
53. Based on assessments in Member States and the exchange of experiences and best practices, this position paper seeks to provide input for the application of appropriate instruments for regulatory bodies, requirements to facilitate procedures, and measures to ensure legal certainty for service operators as well as applicants.