



Railways – between Sector specific and Competition Regulation - A view from DG MOVE

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- Typical competition problems in the railway sector
 - Discrimination in path allocation
 - Discriminatory or excessive charges
 - Access to services (maintenance and shunting yards etc.)
 - Cross-subsidising and predatory pricing
 - Technical restrictions: safety certificates, licences, technical specifications

● Discrimination on access decisions

- Discrimination through track allocation, traffic management, framework contracts
- Regulation: Dir. 2001/14: 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
- Practical issue: decisions must have immediate effect

● Discriminatory or excessive charging

- Competition law:
 - » Excessive pricing: not relevant for track access, potentially for services
 - » Discriminatory pricing: relevant for track access and charges
- Regulation: Dir. 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

● Discriminatory or excessive Charging (2)

- Rules of Directive 2001/14
 - » Principle of direct cost recovery
 - » Clear definition of any additional charges (environmental, scarcity) or discounts
 - » 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: Annex 10 contains detailed data to be supplied to regulator

● Access to services

- Competition law: Essential facilities doctrine
 - » Is access to this specific facility necessary for operation?
- Regulation:
 - » Access right if « no viable alternative »
 - » however no enforcement powers for the regulator (introduced by Recast)
 - » Improvement of access rights in Recast

● Cross subsidies/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: Rules of Directive on separation of accounts – problem: enforcement at national level (Recast: powers for 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
- Railway specialists vs competition generalists
- Deadline problem
- Independence issue

● Scope for action of competition authorities

- Where railway regulator is not independent
- On access to and charging for services
- State aid control of cross-subsidisation (EU)
- Predatory pricing of railway undertakings

Less relevant for:

- Path allocation, track access charges, other contractual conditions between IM and RU