



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

**Communication C-2022-01-SC of 13 July 2022**

**Guidelines for the Notification of a New Rail Passenger Service  
within the Framework of the Economic Equilibrium Test Procedure**

## 1. Introduction

Article 10.2 of Directive 2012/34<sup>1</sup>, modified by Directive 2016/2370<sup>2</sup>, states: *“Without prejudice to Regulation (EC) No 1370/2007, railway undertakings shall be granted, under equitable, non-discriminatory and transparent conditions, the right of access to railway infrastructure in all Member States for the purpose of operating rail passenger services. Railway undertakings shall have the right to pick up passengers at any station and set them down at another. That right shall include access to infrastructure connecting service facilities referred to in point 2 of Annex II to this Directive.”*

Article 11 of the Directive provides the option for Member States to restrict the access of a new rail passenger service if it would compromise the economic equilibrium of public service contracts.

The Act of 11 January 2019 amending the Railway Code transposed these provisions into Belgian law. Article 5.1 of the Railway Code<sup>3</sup>, concerning access to the Belgian network, was adapted as follows: *“Have access to the railway infrastructure under equitable, non-discriminatory and transparent conditions: [...] 3° any railway undertaking established in a Member State of the European Union, for the operation of passenger transport services. That right shall include access to infrastructure connecting service facilities referred to in point 2 of Annex I.”*

In accordance with Article 31 of the Railway Code, modified by the same legislative amendment of 11 January 2019, when an applicant intends to request infrastructure capacity with a view to operating a new passenger service, it shall notify the infrastructure manager and the Regulatory Body **at least eighteen months** before the entry into force of the working timetable to which the request for capacity relates. This notification requirement ensures that it can be checked as to whether this service would compromise the economic equilibrium of the public service contracts.

Article 3 of the Implementing Regulation (EU) 2018/1795<sup>4</sup> defines the term a “new rail passenger service” as *“a rail passenger service designed to be operated as a regular time-tabled service, that is either entirely new, or that implies a substantial modification of an existing rail passenger*

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<sup>1</sup> Directive 2012/34/EU of the European Parliament and of the Council of 21 November 2012 establishing a single European railway area.

<sup>2</sup> Directive (EU) 2016/2370 of the European Parliament and of the Council of 14 December 2016 amending Directive 2012/34/EU as regards the opening of the market for domestic passenger transport services by rail and the governance of the railway infrastructure.

<sup>3</sup> Act of 30 August 2013 on the Railway Code (hereafter “Railway Code”).

<sup>4</sup> 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 (hereafter “Implementing Regulation (EU) 2018/1795”).

*service, in particular in terms of increased frequencies of services or increased number of stops, and which is not provided under a public service contract”.*

The requirement to notify such a “new rail passenger service” in advance implies, besides a publicity of the market players’ intentions that can be harmful for competition, an administrative burden for the applicants. The mandatory notification period of 18 months also limits the possibility of making commercial and operational changes at short notice in order to optimise a service, expand it or take advantage of market opportunities.

Through the present Guidelines, the Regulatory Body wishes to clarify the cases where a notification must, or must not, be submitted, and thus facilitate access to the market.

These Guidelines may be re-evaluated by the Regulatory Body, notably upon changes to the public service contracts or the regulatory framework.

## **2. What rail passenger services are covered by the notification requirement?**

Are you an applicant planning to offer a new rail passenger service in Belgium? If so, you must notify this to the Regulatory Body.

In accordance with Article 31 of the Railway Code and with the Implementing Regulation (EU) 2018/1795, this notification must be made no less than 18 months before the entry into force of the working timetable to which the request for capacity relates, by sending to [info@regul.be](mailto:info@regul.be) the notification form available on the [website of the Regulatory Body](#).

In accordance with the Railway Code and with the Implementing Regulation (EU) 2018/1795, the rail passenger services that must be notified are those that meet all four of the following conditions:

- 1) They are not provided under a public service contract;
- 2) They are regularly time-tabled;
- 3) They are new in the sense that:
  - They are either entirely new; or
  - They imply a substantial modification of an existing service;

- 4) And they are going through the Belgian network and operating at least a connection:
- between two Belgian stops,
  - between two of the following border stops: Aachen, Lille, Luxembourg, Troisvierges, Rodange, Maastricht, Roosendaal,<sup>5</sup> or
  - between a Belgian stop and a border stop.

A number of cases are exempt from the economic equilibrium test procedure and the submission of the notification form because they do not meet these 4 conditions and thus they fall outside the scope of the economic equilibrium test regime regarding the Belgian railway network. These cases are listed below.

### **3. The exempt cases**

The Regulatory Body wishes to clarify the procedure and thus facilitate access to the market by informing the applicants as to the cases for which no notification is required regarding the Belgian railway network. These cases, listed below, have been identified by the Regulatory Body based on the current public service contract and the regulatory framework, these being: the Railway Code and the Implementing Regulation (EU) 2018/1795.

#### **3.1. Case 1: The planned service does not concern the Belgian territory.**

This is a rail passenger service that does not go through the Belgian territory.

Example: A Maastricht-Aachen connection where the route only goes through the Dutch and German territories.

#### **3.2. Case 2: The railway undertaking performing the public service contract wishes to offer a new service covered by the public service contract.**

SNCB wishes to launch a new service or modify an existing service within the framework of its tasks as provided for in the public service contract.

Example: SNCB, within the framework of the public service contract, increases the number of frequencies on the Brussels-Ghent line.

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<sup>5</sup> Border stops as defined in management contract between Belgian State and SNCB 2008-2012: article 24 cross-border traffic. These stops are hereafter called "border stops".

**3.3. Case 3: The planned service does not relate to a route that is covered by the public service contract, nor to an alternative route.**

In this case, the applicant wishes to launch or change a new passenger transport service that is not included in the public service contract.

Example: The direct Brussels-Paris connection is not included in the current public service contract.

**3.4. Case 4: The planned service does not engage in cabotage and thus does not include at least a boarding stop and a disembarkation stop in Belgium or at the border stops.**

A new passenger transport service that does not engage in cabotage does not concern a route covered by the public service contract or an alternative route, and cannot compromise the economic equilibrium of the public service contract of SNCB. It does not include domestic passenger transport services<sup>6</sup>.

Example 1: The connection Ghent-Brussels-Paris where the passengers who board in Ghent are not allowed to disembark in Brussels, so that no domestic passenger transport takes place. Both the stop in Ghent and the one in Brussels are boarding stops only.

Example 2: The connection Paris-Brussels-Ghent where the passengers from Paris may disembark in Brussels and Ghent, but no passengers are allowed to board in Brussels headed for Ghent, so that no domestic passenger transport takes place. Both the stop in Ghent and the one in Brussels are disembarkation stops only.

Exemple 3: The connection Brussels-Paris does not include domestic passenger transport.

**3.5. Case 5: The planned service is not a regular time-tabled service.**

The Regulatory Body considers that “regular time-tabled service” means train routes that are operated for a period of at least 4 months<sup>7</sup> according to a scheduled service (cadence)<sup>8</sup>.

Irregular services and service scheduled for less than 4 months on an annual basis are exempt from notification.

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<sup>6</sup> The notions of “cabotage” and of “domestic service” used here include the border stops.

<sup>7</sup> Regular timetable: The Regulatory Body considers a scheduled service to be a regular timetable from 4 months.

<sup>8</sup> A scheduled service is a service with a fixed and regular time schedule such as, for example: every Saturday at 9am the train leaves at stop X along the same route, or every weekday at 1pm the train leaves at stop X along the same route, etc.

**Example 1 - Scheduled service for less than 4 months:** Applicant X wishes to introduce a ski train with a fixed Brussels-Innsbruck scheduled service between 21 December 202(Y-1) and 21 March 202(Y). The service in question lasts less than 4 months and thus no notification is required.

**Example 2 - The planned service is not a scheduled service:** Applicant X wishes to provide a daily passenger transport service between Ghent and Brussels in which the train's departure time constantly varies and no fixed pattern (read: cadence) can be found. No notification is required for this service.

### **3.6. Case 6: An existing service undergoes a change that is not substantial.**

In accordance with Recital 7 of the Implementing Regulation (EU) 2018/1795, "*[a]n increase in frequency or number of stops may be considered a significant change. An adjustment of tariffs is not a significant change unless that adjustment deviates from normal market behaviour and, if relevant, from the business plan submitted to the regulatory body for the purpose of the previous economic equilibrium analysis*".

**3.6.1. Any modification to an existing service that did not fall within the scope of the economic equilibrium test regime that makes the service now fall within that scope is a substantial modification and must be notified.**

For example, a rail passenger service between Paris and Brussels, which is an exempted case as explained above (case 3), is changed by the addition of a stop in Mons, where passengers may embark and disembark. This modification makes the service fall within the scope of the economic equilibrium test regime since the Mons-Brussels connection is covered by the public service contract. This modification is thus substantial and must be notified to the Regulatory Body within the provided deadline.

Outside of this hypothesis, it is the applicant that must evaluate in first instance if a planned modification of an existing service is substantial or not, without prejudice to the Regulatory Body's *a posteriori* assessment.

Applicants are however advised to get in touch with the Regulatory Body at the slightest doubt.

**3.6.2.** The Regulatory Body considers that the following modifications are **NOT substantial**:

- Adjustment of rates in line with business plan;
- A limited increase in frequency;
- Reduction of frequencies or of the number of coaches;
- Limited addition of stops without changing the nature of the train service (slow train, intercity train, etc.). This concerns:
  - a maximum of 4 stops, each with fewer than 500 boarding passengers on the day of the stop (see SNCB passenger count figures);
  - a maximum of one stop, with more than 500 but fewer than 2,500 boarding passengers on the day of the stop (see SNCB passenger count figures);
- Suppression of stops without changing the characteristics of the service (slow train, intercity train, etc.);
- Increase of the number of coaches by less than 50%;
- Etc.

**3.6.3.** The Regulatory Body considers that the following modifications are **substantial** when they concern the whole duration of the timetable:

- Commercial reorientation of the train, e.g. from night train aimed at international transport, to day train aimed at national transport;
- A substantial increase in frequency(ies);
- Shift of the route from off-peak to peak;
- Addition of one stop with more than 2,500 boarding passengers on the day of the stop (see SNCB passenger count figures);
- Addition of more than 4 stops with fewer than 500 boarding passengers (see SNCB passenger count figures);
- Etc.

**4. Particular case: The planned service does not fall within the application period of an existing public service contract on the same route or on an alternative route, and no public service contract on the same route or on an alternative route is being competitively tendered.**

If the planned new service does not fall under any of the aforementioned exemptions but relates to a period for which there is not yet a public service contract in place or in the process of being competitively tendered, the planned new service cannot compromise the economic equilibrium of this still non-existent public service contract.

A notification is, in that case, required, and is in the applicant's interest considering the necessity to give the notification a definite date. However, no request for a test can succeed.

Example: Applicant X indicates its intention to request capacity for a connection on route Y that will be launched in 3 years. The public service contract covering this route expires in 1 year and no future public service contract on that route or on an alternative route is being competitively tendered. The applicant must notify the Regulatory Body of this service.

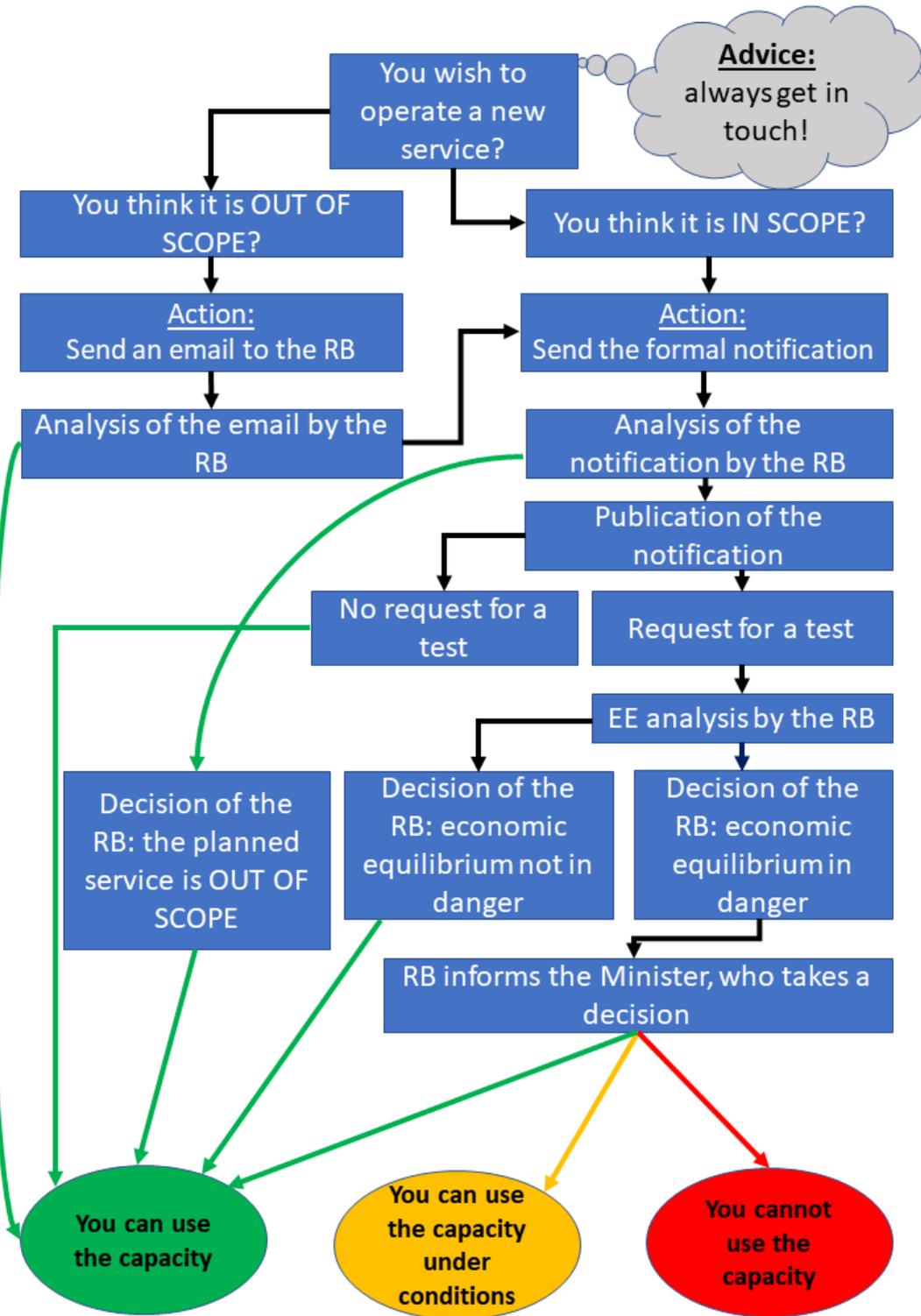
## **5. Sanction for failing to notify**

It is the applicant's responsibility to decide whether or not to submit a notification depending on whether it considers the new service it plans to operate as falling within or outside the scope of the economic equilibrium test regime. Applicants are, however, strongly advised to notify or get in touch with the Regulatory Body at the slightest doubt.

**Failing to notify, or to notify within the provided deadline, a new service that is required to be notified could have for consequence that the applicant's access to the railway network is denied, even, if need be, after the applicant has started to operate the new service.**

Indeed, if the required notification has not been made within the provided deadline, the entities listed in Article 62, § 3, par. 1, 5°, of the Railway Code are entitled, in accordance with that Article, to request an economic equilibrium test within one month from the moment when they receive, by any means, the information that the applicant intend to operate a new service. An economic equilibrium test procedure could thus be started, on the basis of such a request, after the timeframe provided when such procedure starts with a notification within the provided deadline. The procedure could even, in certain cases, be started after the applicant has started to operate the new service.

6. Schematic overview of the procedure to be followed: flow diagram



## 7. Explanation of the flow diagram

**The applicant wishes to operate a service:** At this point, the applicant must make its own evaluation as to whether its service falls under the economic equilibrium regime's notification requirement. To make this evaluation, it can take into account the exemption cases listed in these guidelines.

1. **The applicant considers that the service is out of scope:** The applicant is advised to inform the Regulatory Body (“RB”) by e-mail at [info@regul.be](mailto:info@regul.be).
  - If it should become apparent that an official notification is required, the Regulatory Body will tell the applicant.
  - If an official notification is not required, the regulatory Body will confirm this to the applicant, who will be able to use the capacity.
2. **The applicant considers that the service is within scope:** The applicant needs to submit the official notification form. This can be found on the Regulatory Body website: <https://www.regul.be/en/rail-transport/> (Economic equilibrium section).
3. **The Regulatory Body will assess whether the notified service falls within the scope of the economic equilibrium test regime.**
  - **If NOT:** The Regulatory Body will make a decision that the planned service does not fall within the scope of the economic equilibrium test procedure. **END of procedure: The applicant can make use of the capacity.**
  - **If SO:** Within 10 days, the Regulatory Body will publish the notification and give notice of it to the parties who may request a test. These will have 1 month to request an economic equilibrium test:
    - **If no request for a test is made within 1 month: END of procedure: The applicant can make use of the capacity.**
    - **If a request for a test is made within 1 month, the Regulatory Body will conduct the test and make a decision:**
      - **The economic equilibrium is not compromised: END of procedure: The applicant can make use of the capacity.**
      - **The economic equilibrium would be compromised:** The Regulatory Body informs the Minister of this and **the Minister can make three possible decisions:**
        - The Minister does not limit the applicant’s access: the applicant can make use of the capacity.
        - The Minister limits the applicant’s access by imposing conditions (by royal decree): the applicant can make use of the capacity provided that the conditions imposed are respected.
        - The Minister refuses access (by royal decree): the applicant cannot make use of the capacity.