

Regulatory needs of the railway sector

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A historical transition of policy priorities



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From a state-owned vertically-integrated monopolist

Politically acceptable public services

System efficiency to keep down costs (politically driven)

To one of the following (in practice):

State-owned vertically-integrated dominant company, OR

State-owned monopolist in infrastructure, plus a dominant operator

Formalise economic separation infra/operations

→ formalise access conditions (create pricing and allocation system)

Ensure non-discriminatory access (ensure that system is fair)

Support mkt entry/avoid re-concentration (but does one break up players?)

Concern about abuse of dominant position

Politically acceptable public services: still on the table

System efficiency to keep down costs: falls off the radar screen?

1. Classical / general anti-competitive practices (any sector)

- Agreements between undertakings
 - E.g. price fixing, market sharing, withholding production or investment, discriminatory trading practices with third parties (~Art 101 TFEU)
- Abuse of a dominant position *by the dominant undertaking*
 - E.g. imposing unfair prices, withholding production, withholding markets (~Art 102 TFEU)

2. Additional challenge in some network industries / in rail (~Art 102 TFEU)

- Abuse of the monopoly position *of the infrastructure company*
 - E.g. limiting capacity to the detriment of users (in general)
- Abuse of the dominant position *of an integrated incumbent*
 - E.g. selectively limiting capacity or access to capacity, applying unfair conditions for access to infrastructure

Some arguments for sector-specific regulation in a network industry



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- *Get competition started in a sector that is different from (most) others*
 - This suggests that sector-specific regulation could be **transitional**
- *Ensure specific necessary conditions for competition where the actual or statutory structure of the sector would otherwise prevent competition*
 - This suggests that sector-specific regulation needs to be **permanent**

One could also argue for a distinction between:

Fair access to the market (inspired from Art 102 TFEU), and

Competitive behaviour once on the market (inspired from Art 101 TFEU)

- Permanent existence of a monopolist/dominant infrastructure entity → permanent sector-specific regulation (and regulator) focusing on fair access
- *Possibly* transient “uniqueness” of the sector in “pure” downstream competition → generalist competition authority and rail regulator can (and do) cooperate

- As competition develops, more scope for (potential) concerted practices between railway undertakings may emerge. It could be argued that many aspects of such cases would be easily intelligible for generalist competition authorities
 - The concerted practice would not primarily involve interactions with the infrastructure, but interactions with users
 - *less need to understand some of the intricacies of the sector, e.g. infrastructure charging*
 - Market sharing, price fixing or other such practices would, in such cases, not appear to be fundamentally different from similar practices in other sectors

- In this type of case, collaborative work between the generalist competition authority and the rail sector's regulatory body makes sense, e.g. as in the UK where the ORR and the OFT hold “concurrent powers” and where ORR (in its own words) “will lead” in such cases. The case of the Netherlands is also seen as a positive example of good coordination.

Rail-specific regulation for non-discriminatory access for new entrants



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- Ensuring the right framework conditions using a sector-specific regulator
 - Regulate the infrastructure manager
 - Regulate the essential functions
 - Regulate the essential facilities/services

- *Regulation targets not only the IM, but also the dominant RU - irrespective of the separation regime*

- In principle, abuse of dominant position is thus forestalled
 - Sector-specific legislation that imposes ex ante restrictions
 - A sector-specific regulator who implements these ex ante restrictions

- These key issues are addressed notably in the recast of the First Railway Package: essential functions (charging, path allocation), essential facilities, role of the regulatory body, and separation requirements

Scope and level of detail for sector-specific *legislation* and for the role of the regulator



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- Trade-off with respect to the level of detail in legislation
 - Excessive detail may be inefficient: one-size-fits-all argument; higher cost of compliance; lower cost efficiency/competitiveness of the sector
 - But insufficient detail may offer scope (“loopholes”) for discriminatory practices to exist for extended periods (until competition regulation or change in legislation shuts down those loopholes)

- Scope of responsibilities of the regulator
 - A wider scope, i.e. more duties are handled by the specialised regulator: expertise advantage: legitimacy with sector stakeholders
 - General right of undertakings to approach the RB if aggrieved

- It is often written that sector-specific regulation is (mainly) ex ante (while general competition regulation is (mainly) ex post)
 - Where (in legislation) to impose ex ante (vs ex post) regulatory approval? (For which specific processes? With what criteria?)
 - What information reporting requirements are necessary and proportionate?
 - Does the regulatory body have the capacity to cope with these duties?
 - What impact on the sector in terms of the cost of doing business?

- The issue of capture
 - The RB should not be unduly influenced by any specific RU or by the IM
 - *Nor should the RB be captured by the state / Ministry of Transport*
 - But is it “capture” if the RB is influenced by the rail sector **as a whole**?
 - RB decisions can support/harm whole-sector efficiency and competitiveness
 - A strong RB could help improve the governance of the sector, holding not just the IM and the RUs to account, but also the state

Coordination of regulatory bodies at the EU level



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European coordination of sector-specific regulation		
Gas & Electricity sectors	Rail sector	Description
Council of European Energy Regulators (CEER)	Independent Regulators' Group - Rail (IRG - Rail)	Voluntary association of regulators
European Regulators' Group for Electricity and Gas (ERGEG) (predecessor of ACER)	-	Obligatory association of regulators
Agency for the Cooperation of Energy Regulators (ACER)	-	European Body coordinating national regulators
Single European Regulator (evaluated but not chosen in Third Energy Package)	-	Single European Regulator (national regulators are abolished)

- The simplest reform, but not necessarily the most efficient one, consists in fully separating all that is essential in order to remove all possibilities of potentially significant discrimination with respect to market access
 - Implies a belief that any dominant position in the sector (whether infrastructure, operations, or services) shall always lead to an *abuse of a dominant position (otherwise reform is disproportionate)*

- In its most radical expression, the IM is fully separated, and essential services are forcibly separated from the dominant (incumbent) RU
 - Assumes the IM as a whole is ‘essential’, rather than only some functions
 - Assumes a dominant position in services shall always lead to abuse

 - ***Economically speaking***, one could question the efficiency of such reforms
 - Loss of economies of scope between infrastructure and operations
 - Risk of lowered incentive to invest in rail-related services

- Development of a new position on the cooperation of national regulatory bodies
 - Independence, capacity, and credibility of national RBs
 - Rail-specific RBs “that really understands the sector”
 - On separation, general movement against a single, one-size-fits-all model
 - Subsidiarity principle
 - Free choice of structural model
 - Right to further develop national model
 - Right to switch between types of models
- Clarification of what models (*plural*) should be allowed

CER currently developing its position for the Commission’s 4th Railway Package

Thank you for your attention!



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