



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

Decision D-2021-04-S on determining the reasonable time limit within which responses must be provided to requests by railway undertakings for access to service facilities and rail-related services

Contents

- 1. Subject 3
- 2. Facts and background 3
- 3. Legal basis 4
- 4. Analysis 6
 - 4.1. Time limits proposed in the Draft Decision 7
 - 4.2. Operators' reactions to the Draft Decision 8
 - 4.2.1. SNCB/NMBS's views and evaluation by the Regulatory Body 8
 - 4.2.2. Infrabel's views and evaluation by the Regulatory Body 13
 - 4.3. Determining the time limit for sending an acknowledgement of receipt 18
 - 4.4. Determining the reasonable time limit for responding to access requests 19
 - 4.4.1. Reasonable time limit for ad hoc access requests 19
 - 4.4.2. Reasonable time limit for all other access requests 20
 - A. Scope 20
 - B. Determining the reasonable time limit 21
- 5. Decision 24
- 6. Possibility of appeal 26

1. Subject

1. Article 9, Section 4 of the Belgian Act of 30 August 2013 on the Railway Code (hereinafter "the Railway Code") states that railway undertakings' requests for access to, and supply of services in the service facilities referred to in Annex 1, point 2 of the Railway Code shall be answered within a reasonable time limit determined by the regulatory body.
2. By decision D-2016-05-S¹, the Regulatory Body for Railway Transport and for Brussels Airport Operations (hereinafter "the Regulatory Body") had, on the basis of that provision, already set a reasonable time limit within which a response must be provided to railway undertakings' requests for access to and supply of services in passenger stations.
3. The European Commission Implementing Regulation (EU) 2017/2177 of 22 November 2017 on access to service facilities and rail-related services² (hereinafter "the Implementing Regulation") has been in force since 1 June 2019. With regard to determining the reasonable time limit for responding to access requests, Article 9 of the Implementing Regulation extended and defined the competence of the Regulatory Body on the subject matter.
4. The purpose of this decision is to establish the reasonable time limit referred to in Article 9 Section 4 of the Railway Code and in Article 9 of the Implementing Regulation for responding to requests for access to service facilities and rail-related services. It will also be examined whether it is still appropriate to maintain the reasonable time limit set by decision D-2016-05-S for passenger stations.

2. Facts and background

5. In late April 2021, the Regulatory Body sent email invitations to certain service facility operators and to several railway undertakings, with the intention of holding information sessions with these parties regarding the timescales in which requests for access to service facilities and services are currently being processed and responded to.
6. During May 2021, the Regulatory Body held discussions on this specific topic with the operators of service facilities that accepted its invitation. During these meetings, they were

¹ Decision D-2016-05-S "determining the reasonable time limit within which responses must be provided to railway undertakings' requests for access to, and supply of services in passenger stations", www.regul.be.

² OJ L 307, 23.11.2017, p. 1–13.

asked about the response times they already apply and what, if any, altered time limits would be feasible. In the same month, a meeting was also held with one interested freight transporter to obtain information on its experiences and expectations regarding the response time for requests to access service facilities and services set up by its railway undertaking.

7. Between 4 August and 15 September 2021, a public consultation was organised via the website of the Regulatory Body on its proposal for a decision (hereinafter the “Draft Decision”) regarding the reasonable time limit within which responses must be provided to requests for access to service facilities and rail-related services. All interested parties in the railway sector were invited to respond to this consultation.
8. On 7 September 2021, the Regulatory Body received the written reaction from SNCB/NMBS. The Regulatory Body received the written reaction from Infrabel on 15 September. The views of these parties are now incorporated and evaluated by the Regulatory Body in this decision. Arguments that are accepted by the Regulatory Body are taken into account for the determination of the final reasonable time limit.

3. Legal basis

9. Article 9, Section 4 of the Belgian Railway Code states that:

"Railway undertakings' requests for access to, and supply of services referred to in the service facility referred to in Annex 1, point 2 of the Railway Code shall be answered within a reasonable time limit determined by the regulatory body. (...)"

10. Article 2bis of the Belgian Royal Decree of 25 October 2004 establishing the Regulatory Body for Railway Transport and for Brussels Airport Operations and determining its composition and the administrative and financial charter applicable to its members provides that the Regulatory Body is the regulatory body referred to in Article 9, Section 4 of the Railway Code.

11. Article 9 of the Implementing Regulation reads as follows:

"1. After receipt of all necessary information, the operator of a service facility shall respond to requests for access to and supply of services in service facilities listed in point 2 of Annex II to Directive 2012/34/EU within the reasonable time limit set by the regulatory body in accordance with Article 13(4) of Directive 2012/34/EU. Different deadlines may be set for different types of service facilities and/or services."

(...)

4. For ad hoc requests concerning access to service facilities and services listed in points (a) to (d) and (f) to (i) of point 2 of Annex II, when setting the time limits in accordance with Article 13(4) of Directive 2012/34/EU, regulatory bodies shall take into account the time limits set out in Article 48(1) of Directive 2012/34/EU. Where regulatory bodies have not defined time limits for such ad hoc requests, the operator of a service facility shall answer the request within the time limits set out in Article 48(1) of the Directive.

Where the operator of a service facility has defined an annual deadline for submitting requests for access to service facilities and rail-related services listed in points (a) to (d) and (f) to (i) of point 2 of Annex II, the time limits for answering late requests defined by the regulatory body shall take account of the time limits applied by infrastructure managers for processing such requests.

(...)

5. Operators of service facilities providing additional and ancillary services listed in points 3 and 4 of Annex II to Directive 2012/34/EU shall respond to requests for such services within the time limit set by the regulatory body or, where such a time limit has not been set, within reasonable time.

(...)”.

12. Points 2, 3 and 4 of Annex II to Directive 2012/34/EU of the European Parliament and of the Council of 21 November 2012 establishing a single European railway area³ (hereinafter "the Recast") state the following⁴:

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

(a) | passenger stations, their buildings and other facilities, including travel information display and suitable location for ticketing services;

(b) freight terminals;

(c) marshalling yards and train formation facilities, including shunting facilities;

(d) storage sidings;

³ OJ L 343, 14.12.2012, p. 32–77.

⁴ The provisions from Annex II of the Recast are included in their entirety and in the same order in Annex 1 of the Railway Code, to which Article 9, Section 4 of the Railway Code refers. Where Annex II of the Recast is used in this Decision, the corresponding provisions of Annex 1 of the Railway Code will not be referred to in order to make the text easier to read, given that they are identical.

(e) maintenance facilities, with the exception of heavy maintenance facilities dedicated to high-speed trains or to other types of rolling stock requiring specific facilities;
(f) other technical facilities, including cleaning and washing facilities;
(g) maritime and inland port facilities which are linked to rail activities;
(h) relief facilities;
(i) refuelling facilities and supply of fuel in these facilities, charges for which shall be shown on the invoices separately.

3. Additional services may comprise:

(a) traction current, charges for which shall be shown on the invoices separately from charges for using the electrical supply equipment, without prejudice to the application of Directive 2009/72/EC;

(b) pre-heating of passenger trains;

(c) tailor-made contracts for:

- control of transport of dangerous goods,*
- assistance in running abnormal trains.*

4. Ancillary services may comprise:

(a) access to telecommunication networks;

(b) provision of supplementary information;

(c) technical inspection of rolling stock;

(d) ticketing services in passenger stations;

(e) heavy maintenance services supplied in maintenance facilities dedicated to high-speed trains or to other types of rolling stock requiring specific facilities."

4. Analysis

13. The competence of the Regulatory Body to set the reasonable time limit for responding to requests for access to service facilities and services has been further expanded by the Implementing Regulation, as mentioned above. The scope of this competence is therefore no longer limited to the access requests referred to in Article 9, Section 4 of the Railway Code. Given the direct effect of the Implementing Regulation, the Regulatory Body will therefore base its analysis below mainly on the provisions of this Regulation.

14. The Regulatory Body already made a proposal for a reasonable time limit in the Draft Decision, which will be summarised below. After that, the reactions of the responding operators are presented, as well as their evaluation by the Regulatory Body. Finally, the final time limits are determined, taking into account the initial proposal of the Regulatory Body and the arguments of the operators.

4.1. Time limits proposed in the Draft Decision

15. In the Draft Decision submitted for public consultation, the Regulatory Body proposed the following reasonable time limits:

- A) *The time limit for the operator to send an acknowledgement of receipt to the applicant informing it whether or not its access request is complete shall be 5 (five) working days. If the request is incomplete, the operator shall request the missing information within this period;*
- B) *The time limit for responding to ad hoc access requests by operators of service facilities is 5 (five) working days, and this applies for the service facilities and services listed in Annex II, point 2 (a) to (d) and (f) to (i) of the Recast. If the access request is complete, the acknowledgement referred to in A) need not be sent. If the access request is incomplete, the operator shall ask for the missing information in good time to be able to respond to the ad hoc request within 5 (five) working days;*
- C) *The time limit for responding to requests for access to and for the supply of services in service facilities from point 2 of Annex II of the Recast (Article 9(1) of the Implementing Regulation in conjunction with Article 9, Section 4 of the Railway Code) is 30 (thirty) calendar days, starting from the first working day after the acknowledgement of receipt stating that the request is complete;*
- D) *The time limit for responding to late requests for access to service facilities and rail-related services listed in Annex II, point 2, points (a) to (d) and (f) to (i) of the Recast, when an annual deadline is applied (Article 9(4), paragraph two of the Implementing Regulation), is 30 (thirty) calendar days, starting from the first working day after the acknowledgement of receipt stating that the request is complete;*
- E) *The time limit for responding to requests for access to additional and ancillary services in points 3 and 4 of Annex II of the Recast (Article 9(5) of Commission Implementing Regulation) is 30 (thirty) calendar days, starting from the first working day after the acknowledgement of receipt stating that the request is complete;*
- F) *This Draft Decision entirely replaces Decision D-2016-05-S on determining the reasonable time limit within which responses must be provided to railway undertakings' requests for access to, and supply of services in passenger stations;*

G) *The time limits set in A) to E) will be evaluated further in the future by the Regulatory Body and adjusted if necessary;*

H) *Operators of service facilities shall promptly include in the description of the service facility the reasonable time limit defined above in A) to E) that applies to requests for access to their service facility(ies) and/or service(s), in accordance with Article 4(2)(f) of the Implementing Regulation.*

4.2. Operators' reactions to the Draft Decision

16. The Regulatory Body received two written reactions to the Draft Decision from operators, namely from SNCB/NMBS and Infrabel. These reactions are presented below, as well as their evaluation by the Regulatory Body.

4.2.1. SNCB/NMBS's views and evaluation by the Regulatory Body

Time limit for responding to ad hoc access requests

17. SNCB/NMBS is of the opinion that it is not possible to respond to an ad hoc request within 5 working days if an access request is incomplete and the applicant only provides the missing information at the end of this time limit:

“NMBS merkt op dat het voor de exploitant onmogelijk is om systematisch nog diezelfde dag toegang te verlenen tot de dienstvoorziening als de aanvrager de ontbrekende informatie pas aanlevert op het einde van deze termijn van vijf werkdagen. Artikel 9.1 van de Uitvoeringsverordening bepaalt dat de redelijke termijn begint te lopen “na ontvangst van alle nodige informatie”. Een reële termijn van enkele uren is niet meer redelijk.”

Free translation:

“SNCB/NMBS notes that it is impossible for the operator to systematically provide access to the service facility on the same day if the applicant only provides the missing information at the end of this time limit of five working days. Article 9(1) of the Implementing Regulation states that the reasonable time limit starts “after receipt of all necessary information”. A real time limit of a few hours is no longer reasonable.”

18. In view of Article 9(1) of the Implementation Regulation, SNCB/NMBS can be followed on this point: if the file is not complete, the time limit of 5 working days for responding to the ad hoc access request starts only from the receipt of the requested information. In accordance with Article 8(3) of the Implementing Regulation, the operator shall set the deadline for submitting the missing information.

Time limit for responding to all other access requests

19. SNCB/NMBS points out that during the proposed response time of 30 calendar days, additional questions are asked to the railway undertaking, which could necessitate a suspension of this response time:

“De gedetailleerde analyse door de operationele diensten (bv. onderzoek van alle technische specificaties) kan niet gebeuren binnen de vijf werkdagen, voorzien voor het versturen van een ontvangstbevestiging naar de aanvrager. Tijdens de antwoordtermijn van dertig kalenderdagen zullen bijkomende vragen voor verduidelijking gesteld worden. Deze antwoordtermijn is slechts realistisch als de aanvrager de uitstaande vragen (bv. bijkomende technische details) snel beantwoordt. NMBS stelt daarom voor om deze beslissing aan te vullen met volgende zin: “Tijdens deze termijn beantwoordt de aanvrager de vragen om verduidelijking binnen de twee werkdagen. Indien de aanvrager het antwoord niet binnen deze periode levert, wordt de antwoordtermijn tijdelijk geschorst tot levering van het antwoord aan de exploitant van de dienstvoorziening.””

Free translation:

“The detailed analysis by the operational services (e.g. examination of all technical specifications) cannot take place within the five working days specified for sending an acknowledgement of receipt to the applicant. Additional questions for clarification will be asked during the 30 calendar day response time. This response time is only realistic if the applicant quickly answers the outstanding questions (e.g. additional technical details). SNCB/NMBS therefore proposes to supplement this decision with the following sentence: “During this time limit, the applicant shall answer the questions for clarification within two working days. If the applicant does not provide the answers within this period, the response time shall be temporarily suspended until the answers are provided to the operator of the service facility.”

20. The Regulatory Body is, on the basis of the provisions of Article 9 of the Implementing Regulation, only authorised to set the response times for the operators of service facilities. Operators determine themselves the time limit within which applicants must provide the missing information in order to be able to respond to access requests. The Regulatory Body is of the opinion that in the assumption whereby a railway undertaking does not provide information in time during the period of 30 calendar days, one can reason in the same way as for the sending of the acknowledgement of receipt. Article 8(3) of the Implementing Regulation stipulates in that case that the access request may be rejected. This should be a sufficient incentive for the railway undertaking to react in a timely manner; therefore, a suspension of the reasonable time limit is not necessary.

21. However, the Regulatory Body also wishes to emphasise that it is of great importance that operators of service facilities already include in their description document all the necessary

data that must be sent to them by railway undertakings in order to be able to respond to an access request. It may be inferred from Article 8(3) of the Implementing Regulation that an access request is only complete if it a) contains all the information required in accordance with the service facility description, and b) contains all the information necessary to take a decision. Operators should therefore endeavour through their description document that access requests are as complete as possible at the time of their submission. If this is not the case, the operator must set a reasonable deadline in the acknowledgement of receipt for submitting the missing information. Until then, the application file is incomplete and the 30 calendar day processing period does not start yet.

22. Therefore, there is in principle no reason for the operator to have to request during the 30 calendar day period new information that could be decisive for responding to the access request. The operator should have already listed this information in the description document or, if the file was incomplete, requested it when sending the acknowledgement of receipt. During the 30 calendar day period, the operator may still request specific details for matters already submitted in the access request, but only for the purpose of clarifying these matters. By encouraging railway undertakings to submit all the determining information for processing an access request, including the technical details, before the actual processing time limit of 30 calendar days (either via the description document or via the acknowledgement of receipt indicating that the file is still incomplete), this time limit can be fully used for the analysis and final response to the request. In this case, this time limit should not be suspended or delayed by additional requests for information that should have been obtained in advance.

23. The above elements may also address SNCB/NMBS's concern that the proposed 30 calendar day time limit for responding to requests for access to certain complex infrastructures would be too short:

“De termijn van 30 kalenderdagen is voor bepaalde complexe aanvragen bijzonder kort. (...) NMBS pleit daarom voor het behoud van de antwoordtermijn van 3 maanden voor 4 types van complexe infrastructuren: de Channel en Intra-Schengen Terminal, Brussel Airport Zaventem en de aanvragen voor loketten en ticketautomaten (basisdiensten) en de toegang tot stations voor logistieke of cateringdoeleinden (= aanvullende dienst).”

Free translation:

“The time limit of 30 calendar days is extremely short for certain complex requests. (...) SNCB/NMBS therefore pleads for maintaining the response time of 3 months for 4 types of complex infrastructures: the Channel and Intra-Schengen Terminal, Brussels Airport Zaventem

and the requests for ticket offices and ticket machines (basic services) and the access to stations for logistic or catering purposes (= additional service)."

24. Since the analysis of requests for this type of service facilities and services can indeed be more complex, the Regulatory Body considers that in this case it is even more important that all the information necessary to respond to access requests is submitted in advance by railway undertakings. The responsibility here lies with the operator to develop and detail its description document as much as necessary in function of the data it deems necessary to analyse the access request during the 30 calendar day response time. If crucial information is still missing in the access request, the file remains incomplete until the operator has obtained this information within the reasonable deadline it has determined.
25. In addition, allowing a different time limit of 3 months for certain service facilities and/or services would create too great a divergence from the reasonable time limits applied in the other Member States. This could distort competition on the market and the level playing field between operators.
26. Therefore, the Regulatory Body currently sees no reason to provide for a response time of 3 months for the service facilities and services mentioned by SNCB/NMBS. However, the reasonable time limits determined will be re-evaluated by the Regulatory Body within two years.

Time limit for responding to late requests

27. SNCB/NMBS has the following objection to the fact that late requests should be answered within the same time limit as requests made within the annual calendar:

"Wanneer echter de aanvragers de garantie genieten dat hun laattijdige aanvragen binnen dezelfde antwoordtermijn als aanvragen voor de gepubliceerde deadline beantwoord worden, zal elke prikkel wegvallen voor het respecteren van de jaarlijkse termijn."

Free translation:

"However, if applicants are guaranteed that their late requests will be answered within the same response time as requests made before the published deadline, any incentive to respect the annual deadline will disappear."

28. The Regulatory Body is of the opinion that railway undertakings submitting their access request within the annual calendar are in a more favourable position than those submitting late requests, even if the response time for these requests would be the same. Indeed, the late applicant can only be allocated the remaining available capacity. If it requests capacity

that has already been allocated, a coordination procedure must be carried out in accordance with Article 10(1) of the Implementing Regulation. This article states that any modification of access rights already granted shall be subject to the agreement of the applicant concerned. Moreover, the operator may set out priority criteria in its description document in the event of conflicting requests. One of the possible priority criteria for this is “the timely submission of requests” (Article 11, last indent, of the Implementing Regulation).

29. Thus, the use of an annual calendar for the submission of access requests does create an incentive for railway undertakings. By submitting access requests within the time limit set by the operator, they will be able to avoid the risk of missing out on desired local capacity. There is therefore no reason to provide for a longer response time for late requests.

Immediate inclusion in the description of the service facility

30. SNCB/NMBS also requests to delay the immediate inclusion of the reasonable time limits proposed by the Regulatory Body in the description documents:

“Een onmiddellijke aanpassing van de referentiedocumenten is voor NMBS onmogelijk, omdat de teksten pas aangepast kunnen worden na publicatie van de Beslissing van de Dienst Regulering en goedgekeurd dienen te worden door de bestuursorganen van NMBS. Principieel stelt zich echter ook een probleem van juridische zekerheid. Verschillende spoorwegondernemingen staan op het punt om bv. hun aanvraag voor toegang tot de stations (...). NMBS stelt op basis van deze overwegingen voor om de nieuwe termijnen te laten ingaan voor de referentiedocumenten voor het dienstregelingsjaar 2023 die in het voorjaar van 2022 zullen gepubliceerd worden.”

Free translation:

“An immediate adaptation of the reference documents is impossible for SNCB/NMBS, because the texts can only be adapted after publication of the Decision of the Regulatory Body, and have to be approved by the management bodies of SNCB/NMBS. In principle, however, there is also a problem of legal certainty. Several railway undertakings are about to submit their request for access to the stations, for example (...). Based on these considerations, SNCB/NMBS proposes that the new time limits apply to the reference documents for the 2023 timetable year, which will be published in spring 2022.”

31. The Regulatory Body does not see any obstacle with regard to legal certainty on the part of the railway undertakings, and this because reduced response times play to their advantage, and therefore there can be no impairment of their legitimate interests. In addition, the decisions of the Regulatory Body are not subject to the internal approval of SNCB/NMBS in order to be binding for all operators of service facilities. Therefore, there is no compelling reason to wait until the 2023 timetable year to make the adjustments. However, the

Regulatory Body may assume that some time is needed from an organisational point of view to amend the reference documents. Therefore, a time margin of 60 working days starting from the publication of this decision in the Belgian Official Gazette will be provided for to make the necessary adjustments to the description documents.

4.2.2. Infrabel's views and evaluation by the Regulatory Body

Time limit for sending an acknowledgement of receipt

32. Infrabel argues that the 5 working day time limit for sending an acknowledgement of receipt would be too short if it has to analyse the content of the access request in detail:

“Infrabel est en mesure d’appliquer le délai d’envoi de l’accusé de réception de 5 jours ouvrables, dans la mesure où les informations à vérifier se limitent aux coordonnées du demandeur, à la date de la demande et à la forme de la demande (par exemple, la présence du formulaire de demande adéquat dans l’e-mail). Si Infrabel doit analyser davantage le contenu et s’assurer de l’exactitude de la demande, alors l’expérience montre que les 5 jours ouvrables ne sont pas suffisants.”

Free translation:

“Infrabel may apply the 5 working day time limit for sending the acknowledgement of receipt, provided that the information to be verified is limited to the applicant's contact details, the date of the request, and the form of the request (e.g. the presence of the correct request form in the email). If Infrabel needs to further analyse the content and ensure the correctness of the request, 5 working days are not enough, as shown by experience.”

33. The acknowledgement of receipt should indicate to the applicant whether its file is complete or not. Article 8(3) of the Implementing Regulation states that an access request is only complete if it a) contains all the information required in accordance with the service facility description, and b) contains all the information necessary to take a decision. The operator shall determine in its description document what data it needs in order to be able to finally process an access request. An acknowledgement of receipt can be sent within a relatively short time, because the completeness of the information submitted can be quickly verified using, for example, a checklist. If the information received by the operator in the access request is insufficient, the file is still incomplete, and the operator should mention it in the acknowledgement of receipt and request the missing information.

34. The information received by the operator, either in the access request or following an acknowledgement of receipt indicating that the file is still incomplete, is analysed only during

the 30 calendar day time limit for processing the request. During this period, the operator can still request additional clarifications from the railway undertaking.

Time limit for responding to requests for access to service facilities and services listed in Annex II, point 2 of the Recast

35. Infrabel requests a response time of 30 working days for this type of access requests:

“Au niveau du délai pour répondre aux demandes d'accès, un délai de 30 jours civils est par expérience parfois trop court pour pouvoir traiter les nombreuses demandes, surtout celles entraînant une procédure de coordination. Un délai de 30 jours ouvrables conviendrait dès lors davantage à Infrabel. (...) Afin de permettre à Infrabel de traiter les demandes concurrentes via une procédure de coordination (tel que prévu à l'article 10 du règlement 2017/2177), il est essentiel que le délai pour répondre aux demandes coure à partir du même jour pour toutes les entreprises ferroviaires. En effet, si ce délai court dès le jour suivant l'accusé de réception, et que cet accusé de réception n'est pas envoyé le même jour pour l'ensemble des demandes, Infrabel ne sera pas en mesure de traiter les demandes concurrentes via une procédure de coordination, et devra attribuer l'accès selon le principe First In First Served.”

Free translation:

“As regards the time limit for responding to access requests, experience shows that 30 calendar days are sometimes too short to process the many requests, especially those that lead to a coordination procedure. A time limit of 30 working days would therefore be more appropriate for Infrabel. (...) In order for Infrabel to be able to process competing requests through a coordination procedure (as provided for in Article 10 of Regulation 2017/2177), it is essential that the time limit for responding to requests starts on the same day for all railway undertakings. If this time limit starts on the day following the acknowledgement of receipt, and this acknowledgement of receipt is not sent for all requests on the same day, Infrabel cannot process the competing requests through a coordination procedure and must allocate access in accordance with the principle First In First Served.”

36. Article 10(1) of the Implementing Regulation states that “Where an operator of a service facility listed in point 2 of Annex II to Directive 2012/34/EU receives a request for access to the service facility or supply of a service that is in conflict with another request or concerns service facility capacity already allocated, it shall attempt, through discussion and coordination with the applicants concerned, to ensure the best possible matching of all requests.”⁵ This text indicates that a coordination procedure does not necessarily concern pending capacity requests. Coordination procedures can be carried out in the event of conflicts between new access requests and access requests for which capacity was allocated and which have thus already been processed. Infrabel’s reasoning, according to which it is

⁵ In the same sense: recital 14 of the Implementing Regulation.

necessary to synchronise the processing time of different access requests with a view to possible coordination procedures, cannot therefore be followed.

37. In addition, since the Regulatory Body opted in the Draft Decision for one and the same time limit for all types of access requests from Article 9 of the Implementing Regulation, the provision of paragraph 4, subparagraph 2 of this Article should be observed. It states that, as regards late requests, the time limits applied by infrastructure managers for processing late requests for train paths should be taken into account. Pursuant to Article 36 of the Railway Code, these requests have to be answered within a time limit not exceeding one month. However, setting the reasonable time limit at 30 working days would mean a longer time limit than the time limit of one month provided for in Article 36 of the Railway Code.

38. Infrabel does not give any other reason than the coordination procedure argument why a different time limit of 30 working days should be set for responding to access requests from Annex II, point 2 of the Recast.

Time limit for responding to requests for additional services

39. Infrabel provides the additional service “traction current” referred to in Annex II, point 3, a), of the Recast via the product “YourPower”, which in the Network Statement is split into “supply of traction current” on the one hand and “other transport and distribution services for traction current supply” on the other hand.

40. As regards the supply of traction current, Infrabel requests the Regulatory Body to confirm that:

“Si la décision du Service de Régulation entraîne qu’il suffise qu’Infrabel réponde dans les 30 jours civils à l’entreprise ferroviaire (qui lui communiquerait son intention par e-mail) qu’Infrabel accepte d’être son fournisseur en courant de traction, un délai de réponse de 30 jours civils est acceptable pour Infrabel.”

Free translation:

“If the decision of the Regulatory Body means that it is sufficient for Infrabel to respond to the railway undertaking (which would inform Infrabel of its intention by email) within 30 calendar days that Infrabel accepts to be its supplier of traction current, then a response time of 30 calendar days is acceptable to Infrabel.”

41. As regards the other transport and distribution services for traction current supply, Infrabel requests the Regulatory Body to confirm that:

“Ce service est obligatoire pour toute entreprise ferroviaire désirant circuler avec des trains électriques. Si la décision du Service de Régulation entraîne qu’il suffise qu’Infrabel réponde dans les 30 jours civils à l’entreprise ferroviaire (qui lui communiquerait son intention par e-mail) qu’elle sera - sous réserve de toutes les conditions applicables - autorisée à circuler avec des trains électriques, un délai de réponse de 30 jours civils est acceptable pour Infrabel.”

Free translation:

“This service is compulsory for each railway undertaking that wants to run electric trains. If the decision of the Regulatory Body means that it is sufficient for Infrabel to respond to the railway undertaking (which would inform Infrabel of its intention by email) within 30 calendar days that it is allowed - subject to all applicable conditions - to run electric trains, then a response time of 30 calendar days is acceptable to Infrabel.”

42. The Regulatory Body can confirm both assumptions, and this in view of Article 9(5) of the Implementing Regulation, which states that a response shall be given within the reasonable time limit to a request for an additional service. The fact that Infrabel confirms to the railway undertaking within 30 calendar days that it can provide these additional services is sufficient.
43. Moreover, Infrabel provides the additional service “assistance in running abnormal trains” referred to in Annex II, point 3, c), 2nd indent, of the Recast through the product “YourXXL”. It specifies the following about the response to the requests for such services:

“La grande majorité des réponses d’Infrabel aux demandes d’études préalables à l’autorisation d’un transport exceptionnel se font dans les 5 jours ouvrables. Le délai de 30 jours civils préconisé par le Service de Régulation est donc acceptable par Infrabel. En revanche, parmi lesdites études, certaines nécessitent des analyses longues et complexes, dont la réponse ne peut être garantie dans les 30 jours civils. Pour ce type d’étude complexes, Infrabel demande au Service de Régulation qu’un délai plus long soit autorisé (60 jours civils).”

Free translation:

“The vast majority of Infrabel’s responses to requests for studies prior to the authorisation for exceptional transport are made within 5 working days. The 30 calendar day time limit recommended by the Regulatory Body is therefore acceptable to Infrabel. On the other hand, some studies require lengthy and complex analyses, for which a response cannot be guaranteed within 30 calendar days. For complex studies of this kind, Infrabel asks the Regulatory Body for a longer time limit (60 calendar days).”

44. It can be observed that Infrabel does not explain why certain transports require longer and/or additional studies that cannot be carried out within 30 calendar days. When carrying out feasibility studies on the different types of exceptional transport, the infrastructure manager is expected to have an inventory of infrastructure items that have an impact on this

exceptional transport, including their dimensions and technical characteristics. In principle, therefore, such aspects should not be re-examined each time.

45. Since Infrabel offers no further justification in this regard, there is no reason to extend the proposed time limit of 30 calendar days. However, the Regulatory Body will re-evaluate the stipulated reasonable time limits within two years.

Time limit for responding to requests for ancillary services

46. Finally, Infrabel requests a longer time limit for the “technical inspection of rolling stock” ancillary service referred to in Annex II, point 4, c), of the Recast, which it offers via the product “YourTechnicalControl”:

“Lorsqu’Infrabel reçoit une demande de contrôle technique pour le matériel roulant, elle contacte le demandeur dans les jours qui suivent la demande pour fixer un rendez-vous pour le contrôle technique. Le contrôle et la délivrance de l’attestation se font en général dans les 30 jours civils qui suivent la demande. Le délai de 30 jours civils préconisé par le Service de Régulation est donc acceptable par Infrabel. En revanche, tout comme pour les études préalables à la circulation d’un transport exceptionnel, certaines nécessitent des analyses longues et complexes, dont la réponse ne peut être garantie dans les 30 jours civils. En général, il s’agit du premier contrôle technique du véhicule (...) Pour ce type d’étude complexes, Infrabel demande au Service de Régulation qu’un délai plus long soit autorisé (60 jours civils).”

Free translation:

“When Infrabel receives a request for a technical inspection of rolling stock, it contacts the applicant in the days following the request to make an appointment for the technical inspection. The inspection and the issuance of the certificate are usually done within 30 calendar days after the request. The 30 calendar day time limit recommended by the Regulatory Body is therefore acceptable to Infrabel. On the other hand, as in the case of the studies preceding an exceptional transport operation, some studies require lengthy and complex analyses, for which a response cannot be guaranteed within 30 calendar days. In general, this is the case with the first technical inspection of the vehicle (...) For complex studies of this kind, Infrabel asks the Regulatory Body for a longer time limit (60 calendar days).”

47. According to Article 9(5) of the Implementing Regulation, a response shall be given within the reasonable time limit to a request for an ancillary service. Therefore, this does not mean that the ancillary service has to be carried out within the reasonable time limit, as Infrabel maintains. In other words, the technical inspection can also take place after the 30 calendar days, as long as the railway undertaking has received confirmation within this time limit that Infrabel will carry out the inspection. Providing a longer response time of 60 days is therefore not necessary in this case.

Immediate inclusion in the service facility description

48. Infrabel also requests a transition period to be able to adapt its description documents to the reasonable time limits set by the Regulatory Body:

“Infrabel demande au Service de Régulation de prévoir un délai raisonnable endéans lequel les exploitants d’installations de service et fournisseurs de service doivent adapter leur(s) description(s) d’installations(s) de service à compter de la décision du Service de Régulation (par exemple, 60 jours civils). Ce délai permettrait à Infrabel d’informer au préalable les entreprises ferroviaires avant la publication du document de référence du réseau / des descriptions d’installations de service adaptés.”

Free translation:

“Infrabel requests the Regulatory Body to provide for a reasonable time limit within which operators of service facilities and service providers must adapt their description(s) of the service facility(ies) as of the decision of the Body (e.g. 60 calendar days). This time limit would allow Infrabel to inform the railway undertakings in advance of the publication of the adapted network statement/ descriptions of service facilities.”

49. The Regulatory Body can agree with this and will therefore provide for a time margin of 60 working days from the publication of this decision in the Belgian Official Gazette to make the necessary adjustments to the description documents.

4.3. Determining the time limit for sending an acknowledgement of receipt

50. Article 8(3) of the Implementing Regulation requires that operators of service facilities acknowledge receipt of any request for access to service facilities and rail-related services "without undue delay". The Article also states that where the request does not contain all the information that is required on the basis of the service facility description and necessary for taking a decision, the operator of a service facility shall inform the applicant of this and set a reasonable deadline for providing the missing information. If such information is not submitted by that deadline, the request may be rejected.

51. Article 4(f) of the Implementing Regulation stipulates in this sense that the service facility description must contain information on the minimum content requirements and procedures for requesting access to the service facilities and rail-related services. It is therefore up to the operator of a service facility to decide what information it needs in advance of responding to an access request. This means that, in the first instance, when receiving an access request, it will check whether it has all the necessary information to be able to respond to the request. If not, it will request the missing information from the applicant.

52. Since the reasonable time limit for responding to access requests only starts to run once the operator has all the necessary information⁶, the Regulatory Body considers that a time limit should also be set for sending the acknowledgement of receipt referred to in Article 8(3), informing the applicant of whether its request is complete or not. This allows the applicant to know within a limited period of time what the status of its case is.

53. The Regulatory Body therefore proposes that the time limit for sending an acknowledgement of receipt to the applicant informing it whether or not its access request is complete be 5 (five) working days. If the request is incomplete, the operator will request the missing information within this period.

4.4. Determining the reasonable time limit for responding to access requests

54. An operator receiving a request for access to its service facility and/or a request for the supply of a service in that service facility may either grant or refuse the request. If access to a service facility or service is granted, the operator will prepare an offer.⁷ The situations in which a request for access may be refused are provided for in Article 13 of the Implementing Regulation. As the conditions for granting and refusing access fall outside the scope of this decision, it will not be further elaborated on.

4.4.1. Reasonable time limit for ad hoc access requests

55. Article 9(4), paragraph one of the Implementing Regulation states the following:

"For ad hoc requests concerning access to service facilities and services listed in points (a) to (d) and (f) to (i) of point 2 of Annex II, when setting the time limits in accordance with Article 13(4) of Directive 2012/34/EU, regulatory bodies shall take into account the time limits set out in Article 48(1) of Directive 2012/34/EU. Where regulatory bodies have not defined time limits for such ad hoc requests, the operator of a service facility shall answer the request within the time limits set out in Article 48(1) of the Directive."

56. Article 3(10) of the Implementing Regulation defines an "ad hoc request" as "a request for access to a service facility or a rail-related service that is linked to an ad hoc path request for an individual train path referred to in Article 48(1) of Directive 2012/34/EU".

⁶ Article 9(1) of the Implementing Regulation therefore provides that the reasonable time limit begins to run "after receipt of all necessary information".

⁷ See Article 9(2) of the Implementing Regulation.

57. Article 48(1) of the Recast states that the infrastructure manager shall respond to ad hoc requests for individual train paths as quickly as possible, and in any event within five working days.
58. Considering that the time limit of five working days from Article 48(1) of the Recast should be taken into account for determining the reasonable time limit on the basis of paragraph one of Article 9(4) of the Implementing Regulation, **the Regulatory Body sets the reasonable time limit for responding to ad hoc access requests by operators of service facilities at 5 (five) working days, and this applies for the service facilities and services listed in Annex II, point 2, in a) to d) and f) to i) of the Recast.**
59. Given that ad hoc access requests must already be answered within five working days, this time limit overlaps with the time limit for sending an acknowledgement of receipt stipulated in section 4.1. The Regulatory Body holds the view that this acknowledgement of receipt is not opportune in case of ad hoc requests if the access request is *complete*. However, if any information is missing from the application, the operator shall request this information via the acknowledgement of receipt and reply to the access request within 5 working days after the request is supplemented.

4.4.2. Reasonable time limit for all other access requests

A. Scope

60. Article 9(1) of the Implementing Regulation states that, after receipt of all necessary information, **operators of a service facility shall respond to requests for access to and supply of services in service facilities listed in point 2 of Annex II to Directive 2012/34/EU** within the reasonable time limit set by the regulatory body in accordance with Article 13(4) of Directive 2012/34/EU.⁸ Different deadlines may be set for different types of service facilities and/or services on the basis of this provision.
61. Article 9(4), paragraph two of the Implementing Regulation also provides that, where the operator of a service facility has defined an **annual deadline for submitting requests for access to service facilities and rail-related services listed in points (a) to (d) and (f) to (i) of point 2 of Annex II**, the time limits for answering **late requests** defined by the regulatory body

⁸ Article 13(4) Directive 2012/34/EU, which was transposed into Article 9, Section 4 of the Railway Code, reads as follows: "*Requests by railway undertakings for access to, and supply of services in, the service facility referred to in point 2 of Annex II shall be answered within a reasonable time limit set by the regulatory body referred to in Article 55.*" The Article goes on to define the conditions under which requests can be refused.

shall take account of the time limits applied by infrastructure managers for processing such requests.

62. Finally, Article 9(5) of the Implementing Regulation states that operators of service facilities providing **additional and ancillary services** listed in points 3 and 4 of Annex II to Directive 2012/34/EU shall respond to requests for such services within the time limit set by the regulatory body or, where such a time limit has not been set, within reasonable time.
63. By virtue of the above provisions, the Regulatory Body will determine below the reasonable time limit for responding to:
- requests for access to and supply of services in service facilities listed in point 2 of Annex II of the Recast;
 - late requests for access to service facilities and rail-related services listed in Annex II, point 2, points (a) to (d) and (f) to (i) of the Recast, if an annual deadline is applied;
 - requests for access to the additional and ancillary services set out in points 3 and 4 of Annex II of the Recast.

B. Determining the reasonable time limit

64. The Regulatory Body initially considered whether it would be useful to set different time limits for the different types of service facilities and/or services listed in point 2 of Annex II of the Recast, a possibility provided for in Article 9(1) of the Implementing Regulation.
65. In doing so, the Regulatory Body has reached the conclusion that, in view of the wide range of active operators on the market, a time limit adapted to the type of service facility and/or service would be too complicated, both for the operators themselves and for the railway undertakings. Furthermore, the Implementing Regulation itself already provides for a derogation for access requests that relate to maintenance facilities and the services provided in these facilities. Such requests may indeed benefit from a longer response time. For this reason, Article 9(4), paragraph three and 9(5), paragraph two of the Implementing Regulation provide that, for maintenance facilities⁹ and ancillary heavy maintenance services dedicated to high-speed trains¹⁰, the reasonable time limit shall only start once technical compatibility of the rolling stock with the facilities and the equipment has been assessed and the applicant has been informed thereof.

⁹ See Annex II, point 2(e) of the Recast.

¹⁰ See Annex II, point 4(e) of the Recast.

66. Even after the public consultation, the Regulatory Body sees no reason to permit further derogations for other service facilities and/or services covered by point 2 of Annex II of the Recast, including for passenger stations. In this regard, the Regulatory Body holds the view that the distinction made in decision D-2016-05-S between simple and complex requests, whereby the latter were assigned a separate response time, is no longer necessary or desirable.
67. It also considers that there is no evidence to support an adapted response time for access requests for additional and ancillary services.
- 68. The reasonable time limit that will be set below will therefore apply to all service facilities and services listed in Annex II, points 2, 3 and 4 of the Recast.**
69. In a second stage, the Regulatory Body checked what reasonable time limit has already been fixed by other European regulatory bodies. A comparative benchmark published by IRG-Rail¹¹ in 2018 shows that the reasonable time limit in other countries varies between ten working days and one month.¹² It is the exception rather than the rule for other regulatory bodies to allow a longer period. The benchmark also shows that the reasonable time limit applies to all service facilities and/or services in most cases.
70. The Regulatory Body holds the view that the reasonable time limit that will apply to Belgian service facilities and services must be in line with the time limits within which foreign operators are required to respond to access requests. If European operators are required to respond to access requests within a more or less similar time frame, this may increase competitiveness and the level playing field between these players on the one hand, while on the other hand, this aspect could lead to a wider choice of service providers for railway undertakings if the response time is an important factor in their choice of service provider.
71. In addition, operators of service facilities can now be expected to respond quickly and efficiently to railway undertakings and to take an active role in the market in question. These aspects will become all the more important in the near future, in view of the increasing volume within European rail transport. After all, Europe's aim is to increase freight traffic by 50% by 2030 and to double it by 2050, and also to double high-speed transport by 2030 and

¹¹ Independent Regulators' Group – Rail

¹² "Report on time limits set in the Member States for answering requests by railway undertakings for access to, and supply of services in the service facility pursuant to Article 13(4) of Directive 2012/34/EU", <https://www.irg-rail.eu/irg/documents/position-papers/199,2018.html>.

triple it by 2050.¹³ Service facility operators will need to be able to meet increasing industry demand under these rapidly changing economic conditions. The modal shift can only be achieved if the rail infrastructure is supported by a network of service facilities whose operations are up to date and adequate.

72. The consultation and the reactions following the public consultation showed that some service facility operators are able to respond to relatively simple access requests within just a few days. For certain service facilities and/or services being offered, a longer time frame would be required in practice.

73. Since the Regulatory Body will not make any distinction between the different types of service facilities and services, a compromise needs to be found that is feasible for all operators while meeting the expectations of the railway undertakings. The Regulatory Body considers that a very short time limit as used in the UK, for example, is currently not realistic or desirable for all service facilities and services. An exceptionally long period of three months, as is currently the case for complex access requests for passenger stations, is also inappropriate in this respect.

74. In addition, the time limit for late requests¹⁴ set out in Article 9(4), paragraph two of the Implementing Regulation must be taken into account if the operator of a service facility defines an annual deadline for the submission of requests. According to this legal provision, the infrastructure manager's time limits for late path requests must be taken into account in this case. Pursuant to Article 36 of the Railway Code, these requests must be answered within a period not exceeding one month.

75. In the light of all the above considerations, the Regulatory Body sets the reasonable time limit for responding to

- **requests for access to and supply of services in service facilities listed in point 2 of Annex II of the Recast (Article 9(1) of the Implementing Regulation in conjunction with Article 9, Section 4 of the Railway Code);**
- **late requests for access to service facilities and rail-related services listed in Annex II, point 2, points (a) to (d) and (f) to (i) of the Recast, if an annual deadline is applied (Article 9(4), paragraph two of the Implementing Regulation);**

¹³Objectives from the European Commission's "Sustainable and Smart Mobility Strategy", <https://ec.europa.eu/transport/sites/default/files/legislation/com20200789.pdf>.

¹⁴ Article 3(11) of the Implementing Regulation defines a "late request" as "a request for access to a service facility or a rail related service submitted after the expiry of a deadline for submitting requests defined by the operator of the facility in question".

- requests for access to the additional and ancillary services set out in points 3 and 4 of Annex II of the Recast (Article 9(5) of the Implementing Regulation);

at 30 (thirty) calendar days, starting from the first working day following the acknowledgement of receipt stating that the request is complete.

5. Decision

Having regard to Article 9, Section 4, of the Railway Code, and Article 9 of the Implementing Regulation, which authorise the Regulatory Body to set the reasonable time limit within which requests by railway undertakings for access to service facilities and rail-related services must be answered;

Having regard to the information obtained by the Regulatory Body during its consultation with service facility operators and railway undertakings;

Having regard to the written reactions from SNCB/NMBS and Infrabel following the public consultation on this subject and their evaluation by the Regulatory Body;

In view of the fact that no reaction to the public consultation was received from other operators;

Whereas, in taking this decision, the provisions of Article 65, paragraph 2, of the Railway Code were taken into account;

The Regulatory Body determines the reasonable time limit as follows:

- A) The time limit for the operator to send an acknowledgement of receipt to the applicant informing it whether or not its access request is complete shall be 5 (five) working days. If the request is incomplete, the operator shall request the missing information within this period;**
- B) The time limit for responding to ad hoc access requests by operators of service facilities is 5 (five) working days, and this applies for the service facilities and services listed in Annex II, point 2 (a) to (d) and (f) to (i) of the Recast. If the access request is complete, the acknowledgement referred to in A) need not be sent. If the access request is incomplete, the operator shall ask for the missing information via the acknowledgement of receipt referred to in A) to be able to respond to the ad hoc request within 5 (five) working days after the request is supplemented;**
- C) The time limit for responding to requests for access to and for the supply of services in service facilities from point 2 of Annex II of the Recast (Article 9(1) of the Implementing Regulation in conjunction with Article 9, Section 4 of the Railway Code) is 30 (thirty)**

calendar days, starting from the first working day after the acknowledgement of receipt stating that the request is complete;

- D) The time limit for responding to late requests for access to service facilities and rail-related services listed in Annex II, point 2, points (a) to (d) and (f) to (i) of the Recast, when an annual deadline is applied (Article 9(4), paragraph two of the Implementing Regulation), is 30 (thirty) calendar days, starting from the first working day after the acknowledgement of receipt stating that the request is complete;
- E) The time limit for responding to requests for access to additional and ancillary services in points 3 and 4 of Annex II of the Recast (Article 9(5) of Commission Implementing Regulation) is 30 (thirty) calendar days, starting from the first working day after the acknowledgement of receipt stating that the request is complete;

The Regulatory Body furthermore determines that

- F) This Draft Decision entirely replaces Decision D-2016-05-S on determining the reasonable time limit within which responses must be provided to railway undertakings' requests for access to, and supply of services in passenger stations;
- G) The time limits set in A) to E) will be evaluated within 2 years.
- H) Operators of service facilities shall include in the description of the service facility the reasonable time limit defined above in A) to E) that applies to requests for access to their service facility(ies) and/or service(s) within 60 working days as of the publication of this decision in the Belgian Official Gazette, in accordance with Article 4(2)(f) of the Implementing Regulation.

6. Possibility of appeal

This decision of the Regulatory Body can be appealed at the Council of State, Administrative Case-law Division, according to Article 14, paragraph 1, of the Coordinated Acts on the Council of State. The application for annulment is sent to the Registry of the Council of State, Wetenschapsstraat 33 Rue de la Science, 1040 Brussels, either by registered mail or by using the electronic procedure on the website of the Council of State.

If the application is sent by registered mail, the original application always has to be accompanied by three certified copies and a supplementary copy for each opposing party.

The actions for annulment must be lodged within a period of sixty days after publication, notification, or noticing of the decision.

Each applicant must pay a fee of 200 euros within a term of 30 days.

Done in Brussels, on 25 November 2021,

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

Serge DRUGMAND

Director