



***Regulatory Body for Railway
Transport and Brussels Airport
Operations***

Decision D-2021-03-S regarding the rail passenger service

“Brussels South– Innsbruck Hbf”

1. Object and legal basis

Article 62, § 3, subparagraph 1, 5°, of the Railway Code¹ gives the Regulatory Body for Railway Transport and for Brussels Airport Operations (hereafter the “Regulatory Body”) the authority to determine whether the exercise of the right of access referred to in Article 5, 3°, of the Railway Code would jeopardise the economic equilibrium of a public service contract when this right of access is exercised on the same route as that of the relevant public service contract or on an alternative route.

Article 4.4 of Implementing Regulation 2018/1795² lists the parties that must be notified of a planned new rail passenger service, namely:

- any competent authority that has awarded a public service contract on that route or an alternative route, being in Belgium the Minister as referred to in Article 3, 38°, of the Railway Code;
- any railway undertaking operating services under public service contract on the route of the new rail passenger service or an alternative route, being in Belgium the SNCB/NMBS;
- any other competent authority with the right to limit access under Article 11 of Directive 2012/34/EU, being in Belgium no entity.

Pursuant to these two provisions, the Regulatory Body checks whether a notified intention to operate a rail passenger service falls within the scope of the economic equilibrium procedure.

2. The notified new rail passenger service

On 15 April 2021, the applicant “OSTENDE VIENNE ORIENT EXPERIENCE” (hereinafter referred to as “OVOE”) notified the Regulatory Body by email, with completed application form, of its intention to start a new rail passenger service.

This notified rail passenger service covers the routes listed below with a frequency of once a week during the period from 17 December 2021 (first outward journey) to 5 March 2022 (last return journey):

- Brussels-South – Antwerpen-Berchem – Roosendaal – Breda – Eindhoven CS – Venlo – Salzburg Hbf – Bischofshofen – Schwarzach St. Veit – Zell am See – Saalfelden – St. Johann in Tirol – Kitzbühel – Kirchberg in Tirol – Wörgl Hbf – Jenbach – Innsbruck Hbf.

¹ The Law on the Railway Code of 30 August 2013. This Article 62, § 3, subparagraph 1, 5° is the transposition into national law of Article 11, § 2, of Directive 2012/34/EU of the European Parliament and of the Council of 21 November 2012 establishing a single European railway area.

² Commission Implementing Regulation (EU) 2018/1795 of 20 November 2018 laying down procedure and criteria for the application of the economic equilibrium test pursuant to Article 11 of Directive 2012/34/EU of the European Parliament and of the Council.

- Innsbruck Hbf – Jenbach – Wörgl Hbf – Kirchberg in Tirol – Kitzbühel – St. Johann in Tirol – Saalfelden – Zell am See – Schwarzach St. Veit – Bischofshofen – Salzburg Hbf – Venlo – Eindhoven CS – Breda – Roosendaal – Antwerpen-Berchem – Brussels-South.

(Hereinafter referred to as “the notified rail passenger service”)

On 22 April 2021, OVOE clarified, by email, to the Regulatory Body that the notified rail passenger service for both the outward and the return journey on its route does not allow passengers to:

- board at a Belgian station or in Roosendaal; and
- disembark at another Belgian station or in Roosendaal.

3. Economic equilibrium analysis

In order to determine whether a notified new rail passenger service falls within the scope of the economic equilibrium procedure as referred to in Articles 31 and 62, § 3, subparagraph 1, 5°, of the Railway Code, and in Implementing Regulation 2018/1795, the Regulatory Body examines whether the conditions for this are met, namely:

- The notified rail passenger service shall cover the same or an alternative route as described in a public service contract;
- The notified rail passenger service shall be a new rail passenger service as referred to in the definition in Article 3.1 of the Implementing Regulation;
- The notifying party shall be an applicant.

Where appropriate, pursuant to Article 4.4 of the Implementing Regulation, the regulatory body shall publish on its website the notification form and shall notify the three parties mentioned above.

Pursuant to Article 62, § 3, subparagraph 1, 5°, of the Railway Code, and Articles 2 and 4.4 of Implementing Regulation 2018/1795, a condition for application of the economic equilibrium regime is that the new rail passenger service shall cover the same or an alternative route as one or more public service contracts.

The communication with OVOE explicitly shows that on the notified new route, passengers are not allowed to board at a Belgian station³ and to disembark at another Belgian station: *“We can confirm that, for the requested train service, passengers boarding at a Belgian station will indeed NOT be allowed, for the outward journey, to disembark at another Belgian station or in Roosendaal. For the return journey, no*

³ “Belgian station” is understood here as one of all domestic stops supplemented by all border point stops as defined in the second assignment of the management contract 2008-2012 currently in force between the Belgian State and the SNCB/NMBS concerning cross-border passenger transport by regular service trains, in particular Articles 24 and 25.

passengers boarding in Roosendaal or at another Belgian station will be allowed to disembark at another Belgian station. Therefore, tickets in this sense will not be available."⁴ (free translation).

On the basis of this information, the Regulatory Body concludes that the Bruxelles-Midi/Brussel-Zuid to Innsbruck Hbf route, including the proposed stops, does not cover the same route as in the SNCB/NMBS public service contract or an alternative route. The same observation can be made for the Innsbruck Hbf – Bruxelles-Midi/Brussel-Zuid route, including proposed stops.

As this condition is not met, the other conditions do not need to be further examined.

The Regulatory Body therefore concludes that the notified new rail passenger service does not fall within the scope of Article 62, § 3, subparagraph 1, 5°, of the Railway Code, and of the procedure provided for in Implementing Regulation 2018/1795.

4. Decision

Having regard to the notified rail passenger service;

Having regard to the above economic equilibrium analysis.

The Regulatory Body decides that the notified rail passenger service does not fall within the scope of the legislation on the economic equilibrium.

Access to the network provided for in Article 5, § 1, of the Railway Code is therefore not limited for this notified rail passenger service.

5. Possibility of appeal

Pursuant to Article 221/2 of the Railway Code, the parties concerned have the possibility to lodge an appeal against this decision before the Brussels Market Court. In order to be valid, the appeal must be lodged at the latest 30 days after notification of this decision.

The appeal has no suspensive effect, except with regard to decisions in which the Regulatory Body has imposed an administrative fine pursuant to Articles 63, § 3 and 64 of the Railway Code, or when the Court pronounces the suspension of the contested decision.

⁴ Email from OVOE to the Regulatory Body on 22 April 2021 (16:43)

The Judicial Code shall apply as regards proceedings, and the Market Court shall rule as in summary proceedings.

Done in Brussels, on **26 April 2021**

For the Regulatory Body for Railway Transport and for Brussels Airport Operations,

Serge DRUGMAND

Director