



RAIL BALTIC  
JOINT VENTURE STUDY

# EXECUTIVE SUMMARY

OF THE FINAL REPORT

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TRINITI  
TALLINN RIGA VILNIUS



## Legal Disclaimer

Law firms “*Tamme Otsmann Ruus Vabamets*” (TRINITI Tallinn), *Zverinatu advokatu birojs “TRINITI”* (TRINITI Riga) and *Advokatu profesine bendrija “TRINITI” LT* (TRINITI Vilnius) have prepared this legal analysis “*Rail Baltic Joint Venture Study*” (the **Study**), following their agreement with the Estonian Technical Surveillance Authority (the **Client**), dated October 25, 2012 to analyse the establishment of a joint venture for carrying out the preparatory works and the further implementation and overall management of the Rail Baltic project.

The scope of our Study is limited to the matters set out in the Terms of Reference and the matters we have identified and that have appeared to us to be of material significance. The Study is based on a review of public information, the documentation and information disclosed to us by the Client and the AECOM Feasibility Study 2011 in particular.

We have assumed that all documents and information submitted to us are truthful and accurate in all material aspects. All copies of documents made available have been assumed to be correct and complete copies of the originals unless there has been reasonable basis to conclude otherwise.

**This Study is prepared for the benefit and sole use of the Client only and may not be relied upon by any other entity or third party, and may not be cited without express and clear reference to TRINITI in any publication or other document.**

We shall not be under obligation to update this Study for events and circumstances becoming known to us or occurring after the date of this Study unless explicitly agreed so mutually.

All comments, notes and conclusions made in this Study are based solely on Estonian, Latvian, Lithuanian, and in certain specific matters Polish, law as in force as of 30 January, 2013. No evaluation of any legal issues concerning any other jurisdiction is given in this Study.

With respect to the tax matters, kindly note that it is the common approach of the tax authorities of all three Baltic countries that definite confirmations are available only to taxpayers themselves. In the case of the Rail Baltic project, the taxpayer does not yet exist. Moreover, the answers highly depend on the details of the transactions. For minimizing any further risks it is strongly advisable to prepare written queries to the tax authorities of all three countries immediately after the incorporation of the legal structure, when more detailed information regarding the operational structure is available. For VAT the main aspects to be confirmed include: 1) whether track access charges are subject to VAT, and 2) whether input VAT is fully deductible even in the case of a long investment period.

All financial data and analyses in the Study are based on the interviews, reports and best estimations available at the time of the completion of this Study. They have not been independently verified by the consultant and thus the financial data and analyses should not be interpreted as a management decision, but an input for the decision-makers.

TRINITI  
25.02.2013

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## INTRODUCTION

### Purpose of the Study

The purpose of this analysis “Rail Baltic Joint Venture Study” (the Study) is to analyse the establishment of a joint venture for carrying out the preparatory works and the further implementation and overall management of the Rail Baltic project, as set forth in the memorandum of the Prime Ministers of Estonia, Latvia and Lithuania dated 7 of December 2011 which called for the establishment of a joint venture to implement the project (Joint Venture). The study has been commissioned by the inter-governmental Rail Baltic Task Force (Task Force) for the benefit of the Estonian, Latvian and Lithuanian Governments through a procurement contract signed with the Estonian Technical Surveillance Authority on 25 of October 2012.

### The Scope

This Study has been compiled under the Terms of References of the Contract and taking into account the feedback received from the Task Force during the preparatory phases.

This Study aims to take into account the many variables related to the management structure, legal status, shareholders agreement and financial issues of the Rail Baltic Joint Venture (RB) in order to facilitate the coordination of short-term and long-term working plans over the span of the next 15 years.

The name **Rail Baltic** has been consistently used in the Study to distinguish the yet to be built completely new 1435 mm gauge double track railway line between Tallinn and the Lithuanian-Polish border, from the existing 1520 mm track or the additional sections of the 1435 mm track being planned and built in parallel to the existing 1520 mm railway between the Lithuanian-Polish border and Kaunas (also referred to as **Rail Baltica** and **Rail Baltica 1**).

The proposed Joint Venture is to act as an infrastructure manager and carry out preparatory works, in co-ordination with the Task Force, necessary for the planning, design and construction of the Rail Baltic, whilst assuming an overall supervisory role over the development process. This analysis takes into consideration the various legal, tax, corporate and regulatory issues that are associated with the establishment of a cross-border railway infrastructure manager – suggesting the two best possible alternatives for the corporate structure and the most suitable legal environment for the Joint Venture.

The analysis outlines the optimal tax and corporate environments for the Joint Venture, proposing workable solutions that can be used for decision-making and drawing on the international experience of similar projects. Included in this report are also detailed overviews of railway regulation in the three Baltic countries and Poland, general overviews of the compulsory expropriation and public procurement laws in the three Baltic countries, as differences in these areas may cause substantial inconsistencies in the development of the project. As the project is due to be funded primarily by the European Union, attention has also been paid to the options available under EU funding and other sources of financing, also from semi-private or private investors.

The scope of the background data used for our analyses is defined by the existing legal environment (legal acts in effect and their known future amendments), data presented in the AECOM Feasibility Study 2011, as well as additional information and assumptions provided by the members of the Task Force in the course of our work.

Interviews with relevant key government officials and other stakeholders were conducted in all Baltic countries and around Europe – e.g. national rail companies, regulators, financiers, infrastructure and logistics companies, PPP and construction experts, etc.

## The Team

The Rail Baltic Joint Venture study was carried out and coordinated by pan-Baltic legal alliance **TRINITI** ([www.triniti.ee](http://www.triniti.ee)).

Altogether 8 project partners in 5 countries were involved in the analyses of the various legal, financial, tax and business issues of the study, within the timeframe agreed upon with the Task Force, whereas:

- **TRINITI Estonia, TRINITI Latvia and TRINITI Lithuania** provided the legal analysis of setting up the Joint Venture in Estonia, Latvia and Lithuania respectively.
- **Deloitte** provided the Baltic tax analysis.
- **Keystone Advisors** performed the financial analysis.
- **Innopolis** provided the input on European Union funding possibilities.
- **Domanski Zakrzewski Palinka** shared their legal knowledge on Polish railway infrastructure fees and regulation.
- **Norton Rose**, through their Brussels office, contributed with the summary and analyses of international experience of large cross-border infrastructure projects in Europe.

## Phases and Structure

The analyses were conducted in three phases, as many answers and questions stemmed from the interim results of the study.

In the first phase, comparative tables based on legal and tax questionnaires were prepared and then divided between the project partners based on their expertise. After joint analysis the project lead partners outlined the pros and cons of options in the Interim Report. Final data was compiled and narrowed down into comparative reports with the alternative options considered and weighed by the project leads in respective teams.

Feedback on the progress and preliminary findings was exchanged between the consultant and the Task Force throughout the project, firstly via the comments to the Inception Report and the Interim Report. The Inception Report outlined the scope and methodology of the study and the Interim Report provided the Task Force with a wider choice of alternatives for the corporate structure and several suggested legislative changes.

It is important to note that certain aspects such as the financial analysis and EU funding are highly dependent on the availability of the latest information and ongoing political discussions on the European Union level. The consultant has undertaken reasonable endeavours to ensure that the most up-to-date developments are included in the analysis.

Whilst acknowledging that the three Baltic countries may have different views on the ways and timing of the implementation of the Rail Baltic project, this study aims to provide the most straightforward approach to ensure that the proposed Joint Venture will be economically viable and ensure the cohesive development of an efficient and interoperable new north to south European freight and passenger railway.

The Final Report is structured into three parts:

- the **Executive Summary** that summarizes the key alternative options identified on the basis of comparisons and analyses in the report;
- the **Main Report**; and
- the **Annex**, which includes the full analyses and comparative tables of data used for determining the conclusions and key findings.

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## 1. EXECUTIVE SUMMARY

The purpose of the Executive Summary is to summarize the key alternative options identified on the basis of comparisons and analyses in the report, to outline the main significant issues of mutual cooperation between the participating states that need to be agreed upon and to describe the material findings that our analysis has discovered.

In accordance with the Joint Statement of the Prime Ministers Council of the Baltic countries dated 11 November 2011 the Prime Ministers „agreed to establish a joint venture of Estonia, Latvia and Lithuania by the end of 2012 at the latest, to implement the project“ (JV).

The main issue concerning the immediate establishment of the Joint Venture by all three Baltic countries is that **no direct ownership of shares in a foreign company is currently allowed under the legislation of any of the participating States.**

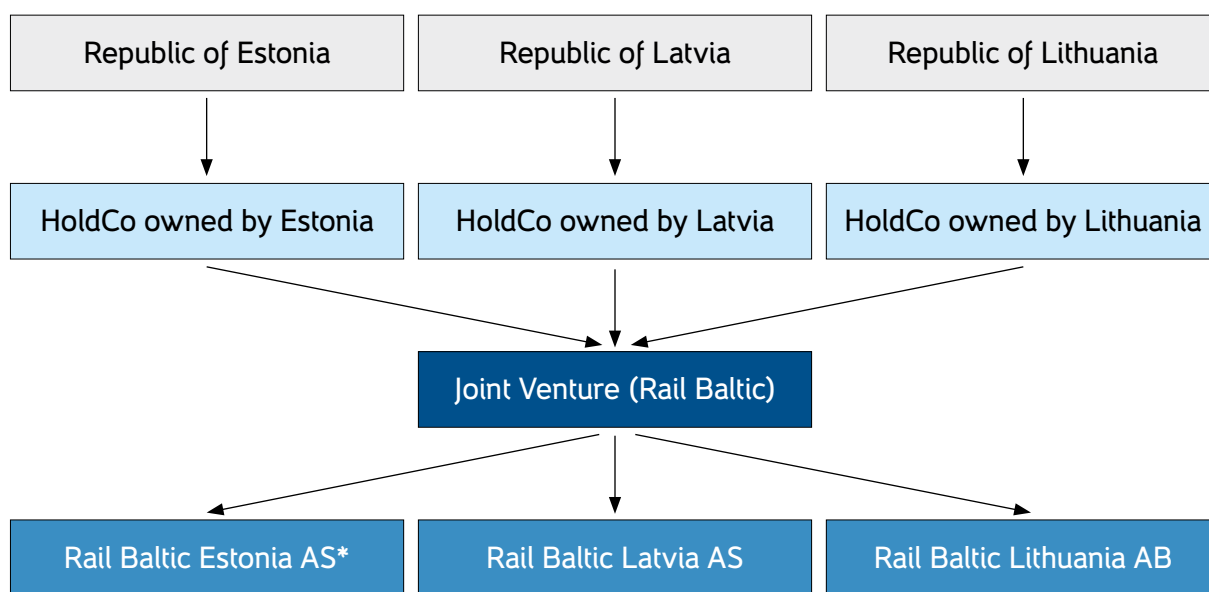
However, this is not a substantial hindrance for proceeding with the foundation of the JV in an expedient manner, as the present legal obstacle can be overcome by using a holding company that is 100% in the ownership of the participating State or alternatively by amending the respective domestic laws regulating government participation in foreign legal entities, the latter obviously being subject to respective political and legislative processes and thus a more time-consuming option.

## 1.1. TWO OPTIONS FOR CONSIDERATION

It is the proposal of this analysis to consider the following two main options for the creation of the future Joint Venture:

### Option 1 – Joint Venture as a two-tier structure by using holding companies owned by the respective participating states

The structure of the Joint Venture would appear as follows when completed:



#### Pros:

- Setting up the Joint Venture would not require any changing of laws governing the States' participation in legal entities (limitations on participation in foreign legal entities).
- Setting up the Joint Venture is less time-consuming and less costly than setting up the Joint Venture using Option 2. The structure may be finally in place within 2-4 months from the decision of the participating states to initiate proceedings for the establishment of the Joint Venture.
- Isolation of risks – an additional legal firewall between the operations and the participating states.
- With respect to tax matters, Option 1 would benefit from the corporate income tax (CIT) being allocated appropriately, resulting in the CIT having a balancing effect.

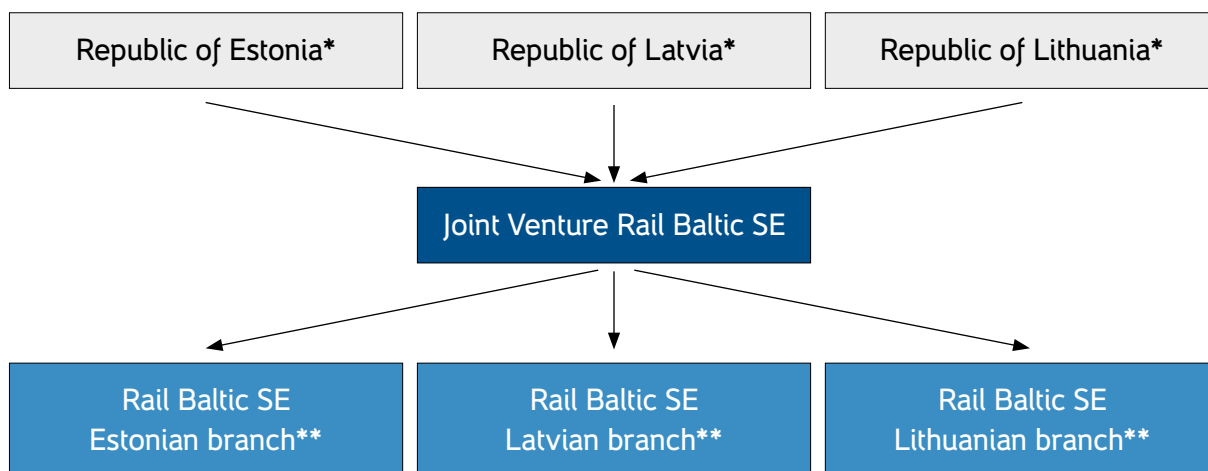
#### Cons:

- Less flexibility to change the structure in case laws, tax regulation, socio-economic aspects, financial situation etc of the participating States change.
- A costlier and more complex structure than the one-tier structure.
- With respect to tax matters, no setting-off of losses of different subsidiaries against each other.
- Net equity requirements are to be followed on the holding company level and on each of the subsidiaries (1+3 companies) which may pose an issue given that the Joint Venture would be posting losses during the implementation phase.



## Option 2 – Joint Venture as a one-tier European company having branches in each of the countries

The structure of the Joint Venture would appear as follows when completed:



\* - as noted above, no direct ownership of shares in a foreign company or SE type company is currently allowed under the legislation of any of the participating States.

\*\* - SE branch offices are not separate legal entities.

### Pros:

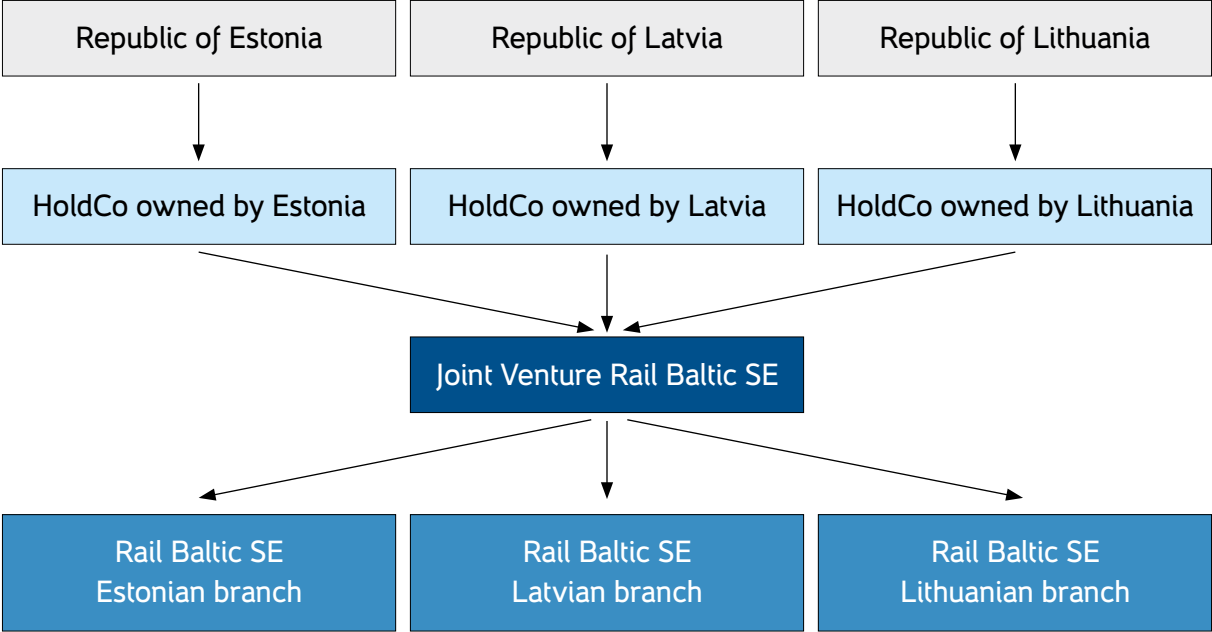
- Offers flexibility, moving the headquarters of an SE is considerably easier than that of an ordinary limited liability company in Option 2. International experience (e.g. Brenner Base Tunnel) has shown that the flexibility of the locations of the head office depending on the development of the project adds value to the implementation and performance of the Joint Venture.
- The SE would own the entire infrastructure directly and not through the subsidiaries, thus simplifying the management of the infrastructure. Depending on the financing structure and securities needed for the financing, the SE owning the infrastructure directly may facilitate simpler structure of loan financing and securitization.
- Net equity requirements are to be followed only in one country. Also the payment of share capital and registration can be done in one country.
- Simpler and more cost-efficient structure than the two-tier structure. Simplified reporting proceedings, less accounting and auditing formalities and costs.
- Ensures that any additional shareholders will be added to the Joint Venture only upon the prior approval of all existing shareholders.
- Use of an SE-type company will result in EU-wide legal recognition compared to „domestic“ legal vehicles.

### Cons:

- Setting up the Joint Venture is more time-consuming and costlier than setting up the Joint Venture using Option 1. Setting up an SE would involve establishing the HoldCo's and subsequent cross-border merger of the HoldCo's into an SE. The structure may be finally in place within 6-10 months from the decision of the participating states to initiate proceedings for the establishment of the Joint Venture, whereas this timeline assumes that laws do not have to be changed and HoldCo's are used (please see next con).

- b) SE as a corporate structure is relatively unknown in the Baltics which may initially cause some practical difficulties with the domestic laws and relations with authorities.
- c) Setting up the Joint Venture under Option 2 would require changing the laws of each of the participating States which currently limit the right of the State to participate in foreign companies and also limit the possibility to participate in a SE-type company.\*

\*This problem can be mitigated by establishing the HoldCos similar to Option 1 and each State would participate in the SE through a HoldCo, in which case the structure would appear as follows:



## 1.2. MATERIAL ISSUES TO BE AGREED BETWEEN THE PARTICIPATING STATES

Please find below a list of the most important issues that need consensus on the highest decision-making level of the participating states and that should be negotiated and agreed upon before the establishment of the Joint Venture can proceed:

	RECOMMENDATION		OTHER OPTIONS
	Option 1	Option 2	Option 3
1. If and when to establish the Joint Venture <sup>1</sup>	As soon as practicable under existing laws	After the completion of the planning and land acquisition phase	After the construction phase has been completed
2. The place of registration <sup>2</sup>	Riga	Vilnius	Tallinn
3. Distribution of shares <sup>3</sup>	Equally between the participating states	Proportionally to the financial contributions	Proportionally to the length of the track
4. Share capital contributions by the participating states <sup>4</sup>	Financing scenario „Do maximum”. 1,34 MEUR per country per year	Reduced financing - „Do medium” scenario 1,03 MEUR per country per year	Reduced financing - “Do minimum” scenario 0,65 MEUR per country per year
5. Corporate Governance of the Joint Venture <sup>5</sup>	Two-tier management, with a business professional as a CEO and the position of the Chairman of Supervisory Board rotating between the participating states annually	Two-tier management, where the position of the Chairman of Supervisory Board does not rotate	One-tier management
6. Role of RIs in the Joint Venture <sup>6</sup>	No direct involvement	Mixed involvement	Direct shareholding by national RI Managers
7. How to Achieve Unified Regulatory Framework <sup>7</sup>	The creation of a new supranational Rail Baltic regulatory framework (the „Rail Baltic Commission”)	Preparing amendments to the current national regulations to achieve identical national RIF and access methodologies as per the SERA Directive	An agreement between the states on using one of the effective national RIF calculation and Access methodologies (as updated to implement the SERA Directive) throughout the new Rail Baltic

<sup>1</sup> Please see clause 1.2.1 of the Executive Summary

<sup>2</sup> Please see clause 1.2.2 of the Executive Summary

<sup>3</sup> Please see clause 2.5 of the Main Report

<sup>4</sup> Please see Table 2 in clause 1.2.3 of the Executive Summary

<sup>5</sup> Please see clause 1.2.5 of the Executive Summary

<sup>6</sup> Please see clause 1.2.6 of the Executive Summary

<sup>7</sup> Please see clause 1.2.7 of the Executive Summary

## 1.2.1. If and When to Establish the Joint Venture

### Main Short-Term and Long-Term Functions of the JV

In accordance with the Joint Statement of the Prime Ministers of the Baltic Council of Ministers, dated November 11, 2011 the Prime Ministers „agreed to establish a joint venture between Estonia, Latvia and Lithuania by the end of 2012 at the latest, to implement the project“.

**Our analysis does not indicate any material reasons why the decision of the Prime Ministers, to establish a Joint Venture as soon as practically possible, should be amended.**

- All Baltic governments have already recognized and agreed that a joint venture will be necessary for the realization of the Rail Baltic project.
- The „Rail Baltic as one common railway and not the sum of 3 railways“ approach is key to the successful planning, construction and operation of the new railway. This common approach and culture will need time to form, root and grow. The sooner the integrated activities of the joint venture start the sooner such results will show.
- A joint applicant (JV) for EU funding would demonstrate the strong political will and co-operation of the Baltic governments regarding the Rail Baltic and would be a significant advantage in the heavy competition with other pan-European large infrastructure projects applying for EU funding.
- Corporate entities are widely accepted to be more effective in marketing activities than the public sector. Due to heavy competition from a) other large projects for EU funding and b) alternative and pre-existing transport corridors and modes, RB needs well-planned and effective marketing from an early stage. In our opinion and based on comparable international experience a joint, motivated and competent business entity would be the most effective vehicle for performing this function.
- The establishment of a Joint Venture will require substantial preparation, negotiation and tripartite agreements between the governments of Estonia, Latvia and Lithuania on a multitude of complex business, technical, financial, corporate and contractual issues. This study provides substantial basis and material reference for such discussions. The process of negotiations will however require considerable time and effort and in case the three Baltic governments intend to achieve the incorporation of the joint venture by 2014, they are well advised to start this process with no further delay.

**Implementation of the Rail Baltic project without the establishment of a Rail Baltic Joint Venture, i.e. continuing the co-ordination of the agreed activities and investments of the three Baltic governments into the Rail Baltic project through the Task Force (or some other project steering group or implementation unit) is in our opinion reasonably possible only to a certain extent and point in time, with the following few immediate advantages but several long-term risks and drawbacks:**

#### **Pros:**

- Possibly complicated negotiations and agreements on the material terms of participation of the 3 Baltic governments in the RB Joint Venture can be postponed or carried out on a more flexible timetable;
- Existing applicable competence of the public sector is immediately available without time and effort spent on a set-up of a new corporate entity or major structural re-organisations;
- No significant additional funding will be immediately necessary to continue with the project on an as is basis.

### Cons:

- Existing competence is not likely to suffice for the growing business needs of the project (incl marketing and business development);
- A steering group does not build joint competence or team for later management of the new railway;
- Without the development of unified business organisation and culture progeny is unlikely;
- It postpones the implementation of „Rail Baltic as one common railway and not the sum of 3 railways“ approach and practise;
- Without a single point of co-ordination and daily information exchange the differences in progress and planning of the next steps of the project in the 3 participating countries are likely to increase further;
- Costs of the project without a JV will increase by 1/5 due to governments not being entitled to reclaim VAT.

Please see Annex 9 for further comparison of the pros and cons of these scenarios.

**The establishment of the Joint Venture does not exclude the ongoing need for a co-ordinating Task Force to continue its work and likewise, the Task Force will not be able to carry out all the necessary functions in the RB project without assigning several of them to the Joint Venture.**

The participating states need to agree on the division of different functions of the implementation phase of Rail Baltic between the different national government bodies and agencies (incl the Task Force) and the Joint Venture.

### Short-term functions of the Joint Venture would include:

- 1) Overall project management and centralized administration
- 2) Co-ordinating information between member countries
- 3) Preparing programme finance applications and subsequent implementation
- 4) Monitoring programme progress and funding
- 5) Organising centralised public procurement tenders
- 6) Contract management
- 7) Legal co-ordination
- 8) Preparing technical specifications for design and construction of railways
- 9) Creating a team of 1435 mm railway experts and ensuring progeny
- 10) Reporting to the national governments and European Union agencies
- 11) Marketing of the project to future clients (freight and passenger operators)
- 12) Coordinating constant communication with the public about the project's progress
- 13) Strategic stakeholder consultations
- 14) Risk management

Please note that in our opinion, in the initial stage after the establishment of the Joint Venture its three primary functions, which could not be sufficiently covered by the Task Force or other civil servants, would be:

- A) **Pre-marketing** of the new infrastructure to future clients and co-operation partners (freight and passenger services, logistics companies, terminal managers, service providers, etc);
- B) **Development of a business plan** (incl forecast of cargo and passenger flows, risk analyses and mitigation, market surveys, etc);
- C) **Preparation of the financial plan** (incl the plan of preliminary cash-flow, analyses of necessary capex investments, preliminary dialogue with potential financiers, etc.).

**Long-term functions of the Joint Venture with respect to the entire Rail Baltic network:**

- 1) Single point of reference for the railway infrastructure management
- 2) Single point of reference for the maintenance of the railway infrastructure
- 3) Single point of reference of safety management
- 4) Single point of reference of the capacity allocation
- 5) Single point of reference for infrastructure charges and collection thereof
- 6) Single point of reference for the management of railway traffic
- 7) Cross-border co-operation

## 1.2.2. Place of Registration of the Joint Venture

In accordance with the Joint Statement of the Prime Ministers of the Baltic Council of Ministers, dated September 20, 2012 the Prime Ministers „supported the launch of a special study to analyse legal, financial and other aspects of the establishment of a Rail Baltic Joint Venture with the headquarters in Riga“.

**Our analysis has not revealed any material reasons why the preference of the Prime Ministers to have the headquarters of the Joint Venture registered in Riga should be amended.**

The analysis indicates that there are no material differences in setting up the Joint Venture in any of the Baltic States.

**In case of Option 1** (two-tier company structure):

- The main disadvantage of both Riga and Vilnius is that due to thin capitalisation requirements (limit on borrowing from related persons) the possibility to use shareholder loans (from the participating States) as part of the financing package is limited, whereas such restrictions do not apply in Estonia. This disadvantage can be mitigated by amending the applicable laws;
- The main disadvantage for establishing the holding company in Estonia is the unfavourable tax treatment, should the holding company opt to sell shares in its subsidiaries. This disadvantage obviously assumes that the sale of shares to private investors is done on the subsidiary level, whereas it is more likely to occur on the holding company level (if at all). This disadvantage can be mitigated by amending the applicable laws;

**In case of Option 2** (single-tier company structure):

- the main disadvantage of both Riga and Vilnius is the same thin capitalisation requirement as described above. This disadvantage can be mitigated by amending the applicable laws;
- an additional disadvantage for Riga is that due to the applicable tax laws there could be a double-taxation effect on any profits obtained by the Joint Venture from the activities of its Estonian branch. This is not a material disadvantage given that no profit is expected during the implementation phase giving sufficient time to amend respective laws.

### 1.2.3. Capital Contributions into the Joint Venture

Carrying out the preliminary tasks (and thus establishing the Joint Venture as soon as possible) versus setting up a Project Steering Group (and establishing the Joint Venture at a later stage) is analysed and presented in the Annex 9.

The main conclusions of our analysis of the estimated project management cost (which is the basis for capital contributions) are reported below:

- The total financial contribution for project management is estimated at the level of single digit percentages and the preliminary calculations put it at 2,2% of the total construction cost or 75 MEUR over the project completion period (see the table below).
- The estimated range was narrowed down from initial interview based assessment of 1-10% to 2-5%, applied on construction cost of 3,4 bn. euros. Thereafter it was verified by a bottom-up calculation to arrive at the preliminary suggestion of 2,2%.
- The split between individual countries should track their contribution into the project and concur with legal set-up. Data is reported assuming equal contribution between countries. Even though the project might not need an immediate capitalization and various financing scenarios are available, we would like to propose to follow the long-term view and anchor the payments/capital contributions to each project implementation cycle (see the tables below).
- Project management cost needs to be periodically monitored and adjusted if applicable, in order to respond to changing circumstances.
- We would also like to emphasize that even though project management cost represents a significant investment, any errors, miscalculations or delays in project implementation would be much more costly (including safety issues) than investment into appropriate project management capabilities.
- We would propose to consider the establishment of one common Baltic team to manage the implementation regardless of the specific legal set-up. While initially cumbersome, the Rail Baltica operation as one unit has found support in most interviews. Besides, cross-border operational and cultural constraints have been emphasized in case of international reference projects (Oeresund Bridge, Channel Tunnel, Brenner Tunnel, etc.) as well.

**Table 1 - Overall breakdown of the cost and schedule of payments**

<b>Project management cost</b>	<b>%</b>	<b>'€ million</b>
Remuneration and outsourcing	70	39
Overheads	27	15
Marketing	3	2
Project management cost	100	56
Contingencies*	+10	6
Social contributions**	+34	13
<b>TOTAL PROJECT MANAGEMENT COST</b>		<b>75</b>

<b>Timeline of payments</b>	<b>%</b>	<b>'€ million</b>
First 4 years	21	16
Second 4 years	41	31
Third 5 years	38	28
<b>TOTAL PAYMENTS</b>		<b>75</b>

\* Applied on project management cost ; \*\*Applied on remuneration and outsourcing



For the purposes of our analysis, we use the project management cost of 75 MEUR or 2.2% as the baseline scenario and call it the maximum financing scenario. Additionally, we have defined two alternative reduced financing scenarios as medium and minimum (see Table 2 below), based on interviews and information received from the Task Force and other involved parties, in order to reflect the current developments and realities.

**Table 2 - Possible financing scenarios, Phase I 2014-2017.**

	<b>Do maximum</b>	<b>Do medium</b>	<b>Do minimum</b>
<b>Time period</b>	4 years	4 years	4 years
<b>Average yearly contribution per country</b>	1,34 MEUR	1,03 MEUR	0,65 MEUR
<b>Estimated team size</b>	Finance team 100% (7-8 people)	Finance team 75% (6 people)	Finance team 25% (2 people)
	Administrative 100% (18-21 people)	Administrative 55% (10 people)	Administrative 25% (3-4 people)
	Project design 100% (6-40 people)	Project design 100% (6-40 people)	Project design 50% (6-20 people)
	Management 100% (9 people)	Management 66% (6 people)	Management 50% (4-5 people)
	Supervisory board 100% (6 people)	Supervisory board 50% (3 people)	Supervisory board 50% (3 people)
<b>Functionality</b>	Until the end of 2015, the design functions are to be performed jointly by the Rail Baltic Task Force, the Joint Venture, and various state institutions.  Thereafter, the JV is to perform full functionality in terms of the project design and other functions.	Until the end of 2015, the design functions are to be performed jointly by the Rail Baltic Task Force, the Joint Venture, and various state institutions.  Thereafter, the JV is to perform full functionality in terms of the project design and reduced functionality in terms of marketing, finance, administrative and support functions.	Until the end of 2015, the design functions are to be performed jointly by the Rail Baltic Task Force, the Joint Venture, and various state institutions.  The objective is to establish the Joint Venture (JV) with a functioning management and minimal financial and administrative staff.  Additional financial contributions after the first year might be necessary and they shall be based on the analysis of the management team.
<b>Risks</b>	Even though it represents a significant investment, the contribution might still underestimate the actual project management needs and scope.	Scenario contains a risk of underinvestment, so that the project management quality will suffer and project goals would be unattained.	Scenario contains a significant risk of underinvestment, so that project management capabilities and execution will be reduced to the level where time will be lost without any achievements.

#### 1.2.4. Distribution of Shares in the Joint Venture

It is the proposal of this analysis to establish the Joint Venture on the basis that each of the participating States would participate in the financing of the Joint Venture on an equal basis and the shares of the Joint Venture would consequently be distributed equally between the participating States.

#### 1.2.5. Corporate Governance of the Joint Venture

##### Chairman of the Supervisory Board, Rotation of the Chairman of the Supervisory Board

The participating states should agree on a number of issues pertaining to the corporate governance of the Joint Venture.

We have suggested that the Joint Venture should have a two-tier management structure, i.e a Supervisory Board and a Management Board. Below we have listed the following material issues which need to be agreed upon, whereas other material terms shall be set out in the draft Shareholders' Agreement of the future joint venture:

- **Number of Supervisory Board members.** Our analysis suggests that each participating State should have an equal number of Supervisory Board members, therefore it is our recommendation that in total the Supervisory Board would consist of 6 members, whereas each participating states would appoint 2 members to the Supervisory Board.

Increasing of the number of Supervisory Board will be possible also at a later stage, e.g. to better involve the representatives of the governments of Poland and Finland, but we would recommend to achieve the latter goal through inviting these governments to participate in the various consultation and co-operation bodies of the Baltic Rail Commission, as explained in clause 1.3.7 of this summary and clause 2.12.3 of the Main Report, in order to keep the business matters of the Joint Venture separated from the international political issues. The preference of such solution is supported also by international experience in comparable projects (please see also clause 1.3.8 below and Chapter 5 of the Main Report)

- **Chairman of the Supervisory Board.** Our analysis suggests that the Supervisory Board would be chaired by a Chairman who is assisted by two Vice-Chairmen, whereas in case one participating state appoints the Chairman, the other participating states would each designate its representative as a Vice-Chairman.
- **Rotation of the Chairman of the Supervisory Board and Vice-Chairmen.** The period of rotation between the Chairman and the Vice-Chairmen should be agreed between the participating states. Our experience and analysis recommends that the positions of the Chairman of the Supervisory Board and Vice-Chairmen are rotated on a yearly basis between the participating countries.

## 1.2.6. Role of Existing Infrastructure Companies in the Joint Venture

In principle there are three main options how the participating states could establish the Joint Venture vis-à-vis the existing national railway infrastructure companies:

1. **No direct involvement of the RIs** – new holding companies are established by the national governments that are independent from the existing railway companies and are owned 100% directly by the respective participating States.
2. **Direct shareholding through national RI Managers** – the Joint Venture would be incorporated through the direct shareholding of the existing railway infrastructure companies.
3. **Mixed involvement** – some of the participating States participating in the Joint Venture through the newly established holding company and some through the existing RI company.

Feedback from the majority of the interviewed industry sources and involved parties has indicated that **the preferred option would be no. 1 above, i.e. establishing a JV directly by the participating states.**

Lithuanian Railways (Lietuvos Geležinkeliai - LG) was the only interviewed party of the opinion that state-owned companies should continue their leading role in the Rail Baltic project. They have also referred to the fact that LG is already preparing the construction of a 1435 mm line from the Polish-Lithuanian border to Kaunas (following the existing 1520 mm track corridor). Furthermore, preparations for another section of the 1435 mm track (from Kaunas to the Latvian border) are being co-ordinated and carried out by LG in the planning phase (for a more detailed overview of Rail Baltic related activities in Lithuania, please see Annex 10).

At the same time it was widely recognised in the interviews that **the industry expertise and know-how of the existing national railway companies should be called upon to benefit the Rail Baltic project** (e.g. know-how for the construction of new railways, best practices of RI maintenance and management, utilization of the 1435 mm gauge expertise of LG, business synergy with the existing railway services, etc.), but it should not necessarily take the form of direct legal involvement but rather through the secondment of experts and personnel, training and consulting, etc.

**We share the above opinion of the majority of the sources as the establishment of the JV directly by the participating states** would have the advantages of:

- minimizing the transfer of any negative historical heritage and attitudes related to the incumbent 1520 mm RI managing practises to the new railway;
- not increasing the loan burdens of the existing railway infrastructure companies;
- facilitating the „one Rail Baltic network, not a sum of national railway sections“ – approach;
- minimizing obstacles and risks related to the EU funding of the Rail Baltic project;
- shorter corporate chain of command and quicker information flow between the participating Baltic governments and the management of the future Joint Venture;
- avoiding the conflict of interest between the existing East-West railway transit business and the establishment of the new North-South railway corridor within the same (group of) companies.

A mixed involvement of some States participating directly in the Joint Venture (or through a special-purpose HoldCo) and some through the existing railway infrastructure companies should in our opinion not be the preferred option, as such an uneven approach would likely result in additional difficulties in communication and information-flow as well as increase the potential of conflict of interest situations. This scenario will complicate the representation of the participating states in the bodies of corporate governance of the Joint Venture on an equal level which in turn is not contributing to the efficient co-operation of the participating states as shareholders of the JV.

However, in order to facilitate the timely establishment of the Joint Venture and bearing in mind the significant expertise and investments of the Lithuanian Railways already related to the project, it should be considered whether in the present situation LG could be designated as the “HoldCo owned by Lithuania” (in the context of the proposal in clause 1.1 above), provided that the efficient flow of information and timely decision-making between the management of the RB Joint Venture and the Lithuanian government is duly ensured.

### Conclusions:

It is evident that today there already exists a significant difference between the three Baltic countries regarding the progress and future of the Rail Baltic project. In the negative case scenario the 1435 mm track sections already planned and built between the Polish border and Kaunas could be in direct competition with the new north-south RB railway and undermine its freight business and financial sustainability in general. Unless a unified approach (e.g. in the form of a Joint Venture) is agreed upon and implemented soon, the respective gap between the three countries only grows in time.

Furthermore, unless an exception is foreseen for Rail Baltic with respect to exclusive rights of LG to manage public railway infrastructure in Lithuania (please see also clause 1.3.1 below and Annex 1) (e.g. through entering into an international treaty re: specific legal regime of the the Rail Baltic and thereby superseding domestic laws), the possibilities and interest of Lithuania to participate in the RB Joint Venture will be significantly different from the other two Baltic states.

These conflicting interests in turn significantly increase the risks related to the successful application for the EU funding, sustainable management of the future railway infrastructure and the timely completion of the whole Rail Baltic as a new faster north to south freight and passenger railway.

### 1.2.7. How to Achieve a Unified Regulatory Framework

From the point of view of the railway operators, expected to provide international rail transport services on the Rail Baltic infrastructure, a “one-stop shop” principle should be implemented in practice to make the rail transport more attractive in comparison with other transport modes (road, sea). Therefore, the railway infrastructure fees calculation and charging methodology needs to be transparent, legally certain and uniform. There are three options available for achieving this:

- A) **An agreement between the states on using one of the effective national RIF calculation methodologies** (as updated to implement the SERA Directive) throughout the new Rail Baltic. The drawback of this option is that the national governments may not be willing to relinquish their authority without some mechanism to ensure that their interests are adequately accounted for in the domestic legislative processes;
- B) **Preparing amendments to the current national regulations of Estonia, Latvia and Lithuania** by adopting identical national methodologies along the principles established by Directive 2012/34/EU creating a single European railway area (SERA Directive) and its implementation measures as adopted by the European Commission. The drawbacks of this option are (i) the details of the implementation measures to be adopted by the European Commission are presently unknown, (ii) the identical regulations may not sufficiently take into account the diverging situations in the stakeholder states and (iii) the actual coordination of the legislative procedures and conformity of its end-results needs to be achieved in the stakeholder states;
- C) **The creation of a supranational Rail Baltic regulatory framework** for the calculation and charging of the Rail Baltic RIFs in support of the implementation of the “one-stop shop” approach. The precondition for this option is that any future changes to such regulative framework would require a long-term international agreement between the states. On a positive note such a „lock-in” of the participating states would provide additional stability to the Rail Baltic legal environment and can be mitigated by the delegation of authority to establish the RIF regulatory framework for the Rail Baltic network and the supervision of its implementation to a neutral body.

Taking into account that the Rail Baltic infrastructure will be built completely new and will technically differ from the existing 1,520 mm railway infrastructure, a specific set of rules for access to and the allocation of capacity (timetabling, network statements, application and co-ordination proceedings, handling of congested or depleted capacity) on the whole Rail Baltic infrastructure should be agreed upon and implemented by Estonia, Latvia and Lithuania.

Furthermore, it is the Consultant’s recommendation that the stakeholder states should designate or agree on setting up a cross-border independent body to supervise the access issues and a body acting as a dispute resolution forum, the awards of which are recognised and enforced by the national legal system. The substantive regulation concerning access to the Rail Baltic infrastructure should be based on the relevant EU legislation and its implementation should be supervised by a regulatory authority which is neutral and independent of the domestic regulatory and political interests.

Please see clause 1.3.7 below and art 2.12.3 of the Main Report for our analyses and proposals.

## 1.3. MATERIAL FINDINGS

### 1.3.1. Railway Legislation

Our analysis has compared the railway regulations in Estonia, Latvia, Lithuania and Poland pertaining to railway infrastructure tariffs, regulatory bodies, etc.

**The general conclusion is that there are major differences in the national methodologies of each of the Baltic states.** It is also notable that they are all influenced by the goal of controlling the railway infrastructure owned by the incumbent infrastructure managers that control the existing public railway infrastructure (1520 mm) almost entirely.

As for the upcoming amendments to the existing legislation:

- In **Estonia**, there are no amendments to the existing methodology currently being processed.
- In **Latvia**, certain amendments concerning technicalities are in the process of adoption.
- In **Lithuania**, the Railway Infrastructure Fee methodology has been recast very recently.
- In **Poland** amendments are being discussed, but have not yet been published, as there are several ongoing court disputes (incl. infringement proceedings initiated by the European Commission) pertaining to the present regulation.

Please note that in the coming years the current methodology is likely to be changed completely in all EU member states in the light of the SERA Directive, which took effect as recently as in December 2012. The SERA Directive requires the Member States to implement the Directive fully by 16 June 2015, whereas before this date the European Commission has to adopt the implementation measures inter alia for the calculation of the charges for the minimum access package and for access to RI connecting service facilities.

Given the timetable for making Rail Baltic operational, the creation of the best suitable RIF calculation and charging methodology for the Rail Baltic is an important task at hand. Due to the forthcoming implementation period of the SERA Directive and also other new regulatory initiatives indicated by the European Commission (e.g. further harmonisation and authorisation issues for the purposes of future introduction of the single European safety certification, elimination of national technical rules, etc.) the RB stakeholders are in a unique position to implement uniform European railway regulations for the Rail Baltic already from the early stages of the project.

**As a specific material finding in the field of regulation please note the legal restrictions to the ownership and management rights of public railway infrastructure in Lithuania.**

Currently the Lithuanian laws (strategic assets legislation) clearly stipulate that public railway infrastructure can be: a) only in the ownership of the Republic of Lithuania, and b) it can be transferred only into the trust of the state-owned company Lithuanian Railways (or other enterprise where the Lithuanian state has the power of decisions i.e. supermajority of shares). (Please see clause 2.12.2 of the Main Report for more details).

This is clearly a significant difference in the Lithuanian railway legislation, as compared to Latvia and Estonia, and as such a material obstacle to the uniform approach to the ownership and management of the future Rail Baltic by the Joint Venture (incl the use of the new RB infrastructure as loan collateral in the future financing of the project).

If the participating states agree that the RB Joint Venture should be the owner and manager of the new railway infrastructure in its entirety, the Lithuanian strategic assets legislation will have to be amended to allow also the Joint Venture to own and manage public railway infrastructure.

### 1.3.2. Public Procurement Laws

**The main principles of the public procurement procedures in all three Baltic States are based on EU law, the differences mainly being in dispute procedures.** When planning future centralized public procurement procedures for the Joint Venture, it is our recommendation that the Estonian public procurement system should be preferred where possible.

The main arguments for using the Estonian public procurement system are:

- 1) In Estonia, an appeal cannot be lodged after concluding a procurement contract. In Latvia and Lithuania an appeal can be lodged up to 6 months after signing the contract.
- 2) In Estonia, an appeal can be lodged in 7 working days from the purchaser's decision. In Latvia and Lithuania it is in some cases in up to 15 days.
- 3) Relatively low percentage of public procurements is appealed in Estonia (4-5 percent). In Lithuania it is similarly 3 percent, compared to 13-14 percent in Latvia.
- 4) As a result, an average public procurement dispute through all court stages in Estonia takes up to 6 months, but in most cases it ends by the ruling of the Appeals Committee (30 days from filing an appeal to reaching a decision). In Latvia it can take 2-5 years in court, in Lithuania it can take up to 10 months.

Co-ordination and centralization of public procurement procedures in large and complicated infrastructure projects as the Rail Baltic are likely to provide substantial cost-savings due to the effects of scale and concentration of required know-how necessary for the timely conclusion of highly specific procurements (design and construction works of the railway infrastructure, signalling systems, etc).

The benefits of the Estonian procurement system could be used if the main seat of the Joint Venture would be in Estonia or if the companies wishing to carry out a centralized procurement procedure (presumably members of the Rail Baltic JV group of companies) would agree to authorize the Estonian company of the group to organize the procurement on behalf of the others and act as a steering partner in the procurement.

Such cross-border procurement co-operation is already successfully ongoing in our region in the fields of defence and medicine:

- Joint procurements between Estonia and Finland for three-dimensional mid-range radars (2009);
- Joint procurement by the Baltic ministries for public health/social affairs for the purchase of medical products and equipment (based on the Partnership Agreement signed in May 2012);
- Joint procurement by the Baltic defence ministries for the joint purchase of ammunition (agreed in June 2012).

It is our current understanding that most of the construction, supply and services procurements, related to the future Rail Baltic project, could be carried out through joint procurement procedures following the rules of the preferable jurisdiction.

### 1.3.3. Land Acquisition Laws

**Compulsory expropriation procedures in the Baltic countries differ significantly and it is strongly advisable to review and amend expropriation legislation in Latvia and Lithuania** in order to support the swift and simultaneous process in all concerned jurisdictions, i.e. so that the overall expropriation process would also take ca 1,5 years, as it is now in Estonia.

Taking into consideration the initial project timeline, as set forth in the 2011 AECOM Rail Baltic Feasibility Study Final Report (AECOM Study) where these two phases – spatial and regional planning and procurement (including expropriation) processes – are separated. It is advisable that in Lithuania these two processes should also be separated.

In Latvia it is advisable to change the legislation so that expropriation decisions would be made on the national government level instead of each time passing a specific law by the Latvian Parliament. This will help to avoid possible contestations of the special expropriation law in the Constitutional Court and avoid potential delays this may cause.

### 1.3.4. Taxation Issues

From the VAT perspective, it is possible to achieve that the track access charges form the taxable supply for the infrastructure manager. Accordingly, the generation of taxable supply would allow the deduction of input VAT (paid on the goods and services that would be used in the course of developing and maintaining the railway infrastructure). The non-eligibility of VAT costs under the Connecting Europe Facility Regulation would not be an issue.

Regarding the VAT perspective, it is also possible that a one-invoice model (where the clients are invoiced from one company) may not work. Thus, separate invoices should be issued for each country separately.

It is the common approach of the tax authorities of all three countries that definite confirmations, on the tax treatment of specific cases are available only to the taxpayers themselves. In the case of the Rail Baltic project, the taxpayer as a legal person does not yet exist. Moreover, the answers highly depend on the details of the transactions. For minimizing any further risks it is strongly advisable to prepare written queries to the tax authorities of all three countries immediately after the incorporation of the legal structure, when more detailed information regarding the operational structure is available. For VAT, the main aspects to be confirmed include: 1) whether track access charges are subject to VAT, and 2) whether input VAT is fully deductible even in case of a long investment period.

From a tax perspective, the two-tier structure and the one-tier structure are equally competitive. Neither of the models have significant tax advantages.



- **Advantages of the two-tier structure:**

If necessary in the future, the holding company may sell the shares of its Estonian, Latvian and Lithuanian subsidiaries.

- There would not be any negative transfer pricing issues in Lithuania. The Lithuanian tax authorities fully allow arm's length pricing only in case of intercompany transactions. For dealings within the same legal entity the Lithuanian tax authorities tend to expect that the Lithuanian unit should earn mark-up on top of its costs but the other parts of the same legal entity cannot do so when invoicing the Lithuanian unit.

- **Advantages of the one-tier structure:**

The net result of the three countries may be taken into account in the tax residency country of the single company (the country where the head office is situated) . In other words, it may be possible to reduce the taxable profit at the level of headquarters if any of the branches incur losses. This is particularly the case in Estonia.

- The negative effects of Latvian and Lithuanian restrictive thin capitalization regulations may be offset in case of the one-tier structure, particularly if the head office is situated in Estonia.
- A lower number of taxpayers (3 taxpayers versus 4 taxpayers in case of the two-tier structure).
- In case of the Estonian head office, there would be no taxation of profit distribution in Estonia as the operational level and the head office would be within the same unit.

For the two-tier structure, Estonia, as the potential holding company country, has some tax advantages when compared to Latvia and Lithuania. Estonia does not apply restrictive thin-capitalisation regulations for related-party loans (i.e. the Estonian holding company may be financed via shareholder loans to an unlimited extent; at the same time, the Estonian holding company may balance the debt and equity financing of its Latvian and Lithuanian subsidiaries as required by the Latvian and Lithuanian thin capitalization regulations; there are no tax restrictions for loans from the Estonian holding company to its Estonian subsidiary).\*

For the one-tier structure, as the tax laws currently stand, at the moment of generating profit it is preferable not to have the head-office of the Joint Venture situated in Latvia. This is because of the timing issues of tax liability. More precisely - the tax liability on the level of a Latvian head office may incur before the corporate income tax payment liability of the permanent establishment in Estonia.\*

Since the experience of the three Baltic States regarding European Economic Interest Groups (EEIGs) is very limited, it is difficult to predict the exact tax implications that would accompany the formation of EEIG.

The use of a Societas Europaea (SE) would not give any clear tax benefits. In general, the tax consequences of an SE are expected to be identical to the ones described under the scenarios of the two-tier model and the one-tier model. In the Baltic countries the taxation of SEs has been tested in practice only to a limited extent. Thus, tax authorities may require additional time for any responses if specific tax issues arise.

\*Please see clause 1.3.9 of the Executive Summary for possible mitigation of these disadvantages.

### 1.3.5. EU Financing

For the next programming period 2014-2020 the Commission has proposed the creation of a new integrated instrument for investing in EU infrastructure priorities, including the European transport system: the “Connecting Europe Facility” (CEF), which will replace the TEN-T programme.

The maximum funding rates shall be those as for countries applicable to the Cohesion Fund. The rates are expected to be the same as for the previous programming period (maximum funding rate is expected to be 85%), but as the budgetary negotiations are ongoing there may be changes to maximum funding rates.

The period for Connecting Europe Facility is 2014-2020, where the final payments have to be made by the end of 2022 (negotiations currently ongoing to apply the N+3 rule so that payments could be made until the end of 2023). This means that the project for Rail Baltic has to be implemented at least in two phases. The second phase of the project would be implemented in the next multiannual financial framework for 2021-2027, where financing possibilities for the RB project are presently unknown, including the co-funding rates available from the EU.

It is recommendable to launch the construction works as soon as possible, preferably earlier than the year 2020 (as currently estimated in the AECOM study) and to complete as much of construction works as possible during the first funding period.

10% of the overall budget can be spent on the purchase of land. According to the AECOM Study the estimated cost of land is 149 million euros. This means that the budget for Phase I of constructing the Rail Baltic should be at least 1,49 billion euros, as then all costs for land will be eligible.

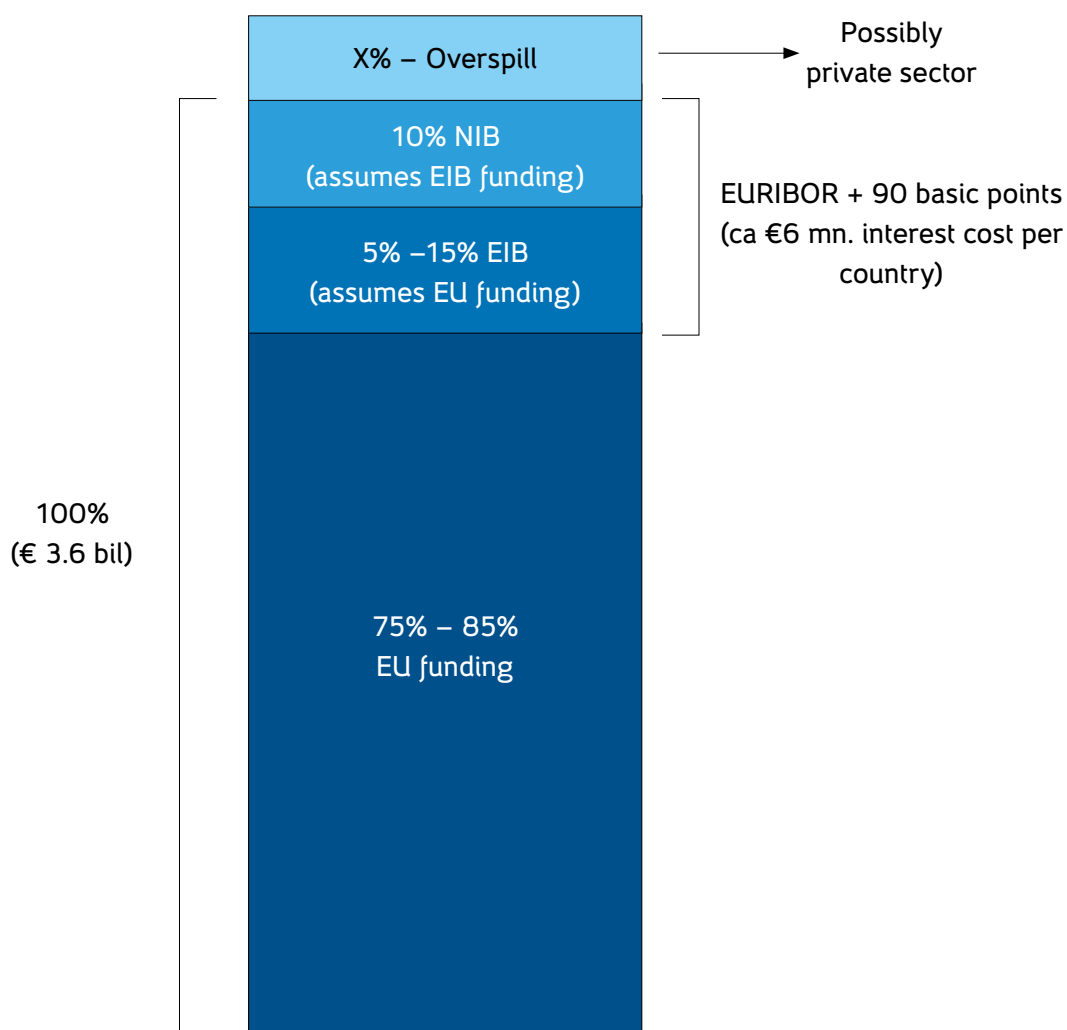
The preferred source of financing for all three Baltic Countries is to apply for funding from CEF earmarked for Cohesion Fund, combining it with PPP and various financial instruments (e.g. Project Bond Instruments, Loan Guarantee Instruments and Ten-T preparatory measures). The Estonian, Latvian and Lithuanian governments should seriously consider engaging Poland to be part of such a joint funding application and note that for this purpose an intergovernmental agreement would need to be entered into, according to the CEF requirements.

### 1.3.6. Private Sector Financing

It is recommended that the financing for the project will be provided by a combination of EU financing, private sector funding and to a limited extent by the national governments themselves. Based on the interviews carried out during our analyses it is safe to conclude that private sector capital is available for financing the project, considering that 75%-85% of the construction cost would be supported directly by the EU. EU support allows for the significant reduction of risk for the private investor.

The first choice in these types of circumstances would be to start negotiations with the European Investment Bank (EIB) and the Nordic Investment Bank (NIB), and thereafter to seek additional financing, should any shortfall incur. Compared with other private sector funds, the EIB/NIB financing is considerably more cost efficient, e.g. EIB has verbally quoted an interest rate of EURIBOR + 0.9% (90 basis points) margin for this project, whereas private sector funds (including pension funds) would target at least 4% + inflation, if not higher, per annum.

Assuming at least 75% effective EU financing (even in case of 85% not all costs are eligible), then it could be topped up to 90% by 15% via an EIB loan, which could be further elaborated by an additional NIB loan, reaching 100% of funding necessary for the completion of the project. Additional private or public sector financing would be called upon only in case of over spills.



### 1.3.7. Regulatory Environment

It is the proposal of this analysis to consider two main options for the future cross-border regulatory environment of the new Rail Baltic:

- **increasing the competence, authorities and mutual cooperation of the existing regulatory bodies to regulate the new 1435 mm railway, or**
- **creating an International Legal Body to govern the Rail Baltic**

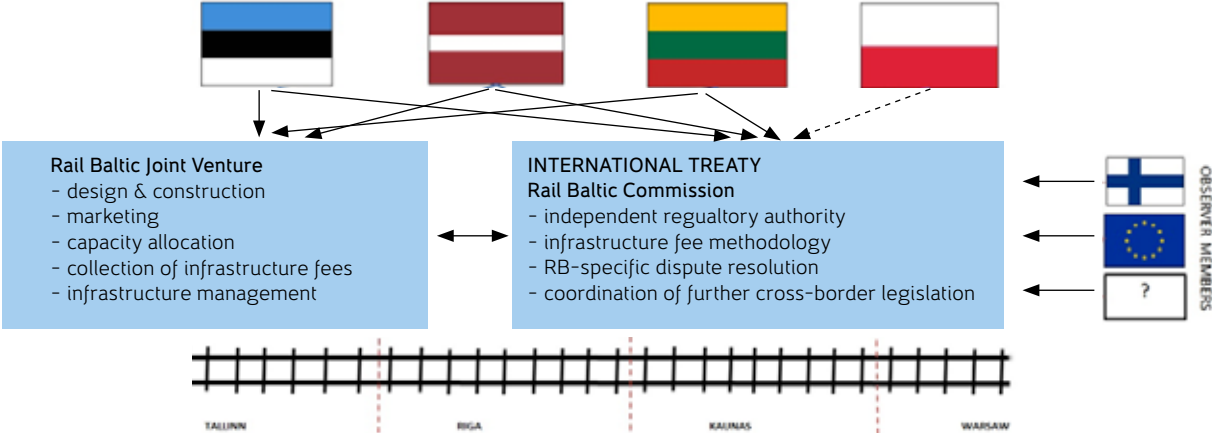
Based on the comparative international experience in large cross-border infrastructure projects (clause 1.3.8 below and Chapter 5 of the Main Report) we strongly recommend considering the formation of a joint international independent body - set up by the three Rail Baltic States in analogy to the Central Commission for Navigation on the Rhine (CCNR).

Such an organization, based on an international treaty, could prove to be a way to transparently and efficiently solve the essential issues relating to the use of the rail infrastructure by providing unified terms and conditions for access, allocation of capacity, dispute resolution etc., which would serve as a transparent, neutral and commercially rational regulatory foundation for the “one-stop shop” available for the prospective rail operators of the Rail Baltic. The joint body would implement directly the pertinent EU railway regulation (excl. such issues which remain within the mandatory jurisdiction of the Member States).

Instead of setting up different agencies (or increasing the staff, tasks and responsibilities of the existing ones) in the three countries, to deal with issues related to the use of the infrastructure (e.g. pertaining to equal access, charging, investment, etc.), such a joint body could prove to be a useful and efficient tool to avoid a duplication of resources and diverging rules and judgements.

As regards the set-up of such a joint body, the CCNR presents a useful model for organising the tasks. For example, the rules on equal representation of Member States’ representatives in the decision bodies (plenary, committees, appeal chamber) could be used for a Rail Baltic joint regulatory body as well. The more detailed division of authority between the joint body and the national authorities and/or incumbent infrastructure managers depend on the future development of the EU railway regulation. Therefore, the joint body needs not to be established simultaneously with the Joint Venture, but it needs to be mandated and be functional by the time the operators will be invited to access Rail Baltic infrastructure.

The following scheme illustrates the division of functions and responsibilities between the future RB joint venture and the possible independent body (tentatively named the **Baltic Rail Commission** for the purposes of this study):



Please see clause 2.12.3 of the Main Report for more detailed analyses and proposal.

### 1.3.8. International Experience

The most important lessons to be learned from the large cross-border infrastructure projects comparatively analysed for the purposes of this study are:

#### **Øresund Bridge** between Sweden and Denmark

- The Øresund Bridge project benefited from a very long preparation period. The first proper investigations and reports were already carried out years before the actual construction process began.
- The implementing entity is operated as a joint venture between two state-owned companies, therefore the ultimate control lies with the participating governments. The board of directors is comprised of an equal number of members from participating countries. Costs and revenues are split equally. This structure ensures the equal treatment of all participants and thus contributes to the smooth implementation.
- The Øresund Bridge Consortium is responsible for both construction and operation of the new infrastructure (Plan-Design-Build-Operate), which led to a long-term view of the project and its complexities.
- The economic issues need to be balanced with the environmental concerns, as throughout the project regional interests were coordinated with the negotiations on national level.
- The Treaty between the participating countries sets down the use of an arbitration board in case of disputes if one of the participants so requests.
- The creation of the Øresund Consortium as an independent agency was very important to enable it to go about its business successfully and in order not to favour one country over the other.
- The lack of arbitration and contractual litigation in the course of the project was noteworthy - largely due to the fact that the contracts were Design & Build, meaning that a large part of the risk was taken on by the contractors.

#### **The Channel Tunnel** between France and the United Kingdom

- There must be a single contract between the participants, it has to be developed and written in one language, and it has to be based on one legal system to avoid problems with cultural matters, communication and contract issues.
- Clearly defined dispute resolution procedures must be in place - all parties have to be familiar with these and all parties have to agree to abide by these. The key element in any dispute resolution is communication.
- It is necessary to establish a sustainable financial planning already from the inception of the project
- As the costs for very large infrastructure projects almost invariably get out of control during the construction phase, it is necessary to include risk buffers and include adequate contractual safeguards
- The possibility of an inclusion of the EIB in the financing of the project should be clarified at the very beginning, i.e. before the procurement process. In this regard, the potentials for EU project bond financing should be examined and clarified with the EIB.

## Brenner Base Tunnel between Italy and Austria

- Using “Societas Europaea” (SE) for the corporate structure has the following advantages: cross-border mobility (re registered seat, cross-border mergers), flexibility re applicable law, European legal form (corporate identity). However, its potential disadvantage is the relatively long registration process.
- The State Treaty between Italy and Austria establishes an Inter-State Commission (ISC) to keep both governments informed in detail about the plans for the various project phases and sets out that any decisions to realise these plans must be made by both governments on the basis of the proposals of the ISC
- Weekly meetings of the persons responsible for the project ensure good and regular communication on the project between the members.
- Both participating countries tried to anticipate potential cross--border problems and set out rules to mitigate any risks relating thereto. The sustained effort to meet regularly and to make the project as transparent as possible indicates the key role communication plays in big, cross-border projects between the parties involved.
- All potential risks need to be assessed and adequately addressed before the project commences so that these can be taken into account in the planning stage and, if appropriate, be addressed in any agreements relating to the project. Cost and time estimates should be as realistic as possible in order for the project financing to be put in place accordingly and to avoid bad publicity.
- If applicable, the relevant industry players should be involved early on in the process to minimise the risk of failing to attract private capital
- Project communication should also include the involvement of the public, making information relating to the project available on the project’s website (including public tenders) to interested citizens to ensure transparency of the project processes.

### 1.3.9. A List of Legal Acts to be Amended or Modified for the Rail Baltic JV

As a result of our analyses we have compiled a tentative list of legislative acts that would be necessary or advisable to amend and/or modify, in connection with the establishment and future operations of the Joint Venture.

Having regard to the length and complexity of the legislative process we have also tried to list the proposals for the changes in national laws in an order of priority to the best of our current understanding.

#### Following laws are necessary or advisable to amend in Estonia:

- **State Property Act** – to allow the participation of the Republic of Estonia in legal persons registered outside Estonia, in particular pertaining to matters of foreign companies and companies which have been established on the basis of EU Regulations;
- **Railways Act** – requirement for operating licence for management of public railway infrastructure should be abolished (no similar requirements in Latvia or Lithuania);
- **Public Procurement Act** – to foresee a more detailed regulation for public private partnerships, perhaps even adopting a separate law focusing on this subject

Following laws are necessary or advisable to amend in Latvia:

- **State Administration Structure Act, Public Entity's Property Alienation Act, Act on State and Municipal Shares and Corporations** - to allow the participation of the Republic of Latvia in legal persons registered outside Latvia, in particular pertaining to matters of foreign companies and companies which have been established on the basis of EU Regulations;
- **Corporate Income Tax Act and Cabinet Regulation No. 556, dated 4 July 2006 "Regulations for Implementation of the Corporate Income Tax Act"** - in order to change the thin capitalisation requirement.
- **Law on Acquiring the Immovable Property Required for Public Needs** - amendments are strongly recommended to foresee expropriation decisions on the national government level instead of a need to each time adopt a separate law in the parliament.

Following laws are necessary or advisable to amend in Lithuania:

- **Law on the Management, Use and Disposal of State and Municipal Assets** - to allow the participation of the Republic of Lithuania in foreign legal persons, in particular pertaining to matters of foreign companies and companies which have been established on the basis of EU Regulations;
- **Railways' Code, Law on Enterprises and Facilities of Strategic Importance to National Security, Railway Transport Code** - so that also other persons (the Joint Venture) than JSC "Lithuanian Railways" would be allowed to act as the infrastructure manager of the public Rail Baltic infrastructure;
- **Land Law** - persons other than the Republic of Lithuania should be allowed to own land underneath railway infrastructure. Alternatively, the law should provide secure rights for land use for the Joint Venture for the entire use period of the Rail Baltic infrastructure;
- **Government Resolution No. 1575, of 9 December 2003 "On the Approval of the Rules for the Requalification of Income or Payments"** - in order to change the thin capitalisation requirement.

As a proposal to all participating states, with regard to achieving railway-specific unified regulatory framework to facilitate the "one-stop-shop" legal environment for the whole new Rail Baltic infrastructure, we suggest that instead of the multitude of amendments to the national regulations of RI fees, access methodology, capacity allocation, etc the three countries agree on a common supra-national regulatory Rail Baltic framework, in line with the latest EU railway legislation, overseen by the independent international body - the "Baltic Rail Commission".

The consultant fully appreciates the time and effort involved with the complex process of changing national laws. In cases where such changes are inevitable we would recommend to consider limiting the changes to national laws (e.g. regarding compulsory expropriation or exclusive rights to manage public railways) to the specific purpose of implementation of large cross-border international infrastructure projects, like the Rail Baltic.

The other possibility would be to achieve the changes of necessary national laws by entering into an international treaty on a level of sovereign states, for the purpose of establishment of a special legal regime for the planning, construction and management of the cross-border Rail Baltic.