



Regulatory Action and Competition Law Enforcement in the Railway Sector

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EUROPEAN
COMMISSION

- Typical competition problems in the railway sector
 - Lack of separation infrastructure/operation
 - Cross-subsidising and predatory pricing
 - Discrimination in track allocation
 - Discriminatory charging structures
 - Access to services (maintenance and shunting yards etc.)
 - Technical restrictions: safety certificates, licences, technical specifications



Lack of separation/cross subsidising/predatory pricing

- Lack of separation to be tackled only through legislation or EU law enforcement by Commission; merger law not applicable
- Competition law: for public funds possible application of state aid rules, otherwise rules on predatory pricing; problem: difficult to apply
- Cross subsidising: Article 6 and 9 of Directive 2001/14 (public funds for infrastructure and PSO contracts not to be used for other purposes) – problem: enforcement at national level (on this Recast proposal: powers for regulator (Art. 56(8)))

● Requirements for regulatory accounts in Annex 10 of the Recast Proposal

- The regulatory accounts shall:
- (a) include separate profit and loss accounts and balance sheets for freight, passenger and infrastructure management activities;
- (b) give detailed information on individual sources and uses of public funds and other forms of compensation in a transparent and detailed manner, including a detailed review of the businesses' cashflows in order to determine in what way these public funds and other forms of compensation have been used;
- (c) include cost and profit categories making it possible to determine whether cross-subsidies between these different activities occurred, according to the requirements of the regulatory body;
- (d) contain a sufficient level of detail as deemed necessary and proportionate by the regulatory body;
- (e) be accompanied by a document which sets out the methodology used to allocate costs between different activities.

● Discrimination on access decisions

- Discrimination through track allocation, traffic management, framework contracts
- Regulation: Article 30 of 2001/14: applicants shall have a right to appeal to the RB if 'unfairly treated', 'discriminated against' or 'in any other way aggrieved on allocation process and its result
- Competition law: infrastructure as an essential facility; without access no market activity possible
- Practical issue: decisions must have immediate effect

● Charging issues (I)

- Competition law:
 - » excessive pricing: No reasonable relation to the economic value of the service
 - » Discriminatory pricing: dissimilar conditions applied to commercial partners for equivalent transactions
- Regulation: Article 30 of 2001/14: appeals possible on charging scheme and level or structure of infrastructure fees
 - » Control whether chapter II of Dir. 2001/14 is applied *and* no discrimination

● Charging issues (II)

- Rules of chapter II of Directive 2001/14
 - » Principle of direct cost recovery (Article 7)
 - » Clear definition of any additional charges (environmental, scarcity) or discounts (Art. 9)
 - » Full cost recovery only on the basis of market-can-bear test for all market segments
- Practical problem: Access of regulator or competition authority to cost data
- Recast of the First Rail Package: Annex 10 contains detailed data to be supplied to regulator

● Charging rules (III): Annex 10 of the Recast Proposal

- Regulatory accounts, to be supplied by infrastructure managers to the regulatory bodies, shall
- (a) set out different cost categories, in particular providing sufficient information on marginal/direct costs of the different services or groups of services so that infrastructure charges can be monitored;
- (b) provide sufficient information to allow monitoring of the individual charges paid for services (or groups of services); if required by the regulatory body, this information shall contain data on volumes of individual services, prices for individual services and total revenues for individual services paid by internal and external customers;
- (c) state costs and revenues for individual services (or groups of services) using the relevant cost methodology, as required by the regulatory body, to identify potentially anti-competitive pricing (cross-subsidies, predatory pricing and excessive pricing).

● Access to services

- Competition law: Essential facilities doctrine
 - » Is access to this specific facility necessary for operation?
- Regulation:
 - » Contains access rights (Annex II of Directive 2001/14)
 - » however no enforcement powers for the regulator
 - » Only to be rejected « if viable alternatives exist »
- Recast of the First Rail Package:
 - » Gives enforcement powers to the rail regulators
 - » Introduces clauses to improve access

● Recast of the First Package: Services (Article 13)

- Independence of service operator when it belongs to a body having a dominant position in one of the rail transport markets
- Access only to be rejected if there are viable alternatives allowing them to operate the freight or passenger service concerned on the same route under economically acceptable conditions
- Burden of proof for viability on the operator of the service facility
- Operator must make available sufficient capacity for competitors
- Use or lease clause

● Technical Obstacles

- Competition law: only applicable when an undertaking in a dominant position delivers the safety certificate (see GVG/FS)
- Nowadays this is done by public authorities (see Safety Directive 2004/49)
- No competence for Railway Regulator

● Conclusion: Enforcement differences regulators/competition authorities

- Regulators ex-ante (control of network statement and charging scheme), competition authorities ex-post
- Regulators ex officio, competition authorities upon complaint
- Density of legal rules available
- Proactivity vs Reactivity
- Railway specialists vs competition generalists
- Deadline problem
- Independence issue