

Independent Regulators' Group – Rail

General Remarks on EC proposal for a Regulation on the use of railway infrastructure capacity in the Single European railway area

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1. Introduction

1. On 11 July 2023 the European Commission (EC) launched a series of legislative proposals as part of the so-called "Greening Freight Package", among which the EC proposal COM(2023) 443/2 on the use of railway infrastructure capacity in the single European railway area (hereafter "the Proposal"), amending Directive 2012/34/EU (hereafter "the Directive") and repealing Regulation (EU) 913/2010.
2. IRG-Rail generally supports the Proposal, which will bring about a much-needed modernisation and supplementation of the Directive's rules on capacity allocation and traffic management on the rail network. Rail market opening is under way and availability of rail infrastructure capacity and access to it are crucial to sustain and develop choices for passenger and freight customers.
3. The Proposal is to a large extent based on a sector initiative and has the potential to contribute to boosting rail services and meeting the Green Deal objectives of environmental sustainability of transport. These, however, will only be achieved if accompanied, within the framework of a comprehensive approach to transport policy, by improved interoperability of railway subsystems, increased cross acceptance of production factors, and harmonised rail safety and technical rules.
4. The Regulatory Bodies (RBs) in IRG-Rail are willing to share their experiences and are committed to continue and support the development of the Proposal. They maintain that, in order to pursue the achievement of the Single European Railway Area (SERA), it is important to ensure that non-discriminatory access to rail infrastructure and service facilities in Europe by the players of the different railway market segments and the efficient use of the rail network are safeguarded.

2. Key points

5. IRG-Rail welcomes that the Proposal addresses domestic and cross-border traffic in a single approach, as an important step towards the creation of the SERA. RBs experience of the Rail Freight Corridors is that a separate allocation regime for cross-border traffic has not worked well.
6. However, the Proposal distinctly lacks checks and balances, in view of the large range of powers and competences entrusted to the European Network of Infrastructure Managers (ENIM) (article 56). ENIM is not a legislative body and its decisions should not be exempted from scrutiny. This is particularly important because of ENIM's role in providing quasi-binding guidelines for national infrastructure managers to coordinate and harmonise their decisions which, although formally not binding, could have the ability to challenge RBs' actions. To ensure equitable, non-discriminatory and transparent access to rail networks, an independent supervision of ENIM's activities is necessary.
7. Therefore, the European Network of Rail Regulatory Bodies (ENRRB) should be competent to supervise ENIM frameworks in a timely manner (on capacity and crisis management as well as on infrastructure managers' performance review) by issuing, where RBs deem appropriate, a position on the proposed frameworks before they are adopted to ensure non-discriminatory and transparent access to rail networks. ENRRB should also be competent to supervise any guidelines adopted by ENIM. Supervision at an early stage

of ENIM decisions would contribute to a harmonised approach and prevent subsequent problems. The lack of balance of competences in the Proposal among ENIM, ENRRB, national infrastructure managers and national RBs could result in increased litigation leading to an inability to effectively supervise the implementation of the regulatory framework and ultimately to a non-functioning market. ENRRB should play a role on the development of regulatory harmonisation for the future.

8. To assume this role, ENRRB should be as independent as RBs. The EC's role in ENRRB should be the same as in other cooperation networks of national regulatory bodies where the EC is not a member of the Board of Regulators, may only participate in deliberations with no voting right and does not act as Chairperson, as in BEREC (in the electronic communications sector). Moreover, ENRRB should be able to adopt its own rules of procedure, without the prior approval of the EC, otherwise its capacity for self-organization would be limited.
9. The Proposal expands the role of the existing ENRRB to provide better coordination between RBs. IRG-Rail acknowledges the importance of the role of ENRRB in ensuring a consistent application of European rules to achieve the SERA by sharing best practices and reaching common understanding of the European regulatory framework. However, it is also crucial that the independence of RBs is safeguarded and that the regulation does not result in the levelling down of the roles that Member States have entrusted to them in the implementation of the EU law that continues to be applicable and is not repealed or amended by the Proposal.
10. RBs must be able to make their regulatory decisions independently. The Proposal entrusts ENRRB with the power to provide opinions or recommendations on pending or adopted decisions on complaints submitted to RBs on requests by applicants, infrastructure managers, and other interested parties. In order to avoid legal uncertainty, article 65.3 should be deleted, as there may be a risk of contradiction in the conduct of ongoing investigations and treatment of complaints by concerned RBs. Moreover, issuing opinions on specific cases investigated by national RBs could undermine the integrity of those RBs, by creating the perception that they are not fully independent and accountable.
11. In addition, the decision to cooperate with third parties within ENRRB's working groups needs to rest solely with RBs represented there. To this end, article 70.3 in the Proposal should be deleted.
12. IRG-Rail also has concerns regarding the balance of powers between infrastructure managers on the one hand, and users of the capacity (railway undertakings and other applicants) as well as operators of service facilities (SFOs), on the other. These stakeholders should have a strong involvement in the creation of the frameworks and the strategic capacity planning to ensure that capacity allocation on the networks reflects market needs. Governance arrangements should enable applicants, new or potential entrants, as well as SFOs to engage in the process.
13. The Proposal increases the mandate of the infrastructure manager to actively manage and plan the use of rail through strategic capacity planning. While this may be necessary to optimize capacity utilisation and improve procedures for dealing with infrastructure works, IRG-Rail observes that this increased authority must be accompanied by sufficient mechanisms for users' initiative and consultation, as well as requirements for objective and transparent methods, all in line with the full pursuit of the SERA.

14. RBs must be competent to participate and supervise the strategic planning of capacity from the start of the process and in the development of relevant frameworks; this involvement is necessary to ensure appropriateness, non-discrimination and transparency in the planning choices. RBs must be entitled to review and require changes, if necessary. RBs should also have full access to digital tools and data used by infrastructure managers for the preparation of the capacity strategy, capacity model and capacity supply plan.
15. The rules on capacity allocation need to be clear to enable non-discriminatory access and allow regulatory scrutiny. For example, according to Article 20(3) in case of requests that are not consistent with pre-planned capacity, the coordination procedure under Article 36 applies – which does not provide for prioritisation. Article 32(5) in its first sentence provides for prioritisation of requests consistent with pre-planned capacity. In the next sentence it says that requests not consistent with pre-planned capacity may be accepted as well. If such requests are refused, the applicant has the right to lodge a complaint with the RB. Thus, the Proposal neither gives clear priority to requests consistent with pre-planned capacity nor expresses that consistent and non-consistent requests are of equal priority. In addition, measures and deadlines to integrate the provisions on management and information on Temporary Capacity Restrictions need to be adjusted to ensure a proper process.
16. Integrating “the last mile” - service facilities - in the Proposal, is important for securing efficient and competitive railway markets. However, to prevent unnecessary burden from unjustified planning and coordination procedures, identifying the relevant operators of service facilities for the scope of the Regulation is key. Selecting SFO that publish real-time data, as set out in the Proposal (article 29) may be a counterproductive criterion, essentially leaving it to each SFO to choose whether to fall within the scope of the Regulation or not. Instead, objective criteria ensuring a balanced involvement of SFOs that are critical for train operation should be set after consulting the RBs and based on SFOs' experience.
17. As key providers of capacity, these SFOs must be clearly distinguished from the users of capacity. To include them in the new generic definition of “operational stakeholders” seems inappropriate. Instead, it is essential to recognise the relevant SFOs' central role in rail transport chains. In IRG-Rail's view, the Proposal should clearly articulate the active involvement, competence, and obligations for relevant SFOs, starting with the establishment of frameworks and integrating them in the entire capacity management process as well as traffic management procedures. In addition, in order to enable aligned capacity management of SFOs and infrastructure managers, the definitions set up in the Directive should also apply to service facilities. In particular, access rights in service facilities should be extended to applicants.
18. Infrastructure managers' performance requirements should be reinforced and RBs should be provided with appropriate tools to monitor service quality independently and drive performance improvement. IRG-Rail suggests that RBs should be empowered to monitor the infrastructure managers' performance and, where appropriate, set incentives. In order to reach the objectives of the SERA, the methodology by which this is carried out, should be applied in a consistent manner across all member states. The Proposal should require infrastructure managers to put in place a procedure for assessing the optimality of capacity allocation in an objective and transparent way.

19. Capacity allocation under Regulation (EU) 913/2010 and under Articles 38 to 54 of Directive 2012/34/EU will be complemented by strategic capacity planning and the application of socio-economic and environmental criteria. However, experience on the effects and outcome of the application of such criteria across EU countries is still very limited. Hence, these criteria should be sufficiently specific and consistent to allow clear decisions to be taken by the infrastructure managers whose compliance with the Proposal can be verified by the RBs. . Every type of rail traffic, both domestic and cross-border, should be taken into consideration when using socio-economic criteria.

20. The Proposal (article 39) allows infrastructure managers to unilaterally modify allocated capacity rights without setting clear conditions. Removing allocated capacity rights without compelling reasons would have adverse market effects that compensation payments may not offset.