

Independent Regulators' Group – Rail

“Railway market regulation in freight terminals”

November 2023

Introductory Remarks

This paper summarizes the findings from IRG-Rail's investigation to identify the scope of railway market regulation in freight terminals. It also gives an overview on national approaches regarding the rail regulated areas within freight terminals.

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1. Introduction

1.1 General remarks

1. Directive 2012/34/EU (the Directive) requires service facility operators (SFO) to provide non-discriminatory access to service facilities and the services supplied in those facilities. However, following a number of discussions with terminal operators and industry stakeholders and given the diverse types of freight terminals, it is apparent that interpretation of the scope of railway legislation varies across member states. According to the different interpretations of the national legislators, it is not always clear which parts of, and services provided within, a freight terminal fall within the scope of the requirements set out in Art. 13 (2) of the Directive.
2. Freight terminals are one of the types of service facility listed in point 2 of Annex II of the Directive, which SFO are required to give access to, and offer the rail-related services provided within. In contrast, private sidings and private branch lines are explicitly excluded from the list of infrastructure in Annex I of the Directive. IRG-Rail investigated the “Regulatory approach to the concept of private sidings”¹ in a paper published in 2022. IRG-Rail also published a paper regarding the qualification of “tracks in ports” in 2021.²
3. The core function of a freight terminal is to transship freight between at least two modes of transport or two different rail systems. In addition to trains entering, being loaded and/or unloaded and leaving the freight terminal, many other steps may be taken during the process of transshipment, involving different kinds of installations and services. Some are widely accepted to be rail-related, like the gantry loading and unloading of trains, whereas others, such as the gantry cranes loading and unloading of ships, or parking areas for trucks, are more difficult to determine.
4. Art. 3 (11) of the Directive defines a service facility as “the installation, including ground area, building and equipment, which has been specially arranged” that allows the supply of certain services as defined by the same Directive. Therefore in order to establish the regulatory approach that should apply to specific parts of a freight terminal (such as transshipment facilities, interim storage facilities, etc.) and whether they should be deemed part of the service facility in accordance with Annex II of the Directive, it follows that it might be necessary to draw a line of the assets and areas that fall within the common scope of railway market regulation across the different countries.
5. This assessment of which parts of a freight terminal should be considered part of the service facility is important for regulatory practice and the application of the Directive. For example, the scope of the access right determines the content of service facility descriptions (SFD), especially regarding information on installations and technical characteristics, as well as the descriptions of rail-related services and charges according to Art. 4 point 2 a), c), d) and m) of the Implementing Regulation (EU) 2017/2177.
6. Considering the varied market structure and regulatory practice in the IRG-Rail member states, it would not be possible (or desirable) to set an exhaustive list of all the regulated services in freight terminals that fall within scope of the Directive. Therefore, the aim of this paper is to give an overview on national approaches regarding the rail regulated areas within freight terminals and to develop a common

¹ <https://IRG-Rail.eu/irg/documents/position-papers/365,2022.html>

² <https://IRG-Rail.eu/download/5/899/IRG-Rail202113-ReportonTracksinPortsdocx.pdf>

understanding of the regulated services in freight terminals. This would increase harmonisation across IRG-Rail member states and help to reach a similar level of understanding on issues related to access to service facilities in terminals, and the applicable legislation.

7. Although this paper sets out an overview of national regulatory approaches, terminal operators should continue to refer to the relevant national and European legislative framework and when relevant engage with the national regulatory body (RB) if they are unsure which parts or services provided within their freight terminal fall within the scope of the legislative framework.
8. In this paper, the term "railway market regulation" covers both the service facility and the railway infrastructure regulation.
9. This paper aims to find common ground in national approaches to the regulation of freight terminals. However, the complexity and variety of types of terminals along with the increasing number of operators with bespoke commercial arrangements presents a challenge in establishing one regulatory position that covers the multitude of set-ups/arrangements in operation today.

1.2 Background

1.2.1 Methodology

10. To get an overview of the different national approaches to the concept of "Railway market regulation in freight terminals" several questionnaires were produced to understand and assess which assets and services offered in terminals IRG-Rail members consider as falling under railway market regulation.
11. The initial questionnaire explored any national definitions for "freight terminals" and assessed which installations and services offered in terminals IRG-Rail members consider falling under railway market regulation. It also looked at whether an asset or service in close proximity to the tracks could indicate the scope of railway market regulation.
12. This initial questionnaire led to deeper discussion and additional questions on determining which installations and services of a freight terminal IRG-Rail understood to be in scope. There was a consensus that the function of a service provided, rather than its location within a terminal, is a strong indication of whether it is "rail-related" for regulatory purposes or not.
13. 24 out of 31 IRG-Rail members contributed their answers to the questionnaires.³

³ AT (Austria), BE (Belgium), BG (Bulgaria), CZ (Czech Republic), DE (Germany), DK (Denmark), ES (Spain), FI (Finland), GR (Greece), HR (Croatia), HU (Hungary), IT (Italy), LT (Lithuania), LU (Luxembourg), NL (Netherlands), NO (Norway), PL (Poland), PT (Portugal), RO (Romania), RS (Republic of Serbia), SE (Sweden), SI (Slovenia), SK (Slovakia), UK (United Kingdom)

1.2.2 Legal basis⁴

Directive 2012/34/EU:

14. 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”.
15. 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.”
16. Annex II point 2 of the Directive mentions:

Access, including track access, shall be given to the following services facilities, when they exist, and to the services supplied in these facilities:

(b) freight terminals;

[...]

(g) maritime and inland port facilities which are linked to rail activities

[...]

Implementing Regulation (EU) 2017/2177 on access to service facilities and rail-related services

17. Art. 1 is as follows “This Regulation lays down the details of the procedure and criteria to be followed for access to the services to be supplied in the service facilities listed in points 2, 3 and 4 of Annex II to Directive 2012/34/EU. 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”.
18. Art. 3 (2) defines ‘rail-related service’ as basic, additional or ancillary service listed in points 2, 3 and 4 of Annex II to Directive 2012/34/EU;

TEN-T Regulation (EU) 1315/2013:

19. According to Art. 3 (s) of the TEN-T Regulation 'freight terminal' means a “structure equipped for transshipment between at least two transport modes or between two different rail systems, and for temporary storage of freight, such as ports, inland ports, airports and rail-road terminals.”

⁴ The interpretation of the Union law is ultimately the prerogative of the Court of justice.

2. Findings of the Survey/Questionnaire

2.1. Definition for the term "freight terminal"

20. Most respondents (91 %) do not have a definition for the term 'freight terminal' in their national legislation.
21. In Lithuania, according to the Railway Transport Code of the Republic of Lithuania, a freight terminal is a place with or without equipment for loading, unloading, transshipment, and/or storage of cargo (including intermodal transport units) when at least one transport mode is rail.
22. Whereas in Poland, according to the Polish Railway Transport Act, a 'cargo terminal' is a structure or a set of structures comprising a rail track, providing the services for the loading and/or unloading of wagons or integrating various transport modes for the transport of goods.
23. The Directive 2012/34/EU does not provide a definition of 'freight terminal'. Some IRG-Rail members refer to the TEN-T Regulation (EU) 1315/2013 definition, some answered that there are definitions in the infrastructure managers' Network Statements, whilst other members' regulatory approach to defining a freight terminal is by virtue of national definitions of infrastructure assets.

2.2 'Specially arranged' according to Art. 3 (11) of the Directive and investigation methods

24. Many respondents (68 %) do not proactively investigate if a freight terminal has been specially arranged according to Art. 3 (11) of the Directive.
25. Those IRG-Rail members that do investigate it, use different methods and sources to gather information on the technical and functional characteristics of the terminal. This includes information found on the SFO's website, sources that are publicly available and the description that an SFO would provide as part of an access application or complaint. In Sweden, the RB has meetings with SFOs to better understand the purpose and operations of the facility and installations; how the site is operated, what facilities there are on the ground, as well as the layout of the facilities and how they are used so that it can assess whether they are within scope of the regulations, or not.
26. The answers of the IRG-Rail members show that there are no general criteria to identify if a terminal is 'specially arranged'. Each case is unique and must be examined individually.
27. There are also different reasons why IRG-Rail members investigate whether the terminal is specially arranged. For example, in Poland in the case of a complaint concerning the provision of a service, the verification of whether the refusal is justified also includes the verification of whether the facility has been specially adapted for the service.

2.3 Service facility operators without tracks

28. In some IRG-Rail member states, some SFOs have argued that they do not fall under railway market regulation as they only operate loading facilities whereas track access is granted by a different SFO or

infrastructure manager. They consider that operating tracks must be a condition for falling under railway market regulation.

29. Therefore, IRG-Rail members were asked whether it is a requirement for operators of loading facilities in freight terminals to also grant track access, to qualify as a SFO. All IRG-Rail members that responded explained that they consider both operators of rail loading facilities as well as operators granting track access to the service facility as rail regulated and to fall under railway market regulation.

2.4 Which installations of a freight terminal fall under railway market regulation?

30. IRG-Rail members were given various options from which to choose the most suitable model comparable to their regulatory approach when considering which installations of a freight terminal fall under railway market regulation. Options ranged from only the tracks, all parts and services within the areas for rail-related activities, to the whole terminal (including parts that only serve the ship and / or truck).
31. 64 % of the respondents considered all 'rail-related' parts of a freight terminal to fall under railway market regulation.
32. The responses and subsequent discussion found that it is more appropriate to assess the service provided itself rather than its location in the terminal to decide upon the scope of railway market regulation. Most IRG-Rail members regard the function of a service, rather than its location within a terminal, as the key identifier as to whether it is 'rail-related' or not. Responses confirmed that most IRG-Rail members consider all services of a freight terminal which are necessary for transshipment on and off trains as 'rail-related'. But as there are different kinds of freight terminals in terms of size, equipment, installations, modes of transport etc., the decision as to which parts and / or services can be considered as 'rail-related' always must be case-by-case.

2.5 Regulated services in terminals

33. The Directive does not provide a legal definition for a freight terminal, nor does it give a list of regulated services provided within. Therefore, RBs have to interpret the legislation and determine whether an installation or service falls within the scope of railway market regulation. This gives room for different national interpretations, which can also vary depending on the scope of competence of the relevant RB. For example, some RBs regulate various modes of transport (including maritime and road) whilst others are rail-focused only.
34. Therefore, a substantial part of this investigation assessed which services that are offered in a freight terminal are subject to railway market regulation. IRG-Rail members were asked whether they consider loading/ unloading, temporary storage and long-term storage of goods as a rail-regulated services or not. Discussions found that the aforementioned terms could be understood and interpreted in different ways and therefore further questions were asked based on agreed, defined terms.

2.5.1 Loading/ Unloading/ Direct transshipment

35. Most responding IRG-Rail members consider the act of loading and unloading goods on and off trains as a service that falls under railway market regulation. Furthermore, their answers showed that they also consider direct transshipment of goods on/ off trains as a rail-regulated service. Direct transshipment in this sense means the direct transfer of goods from one means of transport to another via crane without being loaded or unloaded on /off a permanent structure or building ground area if at least one transport mode is rail. It also includes the movement of goods by mobile device (e.g. tug) between the train and other modes of transport.

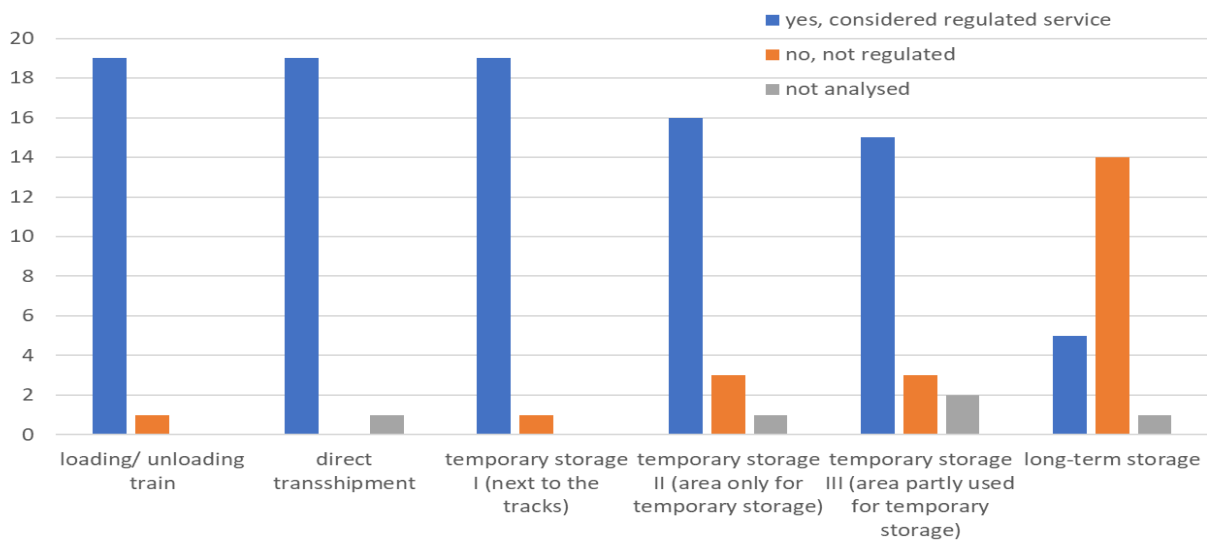
2.5.2 Temporary storage

36. It is often necessary to store goods, either as bulk, gas or liquid or packaged (e.g. containers, parcelled goods) during transshipment. Storage can take place for different reasons, for a different amount of time or in different areas. For most IRG-Rail members, reason, duration and area for the storage might determine whether the particular storage service (including the area in which the storage is provided) could be considered to fall under railway market regulation. Therefore, IRG-Rail investigated the topic further.
37. Temporary storage is often logistically necessary for the transshipment of freight by rail (for example, in larger seaport terminals temporary storage is usually necessary, acknowledging that ships can carry significantly larger amounts of freight than a train and in practice it is a challenge to tune the arrival times of trains and ships). Three types of temporary storage were identified that IRG-Rail members were asked to consider their regulatory approach to.
38. For the first case, IRG-Rail members were asked whether a "loading bay" falls under railway market regulation. The term "loading bay" in this context refers to the general area next to the tracks where goods are loaded on or unloaded off a train. The function of this area is only to temporarily store goods before or after the train has been loaded or unloaded. When considering a loading bay, the location as well as the function of the area is taken into account. Respondents stated that they consider loading bays as falling under railway market regulation.
39. The second type of temporary storage referred to an area where its function is only to temporarily store goods before, or after, the train has been loaded or unloaded. The location of the temporary storage, in this case, is irrelevant and only the function is taken into consideration. 80 % of the respondents stated that they would consider this area as rail-regulated, whilst others argued that they would not necessarily consider storage activities that do not take place next to the tracks as rail-related services.
40. Finally temporary storage, during transshipment, can also take place in an area or building where goods are only partly temporarily stored and therefore may be mixed with long-term storage. It is understandable to assume that these storage areas could be partly considered as rail-regulated. 75 % of the respondents answered that it is irrelevant whether goods are only partly temporarily stored as it is the function of the area that matters.

This is also in line with Art. 3 (s) of the TEN-T Regulation (EU) 1315/2013 that refers to the structure equipped for temporary storage of the freight as being part of a 'terminal'.

2.5.3 Long-term storage

41. IRG-Rail members were also asked if they consider long-term storage as a rail-regulated service. In contrast to temporary storage, long-term storage takes place when goods are stored either for an unspecified or a long duration not necessarily within the process of transshipment. This is a service that can be requested separately by the applicant or imposed by the SFO and can, for example, include the storage of bulk goods for several months or sometimes due to significant disruptions within the logistics chain. About two thirds of IRG-Rail respondents that answered the additional questions do not consider long-term storage to be in scope of railway market regulation. They argue that long-term storage is not necessary for the transshipment of freight and therefore is not directly rail-related.⁵
42. IRG-Rail members were also asked if the duration of storage is significant in deciding whether it is considered temporary or long-term storage. Most IRG-Rail respondents consider that the duration of storage is not a significant criterion but, in absence of clear indications stemming from national legislation, could be an indicator. The purpose of the storage is the decisive factor for the assessment. If storage is strictly necessary for the transshipment, it is considered as temporary storage that falls under railway market regulation.

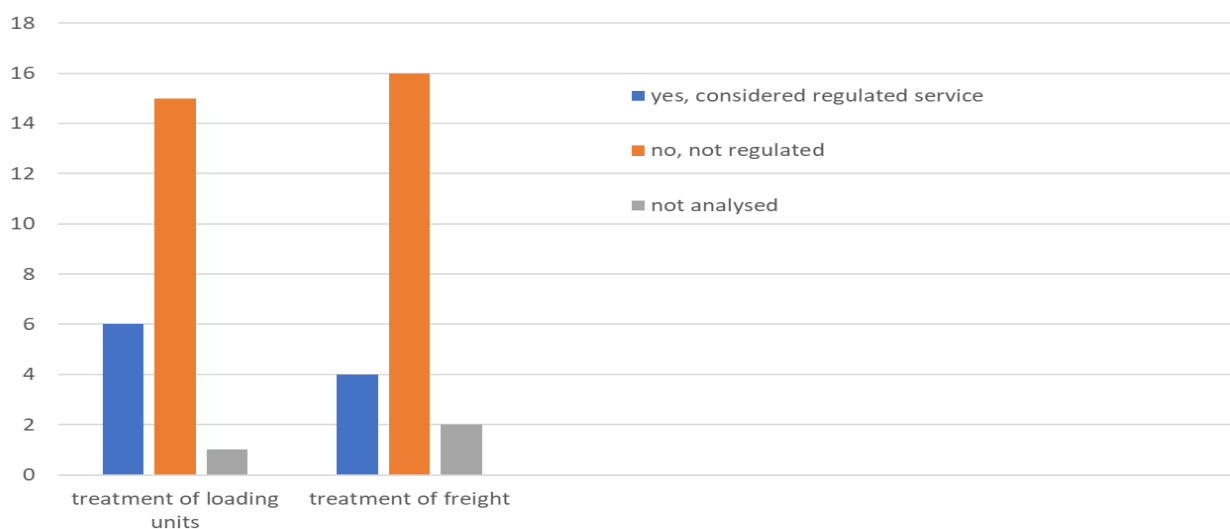


The chart visualizes the answers of the respondents regarding loading/ unloading, direct transshipment, temporary storage, and long-term storage

⁵ In Germany the Higher Court of North-Rhine Westphalia decided on 17th November 2020 (13 A 3534/18) that the provision of long-term storage and processing services (such as gassing, mixing goods etc.) as such can no longer be attributed to the handling of goods. These services have no technical-functional connection with loading/ unloading goods on and off trains (in contrary to temporary storage).

2.5.4 Treatment of loading units and treatment of freight

43. In addition to the services assessed, IRG-Rail members were asked whether they consider the treatment of loading units and treatment of freight as rail-regulated services in a freight terminal.
44. Many respondents (68 %) do not consider the treatment of loading units (e.g. container labelling, securing the load, maintenance, etc.) to fall under rail market regulation as in their view these services are not related to rail transport itself. However, some respondents consider these services to be in scope if they occur in connection with railway transport services. Swedish RB explained that these services can be considered as rail-related, if they are necessary for the use of the terminal and if they require some form of (rail-related) specialist competence or specialized equipment. For example, cargo securing could be within scope as it may require specialized equipment.
45. Many respondents (72 %) do not consider the treatment of freight (e.g. mixing of bulk goods) to fall under railway market regulation. They argued that such activities could apply to any mode of transport and it would be difficult to attribute them specifically to the rail transport mode. The reason for declaring it as not rail-related is the same as for long-term storage – i.e. not necessary for the transshipment of freight. The purpose of such activities relating to the treatment of freight has no direct functional connection with rail transport.



The chart visualizes the answers of the respondents regarding treatment of loading units and treatment of freight.

2.6 The significance of the proportion of train operations

46. Prior to this investigation, an IRG-Rail member claimed the proportion of operations at a freight terminal that are for serving trains is significant in determining whether it qualifies as a service facility and therefore falls under railway market regulation. To investigate whether this interpretation of the legislation is mutual across IRG-Rail members, a question was included around whether it would be

significant for regulatory purposes, if a freight terminal only served trains for a minor proportion of its operations (e.g. 10 % train, 90 % ship).

47. Almost all (91 %) respondents answered that the proportion of 'rail operations' is not significant in determining whether the facility falls under railway market regulation. If the facility allows the supply of one or more rail-related services, then most IRG-Rail members argue that it would fall in scope. The proportion of trains is insignificant for determining whether it should be considered a service facility. If the freight terminal has been set up to serve trains, provide any rail-related service and/ or set up to enable the transshipment of goods on or off the train, then it falls under railway market regulation. They argue that the Directive does not indicate that the proportion of railway operations within a facility is significant in determining whether it is considered a service facility for regulatory purposes.
48. The Danish RB provided a case study that demonstrated it is sometimes significant to consider whether, and to what extent, a freight terminal has been "specially arranged" to handle rail freight. The example was based on a harbour operator that claimed their facility was not specially arranged to accommodate rail freight. Although there was equipment in the facility that was or could be used for rail freight operations, this equipment was not specifically designed for it. The equipment was primarily intended for and used for freight that was not rail related. It was rarely used for rail freight operations and the operator did not operate the nearby tracks. The operator only handled 1-2 rail freight wagons per month, and almost exclusively handled road-ship freight. Based on all these circumstances, the Danish RB found the facility not to be considered 'specially arranged' to deal with rail freight⁶.

2.7 Relevance of the type and form of freight

49. In response to a question whether the type of freight is a relevant criteria to categorize a freight terminal as a service facility, all respondents answered "no". The responding IRG-Rail members agreed that the type of freight (whether it is in containers or bulk goods for example) is not relevant. Many different goods are transported by rail and it is not a factor to consider when assessing whether a terminal qualifies as a service facility. The respondents agree that the criteria crucial to conclude that a terminal is considered a service facility and subject to railway market regulation is whether the terminal is arranged for providing rail-related services. .
50. Similarly, all responding IRG-Rail members agree that the form of freight (for example by pallet, truck or trailer) is not relevant in determining whether a freight terminal should be considered a service facility. All transshipment of goods by rail, irrespective of the form it is handled, qualify the freight terminal as a service facility. Some observe that the form of freight can indicate who the operator may be that handles it. For example, if the freight consists of containers, there is usually also an operator that provides handling services.

⁶ Link to decision: https://www.jernbanenaevnet.dk/Media/637882246325862961/2021-002825%20Holship%20-%20Jernbanen%c3%a6vnets%20afg%c3%b8relse_pdf.pdf

2.8 Relevance of the location of the terminal

51. Several discussions took place regarding the scope of railway market regulation applying to rail-related assets in seaport terminals and on possible criteria to distinguish between railway market and port regulation⁷. Therefore IRG-Rail members were asked whether the type of a freight terminal, being located in a seaport, an inland port or without connection to a waterway makes a difference for qualifying it as a service facility. All respondents answered that their regulatory approach is not affected by the location of the freight terminal e.g. within a seaport, inland port or rail-road-terminal terminal. For those IRG-Rail members the regulatory approach is the same, as the rail-related activities performed in a seaport or inland terminal are all covered by the railway market regulation and the facilities where these are provided are connected to rail lines/infrastructures which fall within the scope of Directive 2012/34/EU. Although the location of the terminal, particularly if it is an unusual or novel set up, may indicate how much regulatory oversight it may require, the approach is the same and the same legislation applies.

3. Summary/ Conclusion

52. The Directive itself gives no legal definition for a freight terminal or list of associated services that sets out the scope of applicable rail regulation. This could lead to different national approaches and has already led to different regulatory decisions in some cases. This investigation confirmed that interpretation of the Directive varies across member states.
53. However, Art. 3 of the TEN-T Regulation (EU) 1315/2013 provides a definition for a freight terminal, which many respondents use for interpretation, particularly regarding temporary storage.
54. The survey revealed that all respondents agree that some aspects do not determine the regulatory approach. For example, the type and form of freight (bulk goods, containers, pallets, trucks or trailers) is irrelevant, as is the location (e.g. seaport terminal, inland terminal) of a freight terminal.
55. There is also a general view amongst the respondents that in a freight terminal, the proportion of train operations in relation to other transport modes is not a factor that influences the application of railway market regulation (even if this could be considered when an exemption according to Art. 2 Implementing Regulation (EU) 2017/2177 is requested).
56. For most respondents, railway market regulation applies to any clearly identifiable 'rail-related services'⁸ irrespective of their importance within a freight terminal. However, it is also important to recognize that this still allows for different interpretation of what is clearly a 'rail-related service'.
57. A crucial factor to decide whether, and which parts and services of, a terminal are considered 'rail-related' is not the location of the installations in the terminal, but rather whether there is a technical/functional connection with railway operations. The installation or provided service must be functionally related to railway transport services.

⁷ <https://irg-rail.eu/download/5/909/IRG-Rail202115-StatementRightsofApplicants.pdf>

⁸ This term is not referring to the legal definition of Art. 3 (2) of the IR.

58. The closer the service is connected to train operations the more likely it is for the RB to consider the service as 'rail-related'. That is why most respondents agreed that loading and unloading on and off trains as well as direct transshipment are qualified as rail-regulated services (irrespective of whether it is carried out via crane or mobile devices).
59. National approaches regarding storage in freight terminals differ significantly. For example, some IRG-Rail members consider all storage services, both temporary and long-term, to be a 'rail-related service' whilst others consider only temporary storage on loading bays next to the tracks as a type of storage that is directly 'rail-related'.
60. Irrespective of the national regulatory approaches to regulated services in freight terminals it is essential for railway undertakings, as well as other applicants, that the provided (regulated) services in a freight terminal and the corresponding charges are described transparently in the SFD.
61. This survey has shown that due to the growing number of freight terminals and operators with bespoke commercial arrangements and diverse set of services provided, the regulatory position must be assessed based upon the unique case study put in front of the RB.