



Legal Study on Marketing of the European Rail Facilities Portal Data

(Version 0.3)

Disclaimer

This is an internal document drawn up by the RNE Joint Office legal team. Some specific questions asked by UIRR were answered by external lawyers appointed by UIRR (see Annex 1). The study findings and recommendations are intended to be submitted for discussion and endorsement to the relevant RNE and UIRR working groups and decision-making bodies enabling the European Rail Facilities Portal business model.

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Version history

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0.2	Tsvetan Tanev, RNE JO Senior Legal Adviser	27.10.2021	Adjustments after the LM WG meeting on 6 October 2021 with ADIF's considerations on the PSI Directive included
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1. Introduction and scope of this document

What is the challenge?

Transactions with industrial data are for pioneers. Data are a complex area of law, and they present their own unique legal problems. Studying business data from a legal perspective is thus still a challenging exercise, especially in the absence of comprehensive legislation on commercially valuable non-personal data in its raw form.¹ This legal analysis on data of the European Rail Facilities Portal ('ERFP'/'the Portal') is no exception.

What is the main goal of this study?

Considering the high degree of legal uncertainty surrounding raw non-personal data tradability (e.g. no legal definition and status, no official registration regime, no officially sanctioned market place, no (dedicated) supervision authority, etc.), the main goal of this study is still to provide as much actionable as possible legal advice on the commercialisation of the Portal's data, building the whole legal framework among the participants in the data exchange basically on a contractual basis (see chapter 5).

There are three main parts of the study:

- The first part is a theoretical catalogue of the rights related to data in principle and their applicability to the Portal's data (e.g., ownership, intellectual property rights). These are pure normative considerations for lawyers.
- The second part is more practically orientated on the Portal's data specific case from a technical and legal point of view; also, investigating whether there are any limitations for a potential business model for monetising the data available in the ERFP guaranteeing a self-sustainable maintenance and further development of the application;
- The key findings and recommendations on the data contracting and licensing can be found in the third part of the paper. Despite the considerable unknowns that remain in the area it tries to answer the questions of RNE as rightholder whether, and under which conditions, Portal's data could be used, as well as the legal possibility to obtain appropriate remuneration for such use. It is therefore important to foster the development of the licensing model between RNE and data originators and data users. Those licensing agreements should be fair, transparent, and non-discriminatory and keep a reasonable balance between all parties concerned.

In order to ease the comprehension of those highly abstract matters, we will briefly define in the beginning what does the Portal do and what data are covered and what data are not covered by the study.

What is the Portal in terms of technology?

The Portal started as an initiative of the European Commission in October 2015 (in a pilot phase), officially launched in June 2019 and handed over to the rail sector in 2020. In essence, the Portal is a web-based application representing with different icons on the

¹ Non-personal data is the term with legal definition in point 1 of Article 4 of Regulation (EU) 2016/679. Nonetheless, all other terms are used as synonyms in the study (i.e., raw, industrial, business data).

map of Europe the locations² and further information of points of interest (POI)³ for any person or organisation with a reasonable interest in (passenger and/or freight) train services. To put it another way, where and under what conditions you can load, unload, and store cargo, stop, park, maintain, refuel, or clean your trains / locos / wagons. It is a generic collection of POI data specialized in the category of (infrastructural and commercial) rail information. POI data can facilitate the interaction between railway undertakings and service facilities operators in the physical world, improving operational efficiency and general decision making in logistics and transportation. What is different to the commonly known POI digital solutions in other sectors (e.g., automotive navigation systems) is the following:

- the rail POI collection's existence is envisaged in directly applicable legal act at EU level, namely Commission Implementing Regulation (EU) 2017/2177 on access to service facilities and rail-related services ('SF Regulation')⁴: this Regulation, in conjunction with Directive 2012/34 establishing a single European railway area ('SERA Directive')⁵, substantially predetermines Portal's governance, data content and charging scheme (see below); at the same time, it is a policy measure fostering openness, transparency and competitiveness in railway sector with basically no business model behind⁶;
- it is publicly available freely accessible at no charge POI data collection: this approach is proclaimed in Art. 5(1) of the SF Regulation which reads that operator of service facilities shall make publicly available the service facility description free of charge, in one of the following ways: a) by publishing it on [...] a common web portal;
- it is a proprietary software protected with different intellectual property rights, i.e., it is not an open-source database that its original source code is made freely available and may be redistributed and modified;
- rail POI data were not extracted via web scraping⁷ or collected with other machine intervention: all data points were and are manually included and verified by human beings.

What is covered by the study?

The legal research was performed with (raw) non-personal data and the Portal's (to be introduced) business case in mind. Therefore, two major aspects were considered: firstly, what type of data is held in the Portal, and secondly, in what kind of context the marketing of data is supposed to take place in the future.

² The initial domain name under which the system has been hosted was called 'rail freight locations'.

³ It is a term borrowed from the IT industry which best explains the core of the system for wider (not necessarily rail) audience.

⁴ <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32017R2177&from=EN>

⁵ <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:02012L0034-20190101&from=EN>

⁶ The current Portal's maintenance and development is a subject to two EU grant agreements under CEF I program running by the end of 2022.

⁷ Web scraping is the process of using bots to extract content and data from a website. Unlike screen scraping, which only copies pixels displayed onscreen, web scraping extracts underlying HTML code, and, with it, data stored in a database. The scraper can then replicate entire website content elsewhere.

As to the first question the paper is limited to data of rail service facilities (SFs)⁸ and rail-related services⁹ provided by service facilities operators (SFOs)¹⁰ in Europe. In brief, it is data about installations in which rail-related services are supplied, including:

- information on their locations and opening hours;
- description of the technical characteristics of the service facility, such as sidings or shunting and marshalling tracks, technical equipment for loading and unloading, for washing, for maintenance and available storage capacity;
- information on private branch lines and sidings that are not part of the railway infrastructure, but are needed to get access to service facilities which are essential for the provision of railway transport services;
- description of all rail-related services, which are supplied in the facility, and of their type (basic, additional or ancillary as listed in points 2, 3 and 4 of Annex II to the SERA Directive¹¹).

In other words, it is all business information about rail infrastructure, and its location, services, access conditions and charges.

It is worth mentioning that the national and the European Court of Justice's judgments on the service facilities under the SERA Directive¹² and the SF Regulation¹³ are also out of the scope of this study. They are of strong interest for the Portal from rail but not necessarily data law angle.

As to the second question concerning the context of data transactions, the focus was put on sharing for profit/trading/marketing/commercialising (raw) data in B2B¹⁴ context (i.e., licencing data among businesses, against remuneration in any form), hence B2C¹⁵ and B2G¹⁶ situations of data exchange/'deals' were not considered in this document¹⁷.

⁸ See Art. 3(11) of Directive 2012/34: 'service facility' means the installation, including ground area, building and equipment, which has been specially arranged, as a whole or in part, to allow the supply of one or more services referred to in points 2 to 4 of Annex II;

⁹ See Art. 3(2) of Regulation 2017/2177: (2) 'rail-related service' means a basic, additional or ancillary service listed in points 2, 3 and 4 of Annex II to Directive 2012/34/EU;

¹⁰ See Art. 3(12) of Directive 2012/34: 'operator of service facility' means any public or private entity responsible for managing one or more service facilities or supplying one or more services to railway undertakings referred to in points 2 to 4 of Annex II;

¹¹ See points 2, 3 and 4 of Annex II to Directive 2012/34/EU: SFs such as passenger stations, freight terminals, marshalling yards, storage sidings, maintenance facilities, cleaning and washing facilities; maritime and inland port facilities, relief facilities, refuelling facilities, traction current, pre-heating of passenger trains, control of transport of dangerous goods, assistance in running abnormal trains, access to telecommunication networks, technical inspection of rolling stock; ticketing services in passenger stations, etc.

¹² Case C-210/18 WESTbahn Management GmbH vs OBB-Infrastruktur AG: <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:62018CJ0210&from=en>

¹³ Case C-60/20 'Latvijas Dzelzceļš' VAS v Valsts dzelzceļa administrācija: <https://curia.europa.eu/juris/document/document.jsf?text=&docid=244191&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=1914851>

¹⁴ Abbreviation for business-to-business: describing or involving business arrangements or trade between different businesses, rather than between businesses and the general public.

¹⁵ Abbreviation for business-to-consumer: describing or involving the sale of goods or services directly to customers for their own use, rather than to businesses.

¹⁶ Abbreviation for business-to-government: relating to trade in products and services between businesses and government, especially trade over the internet

¹⁷ However, please note that there is a principle RNE decision from 21 June 2021 for sharing of publicly available data with any entity requesting the data and sharing of confidential data in anonymised form with EU bodies (e.g., EC, ERA) and entities mandated by EU bodies only, i.e., in de facto B2G context.

What is not covered by the study?

To additionally outline the scope of the study the following types of data, information and services and their accompanying legal acts were considered inapplicable to the Portal's data and RNE's role as a service provider, consequently, were **not examined** in the study:

- **Personal data** under Regulation 2016/679 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data (General Data Protection Regulation-GDPR)¹⁸: personal data in the Portal, if any, are easy extractable, thus it is unlikely to rise any data protection and privacy concerns¹⁹.
- **Open data and public sector information** under Directive 2019/1024 on open data and the re-use of public sector information²⁰ and the proposal for a new Data Governance Act²¹ essentially complementing this Directive. However, the later contains some fundamental definitions (e.g., of data²², data holder, data user, data sharing), that are about to set a new standard in the data law terminology. For that reason they will briefly be commented in chapter 2.4 below.
- **data.europa.eu**: As of April 2021, data.europa.eu is online. The EU Open Data Portal and the European Data Portal joined forces to become the single access point for European data. [Data.europa.eu](https://data.europa.eu) provides access to more than 1 million datasets, from 36 countries, along 13 thematic categories. ERFP dataset is not among these datasets.
- **All sector-specific data** (outside the railways): rules applicable to data sharing within a particular sector or industry (e.g., financial data, electronic communication data, electricity and gas data, chemical safety data, vehicle repair and maintenance data for light and heavy-duty vehicles, smart meter data, energy consumption data, pharmaceutical testing data, clinical trial data, agricultural data, geographical data, etc.).
- **Scientific information** as commented in Commission Recommendation (EU) 2018/790 on access to and preservation of scientific information²³.
- **Digital content and digital services** under Directive 2019/770 on certain aspects concerning contracts for the supply of digital content and digital services²⁴.
- **Data in online content-sharing platforms** under Directive (EU) 2019/790 on copyright and related rights in the Digital Single Market and amending Directives

¹⁸ <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:02016R0679-20160504&from=EN>

¹⁹ There are currently roughly emails in the Portal containing personal names.

²⁰ <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32019L1024&from=EN>

²¹ <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52020PC0767&from=EN>

²² See Art. 2(1) 'Data' means any digital representation of acts, facts or information and any compilation of such acts, facts or information, including in the form of sound, visual or audiovisual recording. Same definition of data is included in the Commission proposal of the Digital Services Act (see Art. 2(19)).

²³ <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32018H0790&from=EN>

²⁴ <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32019L0770&from=EN>

96/9/EC and 2001/29/EC²⁵: we do not consider RNE as an ‘online content-sharing service provider’ within the meaning of this Directive (see Art. 2(6) definition²⁶).

- **Tangible carriers of data:** any tangible medium which serves exclusively as a carrier of data (e.g., computers’ hard drives, on-site servers, cloud servers and equipment, USB sticks, CDs, DVDs, etc.); these issues are covered by the well-known and centuries old ownership concept and the classic contract for the sale of (movable) goods and there is no particular need to be examined in this paper;
- **Legislative proposals of the European Commission** such as the Digital Markets Act²⁷, the Digital Services Act²⁸ and the Artificial Intelligence Regulation²⁹;
- **Program policy documents** such as the European strategy for data³⁰ and the White Paper on Artificial Intelligence³¹;
- **Big data:** as a concept. Indeed, RNE maintain a Big Data Governance Framework that is a document with rather internal character and no direct relation and impact on the Portal’s data;

There are several boarding data types in transport sector and accompanying legal acts that might be of interest for further research but were also not specifically addressed in this study:

- **Rail infrastructure data (also known as RINF data)** under Regulation 2019/777 on the common specifications for the register of railway infrastructure³²: although from a category point of view being very close to Portal’s data, RINF application contains different set of very detailed infrastructure data (see Table 1 to the Regulation) supposed to be supplied by different stakeholders (i.e., the main rail infrastructure managers in EU in different application (can be called on ERA website here: <https://rinf.era.europa.eu/rinf>); Nonetheless, the ERFP (static) data can be seen as a natural and statutory prescribed continuation of the RINF data in the first/last mile rail infrastructure.
- **Multimodal travel information** under Commission Delegated Regulation (EU) 2017/1926 of 31 May 2017 supplementing Directive 2010/40/EU of the European Parliament and of the Council with regard to the provision of EU-wide multimodal travel information services³³. However, this Regulation also provides several definitions (e.g., ‘metadata, ‘dynamic travel and traffic data’ ‘static travel and traffic

²⁵ <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32019L0790&from=EN>

²⁶ Art. 2(6) ‘online content-sharing service provider’ means a provider of an information society service of which the main or one of the main purposes is to store and give the public access to a large amount of copyright-protected works or other protected subject matter uploaded by its users, which it organises and promotes for profit-making purposes. We doubt that the information of the SFs uploaded by the SFOs in the Portal, for example location, number of tracks, charges, etc., would attract, and thus, would be protected by copyright. Therefore, RNE would not qualify under the online content-sharing service provider’s definition.

²⁷ <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52020PC0842&from=en>

²⁸ <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52020PC0825&from=en>

²⁹ <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52021PC0206&from=EN>

³⁰ <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52020DC0066&from=EN>

³¹ https://ec.europa.eu/info/sites/default/files/commission-white-paper-artificial-intelligence-feb2020_en.pdf

³² <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32019R0777&from=EN>

³³ <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32017R1926&from=EN>

data') that are relevant for the data landscape in the mobility sector as a whole. Accordingly, they will briefly be commented in chapter 3.1.1 below.

- **Electronic freight transport information**³⁴ and **regulatory information**³⁵ under Regulation (EU) 2020/1056 on electronic freight transport information (eFTI Regulation): it concerns data exchange of regulatory information among the economic operators concerned and between the economic operators concerned and competent authorities.

2. General part

2.1 (Raw) data, information, and content triologue: legal definitions and challenges

2.1.1 Definition of data and information

Speaking of definitions, again, this study is not about physical manifestations of data and physicality of data embodiments (e.g., different mediums/carriers for data) but entirely focused on immaterial and invisible form of data, comparable to mere information, which ultimately should out of necessity be part of our material world. For example, the American Standard Code for Information Interchange (ASCII), uses a 7-bit binary code to represent text and other characters within computers, communications equipment, and other devices. Each letter or symbol is assigned a number from 0 to 127. In such manner, lowercase "a" is represented by 1100001 as a bit string

In everyday language, the terms "data" and "information" are often used synonymously, referring to "information, especially facts or numbers, collected to be examined and considered and used to help decision-making, or information in an electronic form that can be stored and used by a computer."³⁶ "Data" and "information" are also used interchangeably in various legal contexts, also in this paper. Some scientists use the term "data" to refer to discrete, objective facts or observations that are unorganized, unprocessed and without any specific meaning, and the term "information" to refer to data that has been shaped into forms that are meaningful and useful to human beings. Yet, the simplest way to phrase raw data is to say data are digital representation of information. In that way we could already comprehend the definition by excluding all information stored in non-digital medium (e.g., human brains) and all information available in analog form (e.g., books, tapes, paper sheets).

³⁴ See Art. 3(4) 'electronic freight transport information' or 'eFTI' means a set of data elements that are processed by electronic means for the purpose of exchanging regulatory information among the economic operators concerned and between the economic operators concerned and competent authorities;

³⁵ See Art. 3(1) 'regulatory information' means information, whether or not presented in the form of a document, that is related to the transport of goods in the territory of the Union, including of goods in transit, which is to be made available by an economic operator concerned in accordance with the provisions referred to in Article 2(1) in order to prove compliance with the relevant requirements of the acts laying down those provisions;

³⁶ See definition of data in <https://dictionary.cambridge.org/dictionary/english/data>

In the world of computers, data are basically the input, or what you tell the computer to do or save. Information is the output, or how the computer interprets your data and shows you the requested action.

In the world of railways, the interconnection between raw data and information could be illustrated with the following example: a signal from the IM's command and signalling system when the train passes a particular point is raw data (basically meaningless as such), but processed in the relevant format and system, together with thousands, if not millions, of identical signals, it digitally represents very specific and highly valuable information, i.e., location of the train.

In the world of legal norms, all legal acts related to data in EU operate under the general assumption that the definition of raw data is somehow known to the citizens, businesses, and authorities in Member States. Which in fact is not the case. The truth is that as of today there is still no legal definition of data as a generic term at EU level. Indeed, the definitions of personal and non-personal data as data subcategories are included in the GDPR and Regulation 2018/1907 but the basic notion of raw data is still missing. There is also a tendency to believe that legislators in EU deliberately refrain from defining raw data and granting specific set of rights in data on the assumption that the interests of the parties concerned are presently well protected by a complex network of existing laws. However, this situation of legal uncertainty is about to change at least concerning definition of data. There are two pending legislative proposals of the European Commission (i.e., Data Governance Act and Digital Services Act) both accommodating the following (working) definition of data:

(1) 'data' means any digital representation of acts, facts or information and any compilation of such acts, facts or information, including in the form of sound, visual or audiovisual recording³⁷.

2.1.2 Content

On top of the data and information terms comes the concept and notion of '(digital) content' being data which are produced and supplied in digital form and 'digital service' being (a) a service that allows the consumer to create, process, store or access data in digital form; or (b) a service that allows the sharing of or any other interaction with data in digital form uploaded or created by the consumer or other users of that service (see Art. 2(1) and (2) of Directive 2019/770 on certain aspects concerning contracts for the supply of digital content and digital services³⁸).

2.1.3 Preliminary conclusions

Data or any digitally represented information is not a tangible item. Thus, when it comes to data in legal terms, there are three basic questions to be answered:

1. Do (raw non-personal) data have a legal status in EU?

³⁷ See footnotes 19 and 20 above.

³⁸ <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32019L0770&from=EN>

The short answer is no, and it is not a European phenomenon. Despite the technological boom and universal comprehension on the ever-growing importance of data, the world is still in global search for a legal status of data. There is still no legal definition of raw data in legal act at EU level. In the European context in particular, it is apparent that there is no uniform, comprehensive legal framework on non-personal data as such and, consequently, on economic exploitation and tradability of those data neither at EU level, nor nationally in Austria. The only commonly shared understanding is that data could be a subject of various legal norms. Thus, data are found to be subject to a patchwork of rights and obligations, spread in different legal acts complementing each other.

2. Shall data have a legal status?

Here the opinions are rather diverging. Some policy makers, practitioners and scholars are calling for introduction of property rights in data (e.g., via a digital upgrade of property law), while other camp supports the idea of having exclusive rights in data and special legal protection of algorithms used in data analysis, not necessarily linked with property law. Others argue that none of the above is necessary (i.e., it assumes that existing EU law remains in place unchanged). There is also a fourth group claiming that no one owns – or should own - data³⁹.

3. Shall the legal status of data be linked with property law?

Upon closer review, it is very questionable whether data is—or should be—subject to any property rights. In 2017 in Germany the federal government called for the creation of “data ownership” as a mean to create “data markets” and “data value harvesting.” In a study of the German Ministry for traffic and digital infrastructure on whether data are or should be subject to property rights, concluding that property rights to data could be beneficial to create markets for data and to reward production of data and “essential investments”. This idea has not yet been materialised in a new legislation.

In a nutshell, data propertization would mean that individual data owners will have rights to exclude others from using or accessing that data, which will generally seriously complicate and restrict the free flow of information and creation and maintenance of any ‘data market’.

2.2 Rights related to data

It is a legal patchwork of rights relating to data. The overview below is briefly summarising the main candidates to be considered to the Portal’s data and which of them could in fact apply.

2.2.1 Ownership rights

Although obviously intangible (and invisible) nature of raw data, there is a largely spread wrong assumption in the general public and even among (non-data specialised) lawyers that data are and can simply be subject to property rights, similar or even identical to

³⁹ Determann, Lothar, No One Owns Data (February 14, 2018). UC Hastings Research Paper No. 265, Available at SSRN: <https://ssrn.com/abstract=3123957> or <http://dx.doi.org/10.2139/ssrn.3123957>

ownership over physical items, objects and things. It is wrong because data is not treated as a form of property at EU or any EU Member State level. It is a huge misconception not semantically but in its essence. Typically, discussions revolve around who will “own it” without a proper analysis of what “it” is or what “ownership” would actually mean. The claim “*I want ownership*” does not take into account that ownership is a fluid spectrum of options, not always a clear-cut outcome. Once there is agreement on the business model, it should be possible to support it with appropriate **licensing of intellectual property rights**, combined with other contractual rights. Therefore, ownership is not the right concept to pursue when it comes to raw non-personal data. For the above reason the right mix of rights related to data should apply to the Portal’s data.

2.2.2 Computer program rights

Directive 2009/24/EC of the European Parliament and of the Council of 23 April 2009 on the legal protection of computer programs (Codified version)⁴⁰ aims to clarify and remove differences between the legal protection of computer programs in different European Union (EU) countries in order to contribute to the proper functioning of the internal market. EU countries must protect computer programs by copyright. Programs should be protected as literary works, within the meaning of the Berne Convention for the Protection of Literary and Artistic Works⁴¹. Computer programs include their preparatory design material⁴².

The protection provided for in this directive applies to the expression of a computer program in any form, but not ideas and principles which underlie a computer program or any elements of it and which is original in the sense that it is the author’s own intellectual creation.

The author of a computer program is the person or group of people who have created the program or, where national legislation permits, a legal person, i.e., a company or other legal entity. If several persons participate in creating a program, the exclusive rights are held jointly by these persons. If an employee creates a computer program in the course of his duties or following the instructions given by his employer, the employer exclusively has the economic rights relating to that computer program.

The holder of the rights to a computer program may do, or may authorise others to do, the following (exclusive rights of the rightholder):

- the permanent or temporary reproduction of the program, or a part thereof;
- the translation, adaptation, arrangement and any other alteration of the program;
- the distribution of the programme.

Council Directive 91/250/EEC was formally replaced by Directive 2009/24/EC on 25 May 2009 which consolidated the various minor amendments the original directive had received over the years. The transposition in Austria has been done in 1993 in the Bundesgesetz

⁴⁰ <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32009L0024&from=EN>

⁴¹ <https://wipo.lex.wipo.int/en/text/283698>

⁴² See ECJ Case C-406/10: neither the functionality of a computer program nor the programming language and the format of data files used in a computer program in order to exploit certain of its functions constitute a form of expression of that program and, as such, are not protected by copyright in computer programs for the purposes of that directive.

über das Urheberrecht an Werken der Literatur und der Kunst und über verwandte Schutzrechte (Urheberrechtsgesetz) from 1936.⁴³

Following the chain of contracts on the Portal's software development by the European Commission from 2013⁴⁴ and 2017⁴⁵ and the transfer to RNE⁴⁶, it can be concluded the copyright over the computer program (the source code) of the ERF belongs to RNE.

2.2.3 Database rights

EU, in comparison to the USA, is unique with the *sui generis* right to database recognised in Directive 96/9/EC on the legal protection of databases⁴⁷.

In the meaning of this Directive, the term database refers to a collection of independent works, data or other materials, which have been arranged in a systematic or methodical way and have been made individually accessible by electronic or other means. In the meaning of the Directive the data or materials:

- must not be linked, or must be capable of separation without losing their informative content;
- must be organised according to specific criteria, which means that only planned collections are covered;
- must be individually accessible, i.e., mere storage of data is not covered by the term database.

In EU database can be protected by copyright as a literary work and/or by a *sui generis* database right:

- under the rules of international law - Berne Convention, the WTO/TRIPs Agreement and under the WIPO Copyright Treaty (WCT), original and creative databases enjoy copyright protection as literary works.
- under Directive 96/9/EC on the legal protection of databases, which creates a specific intellectual property right for databases, that is unrelated to other forms of protection such as copyright. This new form of "sui generis" protection applies to those databases, which are not "original" in the sense of an author's own intellectual creation ("non-original" or "uncreative" databases), but which involved a substantial investment in their making.

⁴³

<https://www.ris.bka.gv.at/GeltendeFassung/Bundesnormen/10001848/Urheberrechtsgesetz%2c%20Fassung%20vom%2020.08.2021.pdf>



Excerpt from EU
Contract 2013 on in:

⁴⁴ Contract MOVE B2 827-2013 - Study and pilot -



Excerpt from EU
Contract 2017 on in:

⁴⁵ Contract MOVE C3 2017-198 - Further development -

⁴⁶ Sale contract from 27 May 2020.

⁴⁷ <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:01996L0009-20190606&from=EN>

Both rights only apply to the arrangement of data – neither database copyright nor the sui generis right creates an additional protection for the individual elements of the database. It is worth remembering this consideration as it is of crucial importance for regulating the inbound flow of data in the Portal. It means that every small bit of data in the Portal (i.e., each element of the SFD and the SFD as a standalone data record) does not enjoy legal protection by operation of law. The only way for the data originators to protect individual data entries is based on a licence contract with RNE.

As this is the applicable right to the ERFP database being uncreative, more details on the sui generis right to database's legal regime are provided below. The sui generis protection of databases in the EU applies if a substantial investment was made in obtaining, verifying and presenting its contents. A substantial investment is to be understood as a financial and/or professional investment, which may consist in the deployment of financial resources and the expending of time, effort and energy made in obtaining and collecting the contents. The collection of data should be contained in a fixed base, which includes technical means – electronic, electromagnetic or electro-optical processes or other means – index, table of contents, plan or method of classification, to allow the retrieval of any independent material contained therein. Database protection can apply to both electronic and non-electronic (paper) databases as well as both static and dynamic databases. The term of protection of the sui generis right is 15 years following the database's completion. However, if the database is published during this time, the 15-year term will start running from the publication date. If a new substantial investment is made to an existing database (updates or supplements), the creator will have a new right to the altered database or its substantial part.

The sui generis right grants its holder two categories of rights:

1. the right to prevent the extraction of either all or a substantial part of the database. The term "extraction" refers to the permanent or temporary transfer of the whole or a substantial part of the contents of the database to another medium, by any means or in any form. It implies that some degree of choice or individual appreciation of the content to be extracted is made.
2. the right to prevent the re-utilisation of all or a substantial part of the database. The term "re-utilisation" refers to any form of making available to the public the whole or a substantial part of the contents of the database by distributing or renting copies, through on-line or other forms of transmission.

The expression "substantial part" of the contents refers to a part that could be substantial in quantitative or qualitative terms – therefore a part may be considered substantial even if it is quantitatively small. The sui generis right protects, as an intangible asset, the results of the financial and/or professional investment carried out towards the methodical and systematic classification of independent data. This right is not a right over the information stored in the database and does not constitute an extension of the copyright protection which may apply to the contents of the database.

The holder of the sui generis database right is the person or entity who undertakes the initiative of creating the database – the producer of the database – and takes the risk of investing. The investment's substantial quality has to be proven by the producer, for example by providing invoices or information on the persons/employees involved in the work.

In the EU, *sui generis* database protection is obtained automatically from the moment when the database is created, and no registration or other formality is required. In contrast to patents and trademarks there is no centralised EU-wide register of databases where everybody can check and verify the right holder. Therefore, the *sui generis* database right is basically contextually proclaimed and proven. The above conclusions are to full extent applicable for the Portal' database as well.

2.2.4 Trade secrets and confidentiality

Although confidential information and trade secrets are often used interchangeably and there is a substantial overlap between them, they are in fact different concepts governed by different statutory regulations. Therefore, in order to protect its business information, a company must first determine the type of information it possesses. However, sometimes this turns out to be quite difficult.

Confidential information

Broadly speaking, confidential information has a wider scope than a trade secret. All trade secrets constitute confidential information, however not all confidential information qualifies as a trade secret. There is no strict legal definition at EU level on what constitutes confidential information. Such information could be a company's financial background, business documentation, executed agreements, policies and procedures, etc., which are generally not known by third parties.

Thus, it is rather up to the company to define the specific information it considers confidential. There is no requirement that the information has some commercial value to the company and the company does not need to prove any interest in keeping it confidential. The main element is for this information not to be widely known.

Basically, in order to protect its confidential information, a company needs to include specific clauses, for example, in its contracts with employees and business partners. These clauses shall define the information the company considers as confidential and based on the court practice must be rather detailed in scope (e.g., exhaustively, to the extent practically possible). Further, respective obligations with regard to the confidential information (e.g., not to acquire, use or disclose the information), as well as sanctions for breach of said obligations (e.g., termination of the contract, penalties) if defined by the company could facilitate potential claims.

Confidentiality clauses could be included in various documents depending on the subjects to which they apply, for example, employment contracts, internal regulations/orders, service agreements, non-disclosure agreements. In any event, the respective document must be brought to the knowledge of the respective employee/business partner.

Trade secrets

As previously said, trade secrets and confidential information are not the same concepts, however, there are many similarities between them. Until quite recently, trade secrets were treated rather differently across the EU (e.g., there were Member State having no legal definition of trade secrets) and they did not enjoy the same level of protection in all Member States. These differences caused difficulties and uncertainties for companies carrying our business in more than one Member State and investing in their intellectual capital, including trade secrets. For that reason, and in order to harmonize the legislation

across the internal market, a Directive related to trade secrets was adopted at the EU level.⁴⁸

Trade Secrets Directive

If you possess valuable information on technology or on any other aspect of your business, you can protect it as a trade secret if the following conditions are met:

- the information is not known either by the public at large or by the experts of the sector in question
- the information has commercial value
- you have taken steps to keep the information secret: for example, you keep it in safe storage and you have signed non-disclosure agreements with anyone that has access to it or with whom you have shared the information

Trade secrets can include a vast amount of information and know-how that is not protectable or cannot be protected properly through patents, such as:

- early-stage inventions
- manufacturing processes
- lists of suppliers and clients

Information protected by trade secrets can be strategic for the long-term, like recipes or chemical compounds, or for shorter periods, such as the results of a marketing study, a brand name, price and date of launching of a new product or the price offered in a bidding procedure.

The fact that you have a trade secret does not mean that you have exclusive rights over the information in question. If someone else develops the same information, he or she can use it freely. However, you are protected against dishonest behaviour: for example, if someone accesses the documents related to your secret information without your authorisation, copies them for their personal use or gives them to someone else. You are also protected if someone breaches a non-disclosure agreement and makes the information available to someone else.

The major limitation of the Trade Secrets Directive, from the perspective of a data-driven entity, is precisely that it requires the data to be kept secret, i.e., protection will be lost if the data is made public at any stage. Portal's data, which shall be made publicly available subject to an explicit requirement of EU law, cannot thus rely on any protection grounded in the EU trade secrets regime.

2.3 Private sector data sharing in EU (Guidance from 2018)

There is a EU Commission Staff working document-Guidance on sharing private sector data⁴⁹ in the European data economy, which, although does not constitute a statement of the law and is without prejudice to the interpretation of EU law by the Court of Justice of the European Union and does not bind the Commission as regards the application of EU

⁴⁸ <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32016L0943&from=EN>

⁴⁹ The term 'data sharing' is used in order to describe all possible forms and models underpinning B2B data access or transfer.

law, provides some directions as to the business models and the legal vehicle that could support the B2B data sharing arrangement⁵⁰ (see page 6):

The underlying business models of data sharing can differ quite substantially, and it strongly depends on the type of data in question and the strategic business interest. They can range from an Open Data approach to exclusive data partnerships with only one party:

a) **An Open Data approach:** An Open Data approach, whereby the data in question are made available by the data supplier to an in principle open range of (re-)users with as few restrictions as possible and against either no or very limited remuneration, can be chosen when the data supplier has a strong interest in the data re-use. Examples are providers of services that would like to make use of an ecosystem of third-party application developers in order to reach the final customers.

b) **Data monetisation on a data marketplace:** Data monetisation or trading can take place through a data marketplace as an intermediary on the basis of bilateral contracts against remuneration. This can be interesting for companies that do not know potential re-users for their data and aim at engaging in one-off data monetisation efforts. This mechanism appears suitable when either (1) there are limited risks of illicit use of the data in question, (2) the data supplier has grounds to trust the (re-)user, or (3) the data supplier has technical mechanisms to prevent or identify illicit use. Model contract terms can lower the costs of drawing up data usage agreements.

This is basically the RNE and UIRR business model to be pursued with one significant exception: to our best knowledge, there is no established data marketplace in the EU suitable for the Portal's data.

c) **Data exchange in a closed platform:** Data exchange may take place in a closed platform, either set up by one core player in a data sharing environment or by an independent intermediary. The data in this case may be supplied against monetary remuneration or against added-value services, provided e.g. inside the platform. This solution allows offering added-value services and thus provides for a more comprehensive solution for more stable data partnerships and allows for more mechanisms of control on the usage made of the data; model contract terms can lower the costs of drawing up data usage agreements. Where the data sharing is exclusive, it would need to comply with the competition rules.

Variations and combinations of these models are possible and need to be adapted to each concrete business need.

2.4 Tendencies and prospects for EU universal or sector-specific handling of data: EU drafts in the loop (Definitions from the Data Governance Act proposal)

At EU horizontal level, although it is still not adopted, a valuable part from the proposal of a Data Governance Act (DGA) will be the introduction for the first time of several fundamental definitions for the EU data law as follows (see Art. 2):

⁵⁰ <https://digital-strategy.ec.europa.eu/en/news/staff-working-document-guidance-sharing-private-sector-data-european-data-economy>

(1) *‘data’ means any digital representation of acts, facts or information and any compilation of such acts, facts or information, including in the form of sound, visual or audiovisual recording;*

[...] (4) *‘metadata’ means data collected on any activity of a natural or legal person for the purposes of the provision of a data sharing service, including the date, time and geolocation data, duration of activity, connections to other natural or legal persons established by the person who uses the service;*

(5) *‘data holder’ means a legal person or data subject who, in accordance with applicable Union or national law, has the right to grant access to or to share certain personal or non-personal data under its control;*

(6) *‘data user’ means a natural or legal person who has lawful access to certain personal or non-personal data and is authorised to use that data for commercial or non-commercial purposes;*

(7) *‘data sharing’ means the provision by a data holder of data to a data user for the purpose of joint or individual use of the shared data, based on voluntary agreements, directly or through an intermediary;*

It remains to be seen in what form those draft definitions would be approved in the final version of the DGA but the mere fact of dealing with those terms at general EU level should already be supported.

At the level of transport and mobility, there is no EU draft in the loop offering similar ground-braking definitions or concepts.

2.5 Austrian perspective on (raw) data

Austria has a tradition of keeping its laws as technology neutral as possible. Consequently, it has no law regulating (raw) data or any other modern technology. Rather, the general rules of civil law apply.⁵¹

Austrian civil law basically distinguishes between two categories of exclusive rights: property of things (“Sacheigentum”) according to § 308 in conjunction with § 354 of the Austrian General Civil Code (Allgemein Bürgerliches Gesetzbuch, “ABGB”) and so-called “intellectual property” (Geistige Eigentum), including patent, trademark, copyright, utility model and design rights (Immaterialgüter-recht). With regard to the property of things, the ABGB provides as follows:

(i) § 285 ABGB defines “things” (Sachen) as “everything that is different from a person and serves the use of humans is called a thing in the legal sense” whereas (ii) § 285 ABGB merely excludes animals from this legal definition of “things” and (iii) § 353 ABGB provides that “Everything that belongs to somebody, all his/her tangible and intangible things, is called his/her property”.

⁵¹ The whole chapter on Austrian civil law approach to data is cited from European Commission’s Study on emerging issues of data ownership, interoperability, (re)usability and access to data, and liability (see pages 179-180).

Therefore, Austrian legal commentators generally argue that data/information falls within the legal definition of “intangible things”⁵². However, it is also clear that the ABGB’s regulations on the property of things are not applicable to intangible things such as data.⁵³ Data as such also are not protected by any intellectual property rights currently existing in Austria. Several Austrian legal commentators are continuously discussing whether an intellectual property and/or a property of things approach towards data might make sense in general.⁵⁴ However, all of these approaches came to nothing at present stage. With regard to a possible application of intellectual property protection to data, Austrian legal commentators usually refer to the fact that intellectual property protection specifically is only granted to efforts created by individuals, but not to mere data/information that is “just there”.

Also, the Austrian Supreme Court explicitly held in a copyright case that resizing images to thumb-nails does not amount to any act relevant under the Austrian Copyright Act (Urheberrechtsgesetz, “UrhG”), particularly in case such resizing happens automatically without any human interaction being involved; in the same decision, the Austrian Supreme Court also explicitly held that computer-generated results are not to be qualified as “intellectual creations” in general.⁵⁵ Consequently, automatically generated data generally seem to be barred at least from copyright protection.

If created by a human and reaching the required “originality” threshold, however, data may enjoy copyright-protection. Furthermore, and from a copyright-related point of view, mere data, respectively a collection thereof, may be protected under the sui-generis legal protection for databases laid down in § 76c to § 76e UrhG even if the “originality” requirement applicable to copyright-protected works is not met.

However, even if data cannot be owned under Austrian law, this does not mean that there are no legal means to defend against any unlawful use of data:

Firstly, and with a view to personal data, there is the Austrian Data Protection Act (Datenschutzgesetz, “DSG”), which is the *lex specialis* to the ABGB. Whilst the DSG equally does not speak of any “property” or “ownership” with regard to personal data, it provides data subjects (i.e., in contrast to other EU jurisdictions, individuals and entities, see § 4 fig 3 DSG) with claims that are quite similar (but not identical) to those granted by the ABGB to the owners of things. Most notably, the DSG does not provide data subjects with a claim for surrender of personal data (as laid down in § ABGB for owners of things), but instead with a claim for having personal data deleted/destroyed (§§ 26 to 29 DSG).

Furthermore, data in general (i.e. not only personal data) enjoy protection under the Austrian Criminal Code (Strafgesetzbuch, “StGB”) as § 126a StGB sanctions wilful damage to data that were created/transferred with EDP-support.

Also, data in general may enjoy protection under the Austrian Unfair Competition Act (Gesetz gegen den unlauteren Wettbewerb, “UWG”): using third-party data without permission can be qualified as “unlawfully exploiting some else’s accomplishment”

⁵² See, e.g., Koziol – Welsch/Kletečka, *Bürgerliches Recht* 114 (2014), mn 766, referring also to Andreewitch/Steiner, *Outsourcing – Herausgabe der Daten bei Vertragsbeendigung?*, *ecolex* 2005, 358 and Thiele, *Nochmals: Übertragungsanspruch bei Domain-streitigkeiten*, *RdW* 2006, 80 fn 80 et sequ

⁵³ See, e.g., Koziol – Welsch/Kletečka, *Bürgerliches Recht* 114 (2014), mn 913; Helmich in Kletečka/Schauer, *ABGB-ON*1.02, §285 mn 2).

⁵⁴ See, e.g., Wiebe, *IP Day2016 Hand-Out*, p. 54-63.

⁵⁵ See Austrian Supreme Court, 4 Ob 105/11m – 123.

(Ausbeuten fremder Leistung) or “passing off” (unmittelbare Leistungsübernahme) under § 1 UWG if committed consciously⁵⁶

Finally, the Austrian Data Protection Authority is often pointing out that more and more technical data, for example data related to smart power meters, connected cars, wearables or, more generally speaking, in the Internet of Things (“IoT”) context, have to be qualified as personal data because they often reveal information which may be used for identifying the individual who owns and/or operates such “connected”/IoT products by legal means (e.g. if such a smart and/or IoT product is linked to a user account which contains the user’s entire name and/or other data which may be used for identification purposes, such as the user’s address).

3. ERFP-specific part

3.1 Data in transport/railway sector

3.1.1 General observation

There is no one single, universally applicable in the mobility sector, including railways legal definition of data either. There are some definitions, for example of ‘dynamic travel and traffic data’⁵⁷ and ‘static travel and traffic data’⁵⁸ in Commission Delegated Regulation (EU) 2017/1926 supplementing Directive 2010/40/EU of the European Parliament and of the Council with regard to the provision of EU-wide multimodal travel information services. These definitions will help in delineating some of the characteristics of the Portal’s data below.

On a technical level, different standards of data models and messages apply in different modes of transport⁵⁹. Overall objectives, at least in the railways, are to reconcile heterogeneous information models by semantically transforming the data that are exchanged between the systems, while having a minimum impact on the existing IT architectures implemented by each stakeholder and safeguarding IT investments made already⁶⁰.

⁵⁶ See Wiebe in Wiebe/G. Kodek, UWG I² (2012), mn 650 et sequ ad § 1 UWG.

⁵⁷ See Art.... (7): ‘dynamic travel and traffic data’ means data relating to different transport modes that changes often or on a regular basis.

⁵⁸ See Art. ... (8) ‘static travel and traffic data’ means data relating to different transport modes that does not change at all or does not change often, or change on a regular basis, as listed in the Annex;

⁵⁹ See for example chapter 4.2.22 of the TAP TSI Regulation: In order to manage the connection with other modes of transport, the following standard should be applied for the provision of information to and exchange of information with other modes of transport:

— For the exchange of timetable information between railway undertakings and other modes of transport: norms EN 12896 (‘Transmodel’) and EN TC 278 WI 00278207 (‘IFOPT — Identification of Fixed Objects in Public transport’),

— For the exchange of specific timetable data, the XML technical standards and protocols based on Transmodel, in particular norm EN 15531 (‘SIRI’) for the exchange of real-time timetables and norm EN TC 278 WI 00278207 (‘IFOPT’) for the exchange of ‘stop/station’ data.

— For the exchange of tariff data: this standard is still an open point (see Annex II — List of open points).

⁶⁰ See Chapter 4.2.11.1. of the TAF TSI Regulation.

3.1.2 Legal definition of data in EU (railway) legislation

As mentioned in the foreword, all characteristics of the Portal's data and the relevant EU legislation on rail service facilities are inextricably linked. This means that the data already accumulated in the Portal and the legal framework of rail-related facilities and services should always concurrently be taken into consideration.

Primary EU legislation on non-personal data

In contrast to the personal data and its protection, the Treaty on European Union⁶¹ and the Treaty on the Functioning of the European Union⁶² are silent on non-personal data. The reason might be that the right to privacy is considered a fundamental right in the Union, whereas the non-personal data (or private sector, industrial, machine-generated, or raw data) for the economy is still not recognised at the same level by the Member States.

Secondary EU legislation on non-personal data

The leading characteristic of the Portal data is the (almost 100%) non-personal nature of the data processed in the Portal. It is therefore worth mentioning the EU directives, regulations adopted on non-personal data issues and applicable to the Portal's data.

Horizontal acts

The most relevant of them is the non-personal data Regulation. On the basis of Art. 114 TFEU, the European Parliament and the European Council adopted the Regulation on 2018/1807 on a framework for the free flow of non-personal data in the European Union in 2018 and applicable from 28.06.2019. In general, this legal act recognises the necessity to lay down a clear, comprehensive and predictable legal framework for the processing of data other than personal data in the internal market. It deals with two types of obstacles to data mobility and to the internal market: data localisation requirements put in place by Member States' authorities and vendor lock-in practices in the private sector. However, undoubtedly applicable to the Portal's data, this legal act does not address major civil law issues of interest for RNE such as non-personal data tradability, marketing, distribution, licencing, supervision, etc.

Railway-specific acts

Interestingly, although there are several lengthy EU legal acts exclusively dedicated to gathering and exchange of static and dynamic data in the rail sector (e.g., TAF and TAP TSI Regulations, RINF Regulation), there is no definition of data in it⁶³. In addition, (non-

⁶¹add....

⁶² ...add...

⁶³ However, there is a definition of 'metadata' in the TAF TSI Regulation, see Annex II Glossary: *metadata, simply put, is data about data. It describes data, software services, and other components contained in the enterprise information systems. Examples of the types of metadata include standard data definitions,*

personal) data in principle and data in the Portal are not specifically addressed nor in the SERA Directive or the new PRR Regulation⁶⁴ neither in the SF Regulation.

3.2 ERFP as the ‘common web portal’ under Regulation (EU) 2017/2177/

3.2.1 Portal IT development

Pilot version

Effectively, the portal’s prototype or pilot was programmed as a deliverable to a contract between European Commission/DG MOVE and HaCon Ingenieuresellschaft mbH, Hanover (Germany) and UIC, Paris (France), and subcontractors UIRR, Brussels (Belgium), Triona AB, Borlänge (Sweden) and IF Kreativa, Skopje, (Macedonia) signed in 2013⁶⁵. The European Commission/DG MOVE procured a study titled "User-friendly access to information about last-mile infrastructure for rail freight", which was published in November 2016⁶⁶. This study project also included the development of a pilot version of an EU-wide web-based portal with GIS functionalities, capable of presenting relevant data for different kinds of last-mile infrastructure in a transparent way, for a sample of territories in the EU (i.e., the former European Rail Freight Locations Portal). It was hosted under the domain name ‘Rail Freight Locations’ (railfreightlocations.eu⁶⁷).

The pilot version of the GIS portal was officially launched on the occasion of a stakeholder seminar in Vienna on 19 October 2015. This seminar took place in the context of the 9th international BME/VDV railway congress and thus attracted numerous high-level participants, representing associations as well as companies from all facets of rail freight business (infrastructure managers, rail service providers, rail freight corridors, intermodal (terminal) operators, etc.). Within the course of this seminar, a live demo of the pilot Portal was performed. Starting with this presentation, the portal has been made available to the public and thereby been set into regular pilot operation.⁶⁸

Production version

The production version of the Portal was then further developed subject to another contract signed in 2018⁶⁹. In April 2018, the European Commission procured the further development of a European Rail Locations Portal with the RFP having the following aims: The portal should become the tool of choice: (a) that potential rail stakeholders use to

location and routing information, and synchronisation management for distributing shared data. See also chapter 4.2.11.4. Central Repository: The Central Repository must be able to handle: - metadata: structured data describing the content of messages,

⁶⁴ [REGULATION \(EU\) 2021/782 OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL of 29 April 2021 on rail passengers’ rights and obligations](#)

⁶⁵ Contract MOVE/B2/827-2013: User-friendly access to information about last-mile infrastructure for rail freight

⁶⁶ <https://ec.europa.eu/transport/sites/default/files/2016-11-last-mile-gis-final-report.pdf>

⁶⁷ This domain is no longer active on the Internet.

⁶⁸ See on page 89 of the Study

⁶⁹ Contract MOVE/C3/2017-198: Further development of a European Rail Locations

access information about rail facilities in Europe; and (b) that could assist operators of rail service facilities (freight as well as passenger rail service facilities) to comply with their information provision obligations as foreseen in the SF Regulation.

The contract was awarded to a consortium composed by HaCon Ingenieurgesellschaft mbH (Germany), Triona AB (Sweden), Union Internationale Des Chemins de fer (UIC) (France), International Union for Road-Rail Combined Transport (UIRR) (Belgium), International Rail Freight Business Association e.V (IBS) (Germany) and Studiengesellschaft fuer den Kombinierten Verkehr e.V. (SGKV) (Germany).

On 3 June 2019 the European Commission announced that the European Rail Facilities Portal is online⁷⁰. Meanwhile, a consortium of HaCon and Triona was contracted by the European Commission as an interim portal manager. This contract expired on 7 April 2020. The portal was transferred (sold) to RNE on 27 May 2020.

3.2.2 Legal premiere of the Portal

Officially, the Portal came into legal being with the adoption of the European Commission Implementing Regulation (EU) 2017/2177 of 22 November 2017 on access to service facilities and rail-related services⁷¹, which entered into force on 1 June 2019. The European Commission obliged the service facilities operators, *inter alia*, to make publicly available their service facility descriptions (including static and dynamic data) free of charge and keep it up to date, as necessary. Art. 5 (1), point (a) of the aforementioned Regulation also stipulated that one of the options where to make the service facility descriptions available is a common web portal.

Therefore, the establishment of the web application and the legal framework on the side of the European Commission ran to a great extent in parallel with the effect of having both in place at the same time, i.e., in June 2019. Thus, there are no doubts that the ‘common web portal’ under Art. 5 (1) (a) of the SF Regulation and the web application and the database behind <https://railfacilitiesportal.eu> are the same thing. This is very important to remember as that fact of legal officialization of the Portal in the EU legislation significantly determined its (minimum) content, and the data availability, quality, limitations, etc.

3.2.3 Current understanding on the portal’s role

European Commission

The below excerpt is from the seventh RMMS from January 2021⁷² in which the position of the European Commission on the Portal is clearly formulated:

⁷⁰ https://ec.europa.eu/transport/modes/rail/news/2019-06-03-european-rail-facilities-portal_en

⁷¹ <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32017R2177&from=EN>

⁷² See on page 81: <https://ec.europa.eu/transport/sites/default/files/swd20210001-7th-rmms-report.pdf>

The European Rail Facility Portal became operational in 2019. The Commission created the Portal as a tool for the rail sector, which can serve as a single-entry point for gathering and sharing information on rail facilities and services between interested parties. It covers both rail freight and passenger facilities. Information on service facilities and rail-related services is particularly important for freight. In 2020, RailNetEurope became the portal’s manager and is currently running the portal in cooperation with the International Union of Combined Road-Rail Transport Companies (UIRR). A large number of business associations are providing support to the project by sitting on the Portal’s Governance Board. The Commission developed the Rail Facility Portal with the purpose of providing a single EU user-friendly and market-oriented GIS-based portal, mapping and providing key information on the rail service facilities and last-mile infrastructure in Europe. The portal aims to remedy the lack of easy access to information on rail facilities and last-mile infrastructure, which will in turn contribute to better planning of rail services.

*Service facility operators can use it to comply with their obligation to publish information on access conditions pursuant to Directive 2012/34/EU and Regulation (EU) 2017/2177. **The portal is both a market tool and a compliance tool.** The new portal manager will ensure a close connection of the portal to rail facility operators. This should contribute to a high number of new descriptions appearing in the portal in the coming months. New features will be introduced, which should respond to the portal users’ needs and facilitate compliance with legal rules. **The acceptance of the portal by the sector, as the ‘tool of choice’, both for inputting and for consulting information on the EU rail service facilities, will be the key success factor.** The portal provides a unique opportunity to avoid piecemeal publication of information on services facilities, and thus make such information usable and useful for the benefit of the rail market*

Independent Regulators’ Group – Rail (IRG-Rail)

The rail regulators, along with the lawmakers, are important stakeholders, which general opinion on the Portal should be taken into account as well. In principle, the IRG-Rail welcomes transparent and easily accessible platform for information on all service facilities in Europe⁷³. In addition, as to the experience with and expectations from the Portal, at a webinar on the Portal held online on 15 June 2021 the following conclusions of IRG-Rail were shared with the participants:⁷⁴

- Regulatory bodies (RBs) are neither users of the Portal, nor part of its primary target group
- RBs experience with the Portal is limited; critical mass of SFOs joining has not been reached yet
- SFO’s workload and effort, especially smaller ones, must be kept within reasonable limits
- SFOs, who already publish their SF descriptions by other means legally available to them, should not be forced to join the Portal

⁷³ See IRG-Rail supporting letter dated

⁷⁴ The two presentations are in the attached files: on panel one



Webinar RFP-Panel
1-MThRoehsler.pptx

and on panel two:



Webinar RFP-Panel
2-MThRoehsler.pptx

- There is no legal obligation using only the Portal, hence, it will need to convince with content and performance.

RFP as a business tool:

- Portal is one out of three options for SFO to meet legal obligations
- Assurance that the published content meets the regulatory requirements depends on the process chosen to review the information provided
- Legal obligations and requirements that apply to operators may vary from member state to member state
- SFOs may benefit from guidance provided by the Portal managers; but Portal will be in no position to guarantee SFOs having met their legal requirements
- The market will decide RFP's potential
- Users seem especially interested in comprehensive, up-to-date and easily accessible data
- SFOs seem reluctant to submit data to the Portal if they already published SF descriptions or if submitting data increases their workload

3.2.4 Other applications at EU level with data similar to the Portal's

For the sake of completeness of this study it should be noted that the digital world of railways in EU offers similar portals and platforms (databases) which should yet be distinguished from the ERFP. They must be considered as a former or a current source of very similar or completely identical to the Portal's data, namely:

A. Those with legal basis in EU law

The RINF application under Regulation 2019/777 (ran by European Union Agency for Railways-ERA)

Based on interoperability objectives the Interoperability Directive (Directive (EU) 2016/797)⁷⁵ provides for the creation and publication of a "register of the infrastructure"⁷⁶ pursuant to the format and further rules adopted by the Commission, namely, Commission Implementing Regulation (EU) 2019/777 of 16 May 2019 on the common specifications for the register of railway infrastructure and repealing Implementing Decision 2014/880/EU⁷⁷. The register of railway infrastructure should provide transparency on the characteristics of the network and be used as a reference database. In particular, it should be used in combination with the values of the parameters recorded in the vehicle authorisation for placing on the market, to check the technical compatibility between a vehicle and a route.

The RINF web-based application should be set up and managed by the European Union Agency for Railways ('ERA') and should provide access to the Member States' asset record stating the values of the network parameters of each subsystem or part of subsystem concerned. In particular, Member States should use it to comply with the

⁷⁵ <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:02016L0797-20200528&from=EN>

⁷⁶ Art. 49 of the Interoperability Directive and subject to further acts adopted by the Commission on the basis of Art. 49 (5) of the said Directive.

⁷⁷ <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32019R0777&qid=1623922084997&from=EN>

publication obligation provided for in Article 49(1) of Directive (EU) 2016/797, in order to provide users with a single-entry point.

Subject to a user account the RINF application is accessible online on the Internet here: <https://rinf.era.europa.eu/RINF>.

The common web portal under Directive 2012/34 (NCI ran by RNE)

According to Art. 27(1) of the SERA Directive the content of the network statement (NS) shall be made available free of charge in electronic format on the web portal of the infrastructure manager and accessible through a common web portal. This web portal shall be set up by the infrastructure managers in the framework of their cooperation in accordance with Articles 37 and 40.

As the association referred to in both articles, RNE took the initiative to develop this portal and digitalise the NSs of all infrastructure managers (and in addition and on voluntarily basis rail freight corridors' CIDs⁷⁸ as well) in the course of 2020-2021. The tool is called RNE Network and Corridor Information (NCI).

In its pilot version the application is accessible on the Internet here: <https://nci-online.rne.eu>.

TAF TSI CRD under the TAF TSI Regulation (ran by RNE)

The CRD is the center reference file database for company and location codes in freight train services in EU. Initially developed under the umbrella of UIC's Common Components Group, in 2015 it was then transferred for management and further development to RNE. Each company is identified in every IT system through a four numerical code before 2021 and 6 alphanumeric code from 2021 onwards. The primary and secondary locations of stations, terminals, yards, etc. are also coded in prearranged manner.

Subject to a user account the CRD is accessible online on the Internet on RNE website here: <https://crd.rne.eu/CRD/onlineUser/signUp.action> and without an account on ERA website here: <https://teleref.era.europa.eu>.

TAP TSI RRD under the TAP TSI Regulation (ran by TSGA)

The RRD managed by TSGA⁷⁹ is (almost) the twin application of CRD in passenger train services (i.e., the CRD as a baseline upgraded with the codes of the retail points). According to the TAP TSI Regulation 454/2011, in order to be compliant, every railway undertaking operating passenger trains in the European Union shall a) provide to the TSGA its retail reference data in order to feed the RRD and b) indicate TSGA were to find

⁷⁸ CID stands for 'corridor information document' (see Regulation No 913/2010).

⁷⁹ The TAP TSI Services Governance Association (TSGA) was set up in December 2016 as a long-term governance structure aiming to provide regulatory services that are needed for railways to meet their obligations and for third parties to enjoy their rights under the PRR Regulation

all the required resources as indicated in the Regulation (i.e., up to date timetable, fares, etc.).

The application is not accessible online (under finalisation?).

In practice, both CRD and RRD with the coding of companies and locations are the backbone of any interoperable data exchange in the Union.

B. Those without legal basis in EU law

RNE Customer Information Platform (CIP ran by RNE and Rail Freight Corridors)

This platform started as corridors' initiative with no specific legal basis in EU law. It is coordinated and maintained by RNE on behalf of the rail freight corridors and financed by them with the support of the EU-funded programs (e.g., Connecting Europe Facility).

The application is accessible without user registration on the Internet here:

<https://cip.rne.eu/apex/f?p=212:65>.

ENEE (Register for European station codes, not in operation as from 1 June 2019)

Prior to the CRD being established, UIC had developed the ENEE database which provided country codes and location codes, i.e., some of the data required by the CRD. In order to help railway undertakings migrate smoothly their data to the CRD, UIC has however continued to host and update the ENEE database. This “parallel” running has taken place since 1 January 2015 and has allowed most companies to fully adapt their data exchange so to feed the CRD. Four years later the ENEE database has completely ceased as of 1 June 2019.

Therefore, data included in full or partly in the Portal per service facility (e.g., location, code, type, etc.) are already – in one or the other way and form – multiple times made available and (in most cases) publicly accessible in other web applications on the Internet operated by different stakeholders on different grounds. This conclusion also significantly reflects on the perception for uniqueness of the Portal's data.

3.3 ERFP data: technical perspective

Portal's database is homogeneous database, it means it holds POI data only and there are no images⁸⁰, audio and/video materials, and sounds all in the same database. If we apply the criteria spread around various legal acts and academia books, we can define the Portal's data as follows:

⁸⁰ The location on the map is not shared when all data is extracted from the Portal's database.

3.3.1 Non-personal data

According to Regulation (EU) 2018/1807⁸¹ non-personal data means data other than personal data as defined in point (1) of Art. 4 of Regulation 2016/679⁸² (the GDPR). As already noted, this Regulation does not provide for any further clarity on personal vs non-personal data differentiation either, as it is limited to a negative definition, according to which all non-personal data as defined by the General Data Protection Regulation are included in its scope. However, this regulation does provide a few hints as to what non-personal data are in any case. For example, recital 9 reads as follows: *Specific examples of non-personal data include aggregate and anonymised datasets used for big data analytics, data on precision farming that can help to monitor and optimise the use of pesticides and water, or data on maintenance needs for industrial machines.* The latter could, e.g., be the railway tracks or the trains as such. For the purposes of this study, we assume that such industrial data generated by automatic or semi-automatic systems or manually by human beings as is the case of the RFP, are in any case non-personal data. The Regulation on a framework for the free flow of non-personal data in the EU aims at removing obstacles to the free movement of non-personal data between different EU countries and IT systems in Europe. These are mostly self-explanatory activities taking place under the radar of average citizen and SME but in fact the Regulation ensures some fundamental rules applicable to the Portal's data too:

- Free movement of non-personal data across borders: every organisation should be able to store and process non-personal data anywhere in the EU; for example, data of the Portal was initially stored by the cloud computing provider Amazon at a data center located in Frankfurt am Main, Germany. Now the data is 'moved' to Vienna, Austria in RNE's cloud service provider data center. Indeed, the Portal's data is a good practical example of free movement of non-personal data in the Union originally collected by the European Commission seated in Belgium, stored in Germany and then migrated to Austria, but in any event accessible for everyone in EU and beyond.
- The availability of data for regulatory control (if any): public authorities will retain access to data, even when it is located in another EU country or when it is stored or processed in the cloud. In practice, it would mean that any public authority (e.g. Railway Regulatory Body) would get access to the Portal's data.
- Easier switching between cloud service providers for professional users: The Commission has started facilitating self-regulation in this area, encouraging providers to develop codes of conduct regarding the conditions under which users can move data between cloud service providers and back into their own IT environments. In turn, it should be possible to move the Portal's data from the public cloud of Amazon in Germany into the private cloud of RNE in Austria and the other way around.

⁸¹ [Regulation \(EU\) 2018/1807 of 14 November 2018 on a framework for the free flow of non-personal data in the European Union](#)

⁸² (1) 'personal data' means any information relating to an identified or identifiable natural person ('data subject'); an identifiable natural person is one who can be identified, directly or indirectly, in particular by reference to an identifier such as a name, an identification number, location data, an online identifier or to one or more factors specific to the physical, physiological, genetic, mental, economic, cultural or social identity of that natural person;

Last but not least, it should be underlined that in the case of a data set composed of both personal and non-personal data, which is the case of the Portal data set, the non-personal data Regulation applies to the non-personal data part of the data set. Where personal and non-personal data in a data set are inextricably linked, this Regulation shall not prejudice the application of the GDPR. In our view the personal data in the Portal are extractable and the GDPR would not apply to the portal's data set.

3.3.2 Structured data

Structured data is data that adheres to a pre-defined data model and is therefore straightforward to analyse. Structured data conforms to a tabular format with relationship between the different rows and columns. Common examples of structured data are Excel files or SQL databases. Each of these have structured rows and columns that can be sorted. Structured data depends on the existence of a data model – a model of how data can be stored, processed and accessed. Because of a data model, each field is discrete and can be accessed separately or jointly along with data from other fields. This makes structured data extremely powerful: it is possible to quickly aggregate data from various locations in the database. Structured data is considered the most 'traditional' form of data storage, since the earliest versions of database management systems were able to store, process and access structured data.

In the context of data exchange in the railways, metadata is considered structured data describing the content of messages (see chapter 4.2.11.4. of the TAF TSI Regulation). In the context of the Portal, the Excel file for uploading the data in the Portal should be considered structured data⁸³.

3.3.3 Data held by private organisation falling under the scope of Directive (EU) 2019/1024

In contrast to its members, mostly being public undertakings or public sector bodies, RNE is a private not-for-profit association based in Vienna, Austria.

In RNE data activities for the last almost 20 years, the regime of the old and the new PSI Directives was not considered applicable. However, the concerns raised by ADIF, Spain whether RNE and RNE documents/data would fall under the scope of the new PSI Directive (i.e. Directive (EU) 2019/1024) and its transposition in the Austrian federal law were further clarified in light of the current AT law still based on the old PSI Directive. Consequently, as of 12 November 2021 RNE was not seen as a public body in Austria. Nevertheless, the transposition of the new PSI in the Austrian federal law will closely be followed by the RNE legal team in order to timely reflect on any changes in the above conclusion.

3.3.4 Machine-readable data

Basically, machine-readable or computer-readable data is data in a format that can be processed by a computer⁸⁴. Machine-readable data must be structured data. Machine-

⁸³ <https://railfacilitiesportal.eu/page/help>

⁸⁴ In the United States, the OPEN Government Data Act of 14 January 2019 defines machine-readable data as "data in a format that can be easily processed by a computer without human intervention while ensuring

readable data may be classified in two groups: human-readable data that is marked up so that it can also be read by machines (e.g., microformats, RDFa, HTML), and data file formats intended principally for processing by machines (CSV, RDF, XML, JSON).

There is a definition of 'machine-readable format' meaning a file format structured so that software applications can easily identify, recognise and extract specific data, including individual statements of fact, and their internal structure (see Art. 2(13) of Directive (EU) 2019/1024 on open data and re-use of public sector information).

3.3.5 (For the time being mostly) Static data

Static data is a data that do not change at all or do not change often or change on a regular basis. This definition is inspired by Art. 2(8) of Commission Delegated Regulation (EU) 2017/1926 of 31 May 2017 supplementing Directive 2010/40/EU of the European Parliament and of the Council with regard to the provision of EU-wide multimodal travel information services. Static data is the predominant type of data in the Portal for the time being (e.g., location, address, installations, facilities, tracks, technical parameters, etc.). Dynamic data is considered by the SF Regulation to be part of the Portal, but as long as this is not the case, the analysis will not cover this aspect.

3.3.6 Publicly available data

To draw a clear line between data and information in the physical and online world is not an easy task. Strictly speaking, raw data in the portal, interpreted in its narrow sense as ones and zeros or even as entries in the Excel file for upload of the SFDs, are basically not public. General public has no access to the portal's database (i.e., back-end). But the data representation, i.e., the information on the portal's web application⁸⁵ is publicly available (i.e., front end or user interface) that makes all data no (trade) secret or with confidential character. Therefore, it can be concluded that the Portal's data in its raw form are (not publicly) available (stored in a private cloud⁸⁶ in Vienna), while the Portal's information is accessible 24 hours of the day and 365 days a year from any PC⁸⁷.

Based on the above considerations, the data in the Portal can be classified as non-personal, structured, held by private organisation, machine readable, (for the time being mostly) static and publicly available data.

3.3.7 Quantity, quality, and value of the RFP data

What data shall be included in the portal?

no semantic meaning is lost." The law directs U.S. federal agencies to publish public data in such manner, ensuring that "any public data asset of the agency is machine-readable".

⁸⁵ On the difference between website and web application see here: <https://www.guru99.com/difference-web-application-website.html>

⁸⁶ 'Data clouds' are after all not in the clouds but firmly grounded on Earth servers.

⁸⁷ The portal has no mobile version. On the difference between a web application and a mobile app see here: <https://careerfoundry.com/en/blog/web-development/what-is-the-difference-between-a-mobile-app-and-a-web-app/>

The Portal was designed to accommodate (exclusively or facultatively) on the Internet the SFDs of the SFOs. There is a master Excel file for data upload⁸⁸. Data types are described as follows:

- Text
- Hyperlink
- Integrated/built-in selection list
- Free data entry/selection from calendar/entry from post address

For reasons of transparency and fullness on the topic a Common template for SFOs envisaged in Art. 5(2) of the SF Regulation and developed by the railway sector in cooperation with regulatory bodies should be mentioned here as well⁸⁹. It is not used for the upload of data in the Portal, but it is an element of the overall framework for submission of information to the market by the SFOs when they publish the SFDs on their own website or the website of the respective infrastructure manager.

Given the different file format (i.e., Word vs Excel), structure, and level of detail of both templates, alignment and harmonisation of the templates shall be considered by the sector and RNE in order to avoid creating multiple data models for the same kind of information in different size, form and place.

Quantity of the Portal's data (What minimum/maximum amount of data shall theoretically be handled in the Portal?)

The (static) data to be handled in the Portal are not an infinite figure and to some extent predictable based on statistics and simple calculations. A relatively reliable source for information on the rail and rail-related service facilities in the EU is the rail market monitoring survey reports drawn up and published by the European Commission under Article 15(4) of Directive 2012/34/EU of the European Parliament and of the Council⁹⁰. The Rail Market Monitoring Survey (RMMS) collects data from Member States, among other parameters, on the number of service facilities as referred to in Annex II to Directive 2012/34/EU. However, discrepancies in the definition of each type of service facility and gaps in inputs at national level limit the comparability of figures across Member States and across years, meaning that caution is necessary when drawing conclusions from the inputs received. Moreover, the RMMS does not collect data on the actual or foreseeable use of such facilities: the mere reporting of a facility in the RMMS therefore does not necessarily imply that this facility is regularly used (or could be used at short notice or in the near future).

According to the published in January 2021 seventh RMMS data⁹¹, in 2018 there were about:



Example_facilities_Import_Export_Sheet

⁸⁸ See link N 9 here: <https://railfacilitiesportal.eu/page/help> and the file:



Common_template_for_service_facility_i

⁸⁹ See link N 2 here: <https://rne.eu/downloads> and the file:

⁹⁰ https://ec.europa.eu/transport/modes/rail/market/market_monitoring_en

⁹¹ <https://ec.europa.eu/transport/sites/default/files/swd20210001-7th-rmms-report.pdf>

- 29 000 passenger stations⁹²;
- 894 freight terminals;
- 294 marshalling yards and train formation facilities;
- 964 maintenance facilities;
- 635 maritime and port facilities;
- 830 refuelling facilities.

The sum of the above numbers would represent the rough estimate of all rail and rail-related service facilities in the EU, meaning approximately 32 700 SFDs (= 'points of interest data'⁹³), which can be handled in the Portal under the assumption that the Portal has been used as the 'tool of choice' by most, if not all SFOs. If you multiply the above number by the number of required by Art. 4 of the SF Regulation data fields you could come to the rough maximum of data entries⁹⁴ in the Portal, meaning around 3 960 000 (ca. 4 Mil data entries). However, this number refers to the static data only and the amount of dynamic data supposed to be displayed in the Portal as well (e.g., see Art. ... of the SF Regulation on available capacity, capacity restrictions, etc.) could significantly increase the data volume in the application.

Quality of the Portal's data

The current SFs included in the Portal are **15 136** (as of 6 September 2021). Considering the above figure, it seems that the Portal accommodates a good number of SFs, which it is nominally true, but it should be underlined that the Excel for upload contains ca. 185 data entries but only 4 fields are set as obligatory for official upload/publication of the SFD on the Portal's website. Currently, in October 2021, 82 % of all SFs in the Portal are uploaded with 4 data fields. At the same time, it should be noted that not all 185 data entries are always relevant for all types of SFs. However, considerably higher number of fields are relevant, for example for freight SFs and passenger SFs. A legal check of the RNE Joint Office team of the data entries against the SERA Directive and the SF Regulation legal requirements was performed in April 2021 which has shown that significantly more than 4 data entries shall be deemed obligatory in accordance with the existing EU law.

Given the hurdles before the data collection but in light of the business model, it is still recommended that the above legal evaluation should be taken into account in the further development of the Portal aiming to dramatically increase the quality, respectively the market value of the Portal's data.

Value of the Portal's data

There is no known evaluation of the Portal's data value. There is also no relevant data market where an adequate benchmarking exercise can be performed. It should be subject to separate business analysis comparing similar applications and market supply and demand of similar data.

⁹² All figures refer to the EU27.

⁹³ 'Point of interest data' is the data for one SF or the sum of all data entries associated with particular facility.

⁹⁴ 'Data entry' means a single data field to be filled in the Excel file by the SFO.

3.4 ERFP data: legal perspective

Two approaches to the ERFP legal protection are investigated below: firstly, the Portal as a computer program and, secondly, the Portal as a database. The cradle of both are the initial contacts signed by the European Union (via EU Commission) for the Portal’s pilot version in 2013 and the production version in 2017 (“the Contracts”). In the main body of the Contracts both refer to the Union accruing all intellectual property rights (IP rights) in the *result* of the contract:

Contract from 2013	Contract from 2017
<p>ARTICLE II.10 – OWNERSHIP OF THE RESULTS - INTELLECTUAL AND INDUSTRIAL PROPERTY RIGHTS [...] II.10.2 Ownership of the results The ownership of the results shall be fully and irrevocably acquired by the Union under this contract including any rights in any of the results listed in this contract, including copyright and other intellectual or industrial property rights, and all technological solutions and information contained therein, produced in performance of the contract. [...] All the rights shall be acquired by the Union from the moment the results are delivered by the contractor and accepted by the contracting authority. Such delivery and acceptance are deemed to constitute an effective assignment of rights from the contractor to the Union. [...] The acquisition of ownership of rights by the Union under this contract covers all territories worldwide. Any intermediary sub-result, raw data, intermediary analysis made available by the contractor cannot be used by the contracting authority without the written consent of the contractor, unless the contract explicitly provides for it to be treated as a self-contained result.</p>	<p>11.13 Intellectual property rights II.13.1 Ownership of the rights in the results The Union acquires irrevocably worldwide ownership of the <i>results</i> and of all intellectual property rights under the contract. The intellectual property rights so acquired include any rights, such as copyright and other intellectual or industrial property rights, to any of the <i>results</i> and to all technological solutions and information created or produced by the contractor or by its subcontractor in <i>performance of the contract</i>. [...] The Union acquires all the rights from the moment the contracting authority approves the <i>results</i> delivered by the contractor. Such delivery and approval are deemed to constitute an effective assignment of rights from the contractor to the Union.</p>

Even though both contracts slightly differ in the phrasing with the one from 2013 being a bit more explicit than this from 2017, as to the meaning it is undoubtedly clear that all IP rights to the Portal have been conferred by the European Union represented by the European Commission.

3.4.1 Computer program/software copyright to the Portal

In its main body the contract from 2013 does not explicitly refer to software/computer program, while in the contract from 2017 it is specifically stated the following:

II. 13.3 Exclusive rights

The Union acquires the following exclusive rights:

[...]

(l) where the *results* are or incorporate **software, including source code**, object code and, where relevant, documentation, preparatory materials and manuals, in addition to the other rights mentioned in this Article:

(i) end-user rights, for all uses by the Union or by subcontractors which result from this contract and from the intention of the parties;

(ii) the rights to decompile or disassemble the software;

With the sale contract from 27 May 2020 this right was transferred and assigned to RNE. Consequently, to the present day RNE has not experienced any third parties' claims for copyright infringements related to the source code of the Portal.

Therefore, the EU was the original rightholder of the copyright to the Portal's computer program/software and by way of transfer RNE has successively acquired in full this right in May 2020. As far as RNE (and the sector) does not plan to licence the software of the Portal's, but rather commercialise its data as such, further consideration on the Portal as a computer program are not required.

3.4.2 *Sui generis* database right to the Portal

The Contracts are again not completely identical on this topic with the one from 2013 being silent whereas the other from 2017 explicitly referring to the database:

II. 13.3 Exclusive rights

The Union acquires the following exclusive rights:

[...]

(g) where the *results* are or include **a database**: the exclusive right to authorise or prohibit the extraction of all or a substantial part of the contents of the database to another medium by any means or in any form; and the exclusive right to authorise or prohibit the re-utilization of all or a substantial part of the contents of the database by the distribution of copies, by renting, by on-line or other forms of transmission;

However, the above conclusion on the computer program succession from the Union to RNE is fully applicable to the database right as well. The rightholder is RNE. An important aspect is however whether the Union before and RNE now holds database copyright or *sui generis* database right to the Portal' data.

According to Article 1(1) of Directive 96/9, its aim is ‘the legal protection of databases’. In that regard, that directive institutes two forms of legal protection of databases:

- The first form, governed by Articles 3 to 6 thereof in Chapter II, consists in protection by copyright and is applicable, in accordance with Article 3(1) of that directive, to databases which, by reason of the selection or arrangement of their contents, constitute the author’s own intellectual creation.
- The second form, governed by Articles 7 to 11 of Directive 96/9, in Chapter III thereof, consists in protection on the basis of a *sui generis* right and is applicable, according to Article 7(1), to databases in respect of which there has been qualitatively and/or quantitatively a substantial investment in either the obtaining, verification or presentation of the contents. Those two forms of legal protection are the object of common provisions, in Articles 12 to 16 of that directive set out in Chapter IV thereof⁹⁵.

We tend to agree to the second form of legal protection for the Portal’s database because it would not qualify for copyright protection due to lack of originality. In the Portal’s case any creativity is excluded by definition as long as the main structure and content of the Portal’s database are strictly regulated and prescribed by the law (i.e., SF Regulation).

This specific for EU legal protection seeks to safeguard the position of makers of databases against misappropriation of the results of the financial and professional investment made in obtaining and collection the contents by protecting the whole or substantial parts of a database against certain acts by a user or competitor. The object of this *sui generis* right is to ensure protection of any investment in obtaining, verifying or presenting the contents of a database for the limited duration of the right; whereas such investment may consist in the deployment of financial resources and/or the expending of time, effort and energy. Under the first contract for the pilot version the EU spent EUR and another 374 470 EUR were allocated under the second contract for the final version of the Portal.⁹⁶

Bearing in mind the European Commission and its contractors time, effort, energy and budget spent on the marking of the Portal’s database we could safely conclude that the EU acquired *sui generis* database right to the Portal’s data, currently in RNE’s sphere of rights.

3.5 RNE-EU Commission sale contract of the ERFP

Strictly speaking, the contract signed on 27 May 2020 between the European Commission and RNE⁹⁷ is not explicit on the (raw) data and transactions with data to third parties.

⁹⁵ Case C-30/14, Ryanair Ltd v PR Aviation BV



2018-OJS083-18597
3-en-Contract award

⁹⁶ See contract award notice:



2020-05-27_ERFP_S
ale_Contract_signed

⁹⁷ The sale contract can be found in the embedded file:

However, the sale contract is very explicit on two points with paramount importance regarding the business model:

- Firstly, the charging of the inbound data flow in the Portal (i.e. SFOs data contributors) is forbidden by the Commission in Art. I.4.1 of the sale contract, which reads as follows:

*... the buyer (i.e. RNE) must ensure that the Portal remains accessible to all users by providing possibility **to upload and display** the service facility description free of charge.*

- Secondly, RNE is allowed to market and commercialise services, provided by the Portal in Art. I.10.e of the sale contract, which reads as follows:

*(e) The right to market, distribute, commercialize, broadcast, advertise and communicate **services (e.g. bulk downloads of data)**, provided by the Portal, by any mean, including lending, leasing and renting, whether **free or for a charge**, while still providing the service facility descriptions free of charge;*

Therefore, there is a contractual limitation for RNE, imposed by the sale contract signed with the Commission, to charge the data providers for data upload and display. At the same time, there are no legal or financial limitations concerning data commercialisation towards interested data consumers (e.g. they can be charged for downloads and transfer of bulk data).

3.6 European Commission grant agreements on financing of the ERFP

There are currently two grant agreements in force. Both agreements' objectives are to financially guarantee the maintenance and further development of the Portal until the end of 2022. Thus, there are no limitations on Portal's data monetisation in it either.

	Grant agreement number	Date of entering into force	Implementation period/term	Subject matter	Budget (in EUR)
1.	MOVE/C3/SUB/2019-531/SI2.838213/2020-810/SI2.838215 ⁹⁸	17.12.2020	01.10.2020 – 31.12.2022 (the action runs for 27 months)	1 st Grant agreement: the maintenance grant agreement	340 000
2.	MOVE/C3/SER/2019-524/SI2.841617/2020-809/SI2.841618 ⁹⁹	22.12.2020	23.12.2020 – 23.02.2023 (the action runs for 26 months)	2 nd Grant agreement: the development grant agreement	310 000



2020-12-17_Grant Agreement RFP man

⁹⁸ 1st grant agreement:

⁹⁹ 2nd grant agreement is not attached due to its size.

3.7 RNE-UIRR agreement concerning the ERFP

The agreement signed on 11.01.2021 between RNE and UIRR provides for the general framework of cooperation on the Portal operation, maintenance, and further development.¹⁰⁰ The data in the Portal and its monetisation are not specifically addressed in the agreement.

3.8 ERFP Terms of use

The terms of use of the portal from its premier in production version until sooner after the transfer to RNE (i.e. June 2019 – June 2020¹⁰¹) are basically the industry standard in terms of structure and content¹⁰². However, with roughly one modest page on data issues (the rest is the website's privacy policy) they did not address key legal issues on the rights related to the computer program, database and (inbound) raw data of the Portal and moreover, suggest at least two completely incorrect assumption:

- that non-right holder of computer program and database right such as the so-called Portal Manager (at that time HaCon GmbH, Germany) has been given right to licence Portal's use (see chapter Right of Use).
- And perhaps even more surprisingly the statement that the *Copyright and all other intellectual property rights of whatever nature in the RFP and the contained data are and shall remain the exclusive property of the Operator and its data contributors. If you contribute as User data to the RFP, you agree with the use of the contributed data by the Operator and Users of the RFP as stated in these Terms of Use* (see chapter Intellectual Property Rights).

Given the above highly disputable texts RNE decided to unpublish these Terms of use from the Portal's website and leave a link to its privacy policy until this study is finalised and all issues to portal's intellectual property rights have been clarified. The recommendation for introduction of new terms of use is commented in chapter 5.

It must be reassured that HaCon GmbH was in no way whatsoever part of the sale contract's negotiations and signing, nor claimed any rights in the Portal and its data at a later stage.

3.9 Public availability of the ERFP data

On this topic we completely share the view of the IN2DREAMS project and would like to cite their conclusions that "*the obligations for the IMs (same applies for SFOs) to provide*



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RR_Agreement_on_F

¹⁰⁰ See the agreement in this file:

¹⁰¹ RNE has no information were the same Terms of use in force in the pilot phase of the application, i.e., 19 October 2015 until 3 June 2019.

¹⁰² The extract from the website saved in a Word file can be found here:

information to its customers does not prevent it from monetizing information on a data marketplace. However, this accommodation of a privileged regime for its customers, as opposed to other third parties, would make it difficult for the IM/SFOs to use the data marketplace as its only means to supply data, given the anonymous or pseudonymous character of the data marketplace. The result is that the IM/SFOs would have to make a commercial choice: either to provide information to its customers via other means, or to apply the privileged conditions to all potential data customers within the context of the data marketplace.'

The obligations to make some information publicly available do not legally prevent the IMs/SFOs from attempting to monetize this very same information, but obviously deprives it of economic value. Such regulation does not, however, prevent the IMs/SFOs from monetizing other information related to its infrastructure, such as more detailed information on the condition of the infrastructure and/or data resulting from data analytics.¹⁰³

In overall, there are no obstacles, stemming from the law (EU and Austrian) or based on the contracts investigated above, hindering RNE from execution of marketing activities, trade with and monetisation of the ERFP data, while still providing the service facility descriptions free of charge.

4. Limitations for RNE and UIRR

4.1 Limitations to the business model

4.1.1 Contractual limitations that may pose constrains to the data monetization

All contractual relations of RNE in regard to the Portal's making, transfer, financing, management (in cooperation with UIRR), maintenance and further development were thoroughly and exhaustively listed and checked in chapters above. No place in those contracts was found that can rise a doubt on RNE legal ability to freely operate with the Portal's data on the condition of introducing comprehensive licence agreements for both directions of data flow collecting and sharing of information from SFDs.

4.1.2 Regulatory limitations that may pose constrains to the monetization of data

At EU level, competition law is principally regulated by the Treaty on the Functioning of the European Union ("TFEU"). The relevant sections of the TFEU (notably the provisions of Article 101 and 102, which are the main provisions supporting European antitrust policy) aim to ensure that fair competition is not distorted in the internal market, and that the open market economy is protected. It fosters economic performance and offers consumers a wider selection of better-quality goods and services at more competitive prices and conditions. Article 101 of the TFEU contains a general prohibition against agreements

¹⁰³ Link to the project deliverable see page 62:

between two or more independent market operators which restrict competition, including cartel agreements. Article 102 prohibits firms that hold a dominant position on a given market to abuse that position.

We consider that RNE has no monopolistic or dominant position on the market for rail service facilities information¹⁰⁴, and as long as RNE business model would be based on fair and non-discriminatory treatment of all data users of the Portal's data (similarly to the IM treatment of all applicants on the market of the rail infrastructure), there are no obstacles deriving from the EU competition law for commercialisation of the ERFP data.

4.2 Limitations to data transfer & data sharing (with further distinction between personal and non-personal data)

4.2.1 Regarding data that was provided on the basis of a legal obligation

In practice, even provided on the basis of the SF Regulation, the data were still provided voluntary because the Portal is not a primary place for the SFDs publication. It comes after the NS of the IM or the website of the SFOs. The decisive factor would be under what terms of use the data were provided in the portal.

4.2.2 Regarding data that was provided through voluntary submission

This is the case for all data in the Portal. See the old Term of Use from 2019/2020 (in force on the website before the sale to RNE).

4.3 Limitations deriving from the technology used (regarding data acquisition, storage, share & transfer)

There are no evident limitations deriving from the technology stack used in the Portals' making and maintenance.¹⁰⁵ At the moment, data in question are easily downloadable in a format of an Excel file, which seems to be satisfactory for the potential users RNE already dealt with in no remuneration context so far (e.g., contractors of the EU Commission).

5. Key findings, conclusions, and recommendations: contract is king or full exploitation of contractual freedom principle

Raw non-personal data in EU (civil) law

¹⁰⁴ There are many other mainly nationally created and to different degree similar websites / platforms / portals offering online on the Internet identical or very similar information for rail service facilities (e.g., see the European Commission Study from 2016).

¹⁰⁵ See the list with the technology stack in the sale contract.

The EU legal framework does not sufficiently address data rights towards commodification of data. Generally speaking, there is currently no comprehensive regulation, either at Austrian or Union level, for the handling of (raw) data generated by machines or human beings that is not personal data, nor for its economic use or tradability. In practice, manufacturers or service providers as RNE become de facto "owners" of the data generated by or collected in their machines, systems, or processes. However, the Union approach does not yet offer any indications for a civil law classification and definite ways of transfer of these data. In other words, it is not yet on the EU's digital agenda.

However, it is recommended to use in the Portal's new terms and conditions and licence agreements the working definition of data from the European Commission's proposals of DGA and DSA.

Reference data for Portal's data

Legally speaking, RINF is the master application for rail infrastructure data¹⁰⁶ and CRD has the same role for location codes¹⁰⁷ with the consequence that Portal's data should adhere to the same model / structure / architecture / terminology.

Five years later we could not agree more to the recommendations from the Study'2016 that *the data feeding concept of the Portal should account for related European framework and data exchange standards as defined in TAF and TAP TSI, more specifically on the locations coding and RINF Regulation. [...] it is recommended to coordinate the database of the aimed at last-mile information portal with RINF application and TAF TSI CRD and to harmonise common elements in order to avoid creating multiple data channels for the same kind of data with different data structures and formats. In contrast, a non-coordinated approach would increase complexity of the entire information framework and related costs.*¹⁰⁸

It is recommended to check the compliance of the Portal' data model/records with the RINF Regulation 2017/2177 requirements when it comes to static data (e.g., technical characteristics of infrastructure such as names, core parameters, codes, etc.) and to base any future developments on dynamic data (e.g., capacity and traffic management in the facility) on the TAF/TAP TSI messages. If deficiencies were found, it should be corrected.

ERFP dataset content

There is some degree of uncertainty surrounding the content of the RFP dataset itself (i.e. obligatory data fields). The reason behind is the lack of exhaustive list of the data entries provided by the legislator. Thus, the list (in a form of an Excel file) was elaborated based on the sector's interpretation of the SF Regulation, in particular Art. 4 Service facility

¹⁰⁶ See recital 2 and Art. 2 of the Annex to Regulation 2019/777

¹⁰⁷ See Art. 4.2.10.1 of TAF TSI Regulation No 1305/2014

¹⁰⁸ See on page 97 of the Study

description. Consequently, it led to the current practice to ask the data originators to fill out only 8 data fields out of 185.

It should be noted that in order to remedy this situation and bring the application closer to the SG Regulation spirit and letter, all fields should be considered mandatory for filling in. On the one hand, this approach would satisfy the legal requirements, while increasing the data quantity and quality in the Portal, especially in light of pursued business model.






Lack of limitations on data (re)use



There are no statutory or contractual limitations on data reuse/'disposal'. Armed with the database right over the database and copyright over the computer program (software's source code), and equipped with appropriate terms and conditions (i.e., licence arrangements for inbound and outbound data published on the Portal's website) RNE would freely operate with data in the Portal. This would be valid for the 'old' data already available in the portal (see below the legal fiction solution) and any 'new' data to be published by the SFOs in the future.

There are no legal obstacles, stemming from the EU and Austrian law, jurisprudence or based on the contracts investigated above, hindering RNE from execution of marketing, trade with, commercialisation and monetisation activities with the RFP data.

Rights related to the RFP data

The table below summarise what legal proception the Portal's data can attract considering the EU and Austrian law, both practically fully aligned in those matters:

	Right		Applicability	Comment	Facilitation
1.	Ownership				
2.	Intellectual property rights				
	2.1	Copyright		Computer program of the Portal (the source code)	Licence agreement
	2.2	(Sui generis) database right		(POI) database	Licence agreement
	2.3	Trade secret			
	2.4	Patent			

	2.5	Trademark/Domain name ¹⁰⁹			Domain names are not protected as such by an intellectual property right, i.e., registering a domain name does not mean filing a trademark. However, the name that makes up the domain name may itself be protected by copyright, trademark right or geographical name.
	2.6	Privacy/personal data protection			

It is recommended to register the word/figurative trademark ‘ERFP’ (abbreviated and fully spelled) which would consolidate and strengthen RNE position of rightholder of most of the intellectually property rights associated with the Portal.¹¹⁰

Personal data in the Portal

In order to avoid any unnecessary internal legal discussion or eventually complaints from third parties, if not legal proceedings, over the negligibly small amount of personal data in the Portal, and when licenced, keeping the database with 100% industrial data in it, it is recommended that all personal data with the meaning of the GDPR¹¹¹ is removed from the database before the hand over to the licensee. In practical terms, it would mean, for example, a removal of non-functional email addresses stored in the dataset (i.e., emails containing first and/or family name).

In order to limit the amount of personal data in the Portal keeping it as much personal data neutral as possible, without at the same time degrading the quality and informativeness of the database, it is recommended to include in the Portal’s documentation a strong advice to the SFOs, in case of availability of ‘personal’ and ‘functional’ email addresses on their side, to rather always choice a functional email

¹⁰⁹ Domain names are the human-friendly forms of Internet addresses and are commonly used to find web sites. For example, the domain name rne.eu is used to locate the RNE website at <https://rne.eu>. A domain name such as rne.eu is a unique alias for an IP address (unique number of 195.110.209.106), which is an actual physical point on the Internet. A domain name also forms the basis of other methods or applications on the Internet, such as file transfer (ftp) or email addresses - for example the email address mailbox@rne.eu is also based on the domain name rne.eu.

¹¹⁰ RNE is holder of the trademarks of other of its application. For example, RNE-TIS and RNE-PCS.

¹¹¹ See Art. 4(1): (1) ‘personal data’ means any information relating to an identified or identifiable natural person (‘data subject’); an identifiable natural person is one who can be identified, directly or indirectly, in particular by reference to an identifier such as a name, an identification number, location data, an online identifier or to one or more factors specific to the physical, physiological, genetic, mental, economic, cultural or social identity of that natural person.

address to be included in the Excel file for upload. Same should be recommended regarding the phone numbers (e.g. inclusion of company (landline) numbers instead of numbers associated with individuals' mobile phones.

Legal tools for data exchange

We support the position that the ownership concept cannot find a satisfactory application in the field of data transactions. The traditional perception of signing a sale contract is not a promising avenue for RNE data activities with the ERFP data. Yet, workable legal solutions could be introduced. The legal answer is licence agreements for both 'data originators' and 'data users'.

"Contract is king" solution for the Portal's data

In the absence of comprehensive and consistent EU and national legal regime of data in principle, and non-personal data in particular and its commercialisation, the contractual freedom of the parties concerned¹¹² to regulate data transactions should be pursued¹¹³. As concluded in chapter, the Portal's database is subject to the *sui generis* protection on databases which imply that the data exchange should be qualified as a licence¹¹⁴. In short, the contract-is-king approach should set the conditions in both directions:

- Inbound traffic of data: all SFOs shall provide their data under clear, transparent and balanced conditions on the Portal's website with the explicitly granted right to RNE to monetise the data (see below). In our opinion, the POI individual data records do not attract any IP or other rights. For example, location of SF or all technical installations in particular place are facts from the physical world. They are part of the public domain and are not copyrightable. Fact is that no one owns facts. This is return would mean that they are not legally protected, meaning RNE cannot licence in addition the individual data records of the Portal.
- Outbound traffic of data: with several exceptions of provision of data to EU contractors, RNE has no experience with this type of data transactions.

¹¹² Austrian contract law is primarily governed by the General Civil Code (ABGB). For contracts between traders, the rules in the Austrian Commercial Code (UGB) in particular must also be taken into account. Specific provisions for transactions between traders and consumers can be found in the Consumer Protection Act (KSchG).

¹¹³ Freedom of contract is the underlying principle of Austrian contract law. The contracting parties are thus free to choose any terms suitable for a transaction, unless a contractual provision or covenant would render the agreement unconscionable or otherwise unlawful. A contract is defined as consenting declarations of an offer and a corresponding acceptance and in general, neither offer nor acceptance requires a specific form under Austrian law. Also, oral agreements and, under restricted circumstances, agreements implied through action (tacit agreement) are legally binding and enforceable.

¹¹⁴ See Art. 7(3) of Database Directive: the right referred to in paragraph 1 may be transferred, assigned or granted under contractual licence.

Regarding the inbound data (new terms and conditions¹¹⁵)

There is no unambiguous legal obligation at EU law level, neither nationally for the SFOs to exclusively provide their data in the Portal. Indeed, they are obliged to deliver these data to the market¹¹⁶, but the Portal is just one of the three options listed in the SF Regulation, usually the last one exploited by the SFOs. Therefore, the only viable option to regulate data provision in the Portal is a contract. As a popular saying put it for that kind of situations, the contract is king. To this end, the portal's term of use/terms of service/general terms and conditions will be of paramount importance for enabling the data commercialisation. Most importantly, they shall set the right of RNE to monetise the data disposing it to third parties against remuneration. The proposal is to publish new 'Terms and conditions' on the Portal's website as of, for example, 1 January 2022.

As to the already provided data in the Portal: it is not entirely clear under what legal conditions the data in the pilot and production phases of the Portal were provided until the transfer of the software and the database to RNE. The unpublished 'Terms of use' are silent on this point. As found out in chapter above, they give the wrong signal that original database creator is HaCon GmbH, Germany, although, the database maker is the European Union. The contractors just acted on behalf of the Union/Commission. To solve this open issue the legal fiction may apply that the new terms would retroactively apply to all data sets gathered in the portal since its creation and official pilot roll out in October 2015. Thus, all data (already available and to be provided in the future) would legally be treated in the same way allowing for uniform regime of the outbound transactions. In addition RNE shall inform on the website of the Portal that the terms and conditions of the RFP have been changed and keep this information notice for some time (e.g. a month).

Therefore, it is recommended to draft, approve and publish on the Portal's website new comprehensive terms and conditions handling in undisputable manner all aspects of data transfers between SFOs and RNE.

Regarding the outbound data (licence agreement)

For sharing data already collected in the Portal's database with third parties against remuneration, RNE shall sign a licence agreement. For clarification RNE would not licence the computer program of the ERFP but in full or partly (e.g. POI per country, corridor) the database of the Portal. The template will be subject to further elaboration once this study findings and recommendations have been approved by relevant bodies of RNE and UIRR and ERFP Governance Board.

Remuneration for the Portal's data

In contrast to recently adopted possibility for charging for data exchange of (dynamic) train information (i.e., several TAF TSI messages¹¹⁷), there is no similar enabler for charging of (static) infrastructure data. It is basically left in the hands of the market forces and

¹¹⁵ Terms and conditions would mean all terms and conditions or specifications, irrespective of their name or form, which govern the contractual relationship between the SFOs and RNE.

¹¹⁶ Please note that the SF Regulation shall be binding in its entirety and directly applicable in all Member States.

¹¹⁷ See chapter 4.2 of the TAF TSI Regulation.

contractual freedom of the parties concerned. Two questions are regularly asked regarding the charging for the Portal's data.

Firstly, could RNE¹¹⁸ charge the SFOs for provision of their data in the Portal. The answer to this question is yes, if you consider the statutory norms (e.g. there are no legal constraints for RNE in EU law to charge the SFOs for the initial provision and permanent display of the SFs main characteristics in digital form). However, considering the contractual arrangements on the Portal's data, specifically in light of the sale contract between RNE and European Commission, RNE is not allowed to charge SFOs for the upload and display of their SFDs on the Portal. In other words, one of the potential channels of revenue for the Portal's data under the business model is in practice contractually eliminated.

Secondly, could RNE transfer data of the ERFP against payment. For answering the second question there are two aspects to be considered:

- principle of 'free-of-charge-data-provision-to-applicants' is prominently proclaimed in all sector specific legal acts providing business information to the market (i.e. NS, CIS and SFD) and it must be respected (see Art. 27(1) of Directive 2012/34¹¹⁹, Art. 5(1) of Regulation 2017/2177¹²⁰). Therefore, the content of the ERFP/SFDs required by legislation must always be freely accessible for the rail market players and the general public.
- At the same time, all other services of the portal (e.g. aggregation of data, download and export of full or part of the database, automatic transfer of data via automatic programming interface) could be chargeable services for all interested parties (e.g. railway sector stakeholders, educational and scientific institutions, consultants, company from other sectors, etc.). However, some concerns raised by ADIF, Spain whether RNE and RNE documents/data will fall under the scope of the transposition of the new PSI Directive (i.e. Directive (EU) 2019/1024) in the Austrian federal law shall closely be followed by the RNE Joint Office legal team in order to timely reflect on any changes in the above conclusion.

¹¹⁸ UIRR is not considered as RNE an owner of the ERFP computer program and database. However, any interaction with or involvement of UIRR could be handled internally between RNE and UIRR.

¹¹⁹ For NS: The content of the network statement shall be made available free of charge in electronic format on the web portal of the infrastructure manager and accessible through a common web portal. The CID as a derivative document to NS, the same free of charge principle shall apply by analogy.

¹²⁰ For SFD: Operators of service facilities shall make publicly available the service facility description free of charge, in one of the following ways:

(a) by publishing it on their web portal or a common web portal and providing the infrastructure managers with a link to be included in the network statement;

(b) by providing the infrastructure managers with the relevant and ready-to-be-published information to be included in the network statement.

Annex 1

UIRR external lawyers' input



(Member of the ASPIDES Network)



6. BILLIET & CO

7. Av. Louise 146

B 1050 Brussels
BELGIUM
T: +32 2 6043301
T : +32 486319579
Philippe.Billiet@billiet-co.be
www.billiet-co.be

International Union for Road-Rail Combined Transport (UIRR)

31, rue Montoyer – bte 11
1000 Brussels

Eric FEYEN
Technical Director
efeyen@uirr.com

8.

Date: 15th September 2020

Your Ref:

Direct Line: +32 2 486319579

Our Ref: UIRR

Email: Philippe.Billiet@billiet-co.be

Dear Mr Feyen, Dear Eric,

Re: Feedback on version 0.1 of the “Legal Study on Marketing of the European Rail facilities Portal Data” that was prepared by RNE.

In light of the existing collaboration agreement between UIRR and RNE, you asked us to review the version 0.1 of the Legal Study on Marketing of the ERFP (hereafter the “study”), that was prepared by RNE.

The referred study of RNE is situated in an overall assessment for the identification of a suitable monetization strategy for relevant (data) assets relating to ERFP.

In our call of 13th September 2021, you asked us to focus in our analysis on the following aspects/questions:

1. General prima facie review of the study
2. Is ERFP a compliance tool in light of Article 5 (1) of EU Regulation 2017/2177 (as suggested in title 3.2 of the study) or only a business tool? What is the relevance thereof?
3. Is ERFP handling personal data? Can there realistically speaking be commercial value without personal data?
4. What is the definition of “data” under Belgian law?
5. Is RNE the sole and full owner of the platform and the data register?

6. How would the draft 'Data governance Act' influence the project? Is ERFP compliant?
7. What would be the Belgian law analysis under title 2.5?
8. Should the said EU legislation on non-personal data amount to structural decisions of/for ERFP? Otherwise, what is the relevance thereof for the study?
9. How should the collaboration agreement between RNE & UIRR be optimized, to ensure a 50-50 equal sharing between RNE and UIRR of project revenues?

Please find below our analysis in relation tot each of these 9 points.

We remain available for any further question you may have.

Analysis

1. General prima facie review of the study

Overall, the study prepared by RNE is of high quality. We did not review all details thereof and restricted our feedback only to *prima facie* observations, as requested.

Where we share our views in titles 2-9 below, we did not repeat our views in this title.

- **Regarding the study's question as to whether data as such is susceptible to ownership.**

Evidently, data are subject to access rights and restrictions but these are not property rights. For example, contracts or competition law may be used to regulate access to data but they do not create property rights.¹²¹ Overall, as things currently stand, we opine that no property rights are granted on data as such.

- **Regarding the study's question regarding the extent to which rights relating to a database can be protected**

- **Definition of database**

Article 7 of Directive 96/9/EC of the European Parliament and of the Council of 11 March 1996 on the legal protection of databases stipulates that “Member States shall provide for a right for the maker of a database which shows that there has been qualitatively and/or quantitatively a substantial investment in either the obtaining, verification or presentation of the contents to prevent extraction and/or re-utilization of the whole or of a substantial part, evaluated qualitatively and/or quantitatively, of the contents of that database.”

A database is therefore generally defined as a collection of independent works, data or other materials which are arranged in a systematic or methodical way and are individually accessible by electronic or other means.

Any software which is used in the making or operation of a database is specifically excluded from protection as a database. Nevertheless, as software is often developed in modular form, it is possible that in some cases a collection of software modules may attract protection as a database. Also, some elements of a computer program (for example, on screen look up tables which users may search in order to find information) may constitute a database.

¹²¹ European Commission, Directorate-General for Competition (2019). Competition policy for the digital era. A report by Crémer J, de Montjoye YA, Schweitzer H, p.73; Andanda, P. Towards a Paradigm Shift in Governing Data Access and Related Intellectual Property Rights in Big Data and Health-Related Research. IIC 50, 1052–1081 (2019).

- **Database rights and the requirement of a “substantial investment”**

When a set of data comes within the definition of a database, it will qualify for protection in its own Database Right under the said Directive, irrespective of whether it also benefits from protection under copyright¹²², but only if there has been a "substantial investment" in obtaining, verifying or presenting the contents of the database.

Investment refers to *"any investment, whether of financial, human or technical resources"* and substantial means *"substantial in terms of quantity or quality or a combination of both"*. Investment in creating data which forms part of a database will not automatically result in a database right. Entities that create data must therefore make separate investment in the organisation and arrangement of the database itself in order to gain protection.

The maker of a database is defined as the person who *"takes the initiative in obtaining, verifying or presenting the contents of a database and assumes the risk of investing in that obtaining, verification or presentation"* and that person is the first owner of the Database Right. If the database is made by an employee in the course of their employment, the employer will be regarded as the maker and therefore the owner of the Database Right subject to any agreement to the contrary.

A distinction is to be drawn between a database as such and its individual components. In principle, database rights only protect the collection of data, not its constituent elements.

- **Duration of a Database Right**

Database Right lasts for either 15 years from the end of the year in which the making of the database was completed or, if it was published during that period, 15 years from the end of the year in which the database was first made available to the public.

However, if there is a substantial change (cfr significant development) to the contents of the database then the 15 year protection period recommences for the database in its amended form. This requires a substantial change *"resulting from the accumulation of successive additions, deletions or alterations, which would result in the database being considered to be a substantial new investment"*.

- **Infringement of Database Rights**

A person infringes a database right if they extract or re-utilise all or a substantial part of the contents of a protected database without the consent of the owner.

Extraction refers to the permanent or temporary transfer of the contents to another medium by any means or form. Re-utilisation refers to making the contents of a database available to the public (not necessarily for the first time) by any means.

¹²² Copyright protection on case of a Database right tends to be limited and exceptionally, especially since the CJEU clarified that directive 96/9 must be interpreted as meaning that, subject to the transitional provision contained in Article 14(2) of that directive, it precludes national legislation which grants databases, as defined in Article 1(2) of the directive, copyright protection under conditions which are different to those set out in Article 3(1) of the directive.

2. Is ERF a compliance tool in light of Article 5.1 of EU Regulation 2017/2177 of 22 November 2017 on access to service facilities and rail-related services (as suggested in title 3.2 of the study) or only a business tool? What is the relevance thereof?

Article 5 of the said Regulation stipulates that “*Operators of service facilities shall make publicly available the service facility description free of charge, in one of the following ways: (a) by publishing it on their web portal or a common web portal and providing the infrastructure managers with a link to be included in the network statement; (b) by providing the infrastructure managers with the relevant and ready-to-be-published information to be included in the network statement. Where the infrastructure manager to whose network the facility is connected is exempted from the obligation to publish a network statement in accordance with Article 2(3) or (4) of Directive 2012/34/EU, the operator of a service facility shall provide the relevant link or ready-to-be-published information to the main infrastructure manager.*” (indications added)

We deduct hereof that operators of service facilities carry a transparency obligation under the said Regulation and that, if ERF is tailored to such obligation in the way that it makes publicly available their service facility descriptions free of charge through publication thereof on the ERF portal whilst providing infrastructure managers with a link to be included in the network statement, that making use of ERF could indeed be regarded as a means for the operators to be compliant with their obligations under this Article 5.1.

Moreover, when the European Union sold the portal to RNE in may 2020, reference was made to the said Regulation in Article 1.4 of the sale contract, thereby compelling RNE to “*ensure that the Portal remains accessible to all users by providing possibility to upload and display the service facility description free of charge*”.

The above allows us to conclude that, besides offering a business tool, ERF could be marketed towards operators of service facilities as a tool to be(come) compliant with transparency obligations under Article 5.1 of the said Regulation.

3. Is ERF handling personal data? Can there realistically speaking be commercial value without personal data?

On the basis of the information that we currently hold, we cannot exclude that ERF would be handling personal data.

GDPR will certainly apply to any information that relates to an identifiable natural person. Indeed, according to the definition of Art 4.1 in the GDPR, personal data: “*means any information relating to an identified or identifiable natural person (‘data subject’); an identifiable natural person is one who can be identified, directly or indirectly, in particular by reference to an identifier such as a name, an identification number, location data, an online identifier or to one or more factors specific to the physical, physiological, genetic, mental, economic, cultural or social identity of that natural person.*” (indications added)

We assume that identifiable natural persons would register and insert data on ERF (e.g. with an identification/registration number, location data, etc.), meaning that ERF also contains personal data. Page 30 of the study (see last paragraph of title 3.3.1) suggests indeed that the data set in relation to ERF would contain both personal and non-personal data that are linked with each other. For the part personal data GDPR will inevitably apply.

The essential question to know whether certain data can be processed without resorting under the GDPR therefore amounts to verifying whether it would be possible to extract and use such

data in a manner that the data is in no way linked with personal data. An important criterium may then focus on the question whether the data concerned allows in any manner to identify any personal data.

In other words, where a complex data set contains both, the question remains whether or not the kinds of data can be recognized and separated from one another or are intertwined in such a way that they are not separable. In the first case, GDPR applies to the (personal) information part and non-personal data rules to the non-personal data. When they are inseparable the application of the GDPR prevails.

From a commercial perspective it would be worth to reflect on whether the commercial value of personal data is of greater importance than seeking means to aim at the avoidance of inextricably linked relations between personal data/information and other data. GDPR does not prevent to generate value with personal data/information but merely sets out stringent conditions and parameters when doing so.

We therefore suggest reflection on which opportunities may be given up if UIRR and RNE would seek to merely monetize non-personal data.

4. What is the definition of “data” under Belgian law?

Under Belgian law, there is no general definition of “data” as such. GDPR sets a definition of personal data/personal information applicable in all member states of the European Union. Thereby, no relevance seems to be given to the difference between data and information. What is relevant is whether the data/information is personal or not.

5. Is RNE the sole and full owner of the platform and the data register?

This is a very important question, since no person/entity can give more rights than it holds. It is therefore essential to know whether the rights/assets held by RNE are restricted/limited/conditioned in any manner. To verify the scope those rights, we must verify (1) which rights the European Union had, and (2) which part thereof the European Union transferred to RNE, when it sold assets for 1 EUR to RNE in May 2020.

The following parts in the sale contract dd 20/05/2020 between the European Union and RNE suggest that RNE would have acquired sufficient rights to be able to monetize relevant data-related assets:

- Under clause 1.2. of the sale contract, the subject matter is described as the sale of “a) the source code, the executable code and the database of the portal, c) all error corrections, bug corrections and program patches related to the Portal d) all documentation regarding the portal...”.
- Article 1.4.5 of the same contract stipulates that “... The Portal’s database is part of the sale and the buyer will take ownership of it upon the entry into force of this contract...”
- Article 1.10 of the same contract explains that, the Buyer “acquires ownership of the intellectual property rights, titles and interest in and to the Portal”, thereby referring to the following rights: “a) the right to amend, or ask 3rd party to amend the portal... b) the right to represent or have someone represent the portal... c) the right to adapt, modify, transform, upgrade, integrate or have someone adapt, modify, transform, upgrade or

integrate all or part of the portal... e) the right to market, distribute, commercialize, broadcast, advertise and communicate services provided by the portal ... f) the right to use and exploit the portal for its own needs or the needs of third parties... H) Inclusion in widely accessible databases or indexes, such as via 'open access' or 'open data' portals..."

However, Article I.10.1 of the sale contract refers to “pre-existing rights incorporated in the Portal” that would have been “licensed by” RNE, whereby it would then be the responsibility of RNE to “obtain the relevant licenses from the right-holders to the pre-existing material”. This clause gives rise to concerns since it indicates that there may be third parties that hold rights in relation to ERFP.

According to the definitions in clause II.1 of the sale contract, pre-existing rights are “industrial and intellectual property rights on pre-existing material. It may consist in a right of ownership, a license right and/or right of use belonging to the buyer, the creator, the seller as well as to any other third parties” .

In addition hereto, recital 5 of the preamble of the cooperation agreement between UIRR and RNE dd 11/01/2021 refers to previous contracts that were awarded in 2018 by the European commission, in relation to development of the ERFP. In light hereof, a consortium would have been composed by HaCon Ingenieursgesellschaft mbH, Triona AB, Union Internationale Des Chemins de fer, UIRR, International Rail freight Business Association and Studiengesellschaft fuer den Kombinierten Verkehr. The contract would have expired on 7 april 2020 but we have no information to evaluate whether any of the named entities had then acquired (and retains) in any portion any relevant ownership rights over any relevant assets relating to ERFP.

This must be further verified prior to the implementation of any monetization strategy.

6. How would the draft ‘Data governance Act’ (DGA), i.e. a Regulation that is proposed by the European Parliament and the Council (cfr COM/2020/767 final), influence the project? Is ERFP compliant?

If the proposal for DGA would come about in the way as proposed, the DGA would impact ERFP and can pose limits to the monetization strategies.

The DGA would define data as “any digital representation of acts, facts or information and any compilation of such acts, facts or information, including in the form of sound, visual or audiovisual recording”.

RNE may, based on its constituency and membership structure, be considered as a (de facto) “public sector body”, as defined in the DGA. The DGA poses obligations and limitations for such entities. For instance, a public sector body would be prohibited to make exclusive arrangements regarding the categories of data listed in Article 3 DGA, in accordance with Article 4 DGA. In addition, it must respect the conditions for re-use of such data that are set out in Article 5 DGA and the limitations to fees for such re-use that are listed in Article 6 DGA.

Even if RNE could not be qualified as a public sector body, the DGA would still pose parameters, i.e. those listed under chapter III of the DGA (cfr requirements applicable to data sharing services). These requirements touch on notification formalities for sharing services (Article 9 DGA) and for the entity rendering such services (Article 10 DGA). In addition, the data sharing services as such will need to respect the limits put forward in Article 10 DGA.

If, however, the constituency and membership structure of RNE would allow to conclude that it would be a “public undertaking” (which is likely not the case), the DGA should (in principle) not apply to the data it holds. We do however opine that the involvement of UIRR in the monetization

strategy may urge to then still respect the obligations to which reference was made in the previous paragraph.

We conclude that, if the DGA would eventually enter into force in its current wording, the monetization strategy should respect all formalities that would become applicable under the DGA. It would be prudent to consider the current wording of the DGA when setting out a monetization strategy.

7. What would be the Belgian law analysis under title 2.5?

Under Belgian law, goods are all objects on which a person can lay a claim. Goods can be divided into 2 sub-categories, tangible and non-tangible goods. Under Belgian law, data will be regarded as a non-tangible good.

Where we do not see a legal basis under Belgian law to lay a claim on data, we do see a legal basis to lay a claim on a database/data register. A database as such can indeed be protected under Articles XI.186-XI.188 of the Belgian economic Law Code. These articles explain that:

- Databases which, by virtue of the choice or arrangement of the substance, constitute the author's own intellectual creation, are protected as such by copyright. The protection of databases under copyright does not extend to the works, data or elements themselves and does not affect existing rights in the works, data or other elements contained in the database.
- Unless otherwise provided in a contractual or statutory provision, only the employer is deemed to be the acquirer of the property rights with regard to databases created in the non-cultural industry by one or more employees or officials in the performance of their duties, or according to the instructions of their employer. Regarding the presumption of transfer, collective (employment) agreements may determine the scope and manner thereof.
- The lawful user of a database or of copies thereof may, without the consent of the author of the database, perform all acts referred to in Article XI.165 §1 of the Belgian economic law Code, which are necessary to access and make normal use of the contents of the database. Insofar as the lawful user only has permission to use part of the database, his/her rights deriving from such consent are limited to that part of the database only.

We therefore conclude that the database/data register itself can be protected and can be monetized under Belgian national law.

The data itself would in principle not susceptible to intellectual property rights protection.

8. Should the said EU legislation on non-personal data amount to structural decisions of/for ERFP? Otherwise, what is the relevance thereof for the study?

Articles 2 and 3 of Regulation (EU) 2018/1807 on a framework for the free flow of non-personal data in the EU urge us to conclude that this regulation is applicable to ERFP, that is for the non-personal part of the data set. Consequently, the content of the said Regulation must be respected.

The Regulation emphasizes on the possibility for free movement of data, which means that data localisation requirements are prohibited. The constituency of RNE shall not be used to create prohibitions, conditions, limitations or other requirements that hinder the processing of data in any other Member State.

In addition, competent authorities need to be able to request or obtain access to data for the performance of their official duties in accordance with Union or national law. Access to data should not be refused to a competent authority.

Furthermore, where possible, it would be recommended to operate in line with/make use of available self-regulatory codes of conduct at Union level.

9. How should the collaboration agreement between RNE & UIRR be optimized, to ensure a 50-50 equal sharing between RNE and UIRR of RF-related revenues?

The collaboration agreement between UIRR and RNE dd 11/01/2021 explains in its preamble (“whereas”) that both parties aim at resolving the lack of easy and quick access to certain information about rail freight access points. The preamble also explains, in light hereof, that the common aim is to “further develop” the ERFP. To reach the aims, both parties distributed responsibilities between themselves, regarding (inter alia) the further development of ERFP (cfr Article 1).

Article 2.f.i of the collaboration agreement makes UIRR responsible for the further “development” of “interfaces”, “technical documentation and user manuals”, and “software”. Article 3 c, d and f of the collaboration agreement explain that RNE shall also be responsible for these kind of further developments. Consequently, UIRR and RNE are both responsible for (joint) further developments. We further deduct from article 5 of the collaboration agreement that those (joint) developments will be funded with the involvement of EU grants.

The collaboration agreement is silent on the proportion of rights that UIRR and RNE will respectively hold in the said further developments.

Consequently, we suggest to add a brief addendum to the collaboration agreement in which parties agree in writing:

- 1) That rights in joint further developments will be 50-50 equally shared between UIRR and RNE;
- 2) That RNE and UIRR must both sign agreements with any third parties under which license rights would be granted; and
- 3) That net revenues from ERFP-related monetization will be 50-50 equally divided between UIRR and RNE

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Philippe Billiet
Lawyer

BILLIET & CO
Avenue Louise 146
B-1050 Brussels
Belgium

E: philippe.billiet@billiet-co.be
M: 0032486319579