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Statement on the scope of regulation in port terminals "The right of applicants to request access"

prepared by IRG-Rail Subgroup on Access to Service Facilities

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Terminal operators in ports providing services described in points 2 to 4 of Annex II of the Directive 2012/34/EU are required to meet all legal rail regulation provisions including the transparent publication of Service Facility Descriptions (incl. charges).

Since in some IRG-Rail Member States applicants are allowed to request access in compliance with Recital 9 of the Implementing Regulation (EU) 2017/2177, these applicants have the same right as railway undertakings (RUs) in those Member States.

The contractual relationship does not determine the qualification of a service facility operator nor the application of rail regulation.

The level playing field in the rail market is best met if all potential contracting parties and service facility operators are treated equally with regard to non-discriminatory access to service facilities and supply of rail related services.

I. Introduction

In June 2020, the Federation of European Private Port Companies and Terminals (FEPORT) raised the question to what extent services within port terminals[1] fall within the scope of rail regulation. Several discussions within the European Network of Rail Regulatory Bodies (ENRRB) and beyond revealed diverging opinions on the scope of rail regulation in port terminals. In this context the European Commission stated that charges do not have to be published in the Service Facility Description (SFD) according to the Implementing Regulation (EU) 2017/2177 (IR) if the access contract is concluded with shippers and freight forwarders.

Members of IRG-Rail raised concerns that this would lead to discrimination of applicants (except for RUs) applying for rail services in the port terminals, and potentially in all other service facilities, since in some IRG-Rail Member States not only RUs but also applicants, e.g. shippers and freight forwarders, as defined in Art. 3 (19) of the Directive 2012/34/EU (Directive), are allowed to request access to service facilities.

[1] maritime as well as inland ports

This statement of IRG-Rail seeks to clarify the role of applicants, other than RUs, in the context of port terminals in the different IRG-Rail Member States and outlines IRG-Rail's position regarding the question whether the contractual relationship gives an indication on the scope of rail regulation in port terminals.

II. Legal Basis

Art. 3 (11) of the Directive defines a service facility as "*the installation, including ground area, building and equipment, which has been specially arranged, as a whole or in part, to allow the supply of one or more services referred to in points 2 to 4 of Annex II".*

Art. 3 (19) of the Directive defines applicants as: "*railway undertaking or an international grouping of railway undertakings or other persons or legal entities, such as competent authorities under Regulation (EC) No 1370/2007* ***and shippers, freight forwarders and combined transport operators****, with a public-service or commercial interest in procuring infrastructure capacity*".

Art. 13 (2) of the Directive states that *"Operators of service facilities shall supply in a non-discriminatory manner to all railway undertakings access, including track access, to the facilities referred to in point 2 of Annex II, and to the services supplied in these facilities."*

Art. 13 (5) of the Directive states that *"Where an operator of the service facility referred to in point 2 of Annex II encounters conflicts between different requests, it shall attempt to meet all requests in so far as possible. If no viable alternative is available, and it is not possible to accommodate all requests for capacity for the relevant facility on the basis of demonstrated needs,* ***the applicant may complain to the regulatory body*** *referred to in Article 55 which shall examine the case and take action, where appropriate, to ensure that* ***an appropriate part of the capacity is granted to that applicant****."*

Art. 1 subpara. 2 of IR reads: "*Where the provisions of this Regulation* ***refer to applicants****, they shall be understood as referring to railway undertakings. Where* ***national law entitles applicants other than railway undertakings*** *to request access to service facilities and rail related services, the* ***relevant provisions of this Regulation*** *shall* ***also apply*** *to those* ***applicants*** *in accordance with national law".*

Recital 3 of IR provides: "*Regulation (EU) 2017/352 of the European Parliament and of the Council establishes a framework for the provision of port services and common rules on the financial transparency of ports. This Regulation which lays down the details of the procedure and criteria to be followed by operators of service facilities and applicants* ***should also apply to maritime and inland port facilities which are linked to rail activities****".*

Recital 9 of the IR reads: "***Current practice shows that in many cases applicants such as shippers and freight forwarders request access to service facilities****. However, the railway undertaking appointed by the applicant often does not have a contractual relationship with the operator of the service facility.* ***Therefore, it should be clarified that not only railway undertakings, but also other applicants should have a right to request access to service facilities under the conditions set out in this Regulation, where national law provides for such a possibility.*** *Operators of such service facilities should be bound by this Regulation*

regardless of whether they are in a contractual relationship with a railway undertaking or with another applicant entitled to request capacity in service facilities in accordance with national law".

III. Assessment of the questionnaire

The legal provisions for service facilities in Art. 13 (2) and (4) of the Directive refer to RUs and Art. 13 (5) to applicant. Nevertheless, Art. 1 of the IR states the right of each Member State to entitle applicants other than RUs to request access to service facilities and rail related services within their domestic law. This is also acknowledged in Recital 9 of the aforementioned IR.

The IRG-Rail created a questionnaire to find out whether the concept that allows applicants to apply for access to service facilities is common in the different IRG-Rail Member States. 22 IRG-Rail members (out of 31) answered the questionnaire.

Almost all (20 out of 22) of the responding IRG-Rail members answered that the operators of port terminals which are linked to rail activities, must fulfil the same legal provisions of rail regulation as other service facility operators. In general, there is no difference in rail regulation between port terminals and other service facilities.

Almost half (10) of the responding IRG-Rail members stated that applicants other than RUs are permitted by national law to request access to service facilities. Therefore, shippers and freight forwarders, for example, have the same rights as RUs concerning the access to service facilities, including also the access to information (SFD) *before* concluding a contract. A further three IRG-Rail members answered they have already suggested, or will suggest, changes to their national law that will allow applicants to request access to service facilities.

In addition 14 out of 22 of the responding IRG-Rail members stated that it is the usual (i.e. most common) practice in port terminals to contract on supply of services for rail-related loading and unloading of goods also with applicants other than RUs. Applicants such as shippers and freight forwarders play a decisive role within the logistic chain.

The answers to the questionnaire show that the "concept of applicants" applying for access and services in service facilities is common within the IRG-Rail Member States.

IV. Conclusion

IRG-Rail observes that the access contract with the terminal operator is commonly concluded with other parties than RUs. IRG-Rail members are often confronted with the argument that terminal operators not directly contracting with RUs should not be recognized as service facility operators and therefore do not have to comply with the provisions in rail regulation.

If the contracting party is a criterion to decide whether a terminal operator in a port falls within the scope of rail regulation, terminal operators would be regulated in very different ways based on who is allowed to sign the contract by the terminal operator. To have the same service, such as loading goods on and off

a train, regulated or not, depending on the contracting party might lead to inconsistent results, as it would allow terminal operators to avoid falling under rail regulation. This approach would also have similar negative repercussions on other service facilities in IRG-Rail Member States where applicants are permitted to request access according to national legislation.

For that reason the applicability of rail regulation is determined by the character of the service(s) actually supplied and mentioned in points 2 to 4 of Annex II of the Directive and, importantly, its rail related function.

It is the purpose of the European requirements to harmonize rail regulation and ensure an efficient rail freight sector. A consistent application of the rail regulation provisions throughout Europe could strengthen the rail freight sector. This can only be achieved by applying objective criteria. The level playing field in the rail market is best met if all potential contracting parties and service facility operators are treated equally with regard to rail related services. Drawing the line between rail and port regulation should not be governed by the identity of the parties seeking access but by the rail-related nature of the service being supplied. Otherwise, applicants for the same service might be discriminated. Especially when access to information, including charges fixed by the terminal operators, differs depending on the contracting party, which may harm the railway market.

Decision 60/20 of the European Court of Justice confirms in paragraph 38 and 39 that *"for the purposes of applying Directive 2012/34, 'service facility' means, pursuant to Article 3 (11) of that directive, the installation, including ground area, building and equipment, which has been specially arranged, as a whole or in part, to allow the supply of one or more services referred to in points 2 to 4 of Annex II to that directive. That definition of the concept of 'service facility' is based on an objective criterion, namely that of the technical capacity of an infrastructure to provide specific services and does not lay down any criterion relating to the beneficiaries of those services. Such a criterion is independent both of the nature or classification of the legal title under which such a facility is operated and of the identity of the beneficiaries of those services."*

This is also in line with the rights of applicants to request access to rail infrastructure, whereby shippers and freight forwarders are allowed to request access according to the Directive. Trains for combined transport usually start and end in terminals. Typically, shippers and freight forwarders play an important role in the logistic chain of combined transport solutions. If they are permitted to request access to infrastructure the right to request access to service facilities seems to be in line with the daily procedures and the intention to offer a harmonized transport solution to customers.