

**Guidance on methodology and criteria for assessment of new international
passenger services –**

**How to assess whether the economic equilibrium of public service contracts is
compromised**

28/29 November 2011

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1. Introduction

- 1.1 Directive 2007/58/EC¹ (the Directive) of 23 October 2007 on the liberalisation of passenger services was published in the Official Journal of the European Union on 3 December 2007 and had to be transposed into domestic legislation by 4 June 2009.
- 1.2 The Directive opens up the market in international passenger services from 1 January 2010, and also allows international operators to pick up passengers at any station located on the international route and set them down at another, including stations located in the same Member State (known as 'cabotage'). Providers of new international rail passenger services have now the right of access to the infrastructure subject to certain restrictions and meeting certain tests which are to be undertaken by regulatory bodies:
- the "principal purpose" test which is compulsory and has to be applied by all Member States. This test consists of demonstrating the international nature of the service being proposed.
 - the "economic equilibrium" test which is optional and looks at whether the right of access on services between a place of departure and a destination which are covered by one or more public service contracts compromises the economic equilibrium of those existing services under a public service contract.
- 1.3 Regulatory bodies should cooperate to exchange information and, where relevant in individual cases, coordinate the principles and practice of assessing whether the economic equilibrium of a public service contract is compromised².
- 1.4 IRG-Rail expects relevant parties to follow the procedures outlined in Directive, the interpretative communication from the Commission and relevant domestic legislation transposing the Directive.
- 1.5 The purpose of this document is to set out the method, as well as the criteria and procedures IRG-Rail expects to follow in processing the applications for assessment of new international passenger services. We recommend that this guidance serves as a basis for the development of assessment criteria by national regulatory bodies. As provided under the Directive, guidelines should be developed progressively and criteria should be updated as and when necessary to reflect market developments.
- 1.6 It is important that regulatory frameworks are transparent and non-discriminatory. This guidance supports the aim of having clear and transparent processes that are as straightforward as possible for applicants to follow, and which facilitate a timely and efficient consideration of requests.

¹ Directive 2007/58/EC of the European Parliament and of the Council of 23 October 2007 amending Council Directive 91/440/EEC on the development of the Community's railways and Directive 2001/14/EC on the allocation of railway infrastructure capacity and the levying of charges for the use of railway infrastructure. The text of the Directive can be found at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2007:315:0044:0050:EN:PDF>

² Directive 2007/58/EC, Recital 17.

Regulatory bodies will consider every request on its own merit, building on precedents and taking into account previous decisions when appropriate. The methodology will evolve over time, in particular in the light of market developments and regulatory bodies' experience.

- 1.7 This document should not be interpreted as committing them to making a particular decision. It may be revised and reissued from time to time to take account of further experience and changing circumstances.
- 1.8 The proposed assessment method and criteria will be published on the IRG-Rail website and we would recommend that they are published on the websites of IRG-Rail members' websites.
- 1.9 This document is structured as follows:
 - (a) Chapter 2 outlines some of the issues raised by the implementation of Directive 2007/58/EC, in particular in relation to the requirements to be fulfilled by the regulatory bodies. It also discusses the definitions that are used in the document.
 - (b) Chapter 3 discusses the circumstances when it is necessary to assess whether the new service compromises the economic equilibrium of a public service contract, after conducting the principal purpose test. IRG-Rail intends to develop criteria for the principal purpose test in the future.
 - (c) Chapter 4 describes the issues we consider relevant to assessing whether, based on evidence, we expect the new international passenger service competing with a service under a public service contract to compromise that public service contract's economic equilibrium.
 - (d) Chapter 5 sets out the methodology that IRG-Rail intends to use when carrying out the economic equilibrium tests and in particular how regulatory bodies will cooperate to ensure that necessary information is made available to all relevant parties including other rail regulatory bodies.
 - (e) Annex I contains a list showing the European member states where this test has been applied.

2. Background

Directive requirements

- 2.1 The Directive, part of the Third Railway Package adopted in December 2007, requires the regulatory body, to determine whether the principal purpose of a passenger service is to carry passengers between stations located in different Member States, i.e. whether the service is an international passenger service. The Directive also provides the regulatory body with the option to assess whether the economic equilibrium of a public service contract would be compromised by granting access to a new international passenger service, on the basis of objective economic analysis founded on pre-determined criteria.
- 2.2 The European Commission also published an interpretative communication on the Directive on 28 December 2010³. This note set out the Commission's views on implementation of the directive and in particular how to assess whether the economic equilibrium of public service contracts is compromised.
- 2.3 Railway undertakings, in the course of operating an international passenger service, have the right to pick up passengers at any station located on the international route and set them down at another, including stations located within the same Member State (i.e. cabotage).⁴
- 2.4 New, open-access, international services with intermediate stops should not be used to bring about the opening of the market for domestic passenger services but should be focused on stops ancillary to the international route⁵. Their introduction should concern services whose principal purpose is to carry passengers travelling on an international journey. This should be determined by regulatory bodies by considering criteria such as the proportion of turnover and of volume expected to be derived from the transport of domestic and international passengers, and the length of the service.
- 2.5 In addition the European Commission interpretative communication, which is not a legally binding document, points out that qualitative and quantitative criteria should be used for the analysis, therefore strongly ruling out the application of strict or single thresholds. Several Member States intend to use an approach based on thresholds which give rise to infringement procedures by the European Commission.
- 2.6 The assessment of economic equilibrium should take into account pre-determined criteria⁶ such as the impact on profitability of any services which are included in a public service contract, including but not limited to consequential impacts on the net cost to the competent public authority that awarded the public service contract (e.g. national Transport Ministry, local authority), passenger demand, ticket pricing, ticketing arrangements, location

³ Interpretative communication from the Commission 2010/c 353/01
<http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2010:353:0001:0006:EN:PDF>

⁴ Directive 2007/58/EC, Article 1(8) (3a)

⁵ Directive 2007/58/EC, Recital 8

⁶ Directive 2007/58/EC, Recital 12

and number of stops on both sides of the border, and timing and frequency of the proposed new service.

Roles of regulatory bodies as per Directive

- 2.7 The Directive envisages that regulatory bodies are the sole entity(ies) responsible to carry out the principal purpose and economic equilibrium tests.
- 2.8 When conducting the economic equilibrium test, the regulatory body must carry out the following tasks:
- assess whether the economic equilibrium of public service contract is compromised (Article 1), following a request from:
 - the competent authority or competent authorities that awarded the public service contract,
 - any other interested competent authority with the right to limit access,
 - the infrastructure manager, and/or
 - the railway undertaking performing the public service contract.
 - reach a decision on the basis of reasonably required information that competent authorities and railway undertakings are requested to provide (Article 1)
 - give the grounds for decision and specify the time period for reconsideration of the decision if requested by :
 - the relevant competent authorities or competent authorities
 - the infrastructure manager
 - the railway undertaking performing the public service contract, and/or
 - the railway undertaking seeking access.
- 2.9 This document focuses on the role of regulatory bodies in respect of the economic equilibrium test. We propose that in future IRG-Rail develops a guidance for conducting the principal purpose test.
- 2.10 The Directive also specifies that national regulatory bodies should ... exchange information and ... coordinate the principles and practice of assessing whether the economic equilibrium of a public service contract is compromised. They should progressively develop guidelines based on their experience.⁷

Definitions

- 2.11 The Directive provides a number of definitions. It defines the terms:
- “international passenger service”⁸ as “a passenger service where the train crosses at least one border of a Member State and where the principal

⁷ Directive 2007/58/EC, Recital 17

⁸ Directive 2007/58/EC, Article 1(3).

purpose of the service is to carry passengers between stations located in different Member States; the train may be joined and/or split, and the different sections may have different origins and destinations, provided that all carriages cross at least one border”.

- “public service contract” is defined in Regulation EC 1370/2007⁹ as “one or more legally binding acts confirming the agreement between a competent authority and a public service operator to entrust to that public service operator the management and operation of public passenger transport services subject to public service obligations”.
- “public service obligation” is defined¹⁰ as “a requirement defined or determined by a competent authority in order to ensure public passenger transport services in the general interest that an operator, if it were considering its own commercial interests, would not assume or would not assume to the same extent or under the same conditions without reward”.
- “public service operator” is defined¹¹ as “any public or private undertaking or group of such undertakings which operates public passenger transport services or any public body which provides public passenger transport services”.
- The term “economic equilibrium” is not defined in the Directive. Our interpretation is explained in chapter 4 of this document.

⁹ Directive 2007/58/EC , Article 2(i).

¹⁰ Regulation EC 1370/2007, Article 2(e).

¹¹ Regulation EC 1370/2007, Article 2(d).

3. Circumstances for applying the economic equilibrium test

- 3.1 The Directive provide for two tests to be carried out: one for determining the principal purpose of a new service, and one for assessing whether the new service would compromise the economic equilibrium of an existing public service contract.

Circumstances when the economic equilibrium test could be triggered

- 3.2 The Directive envisages the economic equilibrium test which member states can choose to apply or not. Several member states as outlined further down in the document have decided to use that option.
- 3.3 The Directive¹² provides that whether the economic equilibrium would be compromised shall be determined by the regulatory body following a request from a competent authority, an infrastructure manager or a railway undertaking as mentioned above. Regulatory bodies are not entitled to carry out such assessments on their own initiative.
- 3.4 This “economic equilibrium” test applies when an international passenger operator requests access to the network to run a scheduled passenger service which would compete with an existing passenger operator which is operating a public service contract. This includes instances where the new international operator wants to call at stations within the same Member State to pick up and set down domestic passengers on its international journey. This is known as cabotage.
- 3.5 Based on the “economic equilibrium” test, the right of access for the international passenger service sought, in accordance with Article 1(8)(3b) of the Directive will be granted, modified or denied.

¹² Directive 2007/58/EC, Article 1(8)(3b).

4. Criteria for assessing the “economic equilibrium”

Introduction

- 4.1 This chapter provides more detail of how regulatory body intend to interpret what it meant by economic equilibrium, what is the impact on the public service contract that we are trying to assess and what are the criteria we expect to use in our assessment of the type of change that is likely to be sufficient to compromise the economic equilibrium of a public service contract.

Economic equilibrium

- 4.2 The term “economic equilibrium” is not defined in the Directive. The dictionary definition of equilibrium is a situation in which the forces that determine the behaviour of some variables are in balance.
- 4.3 The economic equilibrium of a public service contract relates to the value of the total public service contract, i.e. that a material change in the value of the public service contract indicates a change in its economic equilibrium. The estimation of the value is likely to vary for each Member State reflecting the way the public service contract is granted. Public service contracts should be interpreted as defined under Regulation EC 1370/2007 and include contracts awarded on exclusive basis or via open competitive tenders.
- 4.4 We consider that the burden of proof will fall onto the parties subject to the public service contract likely to be impacted on by the new service.
- 4.5 In the absence of any such proof, the regulatory body may conclude that access cannot be limited. Similarly, the introduction of a new service should not be limited in those Member States that do not apply the economic tests, but have confirmed the international nature of the new service.

Impact on public service contracts

- 4.6 The economic equilibrium test focuses on the impact on the whole public service contract from the new entry of competing international rail services. The economic equilibrium test is concerned with the precise interaction between the competing services and the public service contract.
- 4.7 Almost any new international train services applying cabotage would have some impact on public service contract. We would expect that for the equilibrium of a public service contract to be compromised, there needs to be a material impact on that public service contract. In some cases the test will address:
- the level of revenue abstraction and its impact on the public service contract,
 - the increase in public funding contribution which should be substantial and unsustainable.
 - The level of profitability of the public service contract and the level of subsidies paid by public authorities.

- 4.8 The assessment of whether a new international passenger service would compromise the economic equilibrium of a public service contract, i.e. has a sufficiently material impact on the whole public service contract, will need to consider in detail the precise interaction between the competing services and how this impacts on the public service contract. The analysis should focus on the public service contract as a whole rather than on individual services.
- 4.9 The economic equilibrium of a public service contract may be compromised where there is a relatively large amount of revenue abstraction. It may also be compromised where the overall impact on the profitability of the public service operator is relatively small (e.g. where the viability of the public service contract is marginal).
- 4.10 The assessment would have to consider the expected range of movement in the value of a public service contract over time, whilst recognising the intention of the Directive to encourage competition in the market for international passenger services, subject to certain restrictions.

Assessment criteria

- 4.11 The Directive does not list the criteria to be taken into account when assessing the “economic equilibrium”. It only specifies that it has to be done on the basis of an objective economic analysis and based on pre-determined criteria.¹³
- 4.12 This chapter outlines the criteria we expect to follow in considering assessment requests. This list of pre-determined criteria should be published on the regulatory body’s website as appropriate. This list is not exhaustive and specific criteria may have to be taken into account when examining specific cases. Through this common approach, our aim is to ensure that consideration is undertaken in a timely manner wholly consistent with EU legislation and domestic transposing regulations.
- 4.13 In making our decisions, we expect to apply several criteria when considering whether the economic equilibrium of a public service contract has been compromised by the introduction of a new international passenger service. These criteria include inter alia, but not exclusively :
- the impact on profitability on any services which are included in the contract of the operator of public passenger services (likely to be in most cases the incumbent operator) or the concession operator;
 - the consequential impact on the net cost to the competent authority awarding the public service contract ;
 - the likely scope for competitive responses by the incumbent passenger operator under a public service contract or concession operator;
 - to the extent relevant, the likely impact on the future value of the public service contract when next retendered;
 - the impact on the long-term profitability of the most profitable routes within the whole public service contract;

¹³ Directive 2007/58/EC, Article 1(8)(3b).

- the impact on the specific new costs likely to arise within the operation of the public service contract;
 - to the extent relevant, the likely impact on performance of services governed by the public service contract as a result of the new international passenger service;
 - the impact of rolling stock investment by railway undertakings;
 - the impact on timetable scheduling/planning for services under the public service contract; and
 - the secondary impact on quality of services provided under the public service contract.
- 4.14 Not every impact on a public service contract should be considered to harm its economic equilibrium. Limited or one-off impact should not necessarily mean that the economic equilibrium will be compromised, in particular if it is within the margins specified in the contract. In this case, the assessment should show that services operated under a public service contract would no longer be sustainable and capable of operating with a reasonable level of operating profit. They would no longer be able to provide a reasonable level of quality contract, and long term investment plans would be affected, thus triggering the compromise of economic equilibrium of the contract.

Information requirement

- 4.15 The Directive¹⁴ provides a useful checklist of information that we would normally expect to take into account when considering whether the economic equilibrium of a public service contract would be compromised.
- 4.16 We consider that the party requesting the test to be carried out is responsible to provide information where available. The relevant regulatory body can also request information from the relevant parties as appropriate and reasonable.
- 4.17 Our aim is to keep the information requested to a minimum to avoid undue burden on stakeholders whilst ensuring the regulatory body is in receipt of all the information that it considers necessary to reach a decision. We intend to base our analysis upon information presented by the parties. It is therefore very important that the application contains sufficient details and supporting information. Regulatory bodies will come to a reasoned conclusion on the basis of information submitted by the parties.
- 4.18 Examples of information that regulatory bodies may request from the railway undertaking seeking access would be:
- proportion of turnover and of volume derived from domestic or international passengers, (e.g. passenger/kilometres, passenger journeys);
 - forecast percentage of revenue and journeys from international and domestic passengers, in particular business plan containing forecast of revenue generation, of benefits of services and passenger demand forecasts and methodology;

- length of service proposed (e.g. kilometres of proposed route);
- passenger demand;
- ticket pricing;
- ticketing arrangements (e.g. reservation needed, open tickets);
- location and number of stops;
- timing and frequency of the proposed service, including departure times, intermediate station stops, and arrival times; and connections;
- rolling stock specifications (e.g. load factors, number of seats, wagon configuration);
- quality standards; and
- marketing strategy

4.19 Examples of the information that regulatory bodies may request from the existing operator of a public service contract are:

- revenue information;
- business plan;
- timetable information for the services, including departure times, arrival times, number and location of intermediate station stops,
- evidence that the new entrant would compromise the economic equilibrium of the public service contract; and
- strategy.

4.20 Examples of the information that may be required from competent authorities would include for instance:

- copy of public service contract details (including all relevant details and quality standards);
- rules for awarding/changing contracts; and
- forecasts

However, these lists are not exhaustive and additional information may be deemed to be relevant to assessing the particular case.

Methodology

4.21 Assessment of whether the economic equilibrium of a public service contract is compromised by the introduction of new international passenger services will be preceded by the “principal purpose” test.

4.22 In analysing the principal purpose of a service, regulatory bodies are likely to request quantitative and qualitative information that may also be used to perform the economic equilibrium test, such as the proportion of turnover and traffic volumes derived from transport of domestic and international

passengers, the length of service proposed, the stopping pattern, the type of rolling stock, etc. Some regulatory bodies may choose to run both tests together.

4.23 Our methodology for the economic equilibrium test will consist of a detailed economic analysis and be based on a quantitative and qualitative analysis.

4.24 The methodology proposed by IRG-Rail envisages the following five stages:

Stage 1: initial assessment of revenue impact

4.25 In that stage, we will analyse and make an initial estimate of both the revenue earnings and passenger numbers the new services are likely to abstract from existing domestic services under public service contract. We also intend to measure the effect of timetable changes on passenger demand and passenger train operator revenue, taking into account factors such as timing and frequency of the proposed services, location of stops and connections.

Stage 2: consideration of fares/ticketing.

4.26 In order to avoid under-or overestimating the level of revenue impact, we will extend our analysis to address specifically the impact of the entrant's proposed fares and ticketing structure. We would expect operators to provide their own details or estimates of the expected levels of ticket sales and price differentials and their impact on forecasts. We would then assess and validate these results, for example, by comparing them against those of existing comparable services.

Stage 3: other modifications to initial assessment of revenue impact

4.27 In stage three, we will take account of other factors that may have an effect on the level of revenue abstraction. These include inter alia impact on rail service performance; the quality of rolling stock; levels of crowding; marketing initiatives; and service quality.

4.28 We also plan to take into account the impact new services could have on performance. As any new service has the potential to have an effect on current performance, our analysis will be extended to account for the impact any change in performance might have on existing operators.

4.29 We will also undertake an assessment of the new entrant's business plan, as this can provide an indication of the level of abstraction that may be required to provide profitable new entry. This will also enable us to test other assumptions that underlie the entrant's revenue forecasts, such as the impact of marketing.

Stage 4: impact on public service contract

4.30 In this stage of the analysis we will focus on the nature of the public service contract and how its characteristics influence the nature and level of impact of the new international passenger service.

4.31 This will include consideration of:

- current operator's performance to date - can we expect the operator to have significant brand loyalty which would be able to reduce the extent of any competitive effects?;

- provisions in a public service contract that might limit the effect of new competing services;
 - impact on the profitability of the routes affected and their relative profitability compared to the overall public service contract; this will also include an estimate of the extent of revenues and costs which would be affected by the new international passenger service;
- 4.32 The onus will be on the existing train operator to provide evidence that the new entrant would compromise the economic equilibrium of the public service contract.
- 4.33 Assessment will not be limited to the impact just in the year that the new services start to operate but will also look at the longer term. It will take account of information such as the concession plans, revenue impacts of changes in performance levels, and forecasts in the business plan of the new international passenger operator. The onus will be on the public service contract funder to make the case about the impact new services would have on the economic equilibrium over the long term.

Stage 5: other relevant factors

- 4.34 This stage allows considering any other factors that we judge relevant to the specific case and as such is difficult to define in a general guidance. However, an example of such factors is the incremental addition of international services – is the overall impact of these services likely to compromise the economic equilibrium of the public service contract?
- 4.35 The methodology will evolve over time, in particular in the light of market developments and regulatory bodies' experience.

Reconsideration of decision

- 4.36 As set out in the Directive, the regulatory body must give grounds for its decision. The following parties can request the decision to be reconsidered, following for instance a change in circumstances:
- The relevant competent authority(ies) ;
 - The infrastructure manager;
 - The railway undertaking performing the public service contract, or
 - The railway undertaking seeking access.
- 4.37 We expect that the party seeking reconsideration will provide the regulatory body with a properly made and evidenced request, together with all necessary information. Upon receipt of information, the regulatory body will consider whether it is necessary to conduct a new economic equilibrium test.
- 4.38 We intend to issue our reconsidered decision within two months of the date of receipt of all relevant information. Regulatory body will cooperate and exchange information as appropriate, prior to reaching a final decision.

5. Cooperation between regulatory bodies

Introduction

- 5.1 Regulatory bodies have a general duty of cooperation. They will have to cooperate in particular in exchanging information and in applying assessment criteria.
- 5.2 The Directive provides ¹⁴ that when an applicant intends to request infrastructure capacity with a view to operating an international passenger services, the latter must inform the infrastructure manager and the relevant regulatory body.
- 5.3 The regulatory body receiving the request will inform both the competent authority that has awarded a rail passenger service defined in a public service contract and any railway undertaking performing the public service contract on the route of this international passenger service of such request.
- 5.4 The regulatory body will open a procedure in accordance with the Directive ¹⁵ only in case of a formal request from:
- the competent authority or competent authorities that awarded the public service contract,
 - any other interested competent authority with the right to limit access,
 - the infrastructure manager, and/or
 - the railway undertaking performing the public service contract.
- 5.5 The regulatory body will reach a decision on the request made by the relevant party within two months of receiving all relevant information. They will provide and publish the grounds for such decision as appropriate.

Exchange of information

- 5.6 Upon receipt of a formal request, the regulatory body will inform other regulatory bodies of such a request and communicate in particular the proposed new service and route. The regulatory body will contact all relevant parties to make them aware of such request.
- 5.7 The regulatory body will forward a core set of information to other regulatory bodies involved on the route, as follows:
- route
 - stopping patterns
 - proposed timetable
 - estimated passenger figures and revenues
- 5.8 Regulatory bodies concerned will meet to exchange preliminary views and check that the information received is consistent and not contradictory.

Cooperation

¹⁴ Directive 2007/58/EC, Article 2(3)

¹⁵ Directive 2007/58/EC, Article 10

- 5.9 The relevant regulatory bodies will apply the principal purpose test and communicate the results to the other regulatory bodies on the route.
- 5.10 If requested and if the service has been classed as “international service”, the regulatory body will carry out the economic equilibrium test on basis of pre-determined, harmonised criteria and using the information provided by the party asking for the test. If not all information is available to the party requesting the test, the regulatory body will contact the competent authority and other parties as appropriate.
- 5.11 In making its assessment, the regulatory body would apply the criteria detailed in chapter 4 considering in particular the following items, subject to the requirements of national legislation:
- Impact on profitability of services under the public service contract
 - Consequential impact on net cost to competent authority letting the public service contract;
 - Proportion of turnover and of volume derived from domestic or international passengers;
 - Length of service;
 - Passenger demand;
 - Ticket pricing;
 - Ticketing arrangements;
 - Location and number of stops;
 - Timing and frequency of proposed service;
 - Quality standards.
- 5.12 The regulatory body concerned will consult other regulatory bodies as necessary and share preliminary views.
- 5.13 The regulatory body will then communicate the result of the economic equilibrium test and any limitation on access to the parties. It will publish its decision on its website. In arranging for the publication of information or decision, the regulatory body will have regard to the need for excluding, so far as that is practicable, any matter that would or might, in its opinion, seriously and prejudicially affect the interests of concerned parties.

ANNEX 1 - Implementation of economic equilibrium tests in EU

	Economic Equilibrium test (optional)	Criteria developed
Austria	Yes	Yes ¹⁶
Belgium	No	No
Bulgaria	Yes	No
Croatia	No	No
Czech Republic	No	No
Denmark	Yes	No
Estonia	No	No
Finland	No	No
France	Yes	
Germany	No	No
Greece	No	No
Hungary	Yes	No ¹⁷
Italy	Yes	Yes ¹⁸
Latvia	Yes	Yes
Luxembourg	Yes	No
Netherlands ¹⁹	Not yet	In preparation
Norway	No	No
Poland	Yes	No
Portugal	No	
Republic of Macedonia	No	No
Romania	Not yet	No
Slovakia	Yes (No
Slovenia	Yes	No
Spain	Yes	No
Sweden	No ²⁰	
Switzerland	No	
UK	Yes	Yes

Source: Response to European Commission questionnaire for Regulatory bodies working group – 30 June 2011

¹⁶ See : http://www.schienecontrol.gv.at/files/txt_5cpdf_5callgemeine_kriterien.pdf

¹⁷ Methodology currently under preparation

¹⁸ Decreto dirigenziale prot.n.203/1/URSF – 6 May 2010

¹⁹ Draft legislation in Parliament

²⁰ Not necessary – market fully open for passenger and freight traffic

ANNEX 2 – Economic equilibrium test process

