

Independent Regulators' Group – Rail

IRG–Rail

Subgroup on Access to Service Facilities

**Common Principles on granting exemptions under Article 2 (2) of
Commission Implementing Regulation (EU) 2017/2177**

I. Introduction

1. Implementing Regulation 2017/2177 (hereafter: the Implementing Regulation) sets out uniform rules and procedures regarding certain obligations for service facility operators (SFO). This expands on the duty to produce information on the services by publishing a service facility description.
2. Under article 2 (2) of the Implementing Regulation, an SFO can file a request with their national regulatory body in order to be exempted from part of the obligations contained in the Implementing Regulation.
3. Pursuant to article 2 (5) of the Implementing Regulation, in this document IRG-Rail sets out common decision making principles that should be applied by the national regulatory bodies when assessing requests for an exemption under article 2 (2) of the Implementing Regulation.
4. With these common decision making principles, the regulatory bodies agree on a set of high-level principles. These are intended to harmonise the decision making process relating to requests for exemptions. However the common decision making principles have to be adapted to the national market situation in the member states. Therefore, IRG-Rail strikes a balance between a common approach for market actors on the one hand, and national regulatory autonomy on the other.

II. Scope of the exemptions

a. Regulation of service facilities under Directive 2012/34/EU

5. Directive 2012/34/EU provides the basis for the regulation of service facilities and rail-related services. The directive imposes a number of obligations on entities that qualify as an SFO.¹ These obligations primarily pertain:
 - access to service facilities and the services provided in those facilities;
 - charges for the use of service facilities and the services provided in those facilities, and;
 - publication of information relating to service facilities and the services provided in those facilities.
6. The level of regulation varies, depending on the category under which the relevant service facility or rail-related service falls as laid down in Annex II of Directive 2012/34/EU. Category 2-services (“basic services”) are the most highly regulated.

¹ Per article 3 (12) of Directive 2012/34/EU an SFO is any public or private entity responsible for managing one or more service facilities or supplying one or more services to railway undertakings referred to in points 2 to 4 of Annex II of that Directive.

Services that fall under category 3 (“additional services”) or category 4 (“ancillary services”) face a comparatively less strict regime.

7. An SFO that provides basic services is required to give non-discriminatory access. Access requests for basic services must be answered within a reasonable time limit, and may only be refused if there is a viable alternative available to the undertaking that is seeking access. Where an SFO encounters conflicts between different requests, it shall attempt to meet all requests in so far as possible.² Charges imposed for providing a basic service may not exceed the cost of providing it, plus a reasonable profit.³
8. Additional services and ancillary services must also be supplied in a non-discriminatory manner. However, additional services need to be supplied on request, whereas ancillary services only need to be supplied if the SFO decides to provide such services.⁴ If an additional or ancillary service is provided by one supplier only, the charges imposed for providing that service may not exceed the cost of providing it, plus a reasonable profit.⁵
9. For all categories of services, there is an obligation to provide information to the infrastructure manager regarding access to and charging for service facilities and services. This information is to be published in the Network Statement.⁶

b. Purpose of the Implementing Regulation

10. The Implementing Regulation lays down the details of the procedure and criteria to be followed for access to service facilities and use of services supplied in those facilities. In particular, the Implementing Regulation provides additional rules regarding the publication of service facility information by an SFO and the access procedures that are to be followed by an SFO.

c. The exemption regime

11. Per article 2 (1), first paragraph, of the Implementing Regulation, an SFO that fulfils one of the requirements set out in article 2 (2) of the Implementing Regulation may request to be exempted from the application of most of the provisions of that Regulation.
12. It is important to note, first of all, that an exemption under article 2 of the Implementing Regulation only affects the obligations set out in that Regulation. The obligations that are laid down in Directive 2012/34/EU continue to apply, regardless of an SFO being exempted under the Implementing Regulation. This means that an SFO that is required to provide access under the directive will still be obliged to provide access after having been exempted under article 2 (2) of the Implementing Regulation.
13. Being exempted does affect the scope of the publication requirements that are imposed by the Implementing Regulation. However, it is not possible to be fully exempted from the

² Article 13 (2), (4) and (5) of Directive 2012/34/EU.

³ Article 31 (7) of Directive 2012/34/EU.

⁴ Article 13 (7) and (8) of Directive 2012/34/EU.

⁵ Article 31 (8) of Directive 2012/34/EU.

⁶ See article 27, article 31 (10) and Annex IV (6) of Directive 2012/34/EU.

publication obligation. On the basis of article 5 of the Implementing Regulation, an SFO must still publish a service facility description. That description must, at the minimum, include the information set out in article 4(2)(a) to (d) and (m).

14. In addition to limiting the scope of the publication obligations, an exemption relieves an SFO of the duty to apply the Regulation's procedural rules regarding access requests. However, an SFO must still follow the procedural rules for access requests set out in article 13 of Directive 2012/34/EU. This includes the requirements relating to viable alternatives and the reconciliation of conflicting requests.
15. Obtaining an exemption should serve to lighten the administrative burden placed on an SFO. Nevertheless, IRG-Rail wishes to point out that guaranteeing a transparent and non-discriminatory treatment of conflicting access requests may require an exempted SFO to develop their own internal procedures if they decide not to apply the procedures provided for by the Implementing Regulation.

III. Criteria for obtaining an exemption

16. According to article 2 (2) of the Implementing Regulation, three categories of service facilities or services may qualify for an exemption:
 - 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;
 - service facilities or services which are operated or provided in a competitive market environment with a variety of competitors providing comparable services;
 - service facilities or services where application of the Implementing Regulation could negatively impact the functioning of the service facility market.
17. 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. In the following paragraphs, IRG-Rail will discuss each of the three categories.

a. The "no strategic importance"-ground

18. In order to determine the validity of exemption requests that are filed on the basis of this ground, regulatory bodies will need to carry out an assessment of the strategic importance of the service or facility in question in relation to the functioning of the relevant rail transport services market(s).
19. Per the Implementing Regulation, strategic importance should in particular be assessed on the basis of the level of use of the facility, the type and volume of traffic potentially impacted, and the type of services offered in the facility. However, these criteria are non-exhaustive, meaning that other factors may be taken into account as well.
20. It is apparent from the example criteria set out in the Implementing Regulation that determining a service or facility's strategic importance requires an economic approach. In other words: a service or facility may be exempted if it is deemed to be of no economic

importance to the functioning of the rail transport services market(s) for which it forms a relevant input.

21. Strategic importance in the aforementioned sense may be determined on the basis of a number of different economic criteria. These criteria should serve to identify the strategic importance of a service or facility from both a qualitative perspective (for instance: does the SFO have certain corporate affiliations which may increase the risk of market foreclosure?), as well as a quantitative perspective (for instance: is the service or facility of such a limited size and scope that it can only serve a negligible share of market demand?).
22. While some of the assessment criteria may be relevant for all of the categories of services and facilities set out in Annex II of Directive 2012/34/EU, the varied nature of those categories necessitates a further delineation of the criteria along the lines of the subcategorization set out under point 2 of Annex II of the directive. After all, the strategic importance of – for instance – a cargo terminal will be determined by different factors than the strategic importance of a refuelling facility.
23. Regulatory bodies will incorporate the relevant criteria into a case-by-case approach to exemption requests. They may decide (insofar as quantitative criteria are involved) to formulate generally applicable thresholds that could be used as indicators.
24. The variations in terms of size and scope of the various national railway markets preclude IRG-Rail from determining quantitative thresholds that may be applied in all member states. Such generally applicable thresholds would risk over- or understating the strategic importance of services and facilities in member states whose railway markets deviate significantly from the European average. Therefore, it is up to the national regulatory bodies to determine appropriate levels for the indicative thresholds for their own member state, when thresholds are applied.
25. A request for an exemption on the basis of the “no strategic importance”-ground should be duly substantiated by the SFO. Any request will call for a thorough assessment by the national regulatory body.
26. Since strategic importance is a multifaceted concept, it is generally not sufficient to base the assessment on only one criterion. As a general principle, regulatory bodies will usually have to take multiple criteria into account in order to properly determine the (lack of) strategic importance of a particular service or facility. From this respect, regulatory bodies may choose to make use of bandwidths rather than fixed thresholds when it comes to determining the level of the relevant quantitative parameters.

27. Taking into account the considerations set out in paragraphs 19-22, IRG-Rail identifies the following assessment criteria that can be used to determine strategic importance for the functioning of the rail transport services market:

General	<ul style="list-style-type: none"> • Corporate affiliation between the SFO and one or more railway undertakings • Annual turnover of the service or facility • Market share of the service or facility • Level of capacity utilization • Number of, and reason for, access requests that have been denied in the last three years • Existence of other service facility operators within the service facility • For <u>freight</u>: proximity to a European Rail Freight Corridor • For <u>passengers</u>: relevance of the facility for existing Public Service Obligations • The service facility is connected to a line or network with non-standard technical characteristics • The service facility is connected to infrastructure that is exempted under article 2(4) of Directive 2012/34/EU
Passenger stations	<ul style="list-style-type: none"> • Number of train tracks • Number of train stops • Number of passengers
Freight terminals	<ul style="list-style-type: none"> • Volume of transshipment, for instance in TEU and/or tons • Number of trains
Marshalling yards/train formation facilities	<ul style="list-style-type: none"> • Volume of traffic • Number or length of train tracks
Storage sidings	<ul style="list-style-type: none"> • Number or Length of track
Maintenance facilities	<ul style="list-style-type: none"> • No additional criteria
Other technical facilities	<ul style="list-style-type: none"> • No additional criteria
Relief facilities	<ul style="list-style-type: none"> • No additional criteria
Refuelling facilities	<ul style="list-style-type: none"> • Volume of fuel supplied (in litres)
Port facilities⁷	<ul style="list-style-type: none"> • Volume of inter or multimodal (rail-ship) transshipment, for instance in TEU and/or tons • Number of trains

⁷ Service facilities within a Port should be assessed according to the type of service facility, e.g. marshalling yard, storage sidings or fuelling facility within the port.

b. The “competitive market environment”-ground

28. According to the text of the Implementing Regulation, a facility or service may be exempted on the basis of this ground if it fulfils the following conditions:
- The facility or service is operated or provided in a competitive market environment;
 - There is a variety of competitors providing comparable services active on the market in question.
29. Services can only be considered to be part of one and the same market if there is a sufficient degree of substitution between those services. This, in turn, requires those services to be comparable.
30. In order to determine whether an individual service or facility is operated in an environment that is sufficiently competitive to warrant an exemption under the Implementing Regulation, regulatory bodies must take into account the following three factors:
- Substitutability;
 - Relevant geographic area;
 - Level of competition.
31. These concepts are also applied in the assessment of markets in the context of EU competition law. This does not mean, however, that regulatory bodies must carry out a full market analysis as is conducted in competition law in order to assess a request for exemption under the “competitive market environment”-ground. Taking into account the scope and purpose of exemptions on the basis of article 2 (2) of the Implementing Regulation, a full market analysis may be regarded as disproportionate.

Substitutability

32. The starting point of an assessment is to determine which substitutes might be available to the applicant's customers. Other services or facilities will only be able to exert competitive pressure on the applicant if they can be regarded as a substitute for the applicant's service or facility, i.e. if they are similar enough to allow customers to switch to the other service or facility. For example, a terminal specialised in dry bulk is unlikely to be considered a competitor of a terminal specialised in containers, due to the different nature of their equipment. Though both are terminals, their services are unlikely to be considered interchangeable by their customers.

Geographic area

33. Substitutability is not only determined by the comparability of services and facilities, but also by the distance separating them. A service facility will only be able to exert competitive pressure on another facility if both facilities are located such that customers are able to switch between them. The range within which customers are willing and able to travel, will depend on the type of service or facility being assessed.
34. In assessing the relevant geographic area, regulatory bodies should not just pay attention to the nature of the service, but should also take into account the relevant characteristics

of the rail network to which the applicant facility is connected. Service facilities on technically different networks are unlikely to be direct competitors. In some instances, technical factors may also provide boundaries to markets. For example, neighbouring or joined networks may have different power systems. National borders may sometimes coincide with or mark different types of power supplies, or even related regulatory requirements. In this context, particular attention should be paid to international rail freight corridors (RFC) that have been set up to facilitate intra-EU train paths.

Level of competition

35. Taking into account the nature of the applicant's service facility and the geographic area relevant for the services provided in that facility, the national regulatory body may next determine whether a competitive environment exists in the relevant market. In particular, the Implementing Regulation requires that there must be a variety of competitors on the relevant market. In markets characterised by high entry barriers, incentives to tacit collusion should be taken into consideration. Therefore, it is reasonable to suggest that an applicant will only be able to qualify for an exemption if there are alternative service facilities available, that are operated by at least two companies. A service facility that only competes with one nearby service facility is unlikely to be considered as operating in a competitive environment.
36. Generally, the number of competitors alone will not fully reflect the level of competition in a market. Other factors may also play a role, such as the (relative) size of the competing companies, the possibilities for market entry, and the market power of companies on the demand side of the market. Such factors may be taken into account by the regulatory bodies insofar as they consider them necessary and/or relevant for their assessment.
37. In addition to the number of competitors, IRG-Rail suggests choosing from the following criteria to determine the level of competition:
 - The relative size of competing facilities, in terms of market share or revenue;
 - Available capacity;
 - Possibilities for market entry;
 - Possibilities for expansion of capacity;
 - Countervailing buyer power.

c. The “negative impact on the market”-ground

38. While the first two grounds for exemption require an assessment of the nature of the service or facility or the market it operates in, the third exemption clause refers to the Implementing Regulation itself in stating that an exemption can be granted for “*service facilities or services where application of this Regulation could negatively impact the functioning of the service facility market.*”
39. According to article 291 (2) of the Treaty on the Functioning of the European Union (TFEU), an implementing regulation can only set out uniform conditions for the implementation of legal obligations that are already part of the directive on which it is based. As a result, the obligations that follow from the directive in question – in this case:

Directive 2012/34/EU – remain applicable even if an exemption from the Implementing Regulation is granted. Therefore, any negative impact in the sense of the “negative impact on the market”-ground must stem from the specific manner in which the Implementing Regulation implements the obligations that follow from Directive 2012/34/EU, and not from those obligations themselves.

40. Since an exemption may only be granted in case of negative effects which affect not just a single SFO, but the service facility market which the SFO operates in ,the area of application for this exemption ground appears to be small. Except for the example given in recital 2 of the Implementing Regulation, no other examples are known to the regulatory bodies of situations in which the negative impact-ground may successfully be invoked.
41. Any applicant requesting an exemption under this clause would therefore be required to state exactly which provision or provisions of the Implementing Regulation would have such a negative impact on the relevant service facility market(s), in order to enable the regulatory bodies to decide on a case by case basis.