

## Independent Regulators' Group - Rail

### *IRG – Rail*

## **BACKGROUND PAPER on the Cooperation of European Rail Regulatory Bodies**

### **I. Introduction**

International cooperation in railways is becoming increasingly important. It already exists in Europe at different levels. It is now time to intensify cooperation between the national Rail Regulatory Bodies<sup>1</sup> in order to promote sustainable and effective competition in the railway sector and contribute to the development of a European internal rail market by fostering a consistent approach to the regulatory framework for railways in Europe, developing regulatory best practice and speaking to all relevant stakeholders at Community level with a single voice.

Positive experience of enhanced cooperation has been gained in the telecommunications and energy sectors. Enhanced cooperation is also in line with the existing European framework and its objective to strengthen international cooperation.

Cooperation between stakeholders is already taking place. For instance Article 15 of Directive 2001/14/EC provides a legal basis for the infrastructure managers to cooperate in a consistent way in order to facilitate the goals laid down in Article 15. This article also provides the infrastructure managers with a clear and detailed legislative mandate to create a body of cooperation and they have done so by creating “RailNet Europe” (RNE).

According to Article 31 of Directive 2001/14/EC the Regulatory Bodies must exchange information about their work and decision-making principles and practice for the purpose of coordinating their decision-making principles across the Community. The Regulatory Bodies are meeting at least twice a year in the Rail Regulatory Bodies Working Group established and chaired by the European Commission. The meetings are organised either by the Commission or by one of the Regulatory Bodies and thus take place either in Brussels or in the country of the Regulatory Body hosting the meeting.

Other international cooperation fora exist at a bilateral or multilateral level on corridors e.g. the International Group for Improving the Quality of Rail Transport in the North-South Corridor (IQ-C) with representatives of the Dutch, German, Swiss and Italian transport ministries, Regulatory Bodies, and National Safety Authorities. These groups were established by a mandate of the ministries based on a MOU signed by ministers of Transport.

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<sup>1</sup> National rail regulatory bodies are responsible for the day-to-day performance of the tasks assigned to them under the regulatory framework and work independently from any public or private organization.

Cooperation between Regulatory Bodies is also foreseen in the regulation concerning a European rail network for competitive freight (“freight regulation”) or the proposal for a new directive establishing a single European railways area (“recast”) published on 17 September 2010. The latter is only a draft and its provisions can be changed. However it might be useful to mention it as an example of a requirement for stronger international cooperation among Regulatory Bodies.

In order to ensure non-discriminatory access to international rail services, Article 20 of the freight regulation aims at ensuring efficient coordination between the Regulatory Bodies involved on the networks covered by the freight corridors. According to this new provision Regulatory Bodies must cooperate and exchange all necessary information with regard to the monitoring of competition in the rail freight corridors. They must also consult the Regulatory Bodies of other Member States, who have to provide and transfer all relevant information before taking decisions.

To enhance the cross-border cooperation and improve market entry conditions the proposals for the recast of the First Package require the Regulatory Bodies to cooperate for the purpose of adopting decisions on access or charging issues relating to international services. Article 57 of the recast proposals provides the legal basis for the regular exchange of information about regulatory work, decision-making principles and practice. The provision requires in particular a close cooperation, including working arrangements, for a consultation process and for the development of common principles and practices.

Without prejudice to any new cooperation procedures between Regulatory Bodies or to the creation of the proposed specific forum for further cooperation, the rationale behind these new provisions is the improvement of cooperation and coordination between the Regulatory Bodies to foster the internal market in Europe.

In this respect, the way the rail sector has evolved roughly mirrors former developments in other sectors especially in the telecommunications and energy sectors. In both sectors national regulators became aware of the benefits of a close cooperation amongst themselves, of sharing practical experiences in implementing the EU-framework and in responding to market and technological developments already at the end of the nineties. The national regulators initiated fora of cooperation in both sectors, like the Independent Regulators Group (IRG) in telecommunications which was founded already in 1997. Similarities can be found in the Council of European Energy Regulators (CEER) for the energy sector which was founded in 2000. One has to bear in mind that in 1997 and 2000 the liberalisation process in the EU Member States in both sectors had not been fully completed and not every Member State had already established an independent regulatory body.

Over the last 10 years the process has been formalised, starting with the establishment of regulatory groups by the European Commission (in the telecom sector the European Regulators Group – ERG in 2002 and the European Regulators Group for Electricity and Gas – ERGEG in 2003) and later on by establishing the Body of European Regulators for Electronic Communications (BEREC) and the European Agency for the Cooperation of Energy Regulators (ACER). But even though significant progress has been made with institutionalising cooperation in both sectors, the initial networks, such as IRG and CEER

were started by the regulatory bodies themselves with the intention to create a platform among themselves for the informal sharing of experiences and the coordination of work and positions. It is worth pointing out that the IRG allows National Regulatory Authorities from those countries to participate that are not (or not yet) Member States of the European Union, thus helping them to already get all the information about implementation issues as well as practical experiences. This is exactly the reason why both groups, the IRG and the CEER have not been integrated into ERG/EREG (the groups founded by the Commission) or the newly created bodies BEREAC/ACER, but worked in the past and are still working in parallel.

Even if essential differences between the various sectors exist the rationale behind the idea and the benefits of an effective network of independent regulators are evident for the railway sector too. Regulatory Bodies often face similar problems and via networking they could share experiences and jointly elaborate common solutions by developing best regulatory practice. By collaborating in such a network Regulatory Bodies could become more visible, gain more influence on EU-level and could serve as a practical and technical adviser. They could play an essential role to address common future regulatory challenges and improve their own performance and expertise through sharing information, data and common practices.

The existing Rail Regulatory Body working group chaired by the Commission is and will continue to be a very useful formal forum and platform for the dialogue at Community level. The new IRG-Rail group is open also to participants from countries that are not or not yet Member States of the European Union, giving them the possibility to share information and experiences. The intentions or objectives of the working group established and chaired by the Commission and the planned network of independent Regulatory Bodies are different and should be considered as interactive and complementary. It should be emphasized that the European Commission is the body developing European legislation and providing support for its interpretation as well as coordinating cooperation across all regulatory bodies in the Rail Regulatory Working Group as foreseen by European legislation. Whereas the proposed network of independent Regulatory Bodies will focus on the development of common approaches, regulatory best practice, mutual assistance and the exchange of information. By doing so, it will complement the work done by the Commission or by the existing working group under the Commission's chairmanship.

In addition the successful model of regulatory cooperation within the IQ-C working group should of course be continued with its work focussing on corridor linked objectives and for this purpose it should work in parallel to the proposed new network. As the number of corridors will grow, the planned network will facilitate sharing experiences and having consistent approaches across corridors.

The network of Regulatory Bodies intends to conduct an open and frequent dialogue with all relevant parties and will ensure that its work and activities are transparent. To this end the network will publish reports, documents etc. and make them available on request to all interested parties for information. Furthermore the network may on a case by case basis invite stakeholders e.g. associations or the Commission to its meetings and may consult interested parties whenever it seems appropriate or helpful.

The network will maintain close relations especially with the Rail Regulatory Working Group and the European Commission by exchanging information and by regularly presenting its views and activities to the Rail Regulatory Bodies Working Group.

The network of Regulatory Bodies should be able to act as a strong and effective counterpart especially to RNE. The infrastructure managers have already taken up their mandate under Directive 2001/14/EC to create the RNE as a body for cooperation. Regulatory Bodies should now do likewise to be able to develop common approaches and speak with a single voice in Europe with all relevant bodies and institutions.

## **II. Approach to create the network**

It is important to state that the creation of the proposed regulatory network should be based on a flexible and rather low key “first step approach” in order to enable a quick and efficient start, and to raise the attractiveness for independent regulatory bodies to join the network.

The network will be initiated by the Heads of Regulatory Bodies signing a memorandum of understanding laying down the main elements of further cooperation.

The memorandum in particular sets out the objectives of the network, the membership criteria and the main organisational and structural items. Further details will be dealt with in rules of procedure or work arrangements.

With regard to often limited financial resources of Regulatory Bodies and in the light of the gradual approach that has been adopted, the levying of membership fee is not envisaged for the time being. As a result, this means that meetings of the working groups and the Plenary Assembly will have to be organised by the individual REGULATORY BODY and each member will have to bear the costs arising from its participation. The coordination work or secretarial functions will be carried out by the REGULATORY BODY chairing (or other volunteers).

The network should be named **Independent Regulators' Group Rail (IRG-Rail)**.

### **1. Objectives of cooperation**

The objectives of the planned network are mainly

- to promote sustainable and effective competition in the railway sector,
- to contribute to the development of an European internal rail market by:
  - o fostering a consistent approach to the European regulatory framework for railways,
  - o developing regulatory best practice in the railway sector in Europe, as well as
  - o speaking to all relevant stakeholders at Community level with a single voice.

To fulfil these objectives the network should provide a forum for discussion and a regular and extensive exchange of information and experiences. The network should elaborate and publish documents, primarily reports, guidance, principles of best practice and common positions on regulatory issues and shall maintain an open dialogue with all relevant parties, including the Commission, market participants and other networks.

## **2. Criteria for membership**

Following the example of the IRG, the rail regulatory body has to meet the following three criteria in order to become a member of the planned network.

### **a) Application of the European framework legislation**

First of all the membership presupposes that the respective Member State of the EU or the EFTA states apply EU legislation directly. It is inherent in the very nature of the transposition of EU legislation into national law that deviations can and certainly do occur between the different national laws of EU Member States/EFTA states. This is a result of national legal flexibility and room for manoeuvre in transposing EU legislation into national legal systems. This criterion is basically independent of any infringement procedures that may have been launched by the Commission and should be dealt with between the Commission and the Member States individually.

The infringement proceedings launched by the European Commission on implementation of the First Railway Package with regard to the lack of independence of the regulatory body are causing some uncertainty as to whether the regulatory body meets the criteria mentioned below.

Hence membership of IRG-Rail is not open to those regulatory bodies whose Member States are subject to ongoing EU infringement proceedings based on insufficient independence of the regulatory body from a railway undertaking and/or infrastructure manager, or being part of the same ministry that contributes to the control of the state railway undertaking and/or infrastructure manager. Confirmation of independence is required to become a full member of IRG-Rail. Nevertheless, in the meantime, whilst addressing these issues, regulatory bodies can join IRG-Rail working groups as outlined below.

### **b) Independence of the regulatory body**

The membership is open to the national rail regulatory bodies that have been established according to Article 30 of Directive 2001/14/EC. Furthermore the regulatory body applying to become a member of the network shall be independent.

Independence in this context means firstly the independence of the Regulatory Body from the (incumbent) Railway Undertaking and/or the Infrastructure Manager.

Since independence is crucial to reach the goals of the proposed network it secondly means independence of the regulatory body from the government. The proposed Article 55 of the recast stipulates clearly that a regulatory body has to be a stand alone authority which is legally distinct and independent in organisational, functional,

hierarchical and decision making terms from any other public authority. The Commission's proposal aims to ensure a very high degree of independence of Regulatory Bodies and to eliminate the de facto or actual possibility of an organisational integration into ministries. The Regulatory Bodies starting the current initiative welcome the Commission's intention to strengthen the independence of the Regulatory Bodies which is essential for effective regulation. This approach is considered as a positive signal for the future work of Regulatory Bodies.

Keeping in mind the high degree of regulatory independence intended under the EU-framework and in order to ensure the planned objectives of the proposed network of Regulatory Bodies, it is necessary that all members of the network should meet at least a minimum level of independence from other public bodies. This minimum level of independence should be the legal distinction and organisational separation from other public bodies. This criterion should be seen formally asking whether the Regulatory Body is separated from the ministry in terms of having an own head, a separate budget and is legally distinct. The fulfilment of this criterion should be confirmed by a separate document in which the head of the Regulatory Body confirms that his Regulatory Body is independent from its government by way of its own budgetary responsibility, it is organisationally separate, legally distinct and is represented by the undersigning head (Confirmation of independence). This document should be attached to the signed MoU. A Regulatory Body that is still a department of the ministry that has no own legal status or budget or bears the name of the ministry or is located in its offices would therefore not qualify for membership.

The membership should not be limited to the EU Member States but following the example of the telecoms and energy sector be opened to Regulatory Bodies of EFTA states. Additionally the membership could be opened to EU acceding countries or candidate countries engaged in negotiations for membership in the EU or have an agreement with the EU.

In addition not all Regulatory Bodies are yet in a position to meet all membership criteria and we are keen to ensure that they have an opportunity to provide valuable input to the work of IRG-Rail. Any regulatory body will therefore be able to participate in IRG-Rail working groups to the extent the subject matter is of relevance. Regulatory Bodies with an interest in a subject matter covered by IRG-Rail working groups can contact the chair of that working group in order to participate in the work of that group.

### **c) Market liberalisation**

The regulatory body applying for membership must be located in an EU Member State/EFTA State, which has already liberalised the railway market (i.e. opened the market for competitors). EU acceding countries or a candidate country for EU membership may join the network, if they are working towards a liberalised railway market (i.e. have more than one operator) and started to apply the acquis communautaire.

The network will start with those Regulatory Bodies interested in joining the group and that meet the criteria listed above. Any other Regulatory Body which will meet the criteria in the future and is interested in becoming a member can apply via the chairing Regulatory Body.

### **3. Organisational and structural questions**

The network is composed of two levels; the so called plenary assembly of the heads or representative of heads of the Regulatory Body and the working groups of national experts.

The plenary assembly is composed of all members represented by the heads or representatives of the heads and takes all decisions aimed at pursuing the outlined objectives. The meetings of the Plenary Assembly are convened at least once a year (and more frequently if appropriate) to approve all documents and take all necessary decisions like the admission of new members, the setting up of working groups and agreeing the work programme for the following year. The plenary assembly is chaired by a Chairperson and a Vice-Chairperson each having a term of one year and being appointed by the plenary assembly from among its members.

The Plenary Assembly formally establishes different working groups composed of the national experts from the national rail Regulatory Bodies that are interested in participating in the working group. Each working group is focussed on a specific topic, and submits the draft documents prepared by the group for the Plenary Assembly's approval and subsequent publication. In general the working groups will be free to organise themselves but should be chaired by one representative of a regulatory body to ensure the coordination of the practical work.

Any further details are laid down in the rules of procedure or work arrangements to be adopted by the plenary assembly.

### **III. Next steps**

On 9 June 2011 a high level meeting will be organised in The Hague aiming at formally signing the memorandum of understanding (MoU) at the level of heads of Regulatory Bodies or their representatives. The signed Confirmations of Independence will be an integral part of the MoU. This meeting will at the same time serve as a first Plenary Assembly which will adopt the working arrangements and a first work programme 2011 and elect the chair and vice chair of the network for 2011/2012.