

Independent Regulators' Group – Rail

IRG–Rail

Subgroup on Access to Service Facilities

**Report on experiences regarding exemptions granted under
Article 2 (2) of Commission Implementing Regulation (EU)
2017/2177**

2nd October 2019

I. Introduction

1. The Implementing Regulation 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, for example, timescales, priority criteria, viable alternatives etc. – with exception of Article 4 (2) (a) to (d) and (m) and Article 5. 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 Regulatory Bodies may decide to exempt SFOs that operate service facilities or provide services, if the conditions in any of three criteria of the same Article are fulfilled (see section II).
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. Since 1st January 2019, SFOs have been able to submit applications to their national RB to request exemption from the Implementing Regulation, as described in point 2.
6. In order to get an overview of RBs' initial experiences in handling these applications and making decisions, and to promote sharing of best practices, IRG-Rail initiated this report.
7. IRG-Rail's subgroup Access to Service Facilities developed a questionnaire asking 31 IRG-Rail members for information on applications for exemptions (received between January and September 2019²). The survey also collected information on RBs' pro-active communication activities, in relation to SFOs, regarding the regulatory framework and procedures for being exempted and aimed to establish a better understanding.
8. Increased general knowledge in the field of rail-related services and better understanding of national differences and commonalities will help members of IRG-Rail in the upcoming work with applications on exemption and ultimately lead to more harmonized decisions on exemptions across Europe.
9. This IRG-Rail report presents the findings of the questionnaire. In total 22 replies were received, representing 77 percent of the length of the European rail network. This high

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

² The editorial deadline for this paper.

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level of participation and the experiences shared provide valuable information for the work of the RBs in implementing a decision-making process relating to applications for exemptions on a national basis.

II. Criteria for exemption

10. According to Article 2 (2) of the Implementing Regulation, three categories of service facilities or services may qualify for an exemption:
- 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 application of the Implementing Regulation could negatively impact the functioning of the service facility market.
11. These three categories are alternative, meaning that only one of them needs to be fulfilled in order for a facility or service to qualify for an exemption.

III. Application for exemptions

12. Since 1st January 2019, RBs of six participating Member States (Austria, Denmark, France, Germany, Slovakia and Spain) have received applications for exemption pursuant to Article 2 of the Implementing Regulation. Sixteen RBs of participating Member States have not received any applications for exemptions. This may be due to the fact that the Implementing Regulation came into force fairly recently and the national rail markets have not yet become aware of the possibilities for exemption. In Norway the reason for not getting applications is that the Implementing Regulation has not yet been transposed into the EEA Agreement and Norwegian law.

RB	Applications in total	Non-strategic importance	Competitive environment	Impairment of functioning	Cultural-historic
Austria	3	3	2		
Denmark	1		1	1	
France	1		1	1	
Germany	27	24	10	8	5
Slovakia	1	1			
Spain	9	9			

13. In relation to other countries the number of applications in Germany is relatively high. This may be due to the fact that the possibility of exempting service facilities from certain obligations existed under the national railway regulation law before the Implementing

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Regulation came into force. Thus, the SFOs are familiar with exemptions and use this knowledge to evaluate the value of an exemption for themselves.

IV. Decisions

14. The Implementing Regulation does not describe how the exemption has to be granted. In all participating Member States, the exemption procedures are concluded with a decision by the RB. Up to September 2019, exemption decisions had been taken in Germany, Slovakia, Austria and Spain.

RB	Decisions in total	Non-strategic importance	Competitive environment	Impairment of functioning	Cultural-historic
Austria	3 ³	3	2		
Germany	1				1
Slovakia	1	1			
Spain	2	2			

15. In Austria the RB granted full exemptions from all provisions of the Implementing Regulation with the exception of Article 4 (2) (a) to (d) and (m) and Article 5. The German RB exempted the applicant from all the provisions of the Implementing Regulation as it was an SFO that exist solely for use by heritage railway operators for their own purposes. However, in Spain, the RB granted exemptions from Article 4 (2) (f) to (k) and (n), 6 (2) and (3) as well as 12 (3) of the Implementing Regulation, as the Spanish RB considers these rules to introduce an unmotivated administrative burden on SFOs.

V. Usage of IRG-Rail’s common principles

16. The questionnaire asked whether RBs would use the IRG-Rail’s common principles as a basis for their decisions and their experiences using it.

17. The RBs of Austria, Belgium, Bulgaria, Croatia, Czech Republic, Denmark, Finland, Germany, Greece, Hungary, Italy, Latvia, Lithuania, Romania, Slovakia, Slovenia, Spain, Sweden, the Netherlands and the United Kingdom have confirmed that they use the IRG-Rail’s common principles or will do so in future when exemption decisions are made. In Austria the applicants based their submissions on the indicators referred to in the IRG-Rail’s common principles. The indicators also proved helpful during the decision-making process. In Germany the criteria described in the IRG-Rail’s common principles are also used not only for exemptions pursuant to the Implementing Regulation but also for the national exemptions pursuant to German Railway Regulation Law. As a result IRG-Rail’s common principles have been included in the German RB’s guidelines on exempting service facilities.

³ Two of these exemptions were justified under more than one criterion.

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18. In Italy some regulatory measures have been issued in the past with regard to access to service facilities and rail-related services (additional to the Minimum Access Package), including those adopted by decision n. 18/2017 concerning shunting services. A new regulatory act was adopted on the 30th of September 2019⁴ which recasts and consolidates previous decisions concerning SFOs, and introduces new regulatory measures regarding passenger stations, sidings, shunting, maintenance depots, freight terminals and rail infrastructure in ports, while taking into account the IRG-Rail's common principles. The decision also introduced a formal procedure to define SFOs covered by the regulations on rail-related service facilities.
19. The Spanish RB adopted a decision on 23th January 2019 to establish guidelines, principles and criteria, including specific thresholds for the Spanish market. This general decision includes a reference to analyze each application for exemption and takes into account the IRG-Rail's common principles.

VI. Challenges in taking decisions

20. A wide variety of challenges may arise throughout the decision-making process on exemptions, which are not specifically addressed in IRG-Rail's common principles. It will be necessary for national regulators to find solutions on a case by case basis. Some of the challenges encountered so far are presented below.
21. One challenge for the national RB is to get access to the data necessary for making a decision to exempt a SFO. The German regulator developed national criteria which have to be fulfilled in order for SFOs to be exempted from national rules as well as the Implementing Regulation. It quickly has become obvious that some applicants have not been able to provide the data required for the examination, as it is not collected. For this reason, the German regulator has reduced the amount of data to be collected to a single criterion. For passenger stations, this is the number of train stops per day and per passenger station and for all other service facilities, the annual turnover from the use of the service facility. This data is already gathered under the RBs annual market survey. As an exception, additional criteria can be applied; but only if the facility's turnover does not exceed the thresholds set by the ruling chamber, which is the responsible organizational unit at the German regulator for making the decision, by more than 10 percent. As a result, extensive data collection from the applicant is not necessary if the applicant participates in the RBs annual market survey. In addition, the turnover from use can be determined in several ways, so that it can also be collected if the applicant does not determine the turnover values himself.
22. Article 2 (4) of the Implementing Regulation requires the RB to revoke the exemption, if the criteria for granting an exemption are no longer fulfilled. To meet this challenge, the Austrian regulator granted exemptions under the condition that the SFOs report back annually and provide data on how their service facilities have developed. The information thus obtained will allow checking whether the grounds for exemption continue to exist or not.

⁴ Decision n. 130/2019

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23. The Spanish regulator has found three main challenges when analyzing applications:
- a) a proper identification of the service facility operator, in particular in maintenance facilities, where several entities perform activities, but only one is responsible and answerable to the railway undertaking;
 - b) if a complex station, freight terminal, port or maintenance facility is considered as strategic, the same qualification applies to all facilities or services in it; and
 - c) some applicants appear to be lacking knowledge of the Implementing Regulation, i.e. leading them to apply for exemption from the whole of the Implementing Regulation, although this is only possible for heritage railways.

VII. Information of the railway market

24. The Implementing Regulation only became law on 1st June 2019. For this reason, the national RBs have made efforts to inform their rail transport market about the existence of this regulation and in particular how to deal with the possibilities of exemption. Hereafter is described how the responding RBs have informed, or plan to inform, their stakeholders.
25. Several RBs have published IRG-Rail's common principles on their website, some in their national languages⁵.
26. In June 2019 the German regulator conducted a market dialogue with the SFOs affected by the application of the Implementing Regulation. The options for getting exemptions were also discussed. In addition, the regulator published guidelines describing the use of the exemption criteria by the regulator and the information required for that purpose on its website. These are updated at regular intervals.
27. After consulting the railway sector, the Finnish regulator also published guidelines on their website in January 2019 explaining how to apply for an exemption. During the autumn 2019 the plan is to continue the discussion and give more information about the Implementing Regulation to stakeholders.
28. The Swedish regulator focused in making sure that SFOs were informed about the Implementing Regulation in the autumn of 2018. They gathered information on the RB's website which provides a guide to the Implementing Regulation, an application form to apply for exemption and the IRG-Rail's common principles, as well as contact information for further questions. The RB has been invited to speak at several meetings arranged by the infrastructure manager (e.g. Network Statement Conference) and ASTOC⁶ and continuously encourages the stakeholders to use the RB's webpage and disseminate information to colleagues in the industry.

⁵ <https://www.irk-rail.eu/irk/documents/common-criteria-for-han/213.Common-principles-on-granting-exemptions-under-Art-22-of-Commission-Implementing.html>.

⁶ ASTOC = Association of Swedish Train Operating Companies.

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29. In Austria the applicants based their submissions on the indicators referred to in IRG-Rail's common principles, which the regulator has published on its website. Also, the regulator conducted an information event for SFO where IRG-Rail's common principles were explained.
30. In the process for defining the new decision (regulatory act) concerning service facilities mentioned in point 18, the Italian regulator carried out an open consultation and a public hearing with stakeholders in May 2019. Collaborating with the infrastructure managers, the regulator wrote to all the service facilities to establish a database in order to map all the service facilities in Italy and to distinguish SFOs working within private infrastructures. As a result, some private SFOs have replied that they consider themselves out of the scope of regulation. Even if these SFOs deal with logistic operation (handling of container, etc.) they assumed to be excluded from the application of the national act, which transposes the Recast directive, and therefore the Implementing Regulation and ART Decision, solely on the basis of being entirely private properties. Two freight terminals have also assumed the right to exemption, invoking the criteria for 'competitive market'.
31. In May 2019 the Lithuanian regulator approved a new legal act describing the Procedure on the exemption of SFO from the application of the provisions of the Implementing Regulation. It is based on IRG-Rail's common principles on granting exemptions under Article 2 (2) of the Implementing Regulation. Prior to the adoption of this legal act, the Lithuanian regulator carried out a public consultation with market players related to the railway service facilities. In this way, many operators were informed of the new regulatory framework.
32. The French regulator has initiated a market test of the service facilities, which aims to lead to the adoption of guidelines. This document will aim to clarify the procedural aspects (submission of applications) and the analysis criteria to be used by the regulator in relation to exemptions.
33. The Dutch regulator has published a guide on rail-related services and service facilities, and has taken several initiatives to inform the market about service facility legislation in general and the new Implementing Regulation in particular. This includes a stakeholder meeting, an informal consultation of the guide, a mailing to (potential) SFO and several meetings with individual companies.
34. The Spanish regulatory body adopted on 23rd January 2019 a decision about guidelines, principles and criteria for granting exemptions. Previously, this document was consulted with the main railway stakeholders. The regulator conducted an information event to explain the final document and address several questions. The regulator also participated in a workshop with Port Authorities to clarify specific issues related to ports.
35. The Danish Regulator plans to conduct investigations in the fall which could result in more requests.
36. The Romanian regulator has published a guide on rail-related services and service facilities, and informed the stakeholders about the service facility legislation and the Implementing Regulation and carried out a public consultation related to the guide.
37. The regulator in the United Kingdom launched a consultation on its revised guidance on access to rail service facilities (stations, light maintenance depots, freight terminals and other sites) in May 2019. The revised guidance modules reflect the regulation and

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provide information on its application. In addition several meetings have been organized with the sector to raise awareness of the regulation, exemption process and applicable criteria.

VIII. Presentation of interesting cases

38. Participating Members who have received applications for exemptions were asked to give a brief description of cases which might be useful as examples.

Slovakia

39. The Slovak regulator granted an exemption under Article 2 (2) of the Implementing Regulation to a SFO at the same time owner of the service facility operating a freight terminal (siding) with a specific focus on the filling of rail tanks with mineral oil from its own production. This service facility and its services do not have any strategic importance for the functioning of the rail transport services market, as it is unlikely to be used by entities other than the applicant is given by the fact that this is a specific service facility solely adapted for the loading of liquid hydrocarbons from the applicant's own oil production in this area. In addition, this private siding is not adapted to empty railway tanks, is not electrified and it has no loading ramps.

Austria

40. The applicants are integrated railway undertakings that are also operating service facilities. All applicants run a number of branch lines connected to the main railway network in Austria. The service facilities operated by the applicants are located on those branch lines. They are used by the applicant railway undertakings only. The European Commission has classified all three applicants' branch lines as strategically non-important under Article 2 (4) directive 2012/34/EU⁷. However, the Austrian regulator rejected the notion whereas this classification 'automatically' applied to the service facilities on those lines. This means that whereas a line may be deemed strategically non-important, this classification will not necessarily and without further examination be extended to the service facilities. In other words, a service facility does not automatically become exempted due to strategic non-importance just because the (branch) line on which it finds itself is strategically non-important. The exemptions were granted but limited to three years and only for as long as nothing relevant to the granting of the exemption changes (hence the requirement for annual reporting by the operators).

Spain

41. The Spanish regulatory body has received applications for exemptions from nine different SFOs in relation with 1.460 passenger stations, 316 freight terminals, 28 maintenance facilities, 6 washing facilities and a port on the basis of non-strategic importance. The RB is analyzing each application under an administrative procedure framework, which includes three stages: a) study of the application, b) hearing of the

⁷ Directive 2012/34/EU of the European Parliament and of the Council of 21 November 2012 establishing a single European railway area.

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interested party (draft decision) and c) final decision. The table below shows the current situation.

	Applicant	Object	Stage (date 3th Sep)
Passenger stations	1	875 stations (and 6 washing facilities)	final decision ⁸
	2	585 stations	final decision ⁹
Freight terminals	3	An intermodal terminal	final decision ¹⁰
	4	9 freight terminals	final decision ¹¹
	5	301 freight terminals	draft decision
	6	5 car terminals	study
Ports	7	a port	study
Maintenance Facilities	8	26 workshops	draft decision
	9	2 workshops	study

The regulator studies each application on the basis of an earlier decision that establishes principles and criteria, including specific thresholds for the Spanish market. This decision, adopted on 23th January 2019, takes into account last year IRG-Rail position paper.

The decisions are based on the lack of strategic importance, considering the existence of public service obligation (PSO) services, commercial activity, relationship between SFO and railway undertakings, the existence of interest in access to stations in the process of railway liberalization, as well as European rail freight corridors. The RB only granted exemptions from the following Articles: 4 (2) (f) to (k) and (n), 6 (2) and (3) as well as 12 (3) of the Implementing Regulation, as the Spanish RB considers these rules to introduce an administrative burden on SFO's.

IX. Conclusions

42. After evaluating the questionnaire's responses, it can be concluded that only a few RBs have received and decided on applications for exemptions at this point in time. The number of applications submitted is also very manageable, although sometimes one application may cover an important number of service facilities. 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 do not consider it necessary to be exempt from its requirements.

⁸ <https://www.cnmc.es/sites/default/files/2645594.pdf>

⁹ <https://www.cnmc.es/sites/default/files/2645625.pdf>

¹⁰ <https://www.cnmc.es/sites/default/files/2490771.pdf>

¹¹ <https://www.cnmc.es/sites/default/files/2578586.pdf>

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43. The development of the applications for exemptions of SFOs should be monitored further and this report should be updated in the next year.