

## Overview of the year 2022

### Developments on the Austrian railway market

The rail passenger transport sector saw all its performance indicators improve in 2022, in some cases quite considerably, thus resuming the growth trend of the years prior to 2020. Conversely, volume and transport performance in the rail freight sector largely remained stable.

The increase in passenger traffic caused the number of passenger-kilometres travelled to rise by more than 50 percent. This was due in part to the phasing out of measures against the COVID-19 pandemic and the large numbers of people returning to the workplace/classroom. Meanwhile, the rail transport sector expanded its services still further by making additions to long-distance routes, improving general timetable densities and extending the hours of operation of local railways. Particularly noteworthy developments included the resumption of the WESTbahn's half-hourly service between Vienna and Salzburg, which has in part been extended to Munich or Innsbruck, and the expansion of ÖBB-Personenverkehr's night train service, which now connects Vienna, Munich and Paris.

The market data for the rail freight sector shows slight increases in the net ton-kilometres and gross ton-kilometres travelled, amounting to 1.4 percent and 2.4 percent respectively. In contrast, the net tonnage transported during 2022 fell slightly by 0.8 percent. In terms of net ton-kilometres, the corporation holding the largest market share in 2022 was the ÖBB group (Rail Cargo Austria) at 60.8 percent. The privately owned railways (e.g. Lokomotion, CargoServ, Ecco-Rail etc.) made up the second largest group. Over the last five years, their market share has increased from 14.3 to 24.7 percent.

As of the end of 2022, there were 86 railway undertakings in Austria. The rail freight undertakings boxXpress, Retrack and Tenforty2-Rail (all domiciled in Germany), Medway Italia, and STRABAG BahnLogistik from Austria have all entered the market since 2021. RegioJet AT, the Austrian subsidiary of Czech provider RegioJet, now operates all the latter's long-distance routes in the passenger transport sector. In contrast, the Czech freight transporter RM Lines had its safety authorisation withdrawn during the summer of 2022. In all, 65 companies were authorised to run trains on ÖBB tracks during the year under review. These included four undertakings in the ÖBB group and eleven undertakings held by foreign incumbents through direct or indirect holdings (dominant undertakings). 39 companies are privately owned (50 percent or more of shares). The remaining eleven companies are majority-owned by public institutions.

Overall, market participants gave very positive feedback on the railway market in Austria. The allocation of train paths, the linguistic competence of railway staff and the quality of the training facilities were all rated particularly highly. The industry saw room for improvement in the competition from other modes of transport, the lack of consistency across the EU with regard to the rules on issuing safety authorisations, and the official requirements pertaining to human resources. Overall, the domestic railway market received subjectively better ratings than the international market.

### New Schienen-Control Kommission

On 5 October 2022, in response to a proposal by the Federal Minister for Climate Action, Environment, Energy, Mobility, Innovation and Technology, the federal government appointed the Schienen-Control Kommission for a further term set to expire on 31 December 2026. Dr Robert Streller will again serve as the Schienen-Control Kommission's chairman. Dr Andreas Huber was appointed as his deputy. Together with Ministerial Councillor

Emeritus Dr. Karl-Johann Hartig, Mag. Sylvia Leodolter, Mag. Norbert Fürst and Dr. Nicola Gattertnig-Spitzky, they make up the Schienen-Control Kommission.

### **Developments on the European market**

April 2023 saw the publication of the eleventh market report by Independent Regulators' Group-Rail (IRG-Rail), which focuses on general developments in European rail transport during 2021. A total of 31 countries provided statistical analyses for this purpose. The report examines how the second year of the COVID-19 pandemic impacted the railway sector. It also provides a detailed explanation of the most important supportive measures implemented by the government to help the sector cope with the crisis situation.

While the passenger transport sector's performance in 2021 was still 41 percent below that of 2019, it was already significantly higher (up 15 percent) than that achieved in 2020. In terms of train kilometres travelled per person in Europe, Austria came in a strong third behind Switzerland and – most recently – France. European rail freight also saw an upward trend from 2020 to 2021 and managed to return to the level of 2019. After overtaking Sweden, Austria became the fifth-largest market in absolute figures and was able to maintain its position among the European frontrunners despite its slow growth. Taking the whole of Europe into account, the transport performance of private railway undertakings and foreign incumbents in the rail freight sector exceeded that of the respective national (formerly) state-run railway undertakings for the first time.

### **Amendments to the law**

The Schienen-Control Kommission Cost Contribution Ordinance implemented by the Federal Minister for Transport, Innovation and Technology, BGBl (Federal Law Gazette) II 2004/442 was amended by BGBl II 2022/501. The Cost Contribution Ordinance regulates the calculation and collection of the cost contributions that users pay to Schienen-Control GmbH in order to fund the organisation's personnel-related and material expenses. BGBl II 2022/501 raised the contribution rate of 5 ‰ of the usage fees payable for access to Austria's main and linked branch line infrastructure during the calendar year to 7.5 ‰. The increase came into force on 1 July 2022.

### **Extension of reference period specified in Regulation (EU) 2020/1429**

Since the enactment of Regulation (EU) 2020/1429 establishing measures for a sustainable rail market in view of the COVID-19 outbreak, member states are now able to permit infrastructure operators to discount, waive or defer fees for minimum access packages. Previously, the reference period specified in the Regulation could only be extended by a Commission Delegated Regulation, according to which it would have expired on 14 April 2022. Regulation (EU) 2022/312 of 24 February 2022 extended the reference period mentioned in Regulation (EU) 2020/1429 to 30 June 2022. Commission Delegated Regulation (EU) 2022/1036 of 29 June 2022 subsequently extended the reference period mentioned in Regulation (EU) 2020/1429 to 31 December 2022.

### **Key areas of the Schienen-Control Kommission's work**

#### **Station fees**

During the reporting year 2022, the Schienen-Control Kommission conducted a competition monitoring procedure addressing the station fees levied by the largest Austrian railway station operator. The regulatory body examined the fees in terms of their compliance with the requirements set out in section 69b EISbG [Railway

Act], which stipulate that service charges may not exceed the costs incurred by facility operators plus a reasonable profit. As part of this procedure, the Schienen-Control Kommission will decide where the passenger station ends and the services covered by track access charges begin.

### **Transmission of train and wagon data**

In 2022, the Schienen-Control Kommission conducted a procedure regarding the mandatory transmission of train and wagon data by the railway undertakings (RU) to the infrastructure managers. At the time the procedure was initiated, only one company in the rail freight sector was able to carry out a system-based transmission of the minimum operational data through a data interface. Another RU had approached the Schienen-Control Kommission with regard to this requirement. During the course of the procedure, the infrastructure operator provided an interim solution by making the data interface available to all RUs with no discrimination. The Schienen-Control Kommission is still considering whether measures will have to be initiated by the competition authorities.

### **Shunting**

The Schienen-Control Kommission conducted a competition monitoring procedure relating to shunting services in Tirol. A railway undertaking had claimed that a request for various services, e.g. the uncoupling, removal and recoupling of freight wagons after repairing technical faults, had been repeatedly denied by the service operator. An attempt to conclude a contract for these cases was unsuccessful. During the procedure before the Schienen-Control Kommission, the service operator took the view that the performance requested did not meet the criteria for a service. By mediating between the railway undertaking and the service provider, the Schienen-Control Kommission was ultimately able to find a solution that was satisfactory to both parties.

### **Traction current charges**

The Schienen-Control Kommission has initiated competition monitoring procedures relating to the published network charges levied for the transmission of traction current in 2021, 2022 and 2023. During these procedures, it will be reviewing the tariffs set by the infrastructure operator.

### **Rolling stock inspection services**

The Schienen-Control Kommission initiated a competition monitoring procedure after identifying disparities in transfer pricing. The fees varied depending on the railway undertaking requesting the service. The Schienen-Control Kommission examined whether this differentiation was objectively justified. It concluded that no objective justification could be ascertained and that the ban on discrimination entrenched in railway law had therefore been violated. In its decision of 23 February 2022, the Schienen-Control Kommission declared the fees charged for rolling stock inspection services null and void. The decision was not appealed.

### **Approval of mark-ups on infrastructure fees**

The Schienen-Control Kommission is conducting multiple procedures regarding the approval of mark-ups on infrastructure fees and the direct costs incurred by train operations. If the infrastructure fees and other revenue generated by the operation of the railway infrastructure are not sufficient to cover all costs, the infrastructure manager is entitled to levy a surcharge. As part of the current procedures, the Schienen-Control Kommission is

reviewing the relevance of these mark-ups to specific market segments along with the full costs and the costs directly incurred when operating the train service. The Schienen-Control Kommission is also examining whether the market segments determined by the infrastructure manager are lawful, whether the model used to establish the viability of these market segments is appropriate, and whether this model is used correctly.

### **Train path conflicts**

In 2022, the Schienen-Control Kommission dealt with two procedures initiated in response to complaints regarding the (non-)allocation of train paths for the 2023 timetable. The first procedure involved a complaint lodged by an RU against the allocation body on the grounds that its request for the allocation of train paths stopping at a specific railway station had been denied. During the procedure before the Schienen-Control Kommission, the allocation body argued that the requested stop could not be assigned on grounds of operational quality. The railway undertaking disputed this. The Schienen-Control Kommission concluded that the train path requested, including the stop in dispute, could be configured with no loss of operational quality, particularly when the necessary travel time reserves were taken into account. It allocated the requested train path and stop to the railway undertaking in a decision announced on 21 September 2022. The allocation body did not appeal.

The second procedure involved an RU that had requested train paths for the summer of 2023 involving a detour rather than the RU's usual route. However, construction work is scheduled to take place on both routes during the period in question. The allocation body neither granted nor denied the RU's request. The Schienen-Control Kommission held verbal negotiations during which it discussed possible solutions with the parties involved. The allocation body subsequently held further talks with the RU, in which Schienen-Control GmbH participated as an observer. These talks facilitated the configuration of train paths that were acceptable to the railway undertaking.

### **Announcement of new transport services**

In 2022, several railway undertakings notified the Schienen-Control Kommission of plans to operate new passenger services. The notifications received by the Schienen-Control Kommission in 2022 encompassed transport services on the following routes:

- Innsbruck–Stuttgart–Berlin/Hamburg,
- Vienna–Innsbruck,
- Vienna–Munich–Augsburg–Ulm–Stuttgart,
- Brno–Vienna–Vienna Airport,
- Munich–Milan,
- Vienna–Erfurt–Berlin,
- Vienna–Marchegg–Bratislava

### **Review of a speed restriction**

One infrastructure manager had reduced the maximum speed on several branch lines from 40 km/h to 20 km/h on the grounds that this complied with the requirements set out in the Railway Crossing Regulation (*Eisenbahnkreuzungsverordnung*). The Schienen-Control Kommission conducted a competition monitoring procedure and examined the possibility of restoring the speed limit between the intersections to 40 km/h. The infrastructure manager argued that the speed limit should not be increased on environmental and security grounds. The Schienen-Control Kommission subsequently closed the competition monitoring procedure.

## Dispatch

One RU which operates block trains in the rail freight sector contacted the Schienen-Control Kommission claiming that the infrastructure manager had repeatedly violated the dispatch rules on one track section to the advantage of the rolling road (*Rollende Landstraße*). On average, the alleged violations caused the RU's block trains to be delayed by half an hour, while transports on the rolling road experienced delays of less than 15 minutes. After the parties had been given the opportunity to make statements in an exchange of correspondence, the complainant requested the Schienen-Control Kommission to suspend the procedure for the time being in order to monitor the impact of the construction work that had taken place on the section during the summer of 2022. In the autumn of 2022, the RU that had lodged the complaint asked the regulatory authority to stop the procedure since no more dispatches had been made in violation of the rules. The Schienen-Control Kommission complied with this request.

## Decisions by the Federal Administrative Court

During 2022, the Federal Administrative Court (*Bundesverwaltungsgericht* - BVwG) made a decision on one procedure initiated by the Schienen-Control Kommission.

A railway undertaking lodged a complaint with the Schienen-Control Kommission pursuant to section 73 EisbG. The RU wished to use premises at Vienna Central Station for ticket sales – but the desired contract with the station operator did not materialise. In a decision made on 22 May 2019 (ref. no. SCK-18-019) which superseded the contract, the Schienen-Control Kommission ruled that access should be granted to a sales outlet. On 21 June 2019, both the railway undertaking and the station operator contested this decision by appealing to the BVwG.

Following a deadline request by the Schienen-Control Kommission, the BVwG issued its ruling on 26 September 2022 (ref. no. W179 2221054-1, W179 2221056-1).

The railway undertaking's complaint was rejected due to lack of grounds for appeal. The RU would have had to share the sales outlet's locking system despite being the sole tenant. The railway station operator's complaint was dismissed as unfounded. The station operator had not classified the company requesting access as a railway undertaking.

Both the station operator and the Schienen-Control Kommission appealed to the Supreme Administrative Court (*Verwaltungsgerichtshof* – VwGH) contesting the ruling.

The BVwG allowed the appeal since the VwGH had no case law on the question of whether a railway undertaking with no Austrian safety authorisation can be regarded as a railway undertaking within the meaning of section 1b EisbG, in which case it would be authorised to access ticket sales premises in Vienna Central Station pursuant to section 58b EisbG.

In another procedure, the Schienen-Control Kommission examined a clause in a tenancy agreement for a ticket sales location in a passenger station which a railway undertaking had concluded with a station operator. In its decision of 30 September 2019, the Schienen-Control Kommission declared the clause null and void pursuant to section 74 par. 1 line 5 EisbG. The station operator then lodged an appeal with the BVwG contesting the Schienen-Control Kommission's decision. In its ruling of 8 June 2022 (ref. no. W179 2226214-1/9E), the BVwG affirmed that the Schienen-Control Kommission may refer to provisions in the ABGB (*Allgemeines bürgerliches*

*Gesetzbuch* - General Civil Code) but concluded that the authority is not competent to declare the contractual clause invalid in this case.

The BVwG therefore annulled the contested decision on the grounds of the authority's non-competence, referring to the ruling passed by the VwGH in case Ro 2021/03/0001 on 5 October 2021. The Schienen-Control Kommission lodged an extraordinary appeal with the VwGH in a written submission dated 5 July 2022.

In its decision of 1 September 2022 (Ra 2022/03/0197), the VwGH dismissed the extraordinary appeal as inadmissible. In its reasoning, the VwGH referred to the change in circumstances that had taken place before the appeal was lodged: firstly, the railway undertaking had given up the property and terminated the lease in question as of 31 May 2022, and secondly, the provision relating to conversion work had not been applied and could not be applied in the future.