Electronic Exchange of Estimated Time of Arrival

ACTIVITY 2

SURVEY ON THE LEGAL CONDITIONS IN TRACKING DATA EXCHANGE

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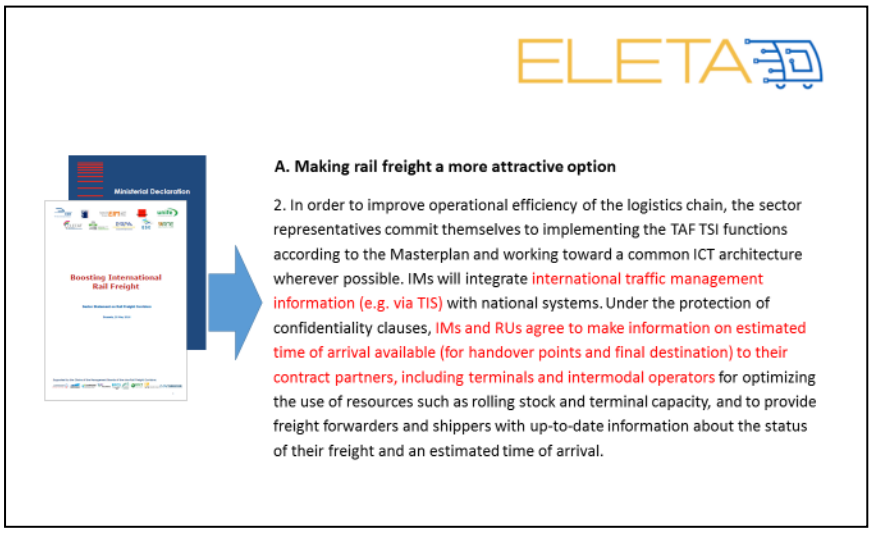
1. Introduction

The exchange of information on tracking and tracing as well as Estimated Time of Arrival has been receiving already wide attention in past years as well as in 2017 after the proposal for the ELETA project has been submitted. At various meetings and events the partners of the ELETA project have been recalling the Sector Statement on Boosting International Rail Freight with agreement reached by the rail freight sector associations at the Rotterdam TEN-T Days in June 2016 on the exchange of ETA information (see quoted text Paragraph A.2 in figure below).



With this agreement the question is no longer '***whether***' to exchange information on Estimated Time of Arrival, but '***how***' to do this. The ELETA project responds to the question of 'how' to realise practically the exchange of ETA in formation in a simplified context, being the case of a limited number and selected intermodal shuttle trains. When drafting the ELETA project proposal it was not evident that in the case of the ELETA shuttle trains the legal context would permit such exchange of ETA information. It was even considered that possibly special legal solutions had to be found for the sake of the objectives of the ELETA project. Therefore under Activity 2 of the ELETA project an analysis of the legal context was made. This activity actually implied a search for potential legal obstacles, which had to be resolved for the purpose of the ELETA project.

2. Legal conditions in the 7 ELETA countries

In 2017 the survey on legal aspects has been conducted in the context of the ETA Taskforce and with the good help of BMVI (Stefan Nagel) in Netherlands, Belgium, Germany and Czech Republic. Under the ELETA project information has in 2018 been added by the Italian, Swiss and Austrian Ministries.

The four questions, which were formulated by the ETA Taskforce and which were addressed to and answered by the responsible authorities in the Member States plus Switzerland were:

Q1: Is it legally allowed that a Party transmits the Data to another Party?

Q2: If yes, do any specific legal prerequisites / conditions have to be fulfilled?

Q3: If a transmission depends from the individual will of a Party, may by any means an obligation be created for the Party to transmit the Data?

Q4: If an IM would include the condition of consent to the transmission of data in their Network Statement, would this be legal?

2.1 Question 1 'Is it legally allowed that a Party transmits the Data to another Party?':

The Belgian Ministry notes with regard to the first question the distinction between two situations:

(1) Transmission between IM and RU. According to the directive 2012/34, article 13 and annexe II point 1, as transposed in the Belgian law (Rail Codex, art. 9, annex I, point 1), it is a legal obligation for the IM to make information related to the train traffic available to a RU for the concerned RU's trains.

(2) Transmission from an IM to a non-RU party. The confidentiality rule as set at article 26 of the Belgian Rail Codex may possibly, depending on the interpretation of what is commercially relevant, prevent the transmission of train traffic information from an IM to a non-RU party. Moreover, this information could possibly be considered as a trade secret and could accordingly fall under the legal protection offered by the directive (UE) 2016/943 of 8 June 2016 on the protection of undisclosed know-how and business information (trade secrets) against their unlawful acquisition, use and disclosure. It is to be noted that there is, as far as we know, no settled case law about which kind of information has to be considered as commercially relevant, and therefore protected, in this specific context. However, IM and RUs can mutually agree to allow the transmission of this information to another party as the protection offered by the law can be renounced by mutual agreement within a contractual relationship.

The German Ministry considers that in general a transmission of data from one party to another party is legally permissible. In regard of access to the rail network there is in Germany a public law obligation of the infrastructure manager to provide information on train movement to a railway undertaking according to Art. 11 in conjunction with Annex 2 Number 1 Eisenbahnregulierungsgesetz (EReg). Service facilities are not subject of such a public law obligation.

The Netherlands Ministry comments that such data transfer by the Infrastructure Manager is only legally permissible with the consent of the railway undertaking to transmit the data to third parties.

The Italian Ministry responds that such information exchange is allowed in the following cases:

- Availability of relevant trains data between IM and contracting RU, as reported in the Network Statement in compliance with Annex II point 1 of Directive 2012/34;

- Availability of real time train graph between IM (without detailed information) between IM and contracting RU with regards to different RU's circulating on the same route in the same timeframe in compliance with resolutions of the Regulatory Body.
- Availability of relevant train data between IM and non-RU Applicant party of a Framework agreement, with regards to the RU trains providing the transport services on its behalf, as reported in the \network Statement in compliance with resolutions of the Regulatory Body.

In summary, the exchange of data between Parties other than the IM is in Italy in principle legally permissible.

The Swiss Ministry responds that the data transmission from one party to another is not explicitly legally allowed, but there are no known legal obstacles. However, me must bear in mind that infrastructure managers in Switzerland are not independent, for the foreseeable future. There is no safeguard against their transmitting foreign RU's data to their own passenger or freight transport department.

2.2 Question 2: 'If yes, do any specific legal prerequisites / conditions have to be fulfilled?'

The German Ministry notes that in case of a public law obligation no other conditions or requirements alongside the statutory provisions and conditions are required. In any other case of a transmission of data from one party to another party on the basis of a private law agreement the relevant legal provisions, e.g. on data protection or the protection of business secrets, must be respected.

The Netherlands Ministry adds that the RU should approve such additionally required transmission and that a RU may not be "forced" by the IM to approve it.

The Italian Ministry confirms that the exchange of data between Parties other that the IM are possible under private law agreements in the respect of national and European laws on protection of business secrets.

2.3 Question 3: 'If a transmission depends from the individual will of a Party, may by any means an obligation be created for the Party to transmit the Data?'

The Belgian Ministry responds that this is not applicable insofar as the law offers a commercial protection by default. However, this offer could be discarded by the parties if they mutually agree.

The Czech Ministry gives a similar response and refers to Article 11 paragraph 1 of the Charter of Fundamental Rights and Freedoms, which is part of the Czech constitutional order, stipulates that "Each owner's property right shall have the same content and enjoy the same protection." Disclosure of the data in question if it should (for the reasons mentioned above in point 1 and 2 of the comments to question no. 2) have the effect of excluding or weakening the protection of property of third parties or parties who are in a contractual or responsibility relationship to the Party could discriminate against the protection of property rights of these third parties in comparison to other persons or parties or, conversely, against the protection of property rights of the concerned parties.

Should a generally binding regulation, or a public authority's decision on that basis exclude or limit the liability of private parties for infringement of trade secrets and/or liability according to CC, by ordering the transfer of data in question, it could constitute unjustified discrimination against parties other than the Party. Parties from different economic sectors could then additionally seek similar special legal regime and justify it for example by more effective use of appropriate means of production or infrastructure.

The German government considers that such obligation can be created by public law. Like the Belgian Ministry, also the Netherlands Ministry responds that such obligation may be created, if it is done in a contractual way (voluntarily agreed) or by EU / national legislative provisions. The Italian Ministry considers than a European or national public law (including a resolution of the Regulatory Body) obligation is needed.

Similarly the Swiss Ministry responds by stating that within the framework of the law, contracting parties are at liberty to create any obligation they wish. This includes transmitting data to a third party, even if this is not a RU. The agreement between IM and RU (Swiss by-law "Eisenbahn-Netzzugangsvereinbarung", Article 15 *https://www.admin.ch/opc/de/classified-compilation/19983395/index.html*) would have to arrange for such a data transmission.

2.4 Question 4: 'If an IM would include the condition of consent to the transmission of data in their Network Statement, would this be legal?'

The Belgian Ministry considers that if a common agreement within the sector is reached on how the transmission of this information to third parties may occur, e.g. with appropriate safeguards (commitment to restrict distribution, authorized users...), the Network Statement of the IM could then legally include these conditions. However, The Belgian Ministry also considers that a common approach on EU level should be preferred as the best approach, since this information could be sent to a non-RU party located in another member state other than the member state where the IM is located. The applicable rules could then differ leading to inextricable commercial complications.

The Czech Ministry responds that that the provisions, which are specified in § 33 par. 3 of Act no. 266/1994 Coll., on rail systems (as amended after the effective date of Act No. 319/2016 Coll.- hereinafter "Act on RS") and list the obligatory requisites of network statement should be considered only as a compulsory minimum. It would therefore seem that the obligation to transfer the data in question does not contradict it, and can effectively supplement the list. However, since this is a transposition of the EP and Council Directive 2012/34/EU, the provisions of the Act on RS must be interpreted in the light thereof. Firstly, Article 29(4), 39(2), 42(7) and 57(1) of the Directive provide explicit protection of trade secrets in specifically defined cases, of which especially the situation in accordance with Article 39(2) of the Directive may apply to the present case. Paragraph 52 of the preamble to the Directive then accentuates considerations of the business requirements of carriers and infrastructure managers, which undoubtedly include protection of trade secrets or prevention of harm to own or customers' interests.

In addition, paragraph 42 of the preamble to the Directive provides:

"The charging and capacity-allocation schemes should permit equal and non-discriminatory access for all undertakings and should attempt, as far as possible, to meet the needs of all users and traffic types in a fair and non-discriminatory manner. Such schemes should allow fair competition in the provision of railway services."

The proposed data communication, however, could be seen as discriminatory, as passenger operators have no such obligation. In addition, the proposed transfer of data should obviously apply only to freight carriers, or to freight transport in freight corridors, as defined in Article 2(2)(a) of the EP and Council Regulation (EU) no. 913/2010, but not to other freight carriers, or other freight transport that would probably be subject to a different scheme, which could undermine the fairness aspect in the competition among them. Moreover, since different substitutable MI routes compete with each other, it could be a violation of fair competition where at least one of these alternative routes were not a freight corridor and therefore subject to different arrangements with respect to the proposed transfer of data.

The Netherlands Ministry considers such additional condition as potentially legal, but since the IM is having a dominant position a monopoly of infrastructure management under competition law RU may not be forced to sign such agreement by making it a compulsory condition for network access. An option as support measure could be that IM proposes a standard clause for the access contract to the (association of) railway undertakings seeking to sign an access contract. The IM may agree on such clause with association RU's and make support common letter of Intent. Formally RU's remain free to sign the clause in their network access contract.

The Italian Ministry responds that the IM may propose to include such a condition in its Network Statement, but the final decision rests on the Regulatory Body, who is required to approve the proposal following the conclusion of a public consultation with the applicants. In any case, the Network Statement already provides obligations on data transmission according to EU/national laws.

The German and German Ministries, however, conclude that additional conditions of the Network Statement are inadmissible. The reason for this conclusion is that the access to the rail network is a public right, whose conditions are substantiated by the relevant provisions of the ERegG. The Swiss Ministry adds that the IM's conditions must reflect the relevant laws and by-laws. Conditions which are not covered by these laws are not admissible.

2.5 Overall conclusions from the four questions

The overall conclusions drawn from the questionnaire is that in the countries, which responded:

1. An exchange of ETA related data between stakeholders is not forbidden in any of the participating Member States. There may be different legal conditions and restrictions to observe on a national level, but there is no general prohibition.

2. There is no legal obligation to transmit ETA related data between stakeholders with one exception. This is the obligation created by Directive 2012/34/EU and implemented in the national law of the participating Member States of the infrastructure manager to provide to the railway undertaking train information data.

3. An exchange of ETA data is legally possible on the basis of a contract between parties involved. This does also include the use of a service provider on the basis of respective contracts between the stakeholder and the service provider.

3. Exchanging information on ETA is becoming obligatory

Whereas at the start of the ELETA project it was still not evident that the exchange of ETA information would be permissible for the purpose of the ELETA trains, meanwhile such exchange of information would become obligatory with the Implementing Regulation (EU) 2017/2177 on access to service facilities and rail-related services, which has been published on 22 November 2017. The text mentions in Article 7.3:

> 3. Where relevant, operators of service facilities, infrastructure managers and applicants shall cooperate to ensure efficient operation of trains from and to service facilities. In the case of trains using rail freight terminals, including those in maritime or inland ports, this cooperation shall include the exchange of information on train tracking and tracing and, where available, the estimated time of arrival and departure in the event of delays and disturbances.

The new Implementing Act on service facilities defines thus new obligations for the exchange of train tracking and tracing information, including all stakeholders involved: applicants, infrastructure managers and terminals including harbours. To what extent this makes the VG's discussion of the exchange of ETA data superfluous has to be examined further with all stakeholders involved. In any case the new IA will be effective from 1 June 2019, when the ELETA project should already be in its operational phase.

Meanwhile also various Infrastructure Managers (IM's) have started to include text in their Network Statements and Access agreements to facilitate the exchange of information on tracking and tracing of trains and their estimated time of arrival. For example ProRail has included in the **General Terms & Conditions Access Agreement ProRail 2019** Article 6.3.c the following text:

> c. The network manager is authorised to release information about the capacity allocated to a titleholder and about the current train service of the railway undertaking as confidential information to the other railway undertakings who have accepted these General Terms & Conditions, as well as to network managers of connected railway networks.

4. A contract for exchanging ETA information is needed by ELETA

The overall conclusions of the questionnaires filed in by the Member States and Switzerland is that a contract between the stakeholders in the logisctic chain is allowed and is needed. This thus leads to the question: What will be the (contents of the) contract between the parties involved? To this extend the Train Information System (TIS) User agreements provide the solution. The partners of the ELETA project must then ensure that all the terminals involved in the 12 ELETA trains, but also all the Railway Undertakings involved, sign the TIS User Agreements. This is an inconvenient and laborious process, but it leads to the result that information can be exchanged as required for achieving the objectives of the ELETA project. It is needless to remark that a more long term and more convenient solution is to be preferred for the sector.

To this effect it is welcomed that the Network of Executive Boards of the Rail Freight Corridors agreed on 7 February 2018 on a set of recommendations on this subject which included the recommendation to actors in the rail freight sector for signing the TIS User agreement.

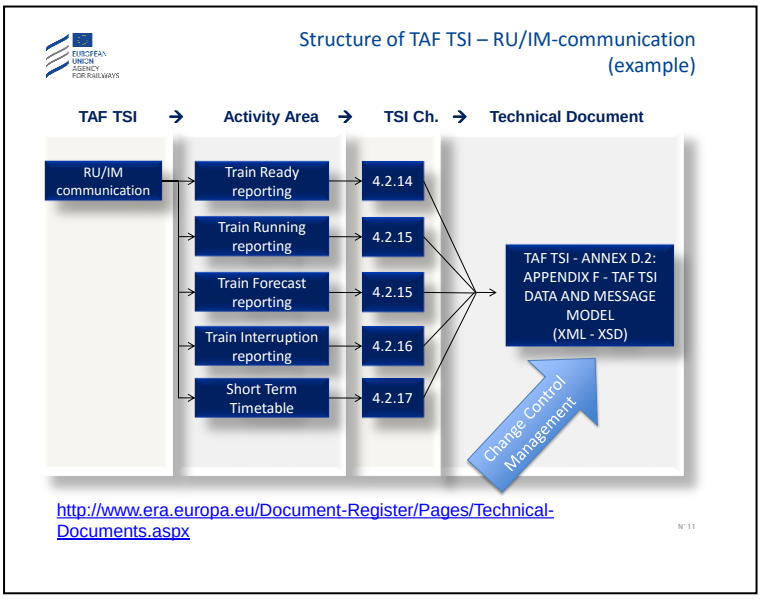
> The Network of Executive Boards of the Rail Freight Corridors recommends:
> 1. That all relevant actors within the rail freight sector, such as railway undertakings and terminal operators, including those in ports, facilitate the exchange of ETA data, making use of a suitable digital platform to provide the necessary conditions, such as the Train Information System TIS provided by Rail Net Europe.
> 2. In addition, the Network acknowledges that signing a user agreement by railway undertakings and terminal operators, where relevant, could substantially facilitate such data exchange.
> 3. The Infrastructure Managers participating in the management boards as far as they are applying a relevant platform and user agreement, to consider the inclusion of all freight trains.
> 4. To the European Commission to further support a railway sector-driven approach in this respect.
> 5. To the railway sector to develop under its own responsibility a guideline to facilitate the data exchange on estimated time of arrival and estimated time of departure.
> 6. To the management boards to report the development in 2018 and 2019 to the Network of Executive Boards.

5. What the TAF-TSI says about ETA

The Grant agreement for the ELETA project mentions that it will monitor the TAF TSI implementation as regards the ETA information exchange. The issue of ETA information is widely addressed in the TAF-TSI.

Firstly the Legal text of the COMMISSION REGULATION (EU) No 1305/2014 (11 December 2014) on the technical specification for interoperability relating to the telematics applications for freight mentions the obligation for the Lead Railway Undertaking to provide ETA information to the customer:

> 2.3.2. *Considered Processes* This TSI for the railway freight transport industry is limited in accordance with Directive 2008/57/EC (1) to IMs and RUs/LRUs with reference to their direct customers. Under contractual agreement the LRU shall provide information to the Customer in particular:
>
> — Path information.
>
> — Train Running Information on agreed reporting points, including at least departure, interchange/handover and arrival points of the contracted transport.
>
> — Estimated Time of Arrival (ETA) to the final destination including yards and intermodal terminals.



Chapter 4.2 gives various details on the ETA messages as well as the calculation of the ETA. For example it places the responsibility for informing the customer on the shoulders of the Lead RU. It also distinguishes between the ETA information to be exchanged with the customer and the ETA or Estimated Time of Interchange to manage the train operational process.

It is also remarkable that the legal text refers to the provision of train running data on agreed reporting points being at least the hand-over points. Hence, there is no obligation on constant tracking and tracing of trains. The data exchange is based on the principle that the next actor in the chain must be informed on the train running. Seen against the background of this principle, it seems not logical that according to the TSI legal text the LRU must provide ETA information to the customer, but not to the terminal, which forms a technical link in the transport process.

An issue of special attention is the position of the intermodal operators being the ELETA project partners. The TAF-TSI refers to RU's '*customers*' , but does not foresee in a definition and/or description of intermodal operators in the rail freight transport logistic chain.

6. External Expert Advisory Board (EEAB) of ELETA about TAF-TSI

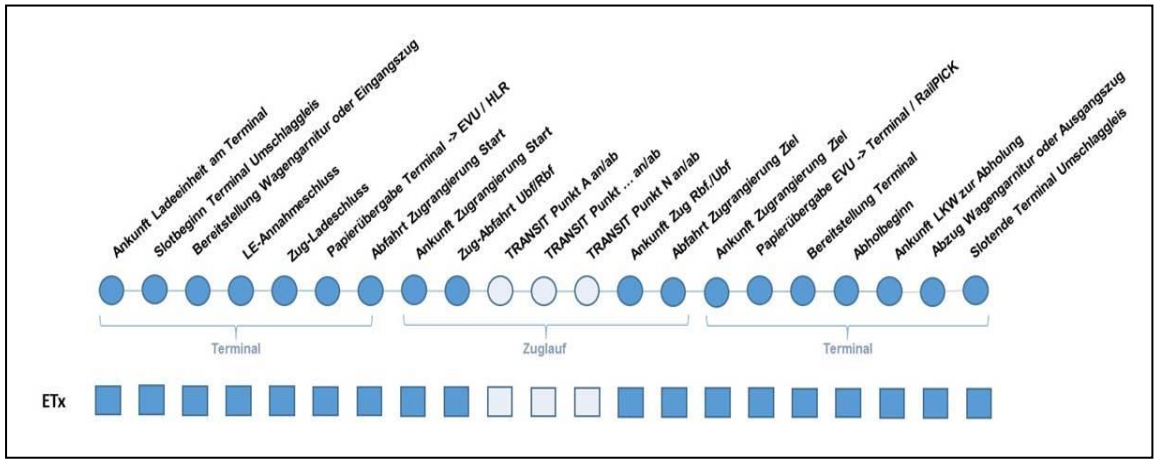
The External Expert Advisory Board (EEAB) of ELETA in its meeting on 22 February 2018 in Frankfurt discussed the ETA subject in relation to the TAF-TSI.

6.1 Definition of ETA and methodologies

In particular the (lack of) definition for the ETA's was widely discussed by the ELETA EEAB. It was recommended that as soon as possible a more precise description is made of the terminology used i.e. type of ETA as well as the accuracy of such ETA. The ETA's must match the practical needs of the other partners in the logistic chain and the RU's customer/ intermodal operator. The end-user wants

possibly a rather simple ETA (known as MAD - Mise À Disposition - of loading units available under the crane).

Below is an illustration which provides 21 different Estimated Time of Arrival milestones in the combined transport logistic chain. Harmonisation and precise definition of terms will be needed for the purpose of the ELETA project.



Distinction should be made between ETA's calculated on the basis of historical data and past events and those calculated on the basis of projected operations (prognosis). In any case an ETA should be calculated through a computerised algorithm with the final objective to create an automatically generated ETA accompanied with business intelligence. Such algorithm for a projected planning is as such not yet available, but various ETA's methodologies exist, which are based on prognoses of operations and which are already used by some RU's. The EEAB recommends taking a pragmatic approach on choosing the best ETA methodology for the purpose of the 12 intermodal trains in the ELETA project.

An important aspect of the ETA is the transparency of its accuracy. The EEAB found that in some form a classification of ETA's is needed. In the course of the next months (Q2 2018) RNE will provide a set of qualifiers for ETA's at handover points (border points could be excluded as not accurate enough). Moreover, parties should ideally be able to see and understand the cause for inaccuracies in the planned train runs. As regard the specifications of the level of accuracy, it was also suggested to consider working with a 'time-frame' range (minimum delay – maximum delay).

A discussion also evolved on the functionality of TIS. It was found that evidently a platform is needed to bring operational information from RU's and IM's together and to aggregate such information in a sort of new '*overlayer*'. TIS has the capacity to handle more data in the foreseeable future and could at least for the time being be considered as platform for such a purpose. The choice of the best system to be used as overlay should be based on clear defined business cases (as reported by ERA during the best practice workshops). It is however clear for all that all infrastructure related data should be managed by TIS.

6.2 Linking up the terminals

The EEAB noticed that the terminals are not really connected to tracking and tracing information exchange processes, which are currently executed by the RU's and IM's in the framework of the TAF

TSI Regulation. The terminal integration has been recognised as a key element to improve the ETA exchange and accuracy. The connection between RU's/IM's and terminals needs to be defined in more detail in the TAF-TSI. To this effect, use-cases must be elaborated, whereby information flow to/from the terminals must be taking place in two directions.

The EEAB concluded that special attention must be given to the (common) interfaces with terminals. These must firstly be defined in functionality.

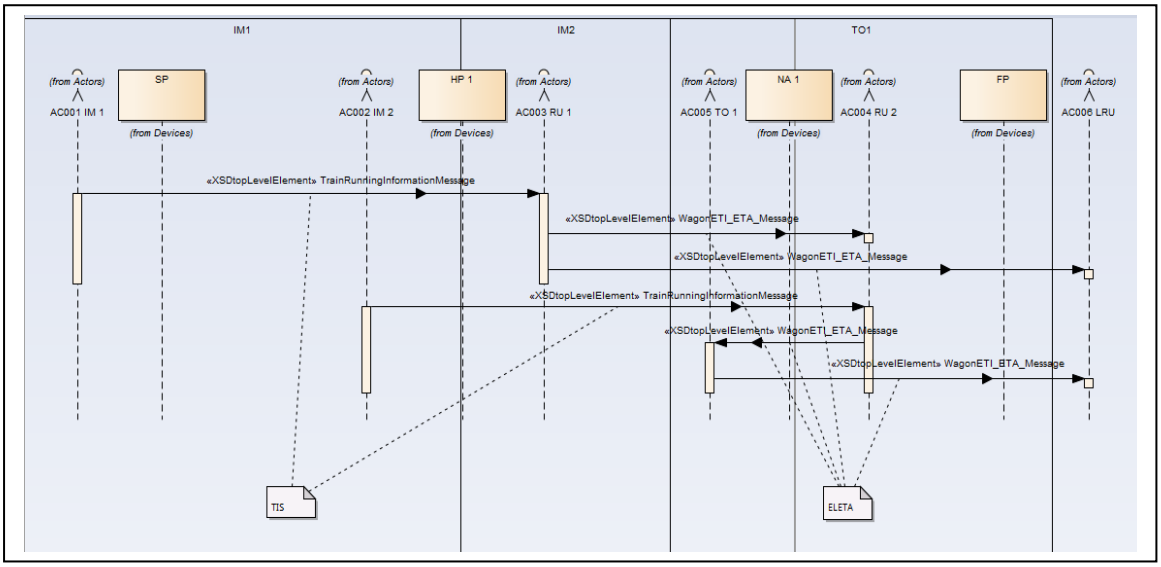
6.3 Unique train numbering

The absence of a unique train numbering system was acknowledged as being a burden for the achievement of the ELETA project objectives. However, efforts to provide a system of unique train numbering are in progress, but will still require several additional years (cf. TAF TSI Master Plan). Therefore, for the limited number of trains in the ELETA project, the train numbers used for the 12 trains could – according to RNE – be manually matched/coupled.

The EEAB considered that at short term a provisional unique train numbering system could be envisaged, but that the acceptance of such short term solution is unlikely. However, the EEAB also concluded that the use of national train numbers for international trains (i.e. trains leading to the border) should be forbidden as soon as possible (Such obligation is already practiced by Infrabel).

6.4 The interaction between ELETA and the TAF-TSI

The data exchange between RU's/IM's and terminals needs to be defined in more detail in the TAF-TSI. This will ultimately result in additional input for the TAF-TSI Technical Document. The practical solutions and definitions resulting from the ELETA project may prove to be helpful. In any case and to this effect firstly Use-case's must be elaborated with data flow to/from the terminals in two directions.



7. Overall conclusions and recommendations

The TIS User Agreement provides adequate contract conditions for orderly exchange of ETA information in the case of the 12 ELETA trains. The partners of the ELETA project must ensure that all the terminals and Railway Undertakings involved in the 12 ELETA trains sign the TIS User Agreements. Most RU's have already done so, but a few gaps remain. For the terminals the signature process is progressing. The signature process evidently requires close cooperation with RNE. For the longer term the sector needs a more convenient solution for providing adequate legal conditions.

TAF-TSI provides a basis for the exchange of information on ETA's. This bases needs to be elaborated with further details. The ELETA project must elaborate precise definitions for the ETA to be exchanged in the case of the 12 ELETA intermodal trains. These could serve as guidance for further details to be incorporated in the TAF-TSI.

Annex 1: Text on activity 2 in the ELETA Grant Agreement

<u>Activity 2</u>: Survey on the legal conditions in tracking data exchange (Leader: KNV)

Objectives:
Identification of the TAF TSI components related to ETA information and of the main identified obstacles in implementing the TAF TSI
Analysis of the legal conditions established under which data can be exchanged between RUs, IMs, Terminals and intermodal operators for the trains involved in the project.

Stakeholders and partners involved:
For this activity, KNV will - with the support of the intermodal operators - perform desk research as well as interview with the national Ministries. In addition, UIRR will provide all relevant information from ongoing activities in TAF TSI and in free flow of (public) data, in particular the current ERA working group monitoring the implementation of the TAF TSI and the initiative of the Commission on the 'free flow of data' concept.

Specific tasks to be performed:

1. To identify the legal conditions in the 7 MS (Austria, Belgium, France, Germany, Italy, Netherlands, Spain) as well as Switzerland in the project under which data can be exchanged between RUs, IMs, Terminals and intermodal operators.
2. To monitor the TAF TSI implementation in case of ETA information exchange
   Assessment of legal "repair work / bilateral agreements" to allow for data exchange on ETA information as foreseen by the Action. If required, bilateral agreement will be prepared by KNV to ensure a smooth data exchange between the operators.
3. KNV will follow the ongoing activity on legal provisions in data sharing lead by Mr. Stefan Nagel, Federal Ministry of Transport and Digital Infrastructure of Germany. This initiative has been activated by by some Member States involved in the implementation of the Rail Freight Corridors.

The milestone for this activity will be a single document describing the current legal assessment in the 7 MS plus Switzerland (including the obstacles and bilateral agreements if any) and compiling all the completed desk research on the current status of the TAF TSI implementation in the ETA exchange between RU and Customer.