

Independent Regulators' Group – Rail
IRG–Rail
Subgroup Access to Service Facilities

**Update of the report on experience gained from exemptions
granted under Article 2 Paragraph 2 of Implementing Regulation
(EU) 2017/2177**

November 2021

Introductory Remarks

This paper shows information on applications for exemptions in the period from October 2020 to September 2021.

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1. Introduction

1. Implementing Regulation (EU) 2017/2177 on access to services facilities and rail-related services (hereafter: the Implementing Regulation) sets out uniform rules, procedures and certain obligations for service facility operators (hereafter: SFO). It also strengthens the requirement to provide information on services by mandating the publication of a service facility description.
2. Under Article 2 (1) of the Implementing Regulation, SFOs can file an application with their national regulatory body (hereafter: RB) in order to be exempted from all or some of the provisions of the Implementing Regulation in relation to, e.g., timescales, priority criteria, viable alternatives etc. An exemption from Article 4 (2) (a) to (d) and (m) and Article 5 of the Implementing Regulation is not possible. SFOs that exist solely for use by heritage railway operators for their own purposes, may request to be exempted from all the provisions of the Implementing Regulation. Exemptions do not affect the SFO's obligation to provide non-discriminatory access to their facilities and services.
3. Article 2 (2) of the Implementing Regulation specifies that RBs may decide to exempt SFOs that operate service facilities or provide services, if the requirements in any of the three following criteria are fulfilled:
 - a) service facilities or services which do not have any strategic importance for the functioning of the rail transport services market, in particular as regards the level of use of the facility, the type and volume of traffic potentially impacted and the type of services offered in the facility;

- b) service facilities or services which are operated or provided in a competitive market environment with a variety of competitors providing comparable services;
 - c) service facilities or services where the application of the Implementing Regulation could negatively impact the functioning of the service facility market.
4. In 2018 IRG-Rail published a document establishing common principles on granting exemptions under Article 2 (2) of the Implementing Regulation (IRG-Rail (18) 7, hereafter: IRG-Rail's common principles).¹ In this document, IRG-Rail sets out decision-making principles that should be applied by the national RB when assessing applications for an exemption under the Implementing Regulation.
 5. In 2019 IRG-Rail published a follow-up report on experiences regarding exemptions granted under Article 2 (2) of the Implementing Regulation (IRG-Rail (19) 7).² In this document, IRG-Rail sets out an overview of RBs' initial experiences in handling applications and making decisions and to promote sharing of best practices to request exemptions from the Implementing Regulation.
 6. In 2020 IRG-Rail published another follow-up report on monitoring exemptions granted under Article 2 (2) of the Implementing Regulation (IRG-Rail (20) 8).³ In this document, IRG-Rail sets out an in-depth look at RBs' practical handling of the exemption procedures in the relevant countries to share experiences made with handling exemption decisions.
 7. In its first two reports on the topic IRG-Rail determined that exemptions are requested, and therefore granted, in very few IRG-Rail members' countries. The common criteria are used for this task and the RBs that do handle requests for exemptions have developed administrative approaches for the tasks. As the application of the common principles has stabilised, the group intends to continue monitoring the number of cases.
 8. Therefore IRG-Rail subgroup Access to Service Facilities developed a questionnaire asking for information on applications for exemptions in the period from October 2020 to September 2021⁴. The survey also collected information on the usability of the criteria set out in the IRG-Rail's common principles and asked for interesting exemption cases which can be used as an example for best practice.
 9. This IRG-Rail report presents the findings of the questionnaire. In total 18 replies were received, but the report only reflects responses by Austria, Denmark, Germany and Italy, as those RBs received requests for exemption over the reporting period.

¹ <https://www.irg-rail.eu/download/5/561/IRG-Rail187-CommonPrinciplesongrantedexemptions.pdf>.

² <https://www.irg-rail.eu/irg/documents/position-papers/166,2019.html>.

³ <https://www.irg-rail.eu/download/5/741/IRG-Rail208-UpdateoftheReportonmonitoringofexemptionsgrantedunderRegEU2017-2177.pdf>.

⁴ The editorial deadline for this paper.

2. Application for exemptions

10. Since 1st October 2020, four RBs of the participating countries (Austria, Denmark, Germany and Italy) have received applications for exemption pursuant to Article 2 of the Implementing Regulation. All other participating RBs have not received any applications for exemptions.⁵

RB	Applications in total	Non-strategic importance	Competitive environment	Impairment of functioning	Cultural-historic
Austria	6 ⁶	6	4	1	0
Denmark	3	3	3	3	0
Germany	16	9	6	0	2
Italy	4	3	1	0	0

3. Decisions

11. The Implementing Regulation does not describe how the exemption has to be granted. In all participating countries, the RBs close the exemption procedures with a decision. In the period from 1st October 2020 to 30th September 2021, exemption decisions have been taken in Austria, Denmark, Germany and Italy.

RB		Decisions in total	Non-strategic importance	Competitive environment	Impairment of functioning	Cultural-historic
Austria	Granted	5	5	3	1	0
	Rejected	1	1	1	0	0
Denmark	Granted	2	2	0	0	0
	Rejected	0	0	0	0	0
Germany	Granted	25	12	6	0	10
	Rejected	0	0	0	0	0
Italy	Granted	3	3	0	0	0
	Rejected	1	0	1	0	0

4. Usage of IRG-Rail's common principles

12. The questionnaire asked whether RBs who received applications would use IRG-Rail's common principles as a basis for their decisions (4.1) and which criteria is used (4.2).

⁵ In Norway, the Implementing Regulation was transposed into the EEA Agreement and Norwegian law by September 2021.

⁶ An application for exemption can be based on more than one criteria stated in Article 2 (2) of the Implementing Regulation. The same also applies to a decision.

4.1. IRG-Rail's common principles as a basis for decision

13. The RBs of Austria, Denmark, Germany and Italy confirm that they use the IRG-Rail's common principles to make an exemption decision. Austria emphasises that they recommends all prospective applicants to use the IRG-Rail's common principles as a basis for their submissions. The criteria in the IRG-Rail's common principles may also serve as a guide to the RB during the phase of clarifying the facts of the case at hand. However, Schienen-Control's decisions are based solely on the law as it stands. The IRG-Rail's common principles do play a role though.

4.2. Overview of used criteria

14. In the IRG-Rail's common principles, the subgroup has listed a selection of possible criteria for making the decision based on strategic importance of the service facility or offered service. Except for Denmark, the participating member states Austria, Germany and Italy decided to use more than one criteria to make their decision.

15. The most frequently used criteria is "Number of train stops" (used by Austria, Denmark, Germany and Italy), followed by a bunch of criteria used by three of the participating countries.

16. The following table lists all criteria relevant for the decision.⁷

Criteria	Used by
Number of train stops	
Level of capacity utilization	
Volume of inter or multimodal (rail-ship) transshipment, for instance in TEU and/or tons	
Number of, and reason for, access requests that have been denied in the last three years	
Number of trains	
Annual turnover of the service or facility	

⁷ All flags are taken from <https://www.countryflags.com/>.

Market share of the service or facility	
Corporate affiliation between the SFO and one or more railway undertakings	
Relevance of the facility for existing Public Service Obligations	
Service facility is connected to infrastructure that is exempted under Article 2(4) of Directive 2012/34/EU	
Number of train tracks	
Volume of traffic	
Service facility is connected to a line or network with non-standard technical characteristics	
Proximity to a European Rail Freight Corridor	
Number of passengers	
Number or length of train tracks	
Existence of other SFOs within the service facility	

17. The results of the questionnaire show that the applied choice of criteria differ from member state to member state. This could be due to the scope of the different applications or national characteristics.

5. Presentation of interesting cases

18. The questionnaire asked participating countries that have received applications for exemptions for a brief description of interesting cases which the RBs could share as an example for best practice.

Italy

19. ART-Italy decided upon the exemption request by Sodele S.r.l. (hereinafter: Sodele) from rules in the Implementing Regulation for their rail freight terminal in the Emilia Romagna region⁸. The freight terminal is connected to the Milan-Bologna railway line under the responsibility of the infrastructure manager Rete Ferroviaria Italiana S.p.A. (hereinafter: RFI). ART-Italy determined that the service facility is of no strategic importance for the functioning of the rail transport services market.
20. ART-Italy found that: the average annual traffic was less than 2,000 wagons over the years 2018 and 2019; competing operators of freight terminals in the reference area exist; the service facility is not fully utilised; there is no direct or indirect control of the service facility by another company and the freight terminal does not belong to a rail freight corridor within the meaning of Regulation (EU) No 913/2010.

Germany

21. Bundesnetzagentur decided upon DB Fahrzeuginstandhaltung's (hereinafter: DB FZI) request for exemption from rules in the Implementing Regulation and in the national Railway Regulatory Act (ERegG) for their maintenance service facilities⁹. The applicant is a subsidiary of Deutsche Bahn (DB) group and operates maintenance facilities for rail vehicles at different locations in Germany, focused on heavy maintenance.
22. Bundesnetzagentur exempted with regard to the performance of maintenance of diesel locomotives, diesel railcars, electrical railcars, passenger coaches and freight wagons. No exemption was granted for the service facilities, which perform maintenance of electrical locomotives, steam locomotives, special vehicles and of local as well as long distance passenger railcars. The evaluation of exemption applied criteria in line with IRG-Rail's common principles. For the evaluation of possible exemptions Bundesnetzagentur especially referred to a "Report on the Markets for Railway Maintenance Equipment" (maintenance report)¹⁰.
23. This report contents findings on whether market-conditions correspond to undistorted competition on the markets for maintenance performance. The market of maintenance services is divided related to the performance. This takes into account that maintenance services usually perform on a nationwide market and the substitutability due to an existing competitive environment was looked at nationwide, if not exceeding to neighbouring countries. Exceptions made for maintenance in local passenger transport, because the operational concepts focus on the local area and have very short maintenance break-time. A distinction between transport services seemed less useful. For maintenance generally, not the category of transport services is important for its distinction but the technical heterogeneity of the vehicles. For the evaluation of strategic importance (Art. 2 (2) dash one Implementing Regulation), the named criteria were each assessed

⁸ The decision is published on ART-Italy's homepage in Italian under: https://www.autorita-trasporti.it/wp-content/uploads/2021/02/Delibera-n.-24_2021_signed.pdf.

⁹ The decision is published on Bundesnetzagentur's homepage in German under: https://www.bundesnetzagentur.de/DE/Beschlusskammern/1_GZ/BK10-GZ/2019/2019_bis0099/BK10-19-0022/BK10-19-0022_B_Beschluss.html.

¹⁰

https://www.bundesnetzagentur.de/DE/Sachgebiete/Eisenbahnen/Unternehmen_Institutionen/Marktbeobachtung/Wartungseinrichtungen/Maerkte/Wartungseinrichtungen.html?nn=401566

and then weighted against each other for decision. The level of utilisation of the facility was based on the statement of the applicant or the maintenance report. The traffic potentially impacted requires a qualitative reflexion by considering the nature of the traffic while the volume of the traffic is measured according to the rail-related turnover achieved, since the turnover allows inference to the usage. Bundesnetzagentur considered the turnover achieved in total and not only of the business of third parties. Otherwise, the need of market participants within the DB group and future competitors would significantly been underestimated. For the assessment of a competitive environment (Art. 2 (2) dash 2 Implementing Regulation) Bundesnetzagentur followed to the above-mentioned report. The decision refers to the findings of the report, with updates where necessary. Looking at the impairment of the market for service facilities (Art. 2 (2) dash 3 Implementing Regulation) Bundesnetzagentur considered if an exemption of a service facility operator jeopardises competition amongst the residual competitors on a market with one very strong competitor. An exception might be appropriate if undertakings which may be strategically important, e.g. considering the turnover but, at the same time, acting as residual competitors against a very dominant market participant. However, this criterion needs a strong plausibility of the impairment. No exemption granted was based on this ground.

Denmark

24. During the supervision of the Implementing Regulation Jernbarnaevnet (the Danish RB) received an exemption application from Aalborg Stevedore Company A/S (hereinafter: ASC) requesting to be exempted from parts of the requirements of the Implementing Regulation.
25. ASC operates a company with freight handling services at the Port of Aalborg, including facilities arranged for handling railway freight. ASC asserted that they fall under the scope of all three exemption criteria in Art. 2 (2) Implementing Regulation. ASC's main argument for being exempted was that it provides port activities, ie. handling of goods between ship and truck, as their primary activity and that the rail related activities are at a very low level.
26. ASC's turnover for rail-related services has been below 5% of the total revenue for the company for the current year. ASC does not actively offer railway solutions. In absolute terms, the annual rail-related turnover for ASC (handling of rail freight) is approximately DKK 400,000 (approximately 54,000 EURO). Port of Aalborg, which owns ASC entirely, has a turnover of around DKK 230 million per year, of which the turnover in relation to railway freight amounts to only 0.7-1 million DKK.
27. According to ASC, and due to the low utilization rate as well as quantities, the service facility does not have a strategic significance for the functioning of the railway market. Besides, ASC has currently no capacity problems in relation to access to and use of the rail-related service facilities, as all applications can be accommodated.
28. Jernbarnaevnet decided to grant exemption due to the criterion of lack of strategic importance. The RB emphasized ASC's information on the limited turnover on the rail-related services both in total and in relation to the ASC's other activities. Furthermore, the RB emphasized that there are a number of other rail-related service facilities at ports in Jutland, which also offers lifting between road/ship and railway.
29. The second case regarded H. Daugaard which is a privately owned international logistics company. It operates facilities for handling railway freight in connection with the railway tracks at the Port of Kolding and the Port of Vejle. H. Daugaard also requested exemption using similar arguments as ASC. Exemption was granted due to lack of strategic importance.

30. However, H. Daugaard requested confidentiality concerning the rail-related turnover and its share of H. Daugaard's total turnover. This is why Jernbarnenaevnet has not shared further details in this case.

6. Conclusion

31. After evaluating the questionnaire's responses, it is possible to conclude that the number of countries receiving and deciding on exemption applications remains very low compared to the numbers reported in the exemption report in 2020. There is also no increase in the number of submitted applications. The low number of applications may be due to the fact that many SFOs are not yet aware of the existence of the Implementing Regulation, or consider it not necessary to be exempt from its requirements.
32. Nevertheless, the development of SFOs exemption requests should be followed up. However, as things stand at present, an update of this report can be dispensed as long as there is no significant increase in the exemption procedures in different IRG-Rail member countries. An update of the report is planned with the revision of the Implementing regulation foreseen for June 2024.