

**Independent Regulators' Group – Rail
IRG–Rail
Position Paper
on considerations for an implementing act on procedures and
criteria for access to service facilities.**

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I. Introduction

1. The European Commission (hereinafter “the Commission”) aims for a greater integration of the European transport sector which is an essential element of the completion of the internal market, Railways are a vital part of the European transport sector moving towards achieving sustainable mobility.
2. In order to achieve fair competition, the non-discriminatory access to service facilities and to rail related services in these facilities is crucial and should allow railway undertakings to offer better services to passengers and freight customers. This in turn should contribute to the enhancement of the rail market.
3. This IRG-Rail position paper provides initial views on the Commission’s future proposal for an implementing act on access to service facilities. According to Article 13(9) of Directive 2012/34/EU (hereinafter “the Directive”), the Commission may adopt measures setting out the details of the procedure and criteria to be followed for access to services to be supplied in the service facilities. These measures are to be based on the experience of the regulatory bodies and of the European Network of Rail Regulatory Bodies (ENRRB).
4. IRG-Rail’s objectives with this paper are:
 - To highlight areas that we believe the above mentioned implementing act should focus on in order to ensure harmonization in the implementation of the Directive;
 - to provide input for future discussions on this matter based on best regulatory practice and a common understanding on access issues for service facilities, drawing on regulatory bodies’ experience.
5. IRG-Rail believes there are three issues that need to be highlighted in the implementing act:
 - transparency of access conditions and procedures as well as of charging principles;
 - procedures for access application and procedures dealing with conflicting requests;
 - the concept of viable alternatives.
6. IRG-Rail provides initial views on these issues in this paper. IRG-Rail also intends to cover issues with regard to service facilities such as accounting separation and “use it or lease/rent it” in separate papers.

II. Transparency of access arrangements and charges

7. Provision of information on access and charging conditions are key to achieve fair competition and non-discriminatory access to service facilities and services provided in these facilities.

Transparency of access arrangements and information

8. Transparency of access arrangements and procedures are key to ensure the basis for access without barriers to service facilities for all applicants. Service facility operators must therefore examine all applicants' information requests.
9. One of the main conditions for non-discriminatory access is complete and precise information on access arrangements and procedures.
10. IRG-Rail believes that the operator of the service facility should publish at least:
 - the list of all installations, their locations and a precise description of the facility and the services offered in it;
 - key contact details, such as the operator's phone numbers and e-mail-addresses;
 - all relevant documents for the access and use of the service facility. For example model access contracts, specific contractual conditions and timescales for dealing with requests;
 - if applicable, the terms of use of the operator's necessary IT-systems and the rules concerning the protection of sensitive and commercial data;
 - details of the access coordination process;
 - details of the dispute resolution system;
 - planned changes of the service facility which could impact on the capability or capacity of the facility.
11. All the above information should be made publicly available, either electronically or in writing. IRG-Rail believes that the information listed above must be easily accessible, readable and regularly updated.
12. The experience of IRG-Rail members shows that this information can be published in different ways. In some countries, such as France, the Netherlands, Norway, Slovenia and the UK the infrastructure manager's network statement contains all necessary information, often by providing a link to the relevant service operators. In Germany, the service operators are required to publish the core access information in an individual document (service facility statement). In Austria railway undertakings operating service facilities are required to publish terms and conditions while infrastructure managers publish their conditions for access to service facilities in their respective network statements. Different ways are possible therefore Member States should be given appropriate flexibility with regard to the method of publication.

Transparency of charges

13. IRG-Rail believes that transparency of charges is a key issue to guarantee a non-discriminatory access to service facilities.
14. The service facility operator must provide sufficient information to give the applicant visibility on charges so that they can develop a well-founded business plan.
15. IRG-Rail believes that service facility operators should publish, at least, the following information:

- Charges for access to the facility and services provided;
 - charging principles, i.e. the methodology of charges calculation. This information should be sufficient to enable the user of the service facility to understand how the charges are determined and may evolve.
16. IRG-Rail believes that in order to allow regulatory bodies to perform their monitoring functions, service operators may also have to provide further detailed information on charging upon request.

III. Access application procedure, including procedure for conflicting requests

17. Capacity in service facilities is a basic requirement for railway undertakings operating both passenger transport services and freight services and other applicants. A predictable access application procedure securing a fast and transparent allocation process is essential for fair access to service facilities and for the successful development of competition in the market for rail transport services. A process including consultation on applications may help flushing out whether there are any conflicting applications about to be made.
18. Once an applicant puts forward a request for access to a service facility or services therein, the service facility operator should acknowledge and confirm the request including the moment it has been received, after ensuring that all the necessary and required information is complete and has been submitted properly. In the case of missing information the applicant should be notified as soon as possible. All this should be done within a reasonable period after receipt of the request.
19. Requirements for a detailed procedure should also apply for the management of conflicting requests as this is an essential part of the application process. If restrictions occur due to capacity issues, the process should include precise access coordination rules. Ultimately, a procedure for conflicting requests should be able to deal with the remaining conflicting applications which cannot be solved by coordination.
20. Therefore the implementing act should require service facility operators to have a procedure dealing with conflicting requests. This is to guarantee a proper and transparent process for non-discriminatory access.
21. In order to ensure the aforementioned predictable and transparent allocation process, IRG-Rail believes that operators of service facilities should justify any refusal to the applicant.
22. In the event of conflicting requests the operator of service facilities should attempt to resolve them through the coordination process. The process should be as follows:
- **As a first step, operators of service facilities should identify conflicting requests**
Practice has shown that it is important that the operator carefully considers, whether two or more requests really conflict or not. Where necessary, the operator should seek additional information and/or ask questions to the applicants.

- As a second step, operators should attempt to coordinate the conflicting requests

If a conflict is identified the service operator should start to solve the conflict on the basis of a mutual agreement with all concerned parties and apply the access coordination process.

- As a third step, without prejudice to appeal procedures, service facility operators should apply a dispute resolution procedure

23. Should an applicant still feel discriminated against, it is possible to file a complaint ¹ with the regulatory body that has jurisdiction over the service facility.
24. IRG-Rail believes that it makes sense for service facility operators to adopt a dispute resolution procedure as is the case for infrastructure managers. The procedure should provide clear and objective rules to decide unambiguously which of the conflicting requests has priority. Criteria and their application should be fair and non-discriminatory. They should not lead to any hidden discrimination or unfair access conditions. Criteria may include:
- Timely coordination, e.g. with approved train paths / circulation of the service;
 - best use in respect of the designated purpose of the service facility (e.g.: a loading siding should be primarily used for loading and not for storage);
 - operational criteria of the service facility (e.g. frequency and volume of use);
 - consideration of existing contractual arrangements;
 - investments made by the user of the service facility;
 - impact on revenues of service facility operators;
 - ability of service facility operators providing railway services to plan the future of their businesses with reasonable degree of assurance;
 - impact on applicants (or potential applicants) at service facility;
 - auction (highest bid), but only as a possible last solution.
25. The above list is neither an exhaustive nor a cumulative list, but criteria have to be applied equally.
26. IRG-Rail recognises that different criteria are likely to apply to different service facilities. The dispute resolution procedure for a shunting or marshalling yard may not be appropriate for a port or a passenger train station. The implementing act should require service facility operators to produce guidelines and set out the conditions and criteria that will be applicable when dealing with access requests. Therefore any requirement for criteria given in the implementing act should consider these differences and give room to operators of service facilities to adopt different approaches concerning the details of dealing with the application process, including the conflicting request management.
27. Implementing such procedures in advance allows a predictable and transparent allocation process in the event of conflicting requests.

¹ In accordance with Art. 56 of the Directive.

IV. Viable alternatives

28. The overall objective of the Directive in relation to service facilities is to open a wide 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 the encouragement of greater use of the rail network. The Directive requires operators of service facilities to provide access to their facilities and supplied services. Therefore, IRG-Rail believes that the Directive foresees a right of access.
29. The Directive states that requests for access to service facilities listed in point 2 of Annex II may only be refused, if there are viable alternatives allowing the railway undertaking to operate a rail service on the same or alternative route under economically acceptable conditions. IRG-Rail considers that the instrument of viable alternatives should not be misused and lead to requests being refused with no further proper justification. Therefore, the viable alternative approach should only be triggered once the process of dealing with conflicting requests has been completed.
30. The definition of “viable alternative” in the Directive refers to access to another service facility under economically acceptable conditions for the railway undertaking, and allows it to operate the freight or passenger service concerned. IRG-Rail considers that this definition does not provide sufficient guidance. IRG-Rail believes that the “viability” should at least not only depend on whether the alternative facility is required to supply the applicant according to its need, but must also allow the applicant to supply its customers on competitive terms.
31. It is important to recognise the different kinds and structures for service facilities. IRG-Rail believes that it is necessary to have a case-by-case analysis on what may be the viable alternative along objective criteria still to be developed. In any case service facility operators when assessing a viable alternative should consider at least the physical characteristics of the service facilities or services to be provided, the capacity of the site and economic conditions. Furthermore, IRG-Rail recognises the challenge in providing sufficient proof of whether the conditions for the alternative proposed are economically acceptable.
32. Notwithstanding this, the examination of the “viable alternative” must not cause excessive delay and bureaucratic burden, especially in the event of ad-hoc requests where rapid decisions are needed.
33. Moreover, IRG-Rail is concerned about the possibility of several alternative service facilities being designated as the viable alternative successively which could be detrimental to the applicant.

V. Role of the regulatory body

34. The Directive sets clear roles for the regulatory body in relation to access to services facilities:
 - The regulatory body must set a reasonable time limit for the handling of access requests to be answered by the facility operator. IRG-Rail therefore believes that it is up to the regulatory body to decide what this reasonable time limit is. This is

likely to vary from one case to another subject to the complexity of the request, the nature and operations of the service facility. Different reasonable time limits may apply to different service facilities. As a result this should not be governed by a legislative provision in the implementing act. Each regulatory body will have to consider the different characteristics of service facilities, when setting up this time limit. In setting up such timescales, the regulatory body must bear in mind that requests must be answered without any undue delay and take into account, where necessary, the need for faster procedure for ad-hoc requests.

- The regulatory body has also a role when conflicts arise between different access requests. The regulatory body will receive complaints, examine each case and take action, where appropriate, to ensure that an appropriate part of the capacity is granted to the applicant. A regulatory body may decide that access cannot be granted.
 - As the regulatory body is required to control access to service facilities and to services and its charging, it follows that it must also monitor that published information is clear, complete, detailed enough, easily accessible and understandable to all applicants.
35. IRG-Rail believes that establishing regulatory oversight is likely to help prevent excessive and overburdened processes and/or the risk of hidden discriminatory criteria applied by the operators of service facilities. Therefore IRG-Rail believes that the regulatory oversight should not be limited to ex-post control. Parties should at least have the opportunity to inform the regulatory body during the procedure dealing with conflicting requests. This may help mitigating the risk of lengthy legal proceedings.
36. The regulatory body should be able to require service facility operators providing services at specific facilities to change their processes and criteria to ensure fair and non-discriminatory conditions so that a level playing field can be created.
37. IRG-Rail intends to discuss and develop guidelines on its approach on dealing with complaints on requests for access to service facilities.

VI. Conclusions

38. IRG-Rail considers that the Commission's proposal for an implementing act should include transparency requirements for access conditions and procedures as well as charges and charging principles. Also the implementing act should contain the need for a procedure in case of conflicting applications. Concerning viable alternatives it should clarify the concept.
39. Implementation of the issues addressed in this paper will contribute to a better functioning of the market for service facilities.