

22 May 2018

Position paper on the Commission public consultation Draft of the Implementing Regulation for the application of the Economic Equilibrium Test

Introduction

1. This paper outlines IRG-Rail's initial views on the Commission's public consultation draft of the implementing regulation setting out the details of the economic equilibrium test on rail passenger services. These comments are provided in order to inform the further development of the implementing regulation and are without prejudice to the opinions and arguments expressed by individual members and by the governments of IRG-Rail Member States.
2. Directive EU 2016/2370 ("the 2016 Directive" which amends Directive 2012/34/EU) opens up the market for domestic passenger services. Where competent authorities have decided to limit the right of access provided for in the 2016 Directive on services which are covered by one or more public service contracts, operators of rail passenger services will have the right to access the rail infrastructure network subject to the new rail passenger service not compromising the economic equilibrium of an existing public service contract (PSC).¹
3. The role of the regulatory body in developing and applying the economic equilibrium test, and determining whether a new rail passenger service should be granted access, is key to ensuring the right balance between the various interests of existing operators, funders of PSCs, new open access applicants, and users. Increased competition is likely to increase the overall size of the rail market, resulting in higher societal benefits including the regenerative effects that improved rail provision can offer. For example, open access operators can help identifying service gaps, achieve network economies, as new or cheaper connections become available, provide necessary competitive pressure on public service passenger operators and in this way contribute to cost reductions, better services to consumers and overall innovative approaches to the operations of passenger services. In addition, increasing the size of the market is likely to lead to a better use of available capacity, reducing underlying costs of all railway services including those included in PSCs, and improving the economic performance of all players within the sector.
4. It is important that public service obligations are not used as a tool to create barriers for new entrants. IRG-Rail would like to stress that regulatory bodies should assume that the operation of more services benefits users and funders and aims at increasing social welfare. The economic equilibrium test can become a useful tool to strike a balance between the

¹ See the 2016 Directive Article 1(6)(b) amending the Recast Directive Article 10 paragraph 2, and the 2016 Directive Article 1(7)(a) og (b) amending the Recast Directive Article 11 paragraphs 1 and 2

IRG-Rail (18) 4

interest of opening the market to new entrants and the legitimate interests of existing PSC-operators and funders in delivering public service obligations.

5. Transparent, predictable criteria are important to ensure that the test is carried out in a consistent manner that offers confidence to stakeholders.
6. The paper also provides a summary (in annex A) of methodologies that have already been developed by several IRG-Rail members, which are used for assessing the impact upon the economic equilibrium of existing public service contracts (PSC). These tests cover different scenarios, including new open-access operators, new international operators who wish to perform cabotage, and modal competition from new coach services.

Key points

7. IRG Rail supports the overall architecture of the implementing regulation as proposed, which provides regulatory bodies with a useful framework. It is important, as mentioned in Recital 16, that national legislation should not contain and set any parameters for the test. The definition of such parameters should be left to the methodology to be established by the regulatory bodies, within the overarching European legal framework.
8. IRG-Rail welcomes the focus on the procedure for the test, such as information requirements, evaluation criteria and clear deadlines and timescales. Clarity and transparency of processes are important to help foster confidence among stakeholders.
9. IRG-Rail supports the proposed approach concerning PSCs with exclusive rights, and welcomes that regulatory bodies have the possibility to perform the economic equilibrium test where such contracts exist. The successful opening of the market for national rail passenger services, and the potential to deliver a better deal for consumers and funders, will depend (among other factors) on avoiding the foreclosure of the rail market via exclusive rights or abuse of direct award of public service contracts, and therefore on a proper definition of services under public service contracts. A clear and common framework for the implementation of the exemptions regime laid down in PSO Regulation is also important in this regard.
10. Given the current extent of services subject to public service obligations in national railway markets and the new competitive environment introduced by the Fourth Railway Package, we welcome the role of regulatory bodies in performing the economic equilibrium test. This will ensure that access to the network may only be limited or denied if the impact of a new rail passenger service is substantial and significantly compromises the economic equilibrium of an existing service under a public service contract.
11. With the aim of opening the market to new entrants, IRG-Rail welcomes that the assessment of the likely impact of the new rail passenger service can take into account the net benefit to customers as well as any impact of network performance and capacity use.

IRG-Rail (18) 4

12. Nevertheless, we have some reservation, in particular with the provision covering the case where a request for an economic test covers a public service contract that is in the process of being tendered. As drafted, IRG-Rail believes that the draft is unclear and could result in the regulatory body having to carry out a test (or a series of successive different tests) on multiple, ill-defined hypothetical scenarios. We believe that this would aggravate uncertainty for both the applicant and the competent authority awarding the public service contract. IRG-Rail considers that this issue should be tackled and left to each regulatory body's methodology.
13. IRG-Rail notes the aspects concerning financial compensation introduced for high speed-services but has some concern as to why there is a different treatment applied to conventional services.
14. As regards cooperation between regulatory bodies for a proposed new international passenger service, IRG-Rail supports that regulatory bodies will have to communicate and share the results of their respective economic equilibrium test but considers that applying the cooperation mechanism of Article 57(3a) of the Directive may lead to confusion and delay.

Detailed comments on public consultation proposal

Recitals

15. Recital 14 does not appear to be in line with the article 10 and seems to introduce new assessment criteria such as *“jeopardize the viability and endanger the continuity of the public service. Subsequently, a substantial impact only seems to arise in unlikely situations. IRG-Rail considers both situations, a public service contract not being economically sustainable or net cost for the competent authority, which the latter would not be able to bear, to be beyond a situation of substantial negative impact.*

Definitions

16. Article 3(1) - The definition refers to the requirement for the new rail passenger service to imply a “substantial modification” of an existing passenger service. In this respect, regulatory bodies may provide further guidance on their approach. The reference to regular timetabled services makes it clear that this definition does not apply to ad-hoc services such as charter and heritage operations.

Notification of planned new rail passenger services

17. Article 4(1) - IRG-Rail welcomes the transparent approach to the notification of planned new rail passenger services. We fully support the requirement to notify a planned new non-PSO (i.e. open access) rail passenger service to the infrastructure manager and regulatory body, and acknowledge the notification deadline of at least 18 months before the entry into force

IRG-Rail (18) 4

of the working timetable to which capacity refers. We note however that such a long period could constitute a barrier to entry or limit the capacity of railway undertakings to meet users' needs, in particular in the case of an existing open access operator seeking to add a couple of stops or extend its route. A more flexible approach encouraging a competitive market and allowing modification of this timeline should be possible in order to allow parties to provide the relevant and correct information within reasonable timescales as indicated by the regulatory body.

18. Article 4(2) - The publication of a standard notification form to be completed by applicants will ensure that a core set of information is provided to regulatory bodies to help them approach the test in a consistent way and raise awareness of parties that may request the test. The proposed approach usefully recognizes that some of the information may not be available in its final form and may need to be adjusted at a later stage. In particular, with regards to timings, frequency and capacity of the proposed new service, applicants may only be able to give indicative information at this initial stage of proceedings, especially considering the proposed 18 month timescale. We also consider that information on rolling stock at this early stage of notification can only be indicative, as mandatory publication of this information could result in a competitive advantage to other operators.
19. Article 4(4) - IRG-Rail notes that the text has been aligned to the 2016 Directive and now includes a reference to alternative route (i.e. another route between the same origin and destination). This implies that, prior to publishing the notification form, the regulatory body would have to identify the relevant alternative route and inform the relevant parties under article 4(4) that a notification to operate a new rail passenger service has been received. It is also not clear to what extent the use of an alternative route may be relevant for triggering a request for the test. The 10-day deadline foreseen in the implementing regulation may be too short for this procedure.
20. Article 4(5) – It should be clear that this provision only applies to the regulatory bodies and infrastructure managers concerned.
21. Article 4(6). In the event of applicant notifications being incomplete or otherwise non-compliant, we welcome the possibility given to parties to complete their notification within two weeks. However, the provision should make clear that it refers to the applicant's notification, rather than the notification made by the regulatory body. In addition, referring to 10 working days would be clearer than "*two weeks*".

Deadline for requesting an economic equilibrium test

22. Article 5(2) – IRG-Rail's preferred position is that if no test is requested, the requirement to inform the infrastructure manager and the applicant about this is left to the discretion of the individual regulatory body. To avoid any ambiguity and the risk of complaint, the regulatory body should inform the relevant parties within a reasonable period or without unreasonable delay.

Public service contracts with exclusive rights

23. Article 6 - We strongly support the aim of this article as drafted as it might prevent exclusive rights from foreclosing the market to new services. The final decision should be taken depending only on the results of the economic equilibrium test, independently of the existence of exclusive rights. We note however that regulatory bodies are required to take into account the monetary value of any exclusive rights. IRG-Rail acknowledges the importance of this analysis in the overall assessment of the equilibrium test and that calculating the asset value of exclusive rights in public service contracts would be necessary in some cases to be able to draw conclusions on the effects of the economic equilibrium of such contract. This may be burdensome and complex to calculate, and it should be sufficient to note and carry out an implicit evaluation with other elements. To date, it is unclear how regulatory bodies will carry out or assess such valuation and to what extent hypothetical elements can be usefully applied by the regulatory body.
24. In addition, as the reference to the monetary value as a criterion for the test is mentioned in article 10(3)(e), it should be deleted from Article 6.
25. Finally, the reference to article 11 in this provision should be amended to read article 10 that deals with the contents of the test.

Information requirements for the economic equilibrium test

26. Article 7 - Regulatory bodies need a consistent framework for information and data to be collected in order to carry out the economic equilibrium test. IRG-Rail supports therefore the approach to information requirements set out in this article. We are pleased with the obligation for any requesting entity to provide a core set of information, including in particular substantiation that the economic equilibrium of a PSC risks being compromised by the introduction of a new rail passenger service. We also welcome the possibility for the regulatory body to request any additional information if necessary to ensure a thorough and robust analysis. To avoid any confusion, it should be made clear, as was the case in an earlier draft, that information needs to be provided for the test at the time of the request for the test.
27. Article 7(2) - It is essential that the regulatory body is entitled to request any information it deems necessary from all relevant parties to perform the economic equilibrium test. IRG-Rail welcomes that the importance of data concerning demand and revenues has been recognized. To this end, regulatory bodies should be able to request for instance that both the competent authority and the railway undertaking provide information on how often PSO services are used, and who is using such services (for example commuters, long distance passengers, students, etc.). It should also be possible for the regulatory body to be able to request the information on estimated elasticities not only from the railway undertaking but also from the competent authority, if necessary.

IRG-Rail (18) 4

28. Article 7(2)(b) - With regard to information to be provided by the railway undertaking performing the PSC, it seems fair to require information on rolling stock specifications, such as number of seats, as this information may be supplied by the open access operator and is likely to be relevant to perform the test. This is also valid for information on the cost structure of the relevant services. IRG-Rail welcomes the obligation on PSC operators to provide any relevant information on capital expenditure/operational expenditure. This will allow regulatory bodies to distinguish between different aspects of the financial business case of the PSC contract. With regard to the provision of the undertaking's business plan, it should be clearer that this does not refer to a new business plan, but rather to the business plan submitted at the time of the contract.
29. Article 7(2)(d) – We welcome that information on plans for the development of infrastructure on the route covered by the new rail service is included in the list of items that may be provided by the infrastructure manager, together with an indication of timescales. This is important to ensure that the assessment carried out by the regulatory body is comprehensive and robust.

Confidentiality

30. Article 8 – IRG-Rail acknowledges the confidential nature of some of the information to be provided under Article 7 (e.g. article 7(2) (b) 3, 4, 5 and (c) 1, 2, 3, 5, 6) and that the regulatory body's decision may need to be redacted as necessary prior to publication. It is also important to recognize that provisions for non-disclosure may also be subject to national rules and cannot be necessarily regarded as homogeneous.
31. Article 8(4) – We do not see the necessity for this provision which specifies that the decision of the regulatory body may be subject to judicial review. This is the case for all decisions of the regulatory body in accordance with article 56 of the Directive. We consider that this provision should be removed or limited to a recital

Procedure for the economic equilibrium test – timescales

32. Article 9 - It is important to ensure that the regulatory body's decision following the assessment procedure is robust and well informed, supported by clear and thorough evidence. Overall, at the end of the process the regulatory body should ensure that all relevant parties have had an opportunity to submit the information that has been requested and that they are aware of the timeframe for decision-making of the regulatory body, who will have to publish its decision within six weeks of receiving all relevant information. The regulatory body will then perform the test on the basis of the information and evidence that has been provided, in particular by the requesting entity. We consider that the current proposal on timescales strikes the right balance between clarity and flexibility, allowing adaptation where information is incomplete, but without allowing a test to continue forever.

IRG-Rail (18) 4

33. Article 9.1 – The reference to article 8(2) in article 9(1) and 9(3) should be corrected to read article 7(2).
34. Article 9.6 – IRG-Rail is concerned about the provision covering the case where a request for an economic test covers a public service contract on the same route or on an alternative route that is in the process of being tendered. For instance, should all the participants in the tender be notified, and what could be the effect (if any) of the regulatory body's assessment of the tender procedure? In this case, the regulatory body is required to carry out the assessment as soon as possible having regard to the advancement of the tender and the availability of information.
35. The effects of this provision are unclear in particular when the tender results are expected soon after an economic equilibrium test has been made.
36. IRG-Rail acknowledges that in this situation, it is necessary to strike a balance between certainty for the access seeker that requires a period of time when the economic equilibrium test is undertaken, and for potential bidders that should know the competition conditions to be able to design their bids. Depending on the procedural stage of the process, the regulatory body may not have all relevant information to perform the test. In these circumstances, it may be more appropriate to wait for the details of the public service contract that will be awarded and assess the new rail passenger service against the new public service contract.

Contents of the test and assessment criteria

37. Article 10 - IRG-Rail acknowledges that, when performing the economic equilibrium test, consistency in the approach of regulatory bodies on the criteria to be taken into account is desirable. IRG-Rail considers this implementing regulation useful in this respect. It is important to note that assessment of some of these criteria is likely to be on a 'so far as is reasonably practicable' basis, as full accuracy in forecasting is rarely possible.
38. Article 10 (3): We welcome the proposed criteria that are listed to carry out the analysis of costs and revenues. This will contribute to the assessment of the financial impact of the proposed new rail passenger service on the public service contract. The concepts listed in this article are not exact indicators. They are relatively wide and flexible, allowing certain elements to be taken into account where appropriate, such as cost savings, variation in costs, impact on investment and any positive financial effects. Nevertheless, IRG-Rail notes that elements such as possible competitive responses and the monetary value of any existing exclusive rights are complex. Further guidance would be needed to be able to assess these indicators correctly and in a harmonized way. These criteria should be taken into account by the regulatory body when it is relevant and appropriate. The regulatory body is required to assess information provided by different parties. The current draft proposal does not make it clear what is the party supposed to supply information on the monetary value of any existing exclusive rights.

IRG-Rail (18) 4

39. Article 10 (5): In assessing the outcome of the economic equilibrium test, additional criteria that are not directly financial/economic in nature, such as the effect upon performance, may be of legitimate interest. IRG-Rail welcomes the flexibility for regulatory bodies to exercise discretion in considering other factors, such as those listed under article 10(5). Any consideration of such criteria should be transparent, and substantiated within regulatory bodies' decisions. It should also be clear that after assessing the net benefits to customers and the impact on the quality of the service, the regulatory body may conclude that these factors compensate the loss in the net financial balance of the PSC, and that conditional access can be granted.
40. Article 10(6) – This provision needs further clarification. In the case of multiple requests for an economic equilibrium test, it is not clear how the regulatory body will deal with these requests, whether the test is carried out with reference to a possible combination of new services, or one by one and how cumulative impacts should be dealt with.

Result of the economic equilibrium test

41. Article 11(1) – IRG-Rail welcomes that the result and the decision of the regulatory body on the economic equilibrium test (i.e. to limit or not access) covers the content of the whole article 10 (the reference to article 11 in public consultation document should be amended) and therefore takes into account both financial and, where used, non-financial considerations.
42. Article 11(2) – This provision makes it clear that before taking a decision that would result in access being denied, the regulatory body shall, where appropriate, indicate changes to the proposed new rail passenger service. In addition, the regulatory body may recommend other changes not related to the new passenger service, such as changes to the competent authorities' public service contracts to ensure that conditions for granting the right of access are met.
43. IRG-Rail considers that the text in recital 17 slightly differs from the article and should be aligned with the text from the article to ensure consistency and legal certainty, keeping in mind that some regulatory bodies already have the power to issue recommendations to competent authorities under national law.

Result of the economic equilibrium test for high-speed services

44. Article 12 (1) - IRG-Rail strongly believes it is important to encourage competition for high-speed services, but clarification is needed as to the reason for a separate and different economic equilibrium test for high-speed services to that performed on other lines. Moreover, there does not appear to be a legal basis for high-speed rail to be separately included in the implementing regulation. Article 11(4) of the 2016 Directive clearly limits the adoption of an implementing act for the application of paragraphs 1, 2 and 3 of that Article 11.
45. Article 12 (2) - This article appears to imply that there are two outcomes to the regulatory body's assessment: either the modification of the service to ensure that access is granted and/or the payment of financial compensation. It is worth noting that the criteria for choosing

IRG-Rail (18) 4

between these two possibilities to limit the new high-speed service are unclear. Similarly, the outcome of a scenario where the applicant seeking access does not accept the regulatory body's proposals regarding the changes to its services is unclear. We note the aspects concerning financial compensation introduced for high speed-services but have some concern as to why there is a different treatment applied to conventional services and seek clarification as to why this should only apply to high-speed services.

Cooperation between regulatory bodies for a proposed new international service

46. Article 13 covers the cooperation between regulatory bodies, the necessary exchange of relevant information, and the need to cooperate to bring about a coherent resolution of the matter in accordance with the cooperation approach outlined in article 57(3a) of the Directive. Therefore, the conduct of the economic equilibrium test could fall under matters concerning an international service requiring the decision of two or more regulatory bodies. IRG-Rail welcomes that regulatory bodies will have to communicate and share the results of their respective decision on the economic equilibrium test but considers that applying the cooperation mechanism of Article 57(3a) of the Directive may lead to confusion and delay. For one thing, not all regulatory bodies will be carrying out an economic equilibrium test; hence, cooperation would be impossible for them. Granting those regulatory bodies the right to comment on the decision on the economic equilibrium test of another regulatory body would seem unjustified.

Fees

47. Article 14 as drafted is unclear, with text being repeated unnecessarily.

Methodology

48. Article 15 - IRG-Rail agrees that regulatory bodies must ensure a consistent approach to the methodology adopted by each regulatory body concerned. IRG-Rail members currently have limited experience in the development and application of the economic equilibrium test. As we develop this practical expertise, IRG-Rail is already sharing case studies, best practice and lessons learnt, as outlined in the Annex. Further guidelines and a harmonized methodology should be developed gradually after member states, regulatory bodies and industry stakeholders have had the opportunity to implement the new rules, and gain valuable experience. As such, we welcome the provision recognizing the need for regulatory bodies to exchange best practices, and share their experience in the Network of Regulatory Bodies, with the possibility of developing guidelines under article 57(1) of the 2016 Directive.

Entry into force

49. Article 17 – IRG-Rail is not clear whether with the repeal of Regulation 869/2014, this creates a gap in implementation for the timetable 2020 starting in December 2019.

ANNEX:

Regulatory Bodies' experience in developing and applying methodologies that are similar to the economic equilibrium test.

1. Several IRG-Rail members have experience in the development and application of tests that are similar in intent and effect to the proposed economic equilibrium test.
2. This valuable experience has been acquired in different contexts: not just to the effect of domestic open-access market entry upon PSO contracts, but also to 'cabotage' stopping patterns of international services, and cross-modal competition from long-distance coach services.
3. By sharing experience, IRG-Rail is better able to influence policy and develop best practice. This annex presents a summary of how such tests have been developed and applied in 5 member-state countries.

FRANCE – ARAFER

Introduction

4. Arafer has performed economic equilibrium tests for international rail passenger services (1 test) and intercity coach services of less than 100 kilometres, liberalized by the "Macron" Act in August 2015 (125 tests). If a transport authority intends to limit or prohibit the opening of a new railway/coach route, it refers to Arafer which appraises the impact of this new service on the economic equilibrium of public service contracts and issues legally binding opinions.
5. Arafer has performed an economic equilibrium test for an international rail passenger service only once, in 2013 when Thello (railway undertaking 100% owned by Trenitalia) opened new services between Milan, Genoa, Monaco, Nice and Marseille. The regional competent authority (Provence-Alpes-Côte d'Azur) appealed to Arafer that this new service substantially impacted the economic equilibrium of the public service contracts of the region. In an opinion issued in October 2013, Arafer stated that the service envisaged by Thello had no substantial impact on the economic equilibrium of the public service contracts between Région Provence-Alpes-Côte d'Azur and SNCF.
6. Based on this first experience with Thello, Arafer constructed methodology and improved its analyses to appraise the impact of new coach services. Since the liberalization of the intercity coach market, 125 economic equilibrium tests have been performed: - 70% opinions where the impact on economic equilibrium is not substantial and the coach service is allowed, - 20% opinions where the impact on public service contracts is considered substantial, - 10% opinions with reservations.
7. This decision and the methodologies used by Arafer were confirmed by the Council of State for both Thello and intercity coach services.

IRG-Rail (18) 4

Methodology

8. Developed in February 2013. The test was carried out before the publication of the implementing act No 869/2014 on new rail passenger service, in October 2013

Data used

9. Arafer ascertains the balance of the public service contract on mid-term basis over a three-year horizon or until the end of the contract. In order to carry out the economic equilibrium test for rail service, Arafer bases its analyses on data provided by the transport authorities and the applicant railway undertaking.
10. Data required from the transport authority
The related public service contract; - Timetable; - Traffic on per-line basis and on the whole contract (annually, with at least a 5 years reviews); - Turnover on per-line basis and on the whole contract (annually, with at least a 5 years reviews); - Tariffs; - Traffic and turnover forecasts on per-line basis and on the whole contract; - Cost data on per-line basis and on the whole contract; - Rolling stock data.
11. Data required from the applicant railway undertaking
Foreseen timetable (stops, schedules, days of activity); - Estimated number of passengers on lines in competition with the public service contract (per tariff classification); - Foreseen tariffs for the related lines; - Traffic and turnover forecasts models (elasticity, projections, repartitions of passengers between the two operators etc.)

Procedure

12. First and foremost, Arafer analyses data provided by the parties, with a particular focus on traffic and turnover forecasts. Arafer reserves the right to use different data if necessary and relevant. Secondly, Arafer carries out an economic analysis based on data provided according to the following criteria: - Provisions foreseen regarding its economic equilibrium; - Potential loss of revenue and additional costs, on short and mid-term basis; - Potential benefits, on short and mid-term basis; - Evolution of profitability of the public service contract.
13. Arafer then determines whether the new service impacts the economic equilibrium of the public service contract. The Authority determines the period for which the transport authority cannot seize again Arafer for the same services. This period may not exceed three years.

The Thello case

14. Arafer used its methodology to carry out economic equilibrium test. The Authority carried out an economic analysis based on data provided by both parties according to the criteria mentioned. The Authority nonetheless adjusted its methodology to put a particular emphasis on time grids, travel times and tariffs of the related services as well other national services

IRG-Rail (18) 4

(i.e. out of the PSC scope), commercial trains (high-speed trains) and intercity trains (TET), considered to be equally substitutable.

15. For its analysis, the Authority distinguished three market segments corresponding to different rail connections and responding to different market stances. For each market segment, Arafer assessed the substitutability with other rail services; the effects on the regional transport offer and the potential impacts on the annual revenue of the connections concerned. These three determinants were pivotal to ascertain whether the introduction of these additional three daily returns of Thello would impact the economic equilibrium of the public service contract by generating substantial financial losses for the competent authority or substantial increase of the public contribution.
16. Arafer drew a double conclusion: first, the financial losses of the competent authority due to the arrival of Thello were largely overestimated and considerably lower than regular contractual risks associated with the public service contract. Secondly, Arafer deemed that Thello's arrival on the rail market would have a genuine overall gain on the regional train uses with pre- and post-transits as well as beneficial effects on transport offer in the region.

Rail and intercity coach economic equilibrium tests

17. See below a table comparing rail and intercity coach economic equilibrium tests. Tests are close but operate according to a quite different logic.

Procedure	Rail	Long-distance coach
Legal framework	Implementing regulation 869/2014/EU – direct effect	No EU law Domestic 'Macron Act'
Request	Request from competent authority, IM, RU operating PSC	Request only from competent authority
Referral procedure	1 month to apply to RB following publication on RB website	2 months to apply to RB following publication on RB website
Time frame	6 weeks for opinion, following receipt of all relevant info	2 months, from initial application
Data used	Extensive data from competent authority and applicant	Limited data, only from competent authority
Comparison perimeter	Impact must be substantial to limit or forbid new services. Measured against PSC as a whole	Impact has to be substantial to limit or forbid new service. CA chooses whether compared against whole PSC, line, or lines.
Analysis to appraise the impact on EE of contract	Assess whether the EE of contract is compromised, which would result in a	Assess whether intercity coach, isolated or cumulative, impacts on the EE service, services, or whole PSC.

IRG-Rail (18) 4

	substantial increase of public expenditure	
--	--	--

ITALY - ART

1. So far, ART have received:
 - a. one request for a 'principal purpose' test on international cabotage. It was agreed that the service was indeed primarily international in nature.
 - b. one request for an economic equilibrium test on domestic open access services. The procedure was stopped because the parties concerned did not provide sufficient evidence as a basis for initiating an EET.

2. ART are developing a methodology, which has raised several issues for consideration
 - a. Should the test be 'common' amongst all regulatory bodies? What scope is there for bespoke, discretionary processes or criteria.
 - b. Should the test be the same for all market segments (domestic, international, high-speed?)
 - c. The basic assumption that economic equilibrium exists within the PSO contract needs to be questioned. The regulatory body should request a detailed report on the financial balance of the PSO contract.
 - d. Does a positive decision necessarily bind the future actions of the railway undertakings, in terms of e.g. ticket price, offers, etc? If either party's actions diverges from assumptions made, or evidence put forward, in the test, can the decision be contested?

IRG-Rail (18) 4

THE NETHERLANDS – ACM

1. An economic equilibrium test was developed by ACM in 2012 for international cabotage services, on the basis of the 2007 liberalisation directive. It was then modified in 2016.
2. ACM expects to apply a modified version of this current policy for domestic open-access.
3. The test seeks to analyse the effect on passengers and PSC operator turnover. The test assumes that PSC operators will be able to adjust their production capacity to changing circumstances.
4. In terms of thresholds, for cabotage to be allowed the maximum projected loss of turnover or passenger numbers for a PSC contract is 1.7%.
5. Key areas of interest, important for assessing the effects of a new service on PSC operators:
 - a. Elasticities: reveal a relationship between variables. This methodology has been adopted from the complex (but recognised) method used in antitrust regulation.
 - b. Market segmentation: important to correctly define the market that the new entrant is operating in, as different market segments react differently to changes. For example, commuters are less price-sensitive than leisure passengers.
6. Methodology: ACM require information on the following areas to conduct the test. This evidence will then be subject to independent verification and quality assurance by ACM.
 - a. Schedule: journey time, stopping patterns, frequency. This will be important for determining any causal substitution effects.
 - b. Price: anticipated ticket prices.
 - c. Rolling stock to be used: will have an effect on popularity and capacity of service.
 - d. Business plans.
7. ACM will then conduct an analysis, based on the evidence produced and any necessary independent market studies. Where relevant, ACM will consult and coordinate with other European regulatory bodies.
8. Where there are multiple new services, then ACM will take the total impact into account of the combined services.
9. ACM will take into account the ability of the PSO to offset any possible revenue loss through adjusting production capacity: for example, redeploying rolling stock or reducing staff capacity. Depreciation (of assets) and turnover (of staff) will be assessed, with 3.33% being the baseline assumption.
10. ACM also takes into consideration that most PSCs were signed before the liberalisation directive had come into effect, and the limited opportunities for renting / leasing unused rolling stock (which in some cases is contractually tied to PSO operation). Taking these

IRG-Rail (18) 4

factors into account, ACM has arrived at a figure of 1.7% per annum as being the acceptable extent to which an open-access entrant can affect the turnover of a PSO operator.

IRG-Rail (18) 4

POLAND – UTK

1. Legal Basis: 2011 domestic legislation, which established a transitional period until 2018 during which RUs already operating on the network are not obliged to be granted open access to be allowed to operate. In 2016 non-PSO operators had 10% of passenger/km.
2. From 2018 RUs must have an open access contract approved by UTK. This can be refused if proposed service will have an effect on the economic conditions of PSC operators, resulting in either:
 - a. An increase by >10% of public compensation
 - b. Disruption of performance
3. UTK can request any information, documents and assumptions deemed necessary to verify possible impact.
4. Test consists of:
 - a. Comparing characteristics and ascertaining substitutability (e.g. morning local service will not be affected by afternoon express service)
 - b. Analysis and assurance of information, documents and calculations
 - c. Performing test: checking whether the competent authority would have to increase compensation by more than 10%.
5. Other factors taken into consideration:
 - a. Volumes of existing and projected PSO and entrant passengers
 - b. Existing and projected revenues
 - c. Demand sensitivity data, on travel time, ticket price, travel comfort, frequency
 - d. Share of PSO passengers using season tickets
 - e. Satisfaction levels with PSO operators
 - f. Extent of unserved routes
 - g. Train crowding
 - h. Any other relevant reasons.
6. So far there have been 61 positive decisions (to grant open access) and 8 decisions refusing to grant open access.

IRG-Rail (18) 4

UNITED KINGDOM - ORR.

Legal Background – domestic UK legislation, 2005 Railways Act

1. Vast majority of passenger services in the UK are operated under PSC contracts. Roughly 1% of passenger km are on open-access trains.
2. All train operators must have access contracts with the IM, approved by ORR. ORR reaches decisions on access in accordance with its statutory duties which must be balanced in their consideration, including most notably in case of economic equilibrium
 - a. Promoting competition for the benefit of rail users
 - b. Taking into account public funds
3. Factors taken into consideration:
 - a. If competing options for limited capacity: costs and benefits of available options
 - b. Impact on performance of existing services
 - c. Increase in competition bringing benefits for passengers?
 - d. Fair and efficient use of capacity
 - e. Effect on government's funds
 - f. Could new services generate their own revenue, rather than simply taking away from the current operator
4. Together, these factors are weighed and measured in the 'Not primarily abstractive' (NPA) test. This test was developed and introduced in 2004, to ensure we do not grant access rights that are 'primarily abstractive of incumbents' revenue without compensating economic benefits beyond proposed or potential lower prices for existing customers'
5. Decision thresholds: a case of measuring how much revenue will be derived from
 - a. Encouraging new rail journeys (generation)
 - b. Passengers switching from other PSC services (abstraction).

A new service must demonstrate that they will generate at least £30 of new rail revenue for every £100 that they abstract from existing PSC suppliers. We will also consider absolute level of abstraction.

6. NPA test has 5 stages
 - a. Initial forecast, using standard models (from Passenger Demand forecasting council)
 - b. Review estimate based on information from stakeholders: new operator, IM, funders, incumbent

IRG-Rail (18) 4

- c. Benchmarking: from comparable situations and existing studies, to refine estimates from first 2 stages. Economic analysis will assess value in terms of user benefits, non-user benefits, revenue, costs to government, operating costs.
 - d. Impacts over time: assess effect over longer time scale (2-3 years).
 - e. Other factors
7. Information on the test in general can be found on ORR's website, which also includes details of previous NPA decisions.