

Independent Regulators' Group – Rail

Working group Access

**Overview of the implementation of current rules relating to
Temporary Capacity Restrictions (TCRs) under
Delegated Decision (EU) 2017/2075**

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Summary

- Insufficient planning and coordination of Temporary Capacity Restrictions (TCRs) has for a long time been identified as a major obstacle for cross-border railway traffic, and as a source of inefficiency in domestic capacity scheduling.
- Points 8 to 17 in Delegated Decision (EU) 2017/2075 introduce a new set of common deadlines and procedures for the consultation, publication and coordination of TCRs in Europe.
- The responses of IRG-Rail members to the European Commission questionnaire on the Delegated Decision in 2020 suggest that while most infrastructure managers have taken steps to incorporate these rules in the network statements, there may still be further work to do to reach full compliance with the Delegated Decision.
- The 2021 Timetable was the first timetable for which all provisions in the Delegated Decision applied, and thus the first opportunity for regulatory bodies to get a full overview of the implementation of the rules in the Delegated Decision in each countries.
- Several regulatory bodies have been involved in complaints and ex-officio investigations concerning the Delegated Decision.
- Bundesnetzagentur in Germany and Transportstyrelsen in Sweden have conducted thorough investigations into the implementation of the rules in the Delegated Decision.
- Bundesnetzagentur has produced a chart to visualize their interpretation of the Delegated Decision. The chart is attached to this overview as an Annex. The chart offers important input and guidance for regulatory bodies that are in the process of entering into more substantial monitoring of the Delegated Decision.
- Based on the German and Swedish experiences, this overview highlights a number of challenges in monitoring compliance with the Delegated Decision which merit further attention:
 - The activities which infrastructure managers need to carry out before the first publication at X-24
 - Requirements on infrastructure managers when consulting applicants and publishing the results of the consultation.
 - The classification of TCRs into different categories, notably
 - Dealing with the category “medium impact” TCRs (< 7 days and > 50 % impact).
 - TCRs which last longer than 7 consecutive days and have an impact between 10 and 30 %.
 - Measuring the duration and impact of TCRs.
 - Altering or adding TCRs after final publication.
- Following the publication of this overview, IRG-Rail aims at discussing the findings with stakeholders and continuing to gather monitoring experience in order to provide updates.

1. Introduction

1. The Delegated Decision (EU) 2017/2075 replacing Annex VII of directive 2012/34/EU (hereinafter the Delegated Decision) introduces a set of rules for infrastructure managers in respect of the consultation, publication, and coordination between infrastructure managers concerning Temporary Capacity Restrictions (TCRs).
2. IRG-Rail expects that the Delegated Decision, by introducing a harmonized timeline for long-term planning, will have a substantial impact on the planning and cooperation of infrastructure managers.
3. The provisions of the Delegated Decision came into force at the end of 2017. In view of the lead times introduced by recital 11 of the Delegated Decision, infrastructure managers could be expected to meet all requirements in the Delegated Decision by the 2021 Timetable.
4. Interest in TCRs has also been highlighted under the current discussions taking place in TTR, a RNE-led project to improve capacity management in Europe initiated in 2014 together with industry stakeholders.¹ Rules on TCRs may be part of a possible forthcoming revision of the European legal framework to enable TTR.
5. Consequently, under the 2021 work program, the Access Working Group has committed to look further into this topic and provide an overview of the experience of regulatory bodies of the rules in Delegated Decision.
6. Chapter 2 and 3 of this overview outline previous work by stakeholder groups on the implementation of the Delegated Decision together with a summary of regulatory bodies' replies to a questionnaire conducted by the European Commission in early 2020.
7. Chapter 4 describes the monitoring experience of regulatory bodies concerning the Delegated Decision. Chapter 5 raises a number of issues based on the experiences in Germany and Sweden, where the regulatory bodies have made thorough investigations into the application of the Delegated Decision.
8. Chapter 6 presents some ideas about further work to gain and exchange monitoring experience and interact with stakeholders in order to facilitate an appropriate application of the rules in the Delegated Decision across Europe.

2. The Delegated Decision (EU) 2017/2075 – background and follow-up by stakeholders

2.1 The European Commission

9. According to article 43.2 of directive 2012/34/EU, the European Commission is “empowered to adopt delegated acts in accordance with Article 60 concerning certain amendments to Annex VII. Thus, after consultation of all infrastructure managers, Annex VII may be amended to take into account operational considerations of the allocation process. Those amendments shall be based on what is necessary in the

¹ [Home - TTR \(rne.eu\)](http://rne.eu)

light of experience in order to ensure an efficient allocation process and to reflect the operational concerns of the infrastructure managers”.

10. In April 2016, the European Commission expressed an intention to use the mandate for a delegated act in article 43.2. Following discussions in an expert group under SERAC², the Commission launched a public consultation seeking input from stakeholders, including RNE (RailNet Europe) who were able to provide input based on the early stages of the TTR project. The Delegated Decision was adopted on 4 September 2017.³
11. In February 2020, DG MOVE decided the time was ripe for following up the implementation of the Delegated Decision and sent a questionnaire to all regulatory bodies, with a view to obtain an overview of how the Delegated Decision had been implemented and to contribute to a factual discussion. The questionnaire in particular focused on the consistency of network statements with the rules of the Delegated Decision, rather than aiming at covering in detail the practices adopted by infrastructure managers for interacting with applicants to define, plan and manage TCRs. 23 regulatory bodies sent a reply. DG MOVE chose regulatory bodies as recipients as they are responsible for assessing and monitoring that access to railway infrastructure is granted to applicants by infrastructure managers in compliance with the principles of transparency and non-discrimination.
12. The findings of DG MOVE were presented at the SERAC Working Group for Rail Freight Corridors in June 2020 and have generated a series of stakeholder exchanges, but no written publication.
13. The European Commission has indicated that the mandate in article 43.2 to adopt a delegated act to amend Annex VII may be part of the legal basis underlying the foreseen revision of the European regulatory framework to enable the deployment of TTR.

2.2 RailNetEurope

14. RNE is an umbrella organization for European infrastructure managers. It was set up in 2004 to help meet the challenges faced by the international rail sector, for example by facilitating operational international business of RNE members and by providing support as regards compliance with the European legal framework, by developing harmonised international business processes, templates, handbooks, and guidelines.⁴
15. Improving and harmonising procedures related to TCRs has been part of the RNE agenda for a long time. In May 2018, RNE published a first version of the TCR Guidelines, designed to cover all aspects of the recast Annex VII, including
 - a. Definition of technical terms in the glossary
 - b. Criteria for capacity restrictions to be coordinated and published
 - c. Calculation method for “Impact on traffic”

² Single European Rail Area Committee

³ [L_2017295EN.01006901.xml \(europa.eu\)](https://eur-lex.europa.eu/eli/reg/2017/295/1)

⁴ [Rne Approach & Structure - Railnet Europe, Rail Net Europe.](#)

- d. Timeline to coordinate TCRs
 - e. Description of the process steps for TCRs
 - f. Responsibilities
 - g. General principles for a platform and tool for the publication of TCR
 - h. Implementation timeline including steps during transition period
16. The TCR guidelines were subsequently updated. The current version 3.0 was approved by the RNE GA on 4 December 2019.⁵
17. The RNE classification of TCRs into an impact cluster displaying the duration of a TCR on the x axis and the impact on traffic on the y axis, has been influential across Europe as a means of clarifying how different TCRs are affected by the rules in the Delegated Decision.
18. Whilst the TCR guidelines have been published by RNE, RNE has emphasized that they represent a joint effort by infrastructure managers and railway undertakings. Moreover, a Task Force on TCR guidelines consisting of members of RNE, FTE, and ERFA has been set up.
19. The harmonization and coordination of TCRs have also been a key part of TTR since the beginning of the project. In February 2020, RNE launched an initiative called "TCRs in TTR" to further integrate TCRs in version 2.0 of the TTR Process Description.⁶ RNE is currently preparing a new TCR handbook for approval at the RNE General Assembly.
20. With the goal of creating a single place with all information about existing TCRs, RNE has developed a web-based TCR Tool. The TCR Tool is a database tool through which the publication, coordination and consultation can be managed jointly by involved IMs for the TCRs of all infrastructure managers in Europe simultaneously. RNE plans to provide links for the national TCRs information on one single webpage and to make changes traceable, so that users could easily find updated information. So far, the TCR Tool has been tested in a pilot run on about 10 European railway networks.⁷

2.3 Forum Train Europe and RU Dialogue

21. In 2019 FTE (Forum Train Europe), the European coordination platform of railway undertakings for cross-border passenger and freight trains, conducted a survey among its members regarding the implementation of the rules for TCRs in the Delegated Decision. Based on replies from 26 railway undertakings (RUs), FTE observed that RUs had the impression that most infrastructure managers had implemented the provisions of the Delegated Decision, but the coordination processes between infrastructure managers and RUs could still be improved. A genuine consultation of the RUs did not take place in every country and the coordination between the infrastructure managers was not yet satisfactory.

⁵ [TCR-Guidelines.pdf \(rne.eu\)](#)

⁶ [New Project: Handling TCRs in the TT Process - Railnet Europe, Rail Net Europe \(rne.eu\)](#)

⁷ [Temporary Capacity Restrictions - Railnet Europe, Rail Net Europe \(rne.eu\)](#)

22. In 2019, a subgroup on Annex VII regarding TCRs was set up under the mandate of RU Dialogue, a forum for regular and open dialogue between RUs, the European Commission and the European Union Agency for Railways (ERA). The subgroup was led by ERFA, the European Rail Freight Association, which represents new entrants in the railway sector.⁸ The subgroup established use cases from RUs in passenger and freight traffic, discussed the use cases in order to identify best practice examples of consultation and coordination and consolidated them consolidate in one recommendation. A preliminary finding from February 2020 was that, while the process was often adhered to, there were still issues of lacking harmonization of e.g. timelines.

3. Overview of national implementation of Annex VII based on the European Commission questionnaire

3.1 The European Commission's questionnaire

23. The coordination and planning of TCRs is an important topic for the implementation of the Single European Railway Area (SERA). Cooperation of infrastructure managers on planning of TCRs for the respective national railway networks is essential for the success of effective, reliable and performing cross border rail transport services. TCRs must be coordinated in the best possible way to allow optimal traffic flows within and between neighboring national railway networks. Bad coordination on TCRs can hinder national and international traffic and prevent the correct functioning of the market. This is the reason why the European Commission developed and sent a questionnaire to regulatory bodies in February 2020 in order to understand how the Delegated Decision has been implemented in each country.
24. In the light of the answers provided to the questionnaire by IRG-Rail members, the WG Access has tried to highlight some topics based on the 2020 Commission questionnaire and relating to the perspective and state of knowledge of the respective regulatory bodies. The assessment and processing are based exclusively on the responses of the regulatory bodies that are members of IRG Rail.
25. Based on the replies to the EC questionnaire, it appears that the introduction of the provisions of Annex VII in the Network Statements of infrastructure managers generally shows varying levels of implementation. The procedures adopted by the infrastructure managers to comply with Annex VII and their descriptions in the respective Network Statements are rather heterogeneous in terms of detail.
26. This overview presents the state of affairs at the time of the questionnaire in 2020, which in practice means the 2021 Network Statements. However, it should be noted that some regulatory bodies submitted their answers at different times and in some cases provided further updates.
27. Concerning point 8 of the Delegated Decision, many regulatory bodies perceive that infrastructure managers publish capacity restrictions and the preliminary results of a consultation with the applicants for a first time at least 24 months and, in an updated form, for a second time at least 12 months before the change of the working timetable concerned, although with different practices and levels of detail

⁸ [ERFA - European Rail Freight Association - ERFA - European Rail Freight Association \(erfarail.eu\)](http://erfarail.eu)

which should be investigated further. There are exceptions, for example in Croatia, where the first publication is done 12 months before the change of the Timetable.

28. With regard to major and high impact TCRs almost no regulatory bodies found evidence that infrastructure managers would try to avoid the consultation requirements by splitting temporary restrictions of the capacity of railway lines of a duration of more than seven days into several shorter ones. No complaints had been received by the time the questionnaire was answered. However, this may also be because not all countries have yet categorized their construction measures in the sense of the Delegated Decision. In some cases, such as in Switzerland, splitting TCR is a procedure which is only permissible to reduce the impact of the disruption on the applicants involved in the capacity process (as, e.g., an alternate single track closure has a lower impact on traffic operations than a complete double track line closure). In Poland requirements of the Delegated Decision can only be circumvented in case of unscheduled works or because of unforeseen needs (e.g. due to technical condition of the infrastructure).
29. Many infrastructure managers publish TCRs in the network statement. Some infrastructure managers use their own website (Spain, Sweden and Switzerland). In some other countries like Belgium, France, Netherland and Germany, the infrastructure managers publish information on TCRs in specific IT-tools which are available for consultation to all the applicants. In most of the countries, the consultation phase for publication before X-24 and X-12 includes the availability and allocation of capacity on diversionary routes.
30. Regarding coordination between infrastructure managers for those TCRs that could involve a cancellation, re-routing of a train path or a replacement by other modes, if their impact is not limited to one network (point 11), many regulatory bodies are in principle aware of some of these processes set up by infrastructure managers of their respective countries. In some cases, the process is described in general terms in the network statement. In most of the other cases the regulatory bodies have been notified of this practice directly by the infrastructure managers. Some practical cases at the French/Belgian and French/Italian borders have highlighted that further implementation is necessary concerning the rerouting of traffic as coordination measures proved to be insufficient. Many regulatory bodies also mentioned that infrastructure managers rely on the RFCs technical groups, to discuss and harmonize international TCRs also for TCRs which are not on corridor infrastructure.
31. Looking at the consultation rules under point 12 for TCRs concerning the information to be published at least four months before the change of the working timetable when more than 10% of estimated traffic volume of the line is affected by TCR, replies indicate that most regulatory bodies assume that infrastructure managers have implemented these rules. In some cases, such as in France and Switzerland, minor TCRs are published earlier than the X-4 deadline. The regulatory bodies in Spain, Sweden⁹ and Croatia found evidence that the respective network statements do not reflect the provisions of the Decision. Also in Germany, the rules and provisions in the Network Statement did not fully comply with the requirements of the Delegated Decision at the time of answering the questionnaire. On the same topic, some regulatory bodies declare to be unaware of any practice by the infrastructure managers for circumventing the threshold of 10 % which is established by the Delegated

⁹ For a description of the Swedish case on this topic, see ch. 4.2 below.

Decision. Regarding the way to publish those TCRs, the review carried out shows that comparable procedures (e.g. in the form of IT tools) are used for major relevance TCRs published at X-24 and X-12.

32. Generally, infrastructure managers have not made use of the option in point 13 to apply more stringent thresholds for capacity restrictions based on lower percentages of estimated traffic volumes or shorter durations, or to apply criteria in addition to the ones mentioned in the Delegated Decision, pursuant to a consultation with applicants and facility operators.
33. Since the entry into force of the Delegated Decision, the infrastructure managers in IRG-Rail member countries usually have not made use of the possibility not to apply the periods laid down in points (8) to (12) of the Delegated Decision if the capacity restriction is necessary to re-establish safe train operations, if the timing of the restrictions is beyond the control of the infrastructure manager, if the application of those periods would cause ineffective or unnecessarily damage regarding in respect of asset life or condition, or if all concerned applicants agree. There have been only few such experiences in Romania and caused by "force majeure" and in Poland by lack of information from track works contractors.
34. Concerning the requirement in point 16 to adopt further procedures in the management of TCRs for TCRs with a duration of at least 30 consecutive days and affecting more than 50 % of the estimated traffic volume on a railway line, most IRG Rail members answered that they do not have relevant experiences.
35. With reference to the obligations in point 17 for TCRs with a duration of more than 30 consecutive days and affecting more than 50 % of the estimated traffic volume, many infrastructure managers did not define specific criteria for which trains of each type of service should be re-routed. In Finland, the priority rules for overbooked capacity described in the network statement were applied. In the Netherlands the infrastructure manager made use of existing criteria for ad hoc capacity allocation phase (first come, first served). In France, the mainline infrastructure manager established detailed criteria:
 - the pro rata of the types of traffic observed during the previous timetable;
 - forecasts of changes in known traffic;
 - commercial and operational constraints of traffic;
 - infrastructure manager's cost reduction objective.

In Germany, the Network Statement contains general assessment criteria that consider re-routing capability of traffic.

36. In Sweden, specific criteria depending on the different types of traffic are used to distribute the preliminary capacity on the diversion route or the ordinary route with capacity restrictions. Consideration is also given to relevant factors in order to meet, as far as possible, the shifting needs of the railway undertakings and to minimize the negative consequences of the restrictions, as well as the commercial and operative limitations of the applicants and the expected developments of traffic. In any case of reduction of the traffic, and in the cases where consensus regarding the allocation of preliminary capacity is not reached, the following circumstances are taken into consideration during the preliminary allocation of capacity:

- supply (quantity of traffic with different train types, to ensure that all types of traffic can be maintained);
 - difficulties to replace railway transport with other modes of transport;
 - time sensitivity for different types of traffic;
37. In Germany, the mainline infrastructure manager DB Netz has issued some guidelines (“Guideline 402.0305”) to establish criteria for the diversion capability of the types of traffic running on the sections affected by construction works.
38. Regarding the practice to cancel or modify TCRs, many IRG-Rail members have provided evidence that the modification of planned TCRs by infrastructure managers is a common practice. Two regulatory bodies stated that cancellation of TCRs can also happen (Spain), even if this appears to be less common following the implementation of the Delegated Decision (Italy).

4. Regulatory bodies’ experience of the Delegated Decision

4.1 Regulatory body cases involving decision (EU) 2017/2075

39. Some of the requirements in the Delegated Decision were applicable from the 2019 Timetable, the first timetable to be established after the entry into force of the Decision. However, because of the lead times for consultation and publication in point 8–11, the 2021 Timetable was the first timetable for which infrastructure managers were expected to comply with all the Decision’s requirements, including requirements on the first publication according to point 8.
40. As a consequence, 2021 is the first year for which regulatory bodies can be expected to have full experience of the implications of the requirements of the revised Annex VII. This is also evident in a number of decisions on complaints and ex-officio investigations among IRG-Rail members.
41. The table below summarizes the formal cases involving Delegated Decision (EU) 2017/2075 which have been brought to the attention of the Access working group. Each case is then described in the following paragraphs.

of proceedings and a decision on 23 March 2021.¹⁵ BNetzA found that the DB Netz Network Statements did not meet the requirements in the Decision regarding several aspects, and in particular the transparent description of criteria for TCRs; adherence to the timeline; the information involved in consultation etc. DB Netz were asked to revise their Network Statement by 30 June 2021. Subsequently, the BNetzA and DB Netz agreed that DB Netz will inform BNetzA by 05.11.2021 about the intended changes of the Network Statements to implement the BNetzA decision. BNetzA conducted a comprehensive analysis of the process and information according to the Delegated Decision which is summarized in a flow chart accompanied by a written description. These background information documents from the German regulatory body can be found in Annex II to this report.

43. In Sweden, the regulatory body Transportstyrelsen has received two complaints and conducted one ex-officio investigation concerning the infrastructure manager Trafikverket's compliance with the rules in the Decision.
44. In a complaint (TSJ 2020-25)¹⁶ by the open-access passenger operator Transdev, Transportstyrelsen ruled on 23 March 2020 that Trafikverket had failed to comply with the rules in points 8 and 17 of the Decision concerning the rerouting of trains in the 2020 Timetable. While the complainant did not explicitly refer to the Delegated Decision, Transportstyrelsen found during the course of dealing with the complaint, that Trafikverket had made an incorrect classification of a number of TCRs by lumping a shorter closure over Easter together with a longer closure in the Summer, applying the criteria for rerouting according to point 17 also to the Easter TCR, in spite of that TCR falling below the threshold for duration and impact.
45. In another complaint (TSJ 2020-3560)¹⁷, Transdev claimed that Trafikverket had failed to meet the four-month deadline for detailed information according to point 12 in the 2020 Network Statement and the running of the 2020 timetable. Transportstyrelsen found that:
 - a. the 13 weeks given to provide information according to the Network Statement is not consistent with point 12 of the Decision.
 - b. the publication of a shorter timeframe in the Network Statement after consultation is not sufficient to qualify as an agreement between the infrastructure manager and the concerned applicants on a shorter lead time according to the second sentence of point 12.
46. In an ex-officio investigation (TSJ 2020-373)¹⁸, Transportstyrelsen investigated how Trafikverket had applied the rules in points 8, 10, 12 and 14–15 of the Decision in the process for the 2021 Timetable. Transportstyrelsen found several errors:
 - a. The publication at X-24 and X-12 did not contain information for each individual TCR:
 - i. on viewpoints expressed during consultation and how the consultation had affected the planning of the TCR.

¹⁵ https://www.bundesnetzagentur.de/DE/Beschlusskammern/1_GZ/BK10-GZ/2019/2019_bis0099/BK10-19-0081/BK10-19-0081_Z_Beschluss_download_bf.pdf?_blob=publicationFile&v=2

¹⁶ [beslut-tvist-tsj-2020-25.pdf \(transportstyrelsen.se\)](https://www.transportstyrelsen.se/meddelanden/2020-03-23/2020-03-23_beslut-tvist-tsj-2020-25.pdf)

¹⁷ [Beslut TSJ 2020-3560 prövning Transdev / Trafikverket \(transportstyrelsen.se\)](https://www.transportstyrelsen.se/meddelanden/2020-03-23/2020-03-23_beslut-tsj-2020-3560-provning-transdev-trafikverket.pdf)

¹⁸ [beslut-tsj-2020-373.pdf \(transportstyrelsen.se\)](https://www.transportstyrelsen.se/meddelanden/2020-03-23/2020-03-23_beslut-tsj-2020-373.pdf)

- ii. on the classification and by implication which rules are applicable.
- b. The publication at X-12 did not contain
 - i. any information on how the TCRs had been updated since X-24.
 - ii. certain TCRs which were known at the time of publication.
- c. There had been insufficient consultation and publication of TCRs according to point 12.

Trafikverket was instructed to correct these errors for the 2022 Network Statement.

47. In the Czech Republic, Úřad pro přístup k dopravní have investigated the requirement in point 17 to publish criteria for rerouting and preliminary allocation of remaining capacity. UPDI decided that the priority rules in the network statement did not comply with the Delegated Decision.
48. In Spain, CNMC received a complaint from the Association of Private Railway Companies (AEFP) in relation to the actions promoted by the infrastructure manager that have an impact on the capacity of the infrastructure. In particular, the AEFP mentions the Delegated Decision (EU) 2017/2075 and article 21.5 b) of the Spanish Law of the Railway Sector, which indicates that *“with regard to the long-term planning of maintenance and/or major renovation of railway infrastructures, the infrastructure manager will consult the candidates and take into account, as far as possible, the concerns expressed”*. In this regard, the AEFP mentions in its letter that *“there is no reference document from the infrastructure manager (ADIF) where sufficient elements are available on the management of the works. The meetings between the infrastructure manager and the railways undertakings are not a procedure defined in collaboration with the railway operators, but merely approximate and changing information tables (...)”* The decision is still pending.
49. In Denmark, following the questionnaire from DG MOVE, Jernbanenaevnet initiated a supervision of implementation of the Decision. The Danish regulatory body has noted the Danish infrastructure manager’s confirmation that the most affected operators of service facilities also receive invitations to meetings regarding capacity restrictions that affect more than one network. The regulatory body expects that by 15 December 2022 at the latest, the infrastructure manager will have confirmed that it has arranged the capacity allocation process so that applications for all types of maintenance work are included. Finally, the regulatory body notes that the infrastructure manager is working on temporary solutions for the publication of information on released capacity until the procedure can be fully IT-supported at the end of 2024. The infrastructure manager is requested to keep the regulatory body continuously informed of the progress regarding measures to fulfill the requirement for publication of information on released capacity and the TTR project. The regulatory body found that the remaining provisions of Annex VII have been complied with.¹⁹
50. The survey of regulatory bodies’ cases involving the Decision shows that several regulatory bodies have started supervising the rules of the Decision but experience of actual complaints and ex-officio investigations remains limited.
51. Although the regulations in the Decisions are unusually detailed for immediately applicable EU rules, they leave some leeway for their interpretation.

¹⁹ <https://www.jernbanenaevnet.dk/da/Lister/Publikationlisteside>

52. The TCR guidelines developed by RNE have the potential to facilitate a consistent application of the rules. The Guidelines provide a first indication on how to approach the implementation of the Decision's requirements for some basic questions. However, they do not contain a complete analysis of the rules.
53. Against this background, there should be a task for regulatory bodies in gathering and exchanging experiences of the implementation, of the rules i.e. identify points where the rules are unclear, where they are difficult to implement or monitor, or where they have unintended consequences.
54. The German and Swedish experiences may serve as useful examples for learning, by pointing out areas of the Decision which have proven complex or difficult to monitor.

5. Topics for further consideration based on the decisions of Bundesnetzagentur and Transportstyrelsen

55. The German and Swedish experiences of implementation of the Decision's rules have shown that there are several aspects of the rules which require an analysis and an interpretation by regulatory bodies. The purpose of this chapter is to raise and discuss a number of key issues stemming from the investigations by Bundesnetzagentur and Transportstyrelsen.
56. Readers may be helped by referring to the explanatory charts provided in Annex 1 to this report when dealing with the findings of Bundesnetzagentur.

5.1 Activities which infrastructure managers need to carry out before X-24

57. Bundesnetzagentur's decision includes a clarification of the activities which infrastructure managers are required to carry out before the first explicit deadline in point 8 to publish at X-24 all capacity restrictions with a duration of more than seven consecutive days and with an impact on traffic exceeding 30 %, together with the results of a consultation.
58. In particular, some initial information on the planned TCRs would need to be shared with applicants as a basis for the consultation which is to take place before the X-24 deadline.
59. For TCRs which affect more than one network, point 11 includes a requirement on infrastructure managers to coordinate between themselves capacity restrictions before publishing capacity restrictions in accordance with point 8. To be able to consult applicants according to point 8, infrastructure managers must be expected to have done the coordination according to point 11 ahead of that consultation.
60. Point 9 further provides, that in the case of cross-network TCRs, a joint discussion is held with applicants, service facility operators and associations of infrastructure managers at the time of the first publication, unless rail infrastructure managers and applicants agree that such a procedure is not required.
61. Also in the period prior to X-24, point 16 stipulates that for TCRs with at least 30 consecutive days and more than 50% restrictions, the infrastructure manager must provide and consult a comparison of the

conditions in at least two alternative capacity restrictions at the request of the applicants. This would require those information on the TCRs must necessarily be provided beforehand in order to allow applicants to request such a comparison.

62. Point 17 requires for TCRs with more than 30 consecutive days and more than 50% impact, the infrastructure manager to publish criteria for the diversion of trains together with a provisional allocation of the remaining capacity for the various types of rail traffic. Point 17 also refers to point 8 and requires appropriate consultations. Therefore, in order for diversion criteria to be published at X-24 (in accordance with point 8) with a provisional allocation of remaining capacity, a consultation must have taken place at that stage.

5.2 Requirements on infrastructure managers when consulting applicants and publishing the results of the consultation.

63. The Delegated Decision calls for consultation with the applicants at various stages of the planning process. Corresponding requirements can be found in points 8, 10, 12, 14, 16 and 17.
64. The Delegated Decision does not provide specific instructions on the design of consultation with applicants. RNE has specified in their TCR Guidelines that consultation is an active exchange process between the infrastructure manager and applicants through formal communication channels, which may include open meetings, e.g., stakeholders are invited to an open meeting or series of meetings; or written information to stakeholders with an opportunity to comment. The infrastructure manager proactively initiates communication with applicants to provide information about the TCR. Infrastructure managers solicit applicants' views on proposed actions to be implemented for capacity restrictions for defined thresholds prior to publication.
65. Transportstyrelsen and BNetzA agree that consultations must be based on information on the infrastructure managers' preliminary plans, that the outcome of the consultation must be reflected in the subsequent publication, and that the second consultation round must build further on the results from the first consultation round.
66. Transportstyrelsen and BNetzA both consider that all consultation requirements involve an obligation for infrastructure managers to present at the level of each individual TCR how the infrastructure manager has taken into account the viewpoints presented during the consultation and if and how the outcome of the consultation has affected that TCR. Transportstyrelsen found that it would be necessary for applicants during the second consultation round to be able to follow up on their viewpoints expressed during the first consultation round, or to be able to request train paths in a way which meets their needs while being consistent with the TCR.

5.3 The classification of TCRs into different categories

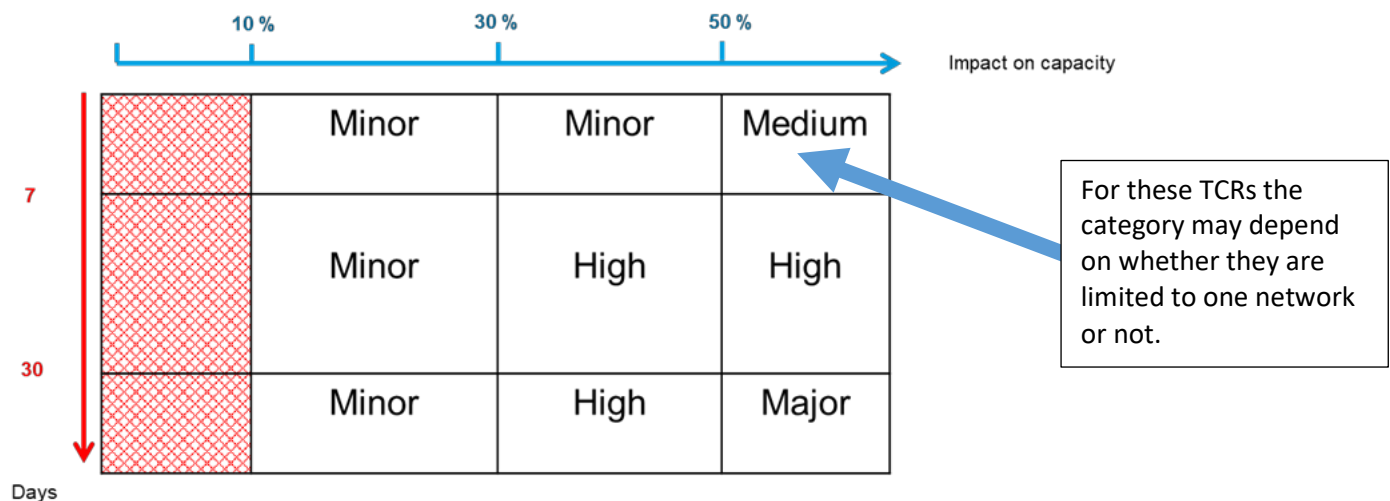
67. The Decision does not provide an explicit categorization of TCRs based on duration and impact. The RNE TCR Guidelines have converted the implicit categories of TCRs under the Decision into a chart. The Guidelines have also introduced the labels "major", "high", "medium", and "minor" impact to describe

the different classes of TCRs. This categorization is useful in making the rules more accessible. However, the classification raises a number of ambiguities that regulatory bodies will have to address when monitoring compliance.

68. Several difficulties stem from the fact that point 11 contains a separate set of deadlines for coordination between infrastructure managers before the second publication of capacity restrictions not limited to one network that could involve a cancellation, re-routing of a train path or a replacement by other modes (hereafter “cross-network TCRs”).

5.3.1 Dealing with the category “medium impact” TCRs (≤ 7 days and $> 50\%$ impact).

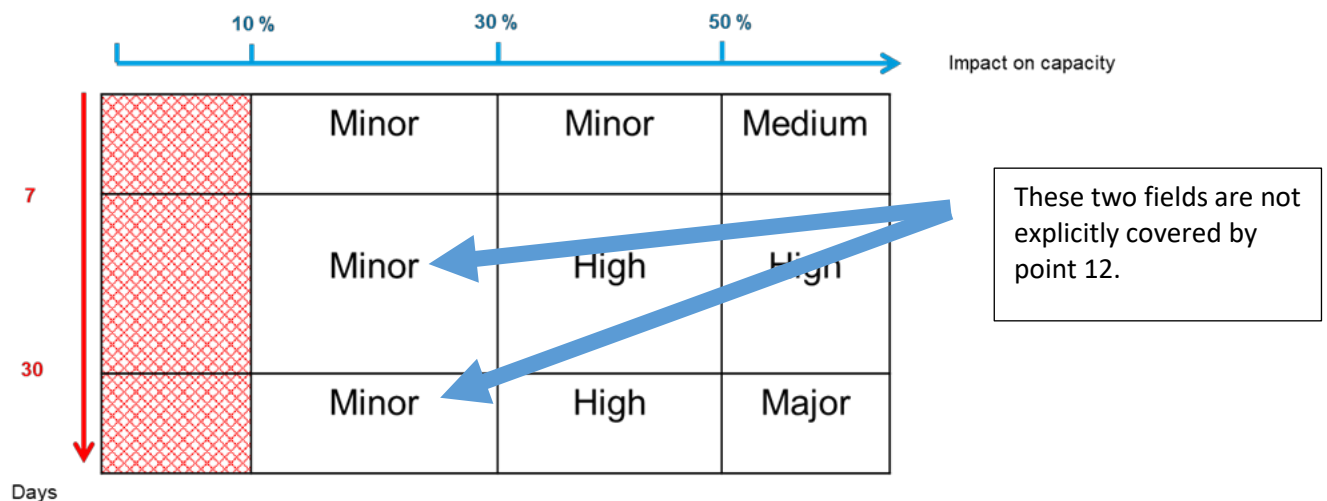
69. The TCR category which raises the biggest need for interpretation covers TCRs which last for 7 consecutive days or less and have an impact exceeding 50 % (“medium impact” in the RNE guidelines). This category is not mentioned in point 8 or 12 and can only be derived from point 11 c, which states that for these TCRs coordination between infrastructure managers before the second publication shall be completed no later than 13 months and 15 days before the change of the working timetable period.
70. Point 11 begins with a reference to point 8: “Before publishing capacity restrictions in accordance with point (8)”. BNetzA has concluded that for medium impact TCRs this reference should be limited to the second consultation and publication requirement at X-12 and does not apply to the first publication at X-24. This interpretation is based on point 11 2 c which provides for coordination for these TCRs and the second sentence in point 10, which subsequently provides for consultation prior to the second publication. Thus, point 11 deviates from the requirements in point 8 with regard to the scope of the measures concerned. Because the variation explicitly refers only to the second publication, the first consultation for this TCRs is required to take place between X 24 and X 12.
71. Although point 11 states “if the impact of the capacity restrictions is not limited to one network”, the RNE TCR Guidelines set up a category “medium impact TCRs” for all TCRs and not only for those with impact on other networks. BNetzA, in contrast, have concluded that the medium impact category is applicable only to cross-network TCRs.



72. In applying the Delegated Decision it remains to be seen to what extent a differentiation between single-network and cross-network TCRs and working with two different timelines for a specific category of TCRs will be practically feasible.
73. Infrastructure managers have access to a means of working around this issue by using the provision in point 13 to apply more stringent thresholds for capacity restrictions based on lower percentages of estimated traffic volumes or shorter durations than those indicated in the Delegated Decision or to apply criteria in addition to the ones mentioned in the Delegated Decision, pursuant to a consultation with applicants and facility operators. However, the Delegated Decision creates no obligations for infrastructure managers to do this.

5.3.2 TCRs which last longer than 7 consecutive days and have an impact between 10 and 30 %.

74. A strict reading of the Decision would indicate that TCRs with a duration of more than 7 consecutive days and an impact from 10 to 30 % are not covered by the deadlines for consultation and publication, since the deadlines for consultation and publication in point 12 are explicitly limited to TCRs with a duration of seven consecutive days or less.



75. However, as stated in point 14, these TCRs would still be covered by the general requirement to consult the applicants and the main operators of service facilities concerned for other capacity restrictions that are not subject to consultation in accordance with other provisions of the Decision.
76. BNetzA has found that an omission of this category of TCRs from point 12 would appear to be contrary to the objectives of the Decision. There is no apparent reason for why TCRs lasting longer than 7 days should be subject to less strict rules than shorter TCRs. Using different requirements would also enable an infrastructure manager to avoid the deadlines for consultation and publication in point 12 by extending the duration of a TCR beyond 7 days. Therefore, BNetzA considers that the rules in point 12 should apply also to TCRs with a duration of more than 7 days and an impact between 10 and 30 %. This is consistent with the RNE Guidelines.

5.3.3 Measuring the duration and impact of TCRs.

77. In Germany as well as in Sweden, the methods for calculating duration and impact of a TCR are at the discretion of the infrastructure manager. The regulatory bodies have the mandate, however, to supervise the methods for and results of these calculation either through ex-officio investigations or following a complaint.
78. Transportstyrelsen's decisions contained a determination regarding TCRs which are not uniform or continuous over time; A single maintenance or reinvestment project often gives rise to several TCRs separated in time, or with an impact on traffic which varies over time. Transportstyrelsen found that in that case, they should as a rule be treated as separate TCRs (even if they are caused by e.g. the same track renewal project).²⁰ Transportstyrelsen's finding is consistent with the treatment of consecutive days in the RNE TCR guidelines.²¹
79. The RNE Guidelines point to the special case of recurrent patterns of TCRs of 7 days or less in a row, e.g. TCR on Monday to Friday for several weeks and propose that "it should be taken into consideration to treat them as one single TCR with a duration of more than 7 days for coordination and consultation purposes. Especially if the TCRs are part of the same project ..."²². Transportstyrelsen and BNetzA support these recommendations in principle. However, there may be some ambiguous situations where it is not evident whether a TCR should be treated as a single continuous TCR or as a series of TCRs with shorter duration. Practical consequences of this classification which have not yet been foreseen may also arise. E.g. will there be a loss of efficiency if the timing of different parts of a single renewal project must be consulted and published according to different timelines?
80. There is also a potential risk of infrastructure managers using this provision to avoid the more stringent requirements under point 8, by splitting a project up into different smaller projects.
81. Infrastructure managers' calculations of duration and impact and the consequences of these calculations for the applicability of different rules in the Decision is a topic which is likely to appear on the agenda of regulatory bodies.

5.4 Altering or adding TCRs after final publication

82. Point 14 sets up a number of conditions for when infrastructure managers may decide not to apply the periods laid down in points (8) to (12).
83. According to Transportstyrelsen's decision, point 14 should be interpreted as a set of conditions for when an infrastructure manager may alter a TCR after final publication at X-12 or X-4. Thus, the wording "may decide not to apply the periods laid down in point 8 to 12" in point 14 refers not only to the infrastructure manager making such decision in advance of the ordinary deadline, but should also be read as a list of circumstances which allow infrastructure managers to alter published TCRs. This list includes the following four conditions:

²⁰ This is the outcome of Transportstyrelsen's decisions TSJ 2020-25 and TSJ 2020-373

²¹ RNE TCR Guidelines 3.00, p. 13.

²² RNE TCR Guidelines 3.00, p. 13.

- a. if the capacity restriction is necessary to re-establish safe train operations,
 - b. the timing of the restrictions is beyond the control of the infrastructure manager,
 - c. the application of those periods would be cost ineffective or unnecessarily damaging in respect of asset life or condition,
 - d. or if all concerned applicants agree.
84. This indirectly requires infrastructure managers, on each occasion when a TCR is altered according to point 14, to communicate to applicants and provide documentation on which of the clauses in point 14 are applicable on this occasion.²³
85. While this has not yet been part of regulatory body experience of the Delegated Decision, there are number of potential issues relating to these provisions, for example:
- a. What factors can an infrastructure manager appeal to according the wording "beyond the control of the infrastructure manager" in point 14? E.g. changes in funding? Failure to meet the infrastructure manager's own target for maintenance /upgrades in a previous year? Failure of long-term planning? Changes in contracts with subcontractors?
 - b. If an infrastructure manager appeals to cost ineffectiveness or damage to an asset, how big is the burden of proof on infrastructure managers to show that this really is the case?
 - c. Concerning "if all concerned applicants agree", is there a risk that an infrastructure manager, often being the stronger part in negotiations with applicants, put pressure on applicants to accept an alteration of a published TCRs against their will?
86. Since point 14 concerns only non-application of the periods laid down in point 8 to 12, infrastructure managers would still have to comply with the requirements in point 16 and 17 for the relevant TCRs.
87. Point 8 contains a limitation of the consultation and publication requirements (X-24) "to the extent they are known". This provision, which does not appear to have been tested in practice by any regulatory body, may prove important for future supervision. For example, in order to avoid abuse by infrastructure managers, it appears reasonable that this provision should only apply to circumstances that are beyond the control of the infrastructure manager. For instance, could a lack of knowledge of a TCR due to inadequate planning by the infrastructure manager really be qualified as "not known"? Other cases, such as TCRs that are not published in a timely manner due to late funding may be a potential issue that requires regulatory attention in the future.

6. Further steps

88. This overview of the experience of IRG-Rail members in monitoring infrastructure managers' compliance with the rules on TCRs in Delegated Decision (EU) 2017/2075 suggests that many regulatory bodies are still in the early stages of setting up a full supervision of the rules of the Decision.
89. The thorough investigations carried out by the German and Swedish regulatory bodies have pointed out a number of areas in the Delegated Decision which raise further questions and a need for interpretation

²³ Deficiency no 5 in case TSJ 2020-373

by regulatory bodies. The proceedings already conducted have not conclusively settled all the issues that have been raised.

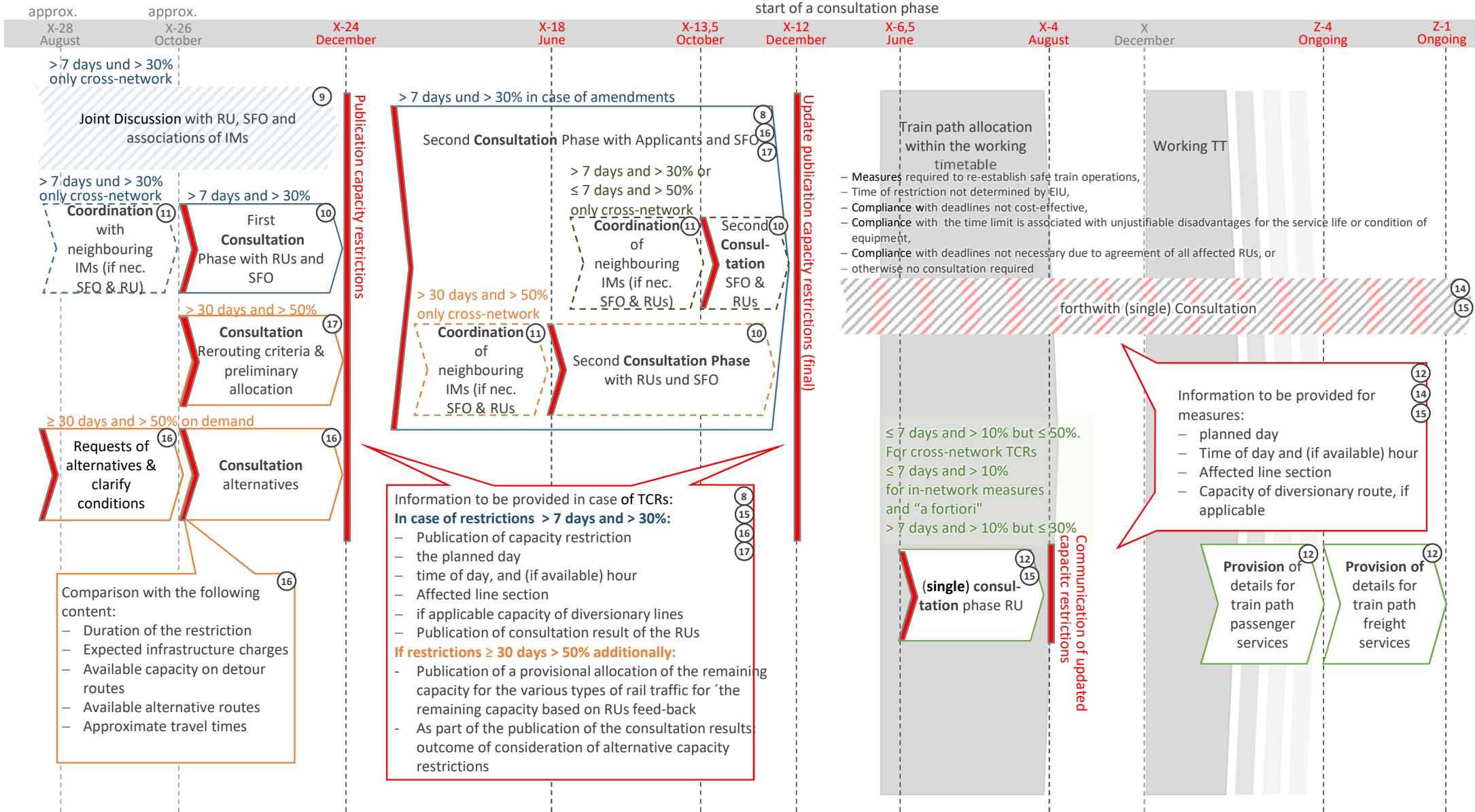
90. During 2022, IRG-Rail WG Access will continue to gather monitoring experience and discuss the extent to which it will be possible to approach a harmonized understanding of these unresolved questions by regulatory bodies.
91. The decisions of Bundesnetzagentur and Transportstyrelsen and Bundesnetzagentur's explanatory charts offer important input and guidance for regulatory bodies that are in the process of entering into more substantial monitoring of the Delegated Decision.
92. Following the adoption of this report at the IRG-Rail Plenary, the WG Access will enter into discussions of the findings with stakeholders involved in TCRs including RNE, FTE, ERFA, and the European Commissions.
93. As more regulatory bodies gather experience of monitoring, new issues can be expected to arise.

Annex I: Bundesnetzagentur explanatory charts of Annex VII rules.

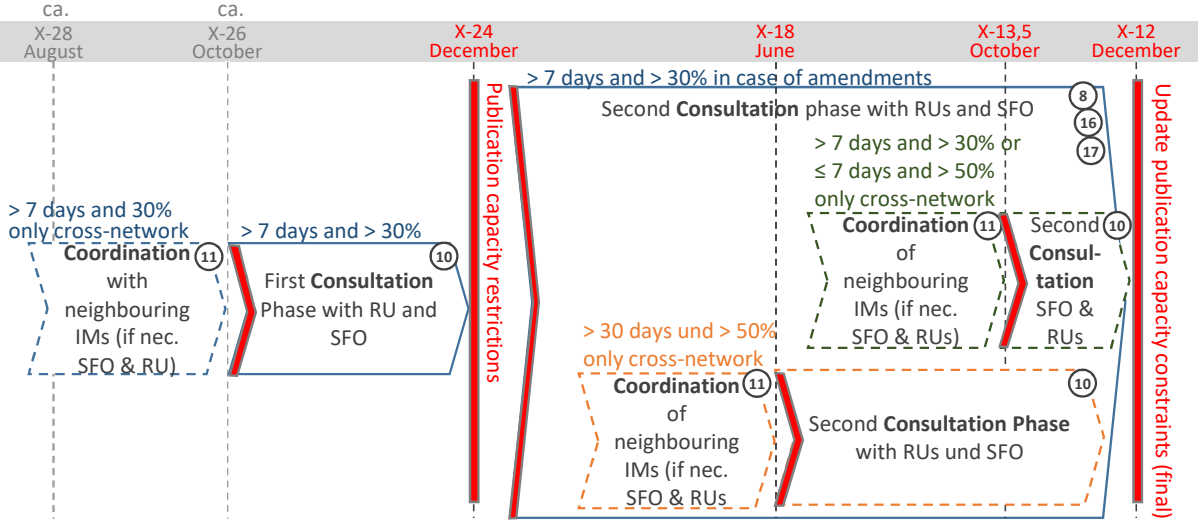
Target process Annex VII (TCRs)

Legend: - X = relevant item(s) in Annex VII
 - = publication date; partly as start of a consultation phase

- X-[number] = Number of months before the start of the ATT
 - Z-[number] = Number of the months before TCRs



Details: Points 8, 10 and 11



Requirements of Annex VII:

- (8) As regards temporary restrictions of the capacity of railway lines, for reasons such as infrastructure works, including associated speed restrictions, axle load, train length, traction, or structure gauge ('capacity restrictions'), of a duration of more than seven consecutive days and for which more than 30 % of the estimated traffic volume on a railway line per day is cancelled, re-routed or replaced by other modes of transport, the infrastructure managers concerned shall publish all capacity restrictions and the preliminary results of a consultation with the applicants for a first time at least 24 months, to the extent they are known, and, in an updated form, for a second time at least 12 months before the change of the working timetable concerned.
- (9) [...]
- (10) When publishing capacity restrictions in accordance with point (8) for a first time, the infrastructure manager shall launch a consultation with the applicants and the main operators of services facilities concerned on the capacity restrictions. Where a coordination in accordance with point (11) is required between the first and second publication of capacity restrictions, infrastructure managers shall consult with applicants and the main operators of service facilities concerned a second time between the end of that coordination and the second publication of the capacity restriction.
- (11) Before publishing capacity restrictions in accordance with point (8), if the impact of the capacity restrictions is not limited to one network, the infrastructure managers concerned, including infrastructure managers that might be impacted by the rerouting of trains, shall coordinate between themselves capacity restrictions that could involve a cancellation, re-routing of a train path or a replacement by other modes. The coordination before the second publication shall be completed:
 - a) no later than 18 months before the change of the working timetable if more than 50 % of the estimated traffic volume on a railway line per day is cancelled, re-routed or replaced by other modes of transport for a duration of more than 30 consecutive days
 - b) no later than 13 months and 15 days before the change of the working timetable period if more than 30 % of the estimated traffic volume on a railway line per day is cancelled, re-routed or replaced by other modes of transport for a duration of more than seven consecutive days
 - c) no later than 13 months and 15 days before the change of the working timetable period if more than 50 % of the estimated traffic volume on a railway line per day is cancelled, re-routed or replaced by other modes of transport for a duration of seven consecutive days or less.

The infrastructure managers shall, if necessary, invite the applicants active on the lines concerned and the main operators of service facilities concerned to get involved in that coordination

Explanations of the ratio of points 8, 10 and 11

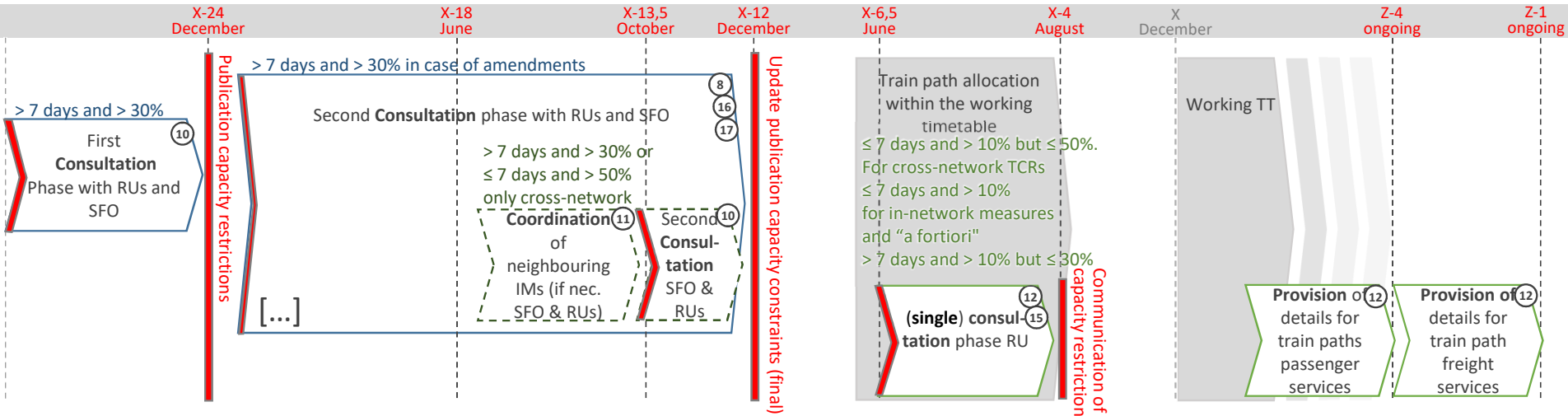
According to the understanding here, in point 10 the provision "When publishing capacity restrictions in accordance with point (8) for a first time" refers to the period before X-24. This is based on the consideration that otherwise the consultation of the RU would only begin with X-24 and the provision "between the first and second publication" in sentence 2 of the provision would refer to exactly the same period.

Alternatively, it could also be argued that the consultation referred to in point 10 would have to take place at X-24, i.e. exactly at the time of publication. This interpretation would place more focus on the consultation between the two publication dates. However, the fact would remain that a consultation would also have to be carried out before X-24 (according to point 8).

According to the understanding presented here, coordination of TCRs ≤ 7 days and > 50% TCRs only takes place before X-12. In this respect, it should be considered that point 8 only provides the obligation to publish TCRs > 7 days and > 30% capacity restrictions. On the other hand, point 11 stipulates that coordination before the second publication according to point 8 also applies to TCRs that are ≤ 7 days and > 50% capacity restrictions. Since the explicit regulation only refers to the period before the second publication, the inclusion in the timetable was only made in this respect.

Alternatively, point 11 could also be read in such a way that the second publication must take place with regard to all case constellations for X-12. In this case, a first publication would also have to be made at X-24 for cases in which TCRs were ≤ 7 days but had > 50% capacity restrictions, and the coordination procedure would probably also have to be run through beforehand. This interpretation would not further hold on the wording of point 8 and be more closely aligned with the wording of point 11.

Details: Points 8 and 12



Requirements of Annex VII:

- (8) As regards temporary restrictions of the capacity of railway lines, for reasons such as infrastructure works, including associated speed restrictions, axle load, train length, traction, or structure gauge ('capacity restrictions'), of a duration of more than seven consecutive days and for which more than 30 % of the estimated traffic volume on a railway line per day is cancelled, re-routed or replaced by other modes of transport, the infrastructure managers concerned shall publish all capacity restrictions and the preliminary results of a consultation with the applicants for a first time at least 24 months, to the extent they are known, and, in an updated form, for a second time at least 12 months before the change of the working timetable concerned.
- (9 - 11) [...]
- (12) As regards capacity restrictions of a duration of seven consecutive days or less that need not be published in accordance with point (8) and for which more than 10 % of the estimated traffic volume on a railway line per day is cancelled, re-routed or replaced by other modes, that occur during the following timetable period and that the infrastructure manager becomes aware of no later than 6 months and 15 days before the change of the working timetable, the infrastructure manager shall consult the applicants concerned on the envisaged capacity restrictions and communicate the updated capacity restrictions at least four months before the change of the working timetable. The infrastructure manager shall provide details on the offered train paths for passenger trains no later than four months and for freight trains no later than one month before the beginning of the capacity restriction, unless the infrastructure manager and the concerned applicants agree on a shorter lead time.

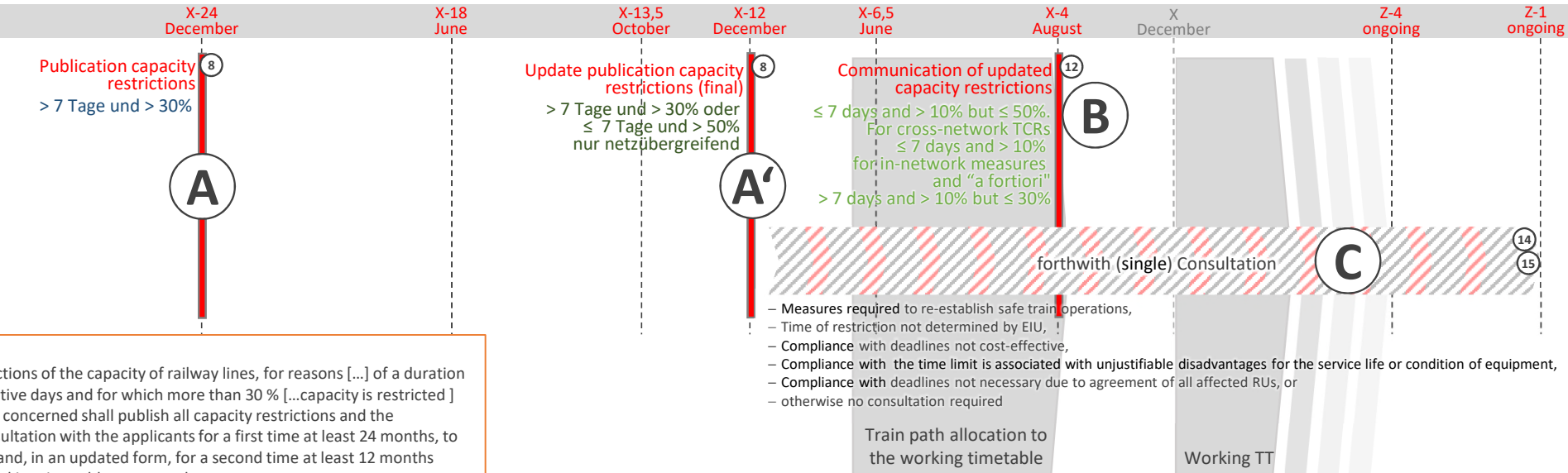
Explanations of the ratio of points 8 and 12

According to the understanding presented here, the consultation phase regulated in point 12 concerns, in the case of cross-network measures, all TCRs ≤ 7 days and > 10% but ≤ 50%, and in the case of intra-network measures, all TCRs ≤ 7 days and > 10%, as well as "a fortiori" all measures > 7 days and > 10% but ≤ 30%.

First of all, the wording of points 8 and 12 suggests that TCRs ≤ 7 days and > 10% are affected. It fits in with this that point 8 does not provide publication at all for such short TCRs. The reference to publication according to point 8 would be purely explanatory.

However, this would mean that some TCRs with an impact of more than 7 days would not be subject of any consultation obligation at all. This applies in particular to measures ≤ 7 days > 10 % but ≤ 30 % capacity restrictions. These TCRs must be included in the scheme of point 12 within the framework of a "first right conclusion". In addition, the initial consultation provided in point 12 is not a sensible fit if consultation has already taken place previously. This applies to cross-network TCRs ≤ 7 days and > 50%, cf. point 11. These measures should therefore be excluded from the scope of point 12.

Details: Points 8, 12 and 14



Requirements of Annex VII:

- (8) As regards temporary restrictions of the capacity of railway lines, for reasons [...] of a duration of more than seven consecutive days and for which more than 30 % [...] capacity is restricted] the infrastructure managers concerned shall publish all capacity restrictions and the preliminary results of a consultation with the applicants for a first time at least 24 months, to the extent they are known, and, in an updated form, for a second time at least 12 months before the change of the working timetable concerned.
- (9 - 11) [...]
- (12) As regards capacity restrictions of a duration of seven consecutive days or less that need not be published in accordance with point (8) and for which more than 10 % of the estimated traffic volume on a railway line per day is cancelled, re-routed or replaced by other modes, that occur during the following timetable period and that the infrastructure manager becomes aware of no later than 6 months and 15 days before the change of the working timetable, the infrastructure manager shall consult the applicants concerned on the envisaged capacity restrictions and communicate the updated capacity restrictions at least four months before the change of the working timetable. [...]
- (13) [...]
- (14) The infrastructure manager may decide not to apply the periods laid down in points (8) to (12), if the capacity restriction is necessary to re-establish safe train operations, the timing of the restrictions is beyond the control of the infrastructure manager, the application of those periods would be cost ineffective or unnecessarily damaging in respect of asset life or condition, or if all concerned applicants agree. In those cases and in case of any other capacity restrictions that are not subject to consultation in accordance with other provisions of this Annex, the infrastructure manager shall consult the applicants and the main operators of service facilities concerned forthwith.

Explanations of the ratio of points 8 ,12 and 14

According to the understanding presented here, the publication dates presented in Annex VII are separate procedures, which may, however, complement each other in parts.

- A** TCRs > 7 days and > 30 % as well as ≤ 7 days and > 50 % are planned with a long lead time. The final publication is made for X-12 and the TCRs can be conclusively taken into account in the working timetable. Between X-24 and X-12 modifications may occur. In the process, the hours are to be specified (points 8 and 15), the results of the coordination of cross-network train paths are to be taken into account (point 11) and an indicative “break-down“ by type of service has to be provided (point 17).
- B** TCRs ≤ 7 days and > 10% but ≤ 50%, intra-network restrictions ≤ 7 days and >10%, and “a fortiori ” TCRs > 7 days and > 10% but ≤ 30% are published conclusively at X-4, although in these cases the details of the train paths must be communicated later, as consideration in the working timetable can no longer take place.

In addition, consultations and restrictions are possible at any time, corresponding to the following case groups:

- C**
 - Measures required to re-establish safe train operations,
 - Time of the restrictions is beyond the control of the infrastructure manager,
 - the compliance with deadlines would be cost ineffective,
 - the compliance with deadlines would be associated with unjustifiable disadvantages for the service life or condition of equipment,
 - the compliance with deadlines is not necessary due to the consent of all affected applicants,
 - otherwise no consultation required

When the conditions are fulfilled - Measures of the other case groups may also be affected by the case group of point 14 if there is still a need for change after the respective final publications.