

Independent Regulators' Group – Rail
IRG–Rail

Position Paper
on the Commission's considerations for an
implementing act on framework agreements

6 May 2014

I. Introduction

1. This IRG-Rail paper provides initial comments on the Commission's proposal for an implementing act on framework agreements.
2. According to Article 42 (8) of Directive 2012/34/EU (hereafter "the Directive"), the European Commission (hereafter "the Commission") may adopt measures setting out the details of the procedure and criteria to be followed for the application of the Article on framework agreements. As set out in the Directive, this implementing act must be based on the experience of the regulatory bodies, competent authorities and railway undertakings and on the activities of the network of rail regulatory bodies.
3. In preparation for the said implementing act, the Commission has entered into a dialogue with the rail regulatory bodies and presented its initial thinking. This IRG-Rail paper refers to a discussion paper presented by the Commission on the occasion of a sub-group meeting of the Single European Railway Area Committee (SERAC) on 13 March 2014.
4. IRG-Rail is happy to provide its experience and give its input to the discussion on this matter, since the detailed provisions of the upcoming implementing act will have a considerable impact on regulatory bodies' daily work.

II. General remarks

5. Despite the fact that the provision on framework agreements has been in place since entry into force of Directive 2001/14/EC, only a few infrastructure managers in some Member States have made use of this optional instrument and have established specific rules for allocation of capacity. Furthermore experience of IRG-Rail members show that the implementation of framework agreements in these Member States is very heterogeneous.
6. IRG-Rail fully shares the Commission's views and objectives that framework agreements should help to ensure predictability for investment as well as innovation and should contribute to curbing discriminatory potential.
7. Experience in several Member States shows that railway undertakings highly value the additional certainty offered by framework agreements so that they can have sufficient access to the railway network to meet their legitimate commercial needs. For railway undertakings operating under public service contracts, framework agreements support their ability to fulfil their obligations under their public service contracts. For freight operators, framework agreements enable them to sign long term delivery contracts with their customers and give them confidence to invest in rolling stock improvements. For open access passenger operators, such agreements also contribute to guarantee that they will be able to run the services they propose for a reasonable duration and generate forecast revenue. This guarantee is important in securing financing their operations, concerning rolling stock, for example.
8. We therefore welcome the Commission's intention with this implementing act to specify the details of the procedure and criteria to be followed when entering into framework agreements. Nevertheless, we believe that it is necessary that flexibility is maintained in order to prevent already existing, well-functioning and effective practices from being overthrown, as long as they comply with the Directive.
9. IRG-Rail agrees with many of the proposed provisions. In particular, we welcome the intention to enhance transparency through the obligation of publishing framework

agreements. We also support the possibility for parties to seek compensation in case of modification or termination of framework agreements and the introduction of rules regarding a surrender of framework capacity.

10. However, we have concerns with respect to certain issues particularly with the provision about ceilings for capacity to be allocated under a framework agreement.
11. We also note that there is no reference in the implementing act regarding cooperation between infrastructure managers for international traffic with regard to framework agreements. IRG-Rail believes that railway undertakings providing international services that have concluded framework agreements (freight or passenger) could benefit from closer cooperation between infrastructure managers, thus promoting the use of framework agreement across borders.
12. In order to ensure adequate availability of infrastructure capacity on rail freight corridors under Regulation No 913/2010, the implementing act should provide that contractual parties are obliged to agree to a modification of framework agreements if capacity is needed for additional pre-arranged train paths to best meet capacity needs.
13. IRG-Rail would question the proposed timescales for implementation of the implementing act. Sufficient time must be made available for Member States to amend their domestic legislation and for businesses to adjust themselves to the new implementing act whilst not suffering disproportionate weights.

III. Details

1. Framework capacity statement

14. The Commission's proposal requires that infrastructure managers develop and publish a framework capacity statement. IRG-Rail strongly welcomes the Commission's intention to ensure that the infrastructure capacity covered by framework agreements is displayed in a transparent and easily accessible manner.
15. Infrastructure managers should be given sufficient flexibility in providing the required information in order to avoid unnecessary administrative burden or duplication. It is important that the benefits of a framework capacity statement are not outweighed by the additional administrative burden on infrastructure managers involved in producing it.
16. Information to be provided should cover at least:
 - The route or services (origin and destination) covered by the framework agreement
 - The level of flexibility or time window under the framework agreement, if applicable
 - The access rights (e. g. number of trains within a time window) granted under the framework agreement
 - The start and end dates of the framework agreement
17. The information in the framework capacity statement or in the network statement should be published on the website of the relevant infrastructure manager. Details for the publication of framework capacity statements or links to the relevant data must be laid down in the network statement.
18. IRG-Rail understands the indicative framework capacity as the indication of routes and time windows for which framework agreements could be concluded. However, IRG-Rail

notes that different types of service use capacity in different ways, which could result in a misleading statement being provided. To ensure a clear understanding of framework capacity statement or similar information, IRG-Rail stresses the importance of clarifying the meaning of infrastructure capacity to be allocated under framework agreements to ensure a fair and open market and a level playing field as concerns access to infrastructure networks.

2. Allocation of framework capacity

19. IRG-Rail also strongly welcomes a mandatory consultation of applicants that could be interested in using the infrastructure requested under a framework agreement where no annual deadline for request is foreseen by the infrastructure manager. The applicants should be informed without the identity of other applicants being disclosed if they so request. The procedure of consultation should be described in the network statements. We also support that the infrastructure manager should not have to hold such consultation where a request for the same or similar capacity is received. We believe that multiple consultations need to be avoided as they may cause high administrative costs and may lead to some discrimination.
20. IRG-Rail strongly recommends that it should be left to the Member States to decide on the timescales for award of framework agreements. This could be done in different ways, e.g. on the basis of a cyclical approach with fixed framework timetable periods or by allowing the conclusion of framework agreements with at least five year duration at any point in time. We support that framework agreements should not be rejected on grounds that the infrastructure manager received the request after the end of a particular application deadline.
21. IRG-Rail welcomes the possibility of concluding framework agreements with a lagging start of train operation.
22. IRG-Rail supports the Commission's general approach on time windows. We believe that the infrastructure manager should describe the allocation of capacity under the framework agreement by way of quantum of capacity, within a chosen period of time. Such time windows should be defined on a case by case basis taking into account the minimum of three train paths per direction to be accommodated and reflecting the requirements of the train service and the capacity planning processes of the infrastructure manager.

3. Ceilings for allocation framework capacity

23. Based on the review carried out by the Access Working Group, IRG-Rail observes that in countries, where framework agreements exist, national practices vary significantly in terms of the proportion of capacity that can be allocated under these agreements. Some Member States apply fixed thresholds. In other countries, no ceilings are in place.
24. IRG-Rail has serious concerns about the methodology applied to calculate the ceilings on the basis of previous year circulation. The proposed approach has serious flaws (see some examples in the annex). It would make framework agreements either impossible or worthless, as they would end up driving potential open access and freight operations out. It would also have the opposite effect to the Commission's objectives (predictability of investments and innovation), as operators wouldn't have any security of long term access which they need in order to make the necessary investment. Examples of such effects can be found in the annex.

25. Moreover, as outlined above, different solutions exist within IRG-Rail members to comply with the Directive's provision that framework agreements must not preclude capacity for other applicants. We believe that in those Member States where the system of framework capacity allocation is organised in a transparent and non-discriminatory way and where framework agreements are pre-approved by the regulatory body, flexibility has to be given for regulatory bodies to choose whether to apply ceilings. Indeed, an EU implementing act should not challenge systems which have proved to be efficient and compliant with the Directive. Indeed, if a new secondary legislation is about to compromise the whole railway system, as it would be the case for the franchise system in UK, an implementing act is not an appropriate forum for this political debate and a decision having such an impact.
26. In order to balance the principles of subsidiarity and non-discrimination, IRG-Rail believes that the regulatory body should undertake an assessment of allocation of infrastructure capacity in particular within framework agreements, review how well national systems are performing and decide, where appropriate, if ceilings are required.
27. In the case of rail freight corridors, the introduction of framework capacity ceilings should be considered in order to ensure that the use of capacity is not precluded for international freight on those corridors. This consideration should also reflect the need of framework capacity for public service operators to fulfill their obligations.

4. Surrender of framework capacity

28. IRG-Rail welcomes the introduction of rules addressing the failure to use framework capacity. Such provisions would prevent and deter frivolous capacity applications under framework agreements by operators trying to deprive competitors of relevant capacity.
29. We also support the Commission's approach in requesting the infrastructure manager to publish the conditions for the surrender of framework capacity in its network statement.
30. Infrastructure managers must be entitled and able to reclaim unused capacity of an applicant in order to optimise the use of their infrastructure. This must be done under conditions which must be transparent and described in the network statement.

5. International framework capacity

31. With regard to international traffic we note that there is no reference in the implementing act regarding cooperation of infrastructure managers with respect to framework agreements. IRG-Rail believes that railway undertakings providing international services that have concluded framework agreements (freight or passenger) could benefit from closer cooperation among infrastructure managers, thus promoting the use of framework agreements across borders. Therefore, the implementing act should provide guidance to infrastructure managers in this issue.

6. Coordination process of requests for framework agreements

32. IRG-Rail believes that a similar process to that applicable to the coordination process of conflicting requests for train paths within the annual working timetable procedure should be used for conflicting requests for conclusion of framework agreements and that a similar approach and criteria on capacity allocation should be used.
33. The capacity allocation process is already set out in detail in the Directive. The implementation of new criteria is neither needed nor appropriate to guarantee a competitive and non-discriminatory railway market.

7. Penalties pursuant to Article 42 (4) of Directive 2012/34/EU

34. IRG-Rail is concerned about the provision proposed by the Commission on penalties. The guiding idea of rail regulation is non-discrimination. It should not be up to the parties of a framework agreement to agree on whether penalties should be introduced or not. If an infrastructure manager decides to offer framework agreements they must be offered to all applicants under the same terms. The Commission's approach is also in contradiction with point 7 of Annex IV of the Directive that requires infrastructure managers to include a model agreement for the conclusion of framework agreements in their network statements. Provisions on penalties must be included in the model agreement or in the network statements. Any deviation from the model should be substantiated and approved by the regulatory body.
35. IRG-Rail welcomes that provisions on penalties in framework agreements must be reciprocal.
36. IRG-Rail welcomes in principle the Commission's approach on the level of compensation. Penalties to be paid due to contractual obligations cannot be considered as equivalent to compensation for damages. Their aim is only to give an incentive to applicants to have a proper consideration of their need for framework capacity before applying.
37. Therefore, IRG-Rail believes that penalties to be paid by applicants should be limited to the actual financial losses incurred by the infrastructure manager sustained until the end of the next working timetable period as a result of the existing agreement being amended. For the next working timetable period but one, the infrastructure manager can renew its calculation of charges.
38. IRG-Rail welcomes the limitation of penalties to the total administrative costs in the cases described in the Commission's proposal.
39. IRG-Rail also suggests considering a more flexible approach for waiving defined penalties and allow such a compensation clause in case of only minor changes in capacity granted under the framework agreement while the service otherwise remains unchanged.

8. Functions of the regulatory body

40. IRG-Rail believes that all regulatory powers and functions in respect of framework agreements must be listed clearly in the implementing act.
41. According to the Article 42 (1) of the Directive, Member States may require prior approval of such a framework agreement by the regulatory body. Even if a Member State does not give ex-ante approval powers to its regulatory body, the signing of framework agreements falls under the scope of Article 56 (1) and can be subject to an appeal procedure. In addition, a regulatory body may, at any time, start an ex-officio examination, either on the model of framework agreement or on any signed framework agreement, in order to prevent discrimination against applicants.

9. Transition

42. As outlined above, IRG-Rail is of the opinion that Member States may require time to amend their domestic legislation, while businesses will require to adjust to the new implementing act whilst not suffering disproportionate weights. We believe it would be adequate if infrastructure managers were required to update their network statements as

soon as possible and in any case within 14 months from the entry into force of the implementing act. The information in framework capacity statements should be published as proposed by the Commission within 6 months from entry into force of the implementing act.

43. IRG-Rail understands that framework agreements that have been validly concluded before entry into force of the implementing act cannot be affected by its provisions.

Annex

Ceilings on Framework Capacity

To look at the impact that introducing ceilings on framework capacity would have we have worked out some examples based on the Commission's proposals.

This first example is a hypothetical example based on a relatively busy mixed use network with 1 public service operator, 1 commercial passenger operator and 1 freight operator. It shows that the public service operator running 9 trains per hour could only include 1 train per hour in a framework agreement and the open access and freight operators could have none.

Priority Class	Trains per hour in previous timetable	Total trains in a 2 hour control period	Priority class ceiling in the control period	Individual operator ceiling in the control period	Individual operator ceiling per hour
Public Service Passenger	9	18	80% = 14.4	20% = 2.8	1.4
Commercial Passenger	2	4	50% = 2	20% = 0.4	0.2
Freight	1	2	50% = 1	20% = 0.2	0.1

This second example uses an approximately 40 kilometer section of a ,main line in Great Britain used by public service, commercial and freight operators. There are 2 public service operators, 1 running 1 train per hour and 1 running one 5 trains per hour; 2 commercial passenger operators each running 1 train every 2hours; and 1 freight train per hour. If the ceiling is rounded up, each public service operator could include 1 train per hour but the commercial operator and freight operators could have none.

Priority Class	Trains per hour in previous timetable	Total trains in a 2 hour control period	Priority class ceiling in the control period	Individual operator ceiling in the control period	Individual operator ceiling per hour
Public Service Passenger	5 PSO a 1 PSO b	10 2	80% = 9.6	20% = 1.92	0.96
Commercial Passenger	1	2 (1 in each hour by 2 different operators)	50% = 1	20% = 0.2	0.1
Freight	1	2	50% = 1	20% = 0.2	0.1

This third example shows how many trains in each class would have to run in the previous timetable for just 1 train per hour to be included in a framework agreement. This level for commercial passenger or freight operators will rarely, if ever, be met.

Priority Class	Trains per hour in previous timetable	Total trains in a 2 hour control period	Priority class ceiling in the control period	Individual operator ceiling in the control period	Individual operator ceiling per hour
Public Service Passenger	7	14	80% = 11.2	20% = 2.24	1.12
Commercial Passenger	10	20	50% = 10	20% = 2	1
Freight	10	20	50% = 10	20% = 2	1