Report on the activities 2014

Railways Arbitration Commission (RACO)

Schweizerische Eidgenossenschaft
Confédération suisse
Confederazione Svizzera
Confederaziun svizra

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Railways Arbitration Commission

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Foreword

The Railways Arbitration Commission (RACO) is the independent and active supervisory authority for rail transport: since the conclusion of the Land Transport Agreement between Switzerland and the European Union it has been supervising non-discriminatory access to the rail network. This gives the regulatory body a function in terms of competition: all railway undertakings (RUs) are entitled to access to the rail network and thus to the rail transport market under equivalent technical and economic conditions.

In the 2014 reporting year RACO was able to exercise the new competencies it received in mid-2013. The year was thus also characterised by an intensive search process for its new focus. Since RACO arbitrates on disputes concerning access to the rail network and also carries out ex officio investigations, the development of these investigative competencies deserves the Commission's full attention.

Here, RACO must balance its statutory mandate and its claim not to hinder competition between traffic participants through additional regulatory stipulations but has to provide fair and transparent access to the network. In the coming years the search for appropriate means of ensuring non-discrimination will continue to demand attention.

Internationally, the Commission has noticed a slowly developing regulatory practice and cooperation between the different countries. It participated actively in developing the freight corridors 1 and 2 and supports the creation of a European railway market. Even if constituting these Corridors will still take some time, RACO takes its commitment here seriously.

In the reporting year, the Commission carried out two investigations, concluding one of them with a decree that discriminatory behaviour was indeed the case, and ordering corresponding measures.

Overall it can be stated that this activities are also highly respected by the stakeholders, which are clearly pursuing concerns that may generate controversy.

The Commission therefore attaches considerable importance to professional competent, uniform and transparent practice, which must be further strengthened over the years to come.

My personal thanks goes to all – Commission members, secretariat and authorities – who have supported RACO in these challenging tasks, and who will continue to do so in the future.

Patrizia Danioth Halter
Chair

The Railways Arbitration Commission (RACO)

The Railways Arbitration Commission (RACO) has been in existence since 1 January 2000 as an extraparliamentary committee. It was set up as part of Railway Reform 1 to monitor non-discriminatory access to the Swiss rail network and to adjudicate in cases where this is disputed. Administratively it comes under the General Secretariat of the Department of the Environment, Transport, Energy and Communications (DETEC).

Essentially, RACO has three functions:

- As a tribunal for adjudicating in disputes over non-discriminatory access to the rail network. Since Railway Reform 2.2 came into force on 1 July 2013 it has been able to initiate ex officio proceedings where discrimination is suspected.
- As a market supervisory authority (ex ante) it actively monitors the market, in order to ensure non-discrimination.
- Within the scope of international cooperations it monitors the decisions of infrastructure managers along the European freight Corridors 1 (Rhine-Alpine) and 2 (North Sea-Mediterranean). It is also a member of the Independent Regulators Group (IRG-Rail) and an observer in the European Network of Rail Regulatory Bodies (ENRRB).

RACO sees itself as the qualified, competent, effective and proactive supervisory authority for non-discriminatory access to the rail network. In this function it makes a substantial contribution to the high quality of the Swiss rail system. It works to ensure that the conditions for fair competition on the rail network are adhered to and not circumvented.

Core tasks

RACO's tasks are laid down in Art. 40a^{bis} of the Railways Act (RailA) and in the Railways Arbitration Commission Regulations. Essentially there are three tasks:

- Monitoring and ensuring non-discriminatory access to the rail network, through appeals, legal complaints and ex officio investigations.
- Market monitoring.
- International cooperations: coordination of regulatory bodies along freight Corridors 1 (Rhine-Alpine) and 2 (North Sea-Mediterranean), ENRRB and IRG-Rail.

"RACO makes sure companies comply with the conditions for fair competition on the rail network"

Werner Grossen, Member RACO

Task	Content
1. Ensuring non-discriminatory access to the rail network	Monitoring or ruling on disputes concerning • network access conditions in accordance with the Network Statement. • train path and infrastructure prices . • network access agreements between infrastructure managers and railway undertakings . • bidding procedures in accordance with Art. 12 of the Rail Network Access Ordinance (RailNAO). • international decisions by infrastructure managers and C-OSS (One-Stop-Shop of the European freight corridors). RACO monitors non-discriminatory train path allocation by the infrastructure managers SBB, BLS and SOB, and by Trasse Schweiz AG since it was founded in 2006.
2. Market and discrimination monitoring	• RACO is responsible for monitoring competition in access to the network, and this requires the currently relevant potentials for discrimination to be identified. • RACO is supported in this supervisory task by the Institute for Transport Planning and Systems (IVT) at the ETH Zurich.
3. International cooperations	• Coordination with the regulatory bodies along Corridors 1 (Rhine-Alpine) and 2 (North Sea-Mediterranean). • Maintaining active contact with the European regulatory authorities as part of ENRRB and IRG-Rail.

International Engagement

Freight Corridors 1 (Rhine-Alpine) and 2 (North Sea-Mediterranean)

In its Regulation 913/2010 "concerning a European Rail Network for Competitive Freight", the EU created nine European freight transport corridors. These serve the international transport of freight by rail and, where it concerns Switzerland, supports the mandate, anchored in the Federal Constitution, to transfer goods from road to rail.

Switzerland is affected by two of these Corridors:

- Corridor 1: Rhine-Alpine (Zeebrugge/Antwerp/Rotterdam – Gotthard /Lötschberg – Genoa);
- Corridor 2: North Sea-Mediterranean (Rotterdam/Antwerp – Luxembourg – Metz – Dijon – Lyon/Basel).

Switzerland establishes, maintains and operates the stretch that is decisive for the functioning of these Corridors. In both Corridors, connection to important transhipment facilities such as seaports, inland ports, intermodal terminals and large marshalling yards, must be ensured. This is particularly relevant to the Rhine port at Basel and the Muttenz marshalling yard.

Corridor One-Stop-Shop

Instead of a national allocation of train paths, a single body now allocates train paths internationally on the entire freight corridor, Corridor One-Stop-Shop (C-OSS). However, it only allocates train paths offered by the national train path allocation bodies, referred to as pre-arranged train paths.

C-OSS decisions can be legally appealed. The regulatory body of the country in which the C-OSS has its headquarters has the authority to decide. For Corridor 1 this is the Bundesnetzagentur in Bonn, and for Corridor 2 the Institut Luxembourgeois de Régulation in Luxembourg. Appeals to the national regulatory body can only be made if the complaints apply to a single national territory. On the basis of EU Regulation 913/2010, the regulatory authorities of Corridors 1 and 2 – those of Belgium, Luxembourg, Germany, Italy, the Netherlands and France – have produced cooperation agreements regulating jurisdiction and cooperation in cases of appeals, as well as supervisory duties.

In place of a cooperation agreement, Switzerland has a Letter of Intent that ensures smooth cooperation in appeals procedures. This in turn ensures the non-discriminatory functioning of the freight corridors from Switzerland's side as well.

RACO participates in the coordinatory meetings of the regulatory bodies along freight corridors 1 (Rhine-Alpine) and 2 (North Sea-Mediterranean).

The Swiss rail network

With a track length of 5,121 km (as of 2010, source SFSO) over an area of 41,285 km², Switzerland has one of the densest rail networks in the world. Rail transport forms the backbone of public transport and is vital for national and international freight transport.

An overview of the key figures:

Person kilometres	19.3 billion [1]
Net transalpine tonne-km	23.65 billion [1]
Net non-transalpine tonne-km	9.7 billion [1]
Number of train paths per year	14,449 [2]
Number of normal-gauge railways	189 [3]
Number of RUs involved in transit	5 [4]

Sources:

[1] As of 2012, source: SFSO.

[2] These 14,449 train paths are distributed between 24 freight and passenger transport clients who made train path applications to Trasse Schweiz AG in April 2014 to use the networks of the SBB, BLS and the Südostbahn for the 2015 annual timetable. Fifteen RUs are running on infrastructure not belonging to them (6 passenger and 9 freight companies), and 7 RUs run only on their own infrastructure (all of them passenger companies).

[3] As of 2014, source: FOT TU Directory.

[4] SAs of 2012, source: VÖV.

The railway network supervised by RACO.

(Quelle: Trasse Schweiz AG; ©SBB Relief: ©DHM25/SRTM-DTED® swisstopo/NASA, NGA (JA062250))

Activities in the reporting year

Ex officio investigations

a) Energy price (flat-rate tariff) in the List of Infrastructure Services

BLS Cargo AG requested RACO to investigate a possible discrimination in the application of the flat rate in accordance with the List of Infrastructure Services published by the SBB, BLS Netz, SOB, Thurbo, Sensetalbahn (STB) and Hafenbahn Schweiz AG (HBS AG) concerning traction power.

This legal complaint was based on the following circumstances:

For goods trains, unlike passenger trains, the infrastructure managers' (IMs') List contains only the category "Long-distance freight train" in the electricity price category. This restriction to a single category leads to the same electricity tariff being applicable to all freight trains in accordance with the List.

To clarify whether discrimination in terms of the price of electricity could occur for some categories of freight trains, RACO undertook an examination of the principles and methods of calculation for determining the energy price, on which the energy price for the train category "long-distance freight train" was based. An expert opinion was drawn up by the Civil Engineering Institute in the School of Architecture, Civil and Environmental Engineering (ENAC) at the EPFL in Lausanne for each category of freight trains and their actual consumption of electricity on the basis of sample measures in accordance with Art. 20a para. 1 Rail Network Access Ordinance (RailNAO; SR 742.122).

The EPFL opinion showed that there existed a reasonable suspicion that there had been discrimination in the energy invoicing for the train path price for freight transport. The heavy freight trains travelling long distances without a stop generally need less energy than invoiced in the category "Long-distance freight train". Conversely, the flat rate for light freight trains travelling short distances is below the effective consumption.

RACO therefore initiated an ex officio investigation in January 2014.

SBB Infrastruktur and BLS Cargo AG consequently launched a pilot project in which billing was for the actual amount of power used. RACO initiated the process of agreement. It was agreed that SBB Infrastruktur would refund BLS Cargo AG the overpayment for energy caused by the flat-rate tariff, retroactive to the beginning of 2014. This is based on BLS Cargo AG'S actual measurements from autumn 2014. It is intended to be a pilot phase for the general introduction of actual power billing to replace invoicing according to train category with measurements taken on the locomotive. The first projections are expected in 2016.

RACO supports and supervises the process of agreement, and ensures that findings of the EPFL opinion are adequately taken into account during the transitional phase and that tariffs differentiated for all freight operators are applied. Furthermore, within an appropriate time limit, measurements of actual power consumed should be introduced across the board. Until these new invoicing methods have been introduced, the inquiry remains pending.

b) Train path allocation by Trasse Schweiz AG concerning the train path application and allocation process for PostMail trains in the 2014 annual timetable

BLS Cargo AG contacted RACO with a request to investigate ex officio the train path allocation process of Trasse Schweiz AG.

This legal complaint was based on the following circumstances:

In 2013, Swiss Post AG announced an open invitation to tender for transporting mail. SBB Cargo AG and BLS Cargo AG tendered to provide this service. At the same time, Swiss Post organised the train paths in the 2014 annual timetable. SBB Cargo also applied for train paths for its Swiss express network. Trasse Schweiz determined that there was a conflict between Swiss Post and SBB Cargo that had not been resolved. Swiss Post broke off the procurement procedure for awarding the order for transport, and signed over to SBB Cargo the train paths needed for PostMail trains.

RACO initiated a comprehensive ex officio investigation in January 2014.

The Commission issued a decree on 5 June 2014:

- RACO instructed Trasse Schweiz AG to request a certificate of movement from the client if it is suspected that orders for the same transport have been duplicated, before conflict resolution.
- Alternative and reasonable train path propositions should be regularly submitted to the clients for their decision at the first conflict resolution meeting.
- If allocation is still not possible, the tendering procedure should be initiated at the latest before the definitive train path allocation.

SBB Cargo AG and Trasse Schweiz AG have filed a complaint to the Federal Administrative Court against the RACO decree.

The decuree is not yet legally binding due to these complaints against brought up before the Federals Administrative Curt.

Supervision of train path allocation

On 25 August 2014, Trasse Schweiz made definitive allocations of 14,449 train paths for the 2015 annual timetable (previous year: 14,606). These train paths are distributed between 24 freight and passenger transport clients who made train path applications to Trasse Schweiz AG in April 2014 to use the networks of the SBB, BLS and the Südostbahn.

RACO checked the train path allocation process regularly, particularly for important milestones. It analysed the non-allocation of ordered train paths and the definitive train path allocation. No breaches of the rules were found.

On the north-south transit routes Gotthard and Lötschberg/Simplon, the train path allocation process proved to be particularly difficult. The Simplon line is available only to a limited extent in 2015 due to maintenance work on the tunnels and tracks. Every week from Saturday midday to Tuesday midday, one of the two tunnel tubes is closed to rail traffic. This is causing an acute contraction of train path capacity. In addition, the Luino line will be closed to rail traffic during the entire month of August 2015 due to construction work. While passenger trains can be compensated for by rail replacement buses, the freight trains planned for this route all have to be re-routed, sometimes over long distances.

Trasse Schweiz AG was able to find solutions for almost all the desired use of the network. However, as part of the conflict resolution Cargo-EVU had to accept some alternatives for the Simplon axis; these deviated from the train paths originally applied for. In 11 cases no acceptable solution could be found for the clients. Trasse Schweiz AG had to reject their applications due to ranking criteria after conflict resolution procedures had been completed [Art. 9a RailA, Art. 12 Rail Network Access Ordinance of 25 November 1998 (RailNAO; SR 742.122), and the FOT Guideline "Trassenzuteilung und Bietverfahren" ("Train path allocation and bidding procedure", in German].

"With two ex officio investigations launched this year, RACO is now exercising its newly acquired competencies to the full."

Yves Putallaz, Member RACO

Audit of the Network Statements

Within the scope of its monitoring of non-discriminatory access to the network, RACO reviewed the Network Statements in 2014, comparing the Network Statements of the SBB, BLS and SOB with the RailNetEurope RNE-Standard. RACO concluded that the Swiss Network Statements conformed to the Standard and were structured in exemplary fashion.

The structure of the Standard is reproduced in full in the Swiss Network Statements, containing all the Standard's relevant points. This transparency is an important condition for non-discriminatory network access. No discrimination was ascertained in this review.

"Beyond Switzerland, RACO keeps an eye on cross-network traffic on the Freight Corridors by monitoring the One-Stop-Shops."

Matthias Finger, Vice-Chair RACO

Market and discrimination monitoring

RACO is responsible for monitoring competition in access to the network and this requires the currently relevant potentials for discrimination to be identified.

In discussion with experts from other regulatory bodies in Switzerland and abroad and with representatives from business, a procedure for monitoring the Swiss rail market was drawn up in accordance with professional and methodologically recognised approaches.

RACO also monitors the development of the rail market through the Institute for Transport Planning and Systems (IVT) at the ETH Zurich, which drew up a Monitoring report, i.e. an analysis of events of economic relevance for the rail market in Switzerland. Some of the IVT's key conclusions are:

- The competition for freight traffic has intensified, because of the poor economic situation and also due to several protracted capacity bottlenecks on the main axes. The network of Swiss wagonload traffic has been substantially reduced in order to improve the economic viability of SBB Cargo.
- Passenger transport by rail is increasingly under pressure from long-distance bus lines. Despite the ban on cabotage in Switzerland, the newly liberalised international long-distance bus services are an attractively priced alternative to the railways. Several suburban and regional transport networks have come into operation: TILO, RER Vaud, RER Fribourg and the St. Gallen S-Bahn.

Consultations

The FOT invited RACO to state its position in consultations on two legislative projects:

a. Total overhaul of the Goods Carriage Act (GCarA):

RACO fundamentally welcomes the emphasis of the proposed amendments.

In particular, the strengthening and clarification of RACO's competencies mean that the Commission is better able to fulfil its tasks.

However, the Commission considers there is a need for action in two areas:

- Art. 2 of the draft provides that the "Confederation shall ensure non-discriminatory access to the terminals for combined transport and sidings" (Art. 2 para. 2 lit. d GCarA).

  This is intended to encompass all freight terminals that receive federal funding, independent of actual ownership (see p. 3923 of the Federal Council's Message on the GCarA, BBL 2014 3827). The Confederation may decree specific conditions. For larger terminals the Confederation may specify non-discriminatory access in such a way that it decrees the operator models or sets an obligation to publish transhipment prices.

  In accordance with Art. 40a^{bis} paras. 1d and 5 RailA, RACO now supervises non-discriminatory access to these facilities and arbitrates in cases of dispute. RACO therefore considers it necessary to ensure greater clarity about the suggested combined transport terminals and sidings.

- Furthermore, the conditions for access to these freight transport facilities, their capacities and the allocation procedures should be laid down.

The law will be submitted to both houses of the Swiss Parliament for discussion in 2015.

b. "Organisation of Railway Infrastructure" (OBI)

RACO had the opportunity to make a statement. The key messages of the Statements were:

- The more consistently infrastructure managers and railway undertakings are separated, the smaller the potential for discrimination and thus any suspicion of network access being hindered.

  This means that without a separation of infrastructure and railway operation, the regulator RACO, rebranded as RailCOM, must have more wide-ranging competencies in order to ensure non-discriminatory access to the network.

- Consequently this also means that, in the case of identified discrimination by an infrastructure company, RACO must hold the competency to order sanctions in the form of fines, as WEKO does for contraventions of the UWG.

- Responsibilities, in particular those with reference to the systems leadership, must be clarified in statutory regulations.

Activities in the international field

a) Supervision of the C-OSS

The C-OSS are jointly monitored by the regulatory bodies in Belgium, Luxembourg, Germany, Italy, the Netherlands, France and Switzerland, with RACO exercising a supervisory function. A Co-operation Agreement – in Switzerland's case, a Letter of Intent – forms the basis for the collaboration of these regulatory bodies.

Together with the other regulatory bodies concerned, RACO carried out inspections of the C-OSS for Freight transport Corridor 2 (North Sea-Mediterranean) in Brussels and of the C-OSS for Freight transport Corridor 1 (Rhine-Alpine) in Frankfurt. In particular, they examined the offer and ordering procedures for the 2015 annual timetable. Freight transport Corridor 1 received 222 orders; freight transport Corridor 2 received 51. The ordering tool "Path Coordination System" proved particularly problematic for clients. The regulatory bodies took note that RailNetEurope (RNE), the association for European Rail Infrastructure Managers and Allocation Bodies has already introduced improvements. The processes proved their worth in other areas. The potential for optimisation between train path allocation bodies, identified by those ordering train paths, will be tackled with a view to next year's train path allocation process and will be supervised by the regulatory bodies.

In the reporting year, RACO issued a Statement on the Framework for Capacity Allocation (FCA). The FCA was signed in December 2014 by representatives from the transport ministries along Corridor 1 (Rhine-Alpine) – Belgium, Germany, Italy, the Netherlands and Switzerland – and Corridor 2 (North Sea-Mediterranean) – Belgium, Luxembourg, the Netherlands, France and Switzerland. The FCA refers to Article 14 para. 1 of EC Regulation 913/2010, and describes the roles of the involved organisations (regulatory bodies, C-OSS, Management Boards) and the processes according to which international capacity is allocated. A new order of priorities for freight transport Corridors 1 and 2 (Rhine-Alpine and North Sea-Mediterranean) planned for the 2016 annual timetable, i.e. the Flex-PaP (Flexible Pre-arranged Path) and NetPaP (Network Pre-arranged Path), is intended to provide more flexibility for railway undertakings.

b) Participation in the European Network of Rail Regulatory Bodies (ENRRB)

The European Network of Rail Regulatory Bodies (ENRRB) was founded in 2013 following the recast of Directive 2012/34/EU. The European regulatory bodies, together with the European Commission, exchange opinions on international topics in rail regulation at regular meetings. The ENNRB supports cooperation between the regulatory bodies. RACO is admitted as an observer, but also contributes actively.

RACO issued a statement on the "Handbook on the Regulation concerning a European rail network for competitive freight (Regulation (EU) 913/2010)". This Handbook, published by the European Commission (DG MOVE), is a non-binding practical guidebook. It comments on EC Regulation no. 913/2010 on international train path allocation and gives instructions on how to implement the individual aspects of the Regulation. RACO has pointed out that the regulatory bodies should keep an eye on the joint supervision of the C-OSS. The principle of territoriality means that national competencies may not be affected.

c) Membership of the Independent Regulators' Group-Rail (IRG-Rail)

IRG-Rail is a network of currently 25 regulatory bodies. Its objective is international cooperation to support the development of an internal rail market in Europe: development of best practices, mainly in network access, service facilities and the promotion of a joint approach to implementing the European regulatory framework. In 2010, together with the regulatory bodies from Germany, the UK, the Netherlands and Austria, RACO took the initiative to strengthen collaboration between the national regulatory bodies. Finally in 2011, IRG-Rail was founded.

In the reporting year, RACO participated in working groups concerned with the freight transport Corridors, and drew up a checklist for supervising the C-OSS. This checklist will in the future enable the regulatory bodies to detect any cases of discrimination in the train path allocation by the C-OSS.

Composition of the Commission

The seven members of RACO were appointed by the Federal Council for a term from 2012 to 2015. They undertake this work in a part-time capacity.

As a federal extraparliamentary commission, RACO must declare the interests of its members. They can be seen via this link: https://www.admin.ch/ch/d/cf/ko/gremium_10046.html

RACO (left to right): Dr Yves Putallaz, Santina Bevington (head of secretariat), Ursula Erb, Prof. Matthias Finger (Vice-Chair), Patrizia Danioth Halter (Chair), Peter Bösch, Barbara Klett, Werner Grossen

Function	Name	Year of birth	Background
Chair since 2013	Patrizia Danioth Halter	1964	lic.iur., lawyer and notary, LL.M., Altdorf
Vice-Chair since 2004	Matthias Finger	1955	Professor EPFL, Croix-de-Rozon
Member since 2012	Peter Bösch	1956	logistics expert, Binningen
Member since 2013	Ursula Erb	1967	Dr. oec. publ., Uhwiesen
Member since 2012	Werner Grossen	1961	Business economist, NDS HF, Thierachern
Member since 2012	Barbara Klett	1962	Lawyer, LL.M. and mediator, Lucerne
Member since 2012	Yves Putallaz	1971	Dr. Ing. Civil engineer EPFL, Vevey

Finances

Administratively, RACO comes under the DETEC General Secretariat, and has its own specialist secretariat.

The 2014 accounts showed an expenditure of CHF 498'503.–. This sum covered RACO's entire staff and operating costs.

Looking ahead

2015 will be marked by further legislative development: the Goods Carriage Act will be discussed in Parliament, Organisation of Railway Infrastructure (OBI) will also enter a consultation phase, first within the Federal Administration and in the second half of the year within the general public; the wear factor as the core of the Rail Network Access Ordinance (RailNAO), which is undergoing revision.

The Commission will continue to pursue its stance through all these legislative projects: competition, and thus non-discriminatory access to the rail infrastructure, must be ensured. This also means that clarification of the roles of the FOT and the regulator RACO should be carried out.

In international discussions the Commission, with the help of the secretariat, will also drive foreward the topics of Corridors an access to the rail network.

This work within the Commission is associated with further steps in the reorganisation of the specialist unit. This will be strengthen. Discrimination monitoring will be developed further and expanded, and the Commission will be supported in its decisions by additional expert resources.

The future will bring diverse challenges for RACO, which it will face professionally and with confidence.

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