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Publication date

2013

Document Version

Final published version

Published in

9th ITS European Congress 2013: Real Solutions for Real Needs: Dublin, Ireland, 4-7 June 2013: online conference proceedings

[Link to publication](#)

Citation for published version (APA):

van Haaften, W. F., & van Engers, T. M. (2013). EETS: How to get it on the road. In *9th ITS European Congress 2013: Real Solutions for Real Needs: Dublin, Ireland, 4-7 June 2013: online conference proceedings* ITS in Europe.
<http://www.itsineurope.com/its9/index.php/programme/proceedings>

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EETS: How to get it on the road?

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Abstract: Interoperability is a political priority as it comes to electronic tolling in Europe. The idea of numerous on board units behind the windscreen of European trucks is a true politicians nightmare. Still the number of on-board equipment (OBE) is increasing while the answer to stopping this, the European Electronic Tolling Service (EETS), is not taking off. In this paper the specific complexity of EETS and the interoperability Directive are looked at from the perspective of a public toll charger. This perspective is relevant because in many Member States motorways are publicly owned and operated, and road user charges consequently will be public money, often levied as a tax. These circumstances do not seem to match very well with the starting points of the Directive that more or less seems to presuppose private roads were private service providers can collect private service fees for the private toll chargers. In this paper the political and legal problems will be represented and put out for discussion.

Keywords. Road user charges, road taxation, tolling systems, good governance.

1. Introduction

Since the introduction of the first free-flow distance-based user charges for trucks by means of OBEs at the beginning of this century the necessity to come to an interoperable solution has arisen. Such solution should facilitate the free movement of goods within the EU and prevent the international truck driver from ending up with a whole battery of boxes behind the windscreen of his truck. In 2004, the political wish for interoperability was laid down in Directive 2004/52/EC², which subscribed interoperability as a principle not only for the technical specifications but also as a model for interoperability of the charging service, the European Electronic Tolling Service, EETS.

In 2009, the EU Commission published definitions to support further implementation of the Directive³. End of August 2012 the EU Commission came with an intermediate position⁴, in which the lack of progress was more or less attributed to the lack of cooperation of the Member States. This appeal upon the Member States was obviously correct in both the political as the legal sense, since the Member States agreed to the Directive and it addresses them to implement it. However, the interesting questions are whether the reluctance of the Member States indeed is the major cause of

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² Official Journal EU L 166, 30.4.2004, p. 124., corrected in Official Journal EU L 200. 7.6.2004. p.50

³ Official Journal EU L 268, 13.10.2009, p. 11.

⁴ COM(2012) 474 final, Brussels, 30.8.2012

the disappointing progress in the EETS dossier, and if so, why the Member States are reluctant. And if not what other factors may be interfering in the process of establishing EETS?

2. The EETS situation

In its efforts to come to an interoperable solution for the OBE the EU Commission has not restricted itself to the technical interoperability of the OBE. It recognized that besides the interoperability of the OBE also the interoperability of the services would be necessary. Both items were included into the Directive 2004/52/EC. Although an OBE without a service cannot function, the introduction of the tolling service in the Directive hasn't brought the eventual goal, i.e. interoperability, much closer yet. In order to get a better understanding as to why this is the case we will specifically look at the distinctions that influence the progress when introducing EETS. We will specifically focus on two related distinctions, regarding the situation where the building and operations of roads is in public hands. The first distinction has to do with the division of competences between the Ministers in the Member States, the Transport Minister for the roads and the Finance Minister for the money. The second distinction regards the distinction between private and public building and operation of roads and its legal implications.

2.1. The Transport Ministry perspective

The perspective of the Ministers of Transport starts with their concern for a good road infrastructure, adequate for the needs of the economy and well connected to the neighboring countries, to assure optimal use for –international- transport. Although their interests may differ on specific policy issue, they agree on the importance of achieving interoperability of road user charge systems throughout Europe. The idea of having one OBE that could provide for road user charge services in all Member States was clearly not opposed to. The next step, creating a service that could run that OBE was a logical continuation, so it was addressed in the same Directive. However by doing so the Transport Ministers in a way crossed the border of their influence. They were fully in power to prescribe the technical specifications of the OBE and in doing so concluding the interoperability of the OBE in the Directive. The question is, however, what the (legal) status of the subsequent step, i.e. the introduction of an EETS, really is. Did the Ministers of Transport have the power to prescribe the EETS, not only in the situation with privately operated roads, but also in the situation of publicly operated roads? In the first case neither the Council nor the EU Commission was able to establish the service within their own realm of influence because they implicitly left the services part to private sector. This means that they entirely rely on the occurrence of a market for EETS. So far this market has not developed and it is questionable if it ever

will. We will come back to the market perspective of EETS in paragraph 2.3. In the second case, of a publicly operated road network, they were competent for the roads, but not for the public charging. In most countries the competence for charging lies not with the Ministry of Transport, but at the Ministry of Finance.

2.2. The Finance Ministry perspective

The perspective of the Ministers of Finance in this matter differs a lot between Member States. The major issue is whether the roads in a Member State are -partially- privately financed or not. If they are a clean private tolling operation, with hardly any interference from the Finance Ministry at all, can provide the source for the financing of those roads. For the roads being financed with public resources however, the Ministry of Finance will be fully involved. If it is to be decided that those resources should be obtained by means of a Road User Charge they will in most cases also be involved in both the decision-making and in the charging itself. An illustration of this procedure can be found in the levying of the Eurovignette. In all five Eurovignette levying Member States the charging is levied as a tax, by the respective Ministry of Finance or Taxation. Also the recent distance based Road User Charge initiatives in Belgium and Denmark are being conducted by the Ministries of Finance in respectively Flanders and Denmark.

This public setting has, apart from the leading role of the Ministry of Finance, also consequences for the legal setting in which the charge is being shaped, usually as some form of tax. The choice for a tax or other public charging instrument, with all the governance issues attached to it, will be elaborated in paragraph 2.4.

2.3. EETS in private environment

As stated earlier the interoperability Directive was negotiated by the Ministers of Transport with the idea in mind that the EETS should be a service that could be offered to private toll chargers by private service providers. In proposing this model, the Commission may have probably been inspired by the roaming practice modeled in the telecom sector. So they envisaged an EETS implementation similar to the cell phone model, i.e. trucks would have one on board device that, while travelling throughout Europe, would be connected to one customer service provider. This would allow this provider to gather all road usage in all Member States in one invoice. In the countries where the roads are being operated by means of concessions to private parties, this looks like a logical model. According to this view EETS would be rather similar to the phone companies model: The EETS-service has to be available in all EU countries and the user should be able to deal with one service provider, most probably in his home country. So far for the similarities. There also are some big differences, especially from a market perspective. First of all within the EU in 2010 there were 565 billion active

SIM-cards⁵. The number of international users of EETS will probably never exceed a few million, the hard core of true international transporting trucks may not even exceed 0.5 million. These numbers could appear to be too low to base the business model on. Secondly people are willing to pay for the mobile phone service, while it is very doubtful if transport companies are willing to pay anything for Road Charging Services.

Another factor that is not very helpful is that the situation in the countries with privatized roads is very fragmented by the numerous concession holders that have to come to agreements with also numerous potential service providers. A large number of bilateral agreements will have to be closed in order to get the EETS coverage on all toll roads. The previous circumstances seem to have a repulsive effect on the development of the business case for the EETS. For the advocates of the Directive this leads to the question what incentives do private parties need, in order to come to a full coverage for the EETS, thus finally obtaining the business case. An important issue with a high impact on the answer to this question will be: who is going to pay for the EET Service? In the Directive no role has been foreseen for the beneficiaries of interoperability. After the politicians and the road operators, whom will have to spend less on collecting the money, these are the trucking companies and truck drivers. Choosing a market perspective might suggest that the end user eventually is going to pay for the EET Services. This end user will be the trucking company. It will be interesting to see if they would be willing to pay the price of interoperability. In other words, what is interoperability worth to the trucking company? So far they did not pick up the bill, which might suggest that interoperability is not really important to them, but more like a 'nice to have' issue. In other words if you would ask the trucking company if they would fancy a single EU-OBE instead of 5 national ones the answer will be, yes please. But if you would ask them how much they are willing to pay for that single OBE, their answer will probably be, nothing. Putting the question to the road operators could well lead to the same answer. In order to get closer to the business case in the private environment, it would at least be interesting to know how much both road providers and road users eventually can save by using the EETS.

That could lead to the conclusion that, since not all stakeholders are yet convinced of the potential savings of an EETS, the only stakeholders that really are committed to realizing such interoperable solution are the politicians. That being the case it is interesting to look for a solution in an environment where politicians do have a leading role in creating the interoperable solution, the public administrative domain.

2.4. EETS in public administrative domain

Regarding EETS in a public administrative domain leads to a different perspective. In EU Member States where the roads are traditionally operated by public authorities, the choice for a private service provider model is less obvious, but if a private service provider is being engaged, the public principal will provide for a business case by

⁵ European Mobile Industry Observatory 2011.

contracting the service provider. In this domain a model like the EETS model however, where the engagement of various international EETS providers is being prescribed, could well appear to be counterproductive. After all, within these countries the toll charger generally is the government, usually delegating its operational issues to a public administration, such as tax administration. Due to that fact the levying of tolls will be governed by public law, the first reflex of the (tax) administration will be to perform the service itself. In this perspective it is less relevant if the levying has the legal form of a user charge⁶, or if the charge will take the form of a tax⁷. Either way the charge must be compliant with the specific public legal framework. This inevitably creates a threshold for the engagement of private service providers.

2.4.1. *Public legal framework*

The public legal framework creates a somewhat different playing field compared to the private legal playing field and the corresponding accounting principles of the EETS providers as foreseen in the Directive. In fact from a legal viewpoint privately organized toll chargers have a different set of do's and don'ts than public toll chargers have. This can be illustrated taking the example from the telecom sector. When a customer uses his mobile phone in another country the provider in this country will get a claim on the provider of the customer. In principle the foreign provider will charge the customer's provider for the amount. But how the providers are going to balance the sheet is totally up to them. It could lead to anything between full recovery of the amount by settling the open accounts against each other, to not recovering at all, for instance because the amount to be recovered after the settlement is too low and there for it is not economically feasible to recover it. A provider dealing with public money doesn't have that choice. He has to meet public law terms and conditions, as if he was acting as a governmental body.

These terms and conditions can be classified in three public law categories, a general category and two more administrative public laws. The categories most relevant to public user charging are:

- Good Governance⁸; this contains the general principles of democratic governance like accountability, efficiency, transparency and the rule of law. In the administrative financial relations between the State and the citizen or company this will imply for example equality before the law, legal certainty and fair play.

⁶ German Maut is a public user charge levied by the Ministry of Transport

⁷ The Eurovignette in all its Member States, the kilometer charges foreseen in France, Belgium and Denmark are all taxes.

⁸ Good governance in the European Union, Tanja A. Börzel, Yasemin Pamuk, Andreas Stahn (Berlin, January 2008)

- Tax Law; a set of specific principles for levying taxes properly, such as territoriality, legality (the establishment of a formal tax law), and a legal basis for both the levying (i.c. time or distance) and the rate (i.c. price per unit).
- Financial accountability law; a set of specific principles applying to the handling of public money, such as legal compliance, transparency, completeness and accountability.

These rules and the practices will be fully controllable if the public authorities maintain them their selves. After all it is their core business, good governance should be in their DNA. At the same time these requirements create a serious threshold for outsourcing the collection of taxes to the private sector. This threshold is pushed even a little higher if the amount of risk is considered that is involved in collecting taxes. This risk is primarily connected to the large amounts of revenues that can be involved, compared to the relatively modest operation required to collect the revenues. When something goes wrong it will be very hard to collect the lost revenue from the private service provider, even with large companies behind it, as the German ‘Maut’ case shows⁹. Loss of tax revenues in cases like this rapidly exceeds the amounts that a service providing company is able to guarantee. So the administration will be very careful before selecting a service provider and entrusting it with a large sum of public revenues.

The position of the administration is particularly hazardous since, if it is decided to grant the operation to a private service provider, the requirements for the service from a public law perspective will not change. The levying of the user charges will still be the responsibility of the public authorities, and it will have to comply with public standards. It is largely for that reason that in the Member States with public roads tolls in the legal form of road user taxes, these taxes are basically levied by the tax administrations themselves. Examples are the levying of Eurovignette of national lorries in Belgium, Denmark, Luxemburg and Sweden. This does not imply that a private service provider cannot be engaged in the levying of taxes, but it requires a very studious preparation.

2.4.2. *Service provider as ‘tax’ collector*

In some cases market participants are being contracted to levy taxes. In these cases they will be acting on behalf of the (tax) administration. This specific power will (usually) be granted to a single service provider. More than one service provider in a public role would mean a heavy burden on the administration in terms of management and control, since the service provider would have to meet the most stringent requirements in order to comply with the public legal framework¹⁰. Meanwhile the

⁹ The introduction of the German Maut planned in 2003 was delayed for 15 months due to problems at the service provider. The lost revenue of several billion euros has not been recovered (yet).

¹⁰ The Dutch Tax administration even has an on-line monitor view into the system of the single service provider for the Eurovignette.

public authorities (Politics) will remain responsible for the entire operation. Examples of single service provider operations are the Eurovignette in the Netherlands as well as the collection of Eurovignette revenues from non residents in other levying Member States, and the collection of 'Maut' in Germany.

3. The EETS model

The EETS model has three groups of players, the Toll Charger, the EETS provider and the user or client¹¹. Basically the idea is that the EETS provider services the user with one contract for all toll roads in Europe. The EETS provider will collect the money from his contracted users, and pays it to the Toll Charger, the party operating the tolled road or network, on the basis of another contract. In order to assure that the EETS provider will be competent and trustworthy as well as sufficiently solvent to meet his obligations towards all Toll Chargers he has to be approved of by his national certification authority. Once he has that certificate he can collect toll for any Toll Charger within the EETS on a contractual basis. The very legal foundation for this EETS practice lies in the Directive 2004/52/EC. In the next paragraphs we shall look more closely at the definition of the EETS in the Directive, and we shall look at the way this works out for both private and public toll chargers.

3.1. The EETS Directive

In the Directive 2004/52/EC EETS is being defined as a '*contractual set of rules allowing all operators and/or issuers to provide the service, a set of technical standards and requirements and a single subscription contract between the clients and the operators and/or issuers offering the service*'¹². This definition contains a private law (contractual) ruled open system where any service provider that meets the contractual set of rules, as well as the technical requirements, can be admitted to the system and can collect toll revenues from its clients on the basis of a contract with the Toll Charger. Within this paper we will restrict ourselves to a few issues specifically relevant to the distinction between private and public Toll Chargers. Also the observations on the definition should be put into that perspective.

The first observation could be that the concept of 'Toll Charger' is absent in the definition. In fact it is absent in the entire Directive. Since this paper is to a large extent about the relation between the Toll Charger and the EETS provider, as one of the key issues when dealing with public Toll Chargers, the Directive is not offering a lot of grip. In the Directive the counterpart for the users can be both the (road?) operators and issuers (EETS providers?). From the definition it could be inferred that both operators and issuers are in fact EETS providers. The issuers are pure EETS

¹¹ Brochure of the EU, DG-MOVE, 2011, ISBN 978-92-79-18637-0

¹² Directive 2004/52/EC, article 3.

providers, and the operators are Toll Charger as well as EETS provider on their own roads, and can be EETS provider for all other toll roads in Europe. Apart from the definition and the Directive we assume that the operator can also be just a Toll Charger, leaving EETS entirely to the EETS providers. The latter relation is not being addressed in the Directive. Since it is the crucial one for the distinction between public and private Toll Chargers, we will focus on the consequences of this relation in case of a private or a public Toll Charger in the next paragraphs.

The second observation could be that since the relations between the operator/issuer and the user, as well as those between the operator and the issuer, are being governed by private law, the actual contracting will be subject to the explicit will of both parties involved. This means in fact that neither the EU, nor the Member States will have any influence on the actual development of a contract. They can put regulations to the contract and prescribe the content of the contract to a certain extent, but it is not possible to force parties into the contractual relation against their will. That means that EETS can never work without a proper business case for both operator/issuer and user. A proper business case in this framework is not only a national business case, but has to be a European one. Although it is questionable if such a business case exists, regarding the relatively low number of potential clients and the lack of demand from the user side, even then it will not solve all the issues in the relations between EETS providers and Toll Chargers. These relations will be further scrutinized in the next paragraphs specifically looking at the differences between a private toll charger setting and in a public one.

3.2. Private Toll Charger

In case of a private Toll Charger the agreement between this Toll Charger (operator) and the EETS provider (issuer) will be based on the contractual rules and will be completed with additional commercial conditions. Both the Toll Charger and the EETS provider must have a commercial incentive to come to an agreement. If they both have it, the business case will be found. Last year the EU Commission concluded that the business case was still lacking. Earlier we concluded that the end user, the trucking company, probably likes the concept of road user charges with one OBE for the whole of Europe, but probably is not willing to pay extra for the toll charging service. So looking at the relation between the private Toll Charger and the EETS provider in search for the business case they will have to work it out together.

Looking at the relation between the Toll Charger and the EETS provider it looks that the key to success must be in the business case for the EETS provider. The operators already have their business case in operating roads. As a part of that operation they may also be in the role of Toll Charger. If they collect their own charges they also are in the role of the service provider. Their interest could be to have easy access to the EETS system so that they can outsource that last role, collecting the

money, which is not their core business anyway. The amount they could pay for this outsourcing probably should not exceed their current costs for collecting the money.

To the EETS providers however, running the tolling service is their core business. Their goal will be to run a smooth operation while getting a profitable fee on their services. The question is whether this fee has the same magnitude as the costs that the Toll Chargers make by collecting the money themselves. If not, other possibilities are to be considered. The prospect from the early days, value added services to finance levying the charge, has largely evaporated because of the vast growth of the Internet and all kinds of mobility services on (smart) mobile phones. On the other hand the road transport industry is blessed with a wide range of financial service providers suited to become EETS providers when the business case would reveal itself. For the moment however the only way to pay for the charge is along with the charging service itself. In that case the Toll Charger raises the charge slightly in order to be able to pay for the costs of the EETS provider.

Besides solutions within the contractual relation between the Toll Charger and the EETS provider also the possibility of a contribution directly from the user to the EETS provider could be considered. In fact in the private Toll Charger variant there is a lot of room for solutions on a voluntary, contractual basis.

3.3. Public Toll Charger

How different that is in a Public Toll Charger situation. Besides the specific responsibility of the Member State to implement the Directive, which is an EU-law issue that I will not address in this paper, the set of rules that an EETS provider has to comply with when servicing a public road user charge or tax, is very different from the private variant, and liable to a set of the specific public rules as set out in 2.3. These rules are ascending the 'contractual set of rules' as prescribed in the Directive. This does not mean that all the rules have to change, it specifically means that the legal status of the rules changes. Regarding the interoperability Directive a number of issues arise in relation with public operator (Toll Charger).

The first one is that the outsourcing to a service provider does not waive the political responsibility for the public toll charging. No matter who collects the money, the public authorities remain responsible for getting all revenues into the treasury. Furthermore the process of collecting of tax remains a public national competence, which cannot be privatized to match the current EETS framework of the Directive. The Directive recognizes this by stating that the authority of the member States for their national taxation is not effected, but it also has consequences for the applicability of the Directive, for instance as it comes to the freedom of contracting a service provider and being non discriminatory. The public rules could force the public Toll Charger to put specific national requirements to the potential EETS providers, despite their certification in another Member State.

Also the full transparency required when handling public money relates arduously with the EETS. Bottom line is that a public toll charger has to make sure that the tolling service is available to everybody. There for he cannot rely exclusively on the EETS providers, but has to make his own arrangements, just to make sure the service will be available even if no EETS provider shows up, or in case the EETS provider does not want to contract with certain users, within the framework of the voluntariness of concluding contracts. In the revoked Dutch kilometer charge project (2007-2009) this safety net role was attributed to a public service provider¹³. However these arrangements could also consist of contracting a single service provider operating the tolling system at a public requirements level¹⁴. As long as the principles of good governance and the public financial standards are being respected the single service provider can act as a Toll Charger on behalf of the public authorities. In that capacity it can collect the revenues from the end users, or it can utilize the services of service providers that provide services directly to the end users, the trucking companies.

4. Conclusion

In this paper we have tried to put some light on the distinction between the application of EETS in the context of a private Toll Charger and in the context of a public Toll Charger. It illustrates that many consequences of the EETS model are not yet clear, not when it comes to the business case and not when it comes to the legal embedding. More research will be needed on the way the various parties involved interact. A good understanding of the stakeholders' mutual interests is essential when one wants to create an effective legal solution to this complex issue. So far the EETS has not taken off yet, because the business case is lacking and because the legal issues and their consequences have not yet been sufficiently addressed. In order to establish interoperability of road user charge systems within the EU, both on privately and publicly financed roads, the current EETS as defined in the Directive seems not yet to have developed enough to make that happen.

¹³ In the last kilometer charge project in the Netherlands (2007-2010) the service providers ended the cooperation as soon as became clear that the Dutch administration would create a public service provider (the Central Legal collection Agency (CJIB)).

They felt that there would be no business case competing with the administration itself.

¹⁴ In the electronic Eurovignette this model has been chosen by the 5 Member States.