

European Rail Infrastructure Managers (EIM)



Railways - between sector specific and competition regulation

Views from Independent Infrastructure Managers

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The questions

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- What room for competition/regulation?
- Advantages and disadvantages?
- Problems from unclear delimitation?
- How do competition and regulation relate with performance of the railway sector?



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Competition and regulation

Competition and regulation

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Competition*

- Ex post
- Case specific
- One policy goal
- Transversal rules

* Antitrust

Regulation

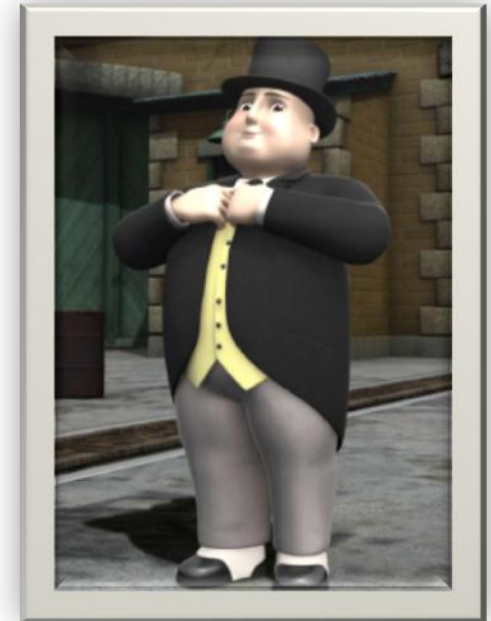
- Ex ante
- General
- Typically multiple policy goals
- Industry specific

Competition and regulation

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Fundamental principles:

- Public intervention should only occur in the market to address clearly identified **market failures!**
- **Remedies** should be proportional and adequate to solve market failures.



Remedies - Market failures / competition problems

Market failures in the railway sector

Market failures in the railway sector

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Features of network industries:

→ Network and assets not easily replicable

Track, stations, terminals, marshalling yards, train formation facilities, storage sidings, etc.

→ Vertically integration of different activities

Network management and service operations

→ Capital intensive industry

→ Positive demand externalities

→ Services of general economic interest

Market failures in the railway sector

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→ Legal entry barriers:

- Market-opening

→ Administrative entry barriers:

- Safety certificate
- Operating licence

→ Technical entry barriers:

- Low degree of interoperability
 - Gauge width, electrical voltages, signaling systems, platform dimensions, loading parameters, operational rules, training,...



Standard competition problems

... related with market failures



Standard competition problems

... related with market failures

→ **Refusal to deal**

→ **Non-price issues**

- Discriminatory use or withholding of information
- Delaying tactics
- Undue requirements
- Quality discrimination

→ **Price issues**

- Price discrimination
- Artificially raise competitors' costs
- Cross-subsidisation
- Predatory pricing

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Role of sector specific regulation

Role of regulation

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→ (Enforcement of) remedies currently in place

- Transparency obligations
- Non-discrimination obligation
- Accounting separation
- Access obligation
- Price control (cost based pricing)
- PSO

→ COM proposal to recast 1st railway package

- COM attempt to clarify and reinforce current provisions
- 2nd reading to start beginning 2012
- Dangerous setback on accounting separation

→ 4th Railway package

- Open-up domestic passenger market
- Separation between network management and service provisions

Role of regulation

→ The railway sector is lagging behind...

Sector	Degree	Legal basis	Model
Railway			
	1	Directive 91/440/EC	Accounting separation
	1	Art. 6 (1) Directive 2001/12/EC	Accounting separation
	*	Art. 6 (3) Directive 2001/12/EC	*The precise meaning of this provision is being assessed by the Court of Justice.
Electricity			
	1	Directive 96/92/EC	Accounting separation
	2	Directive 96/92/EC	Management (organizational) unbundling
	4	Directive 2003/54/EC	Legal and functional unbundling of TSI
	5	Art. 9 Directive 2009/72/EC	Ownership/structural unbundling*
	*	Art. 13 Directive 2009/72/EC	"Third way"
Gas			
	1	Directive 98/30/EC	Accounting separation
	3	Directive 2003/55/EC	Functional separation
	4	Directive 2003/55/EC	Legal separation
	5	Directive 2009/73/EC	Ownership/ structural unbundling
	*	Art. 14 Directive 2009/73/EC	"Third way"
Telecoms			
	3	Directive EC/2887/2000	Functional separation (local loop)
	3	Art. 13a Directive 2002/19/EC	Functional separation as potential remedy by NRAs

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Role of competition law

Role of competition law

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→ CJ judgment Case C-280/08 P - *Deutsche Telekom v Commission*

Sector-specific regulation does not preclude the application of competition law!

→ Address **non-regulated issues**

→ **Fill the gap** when novel issues occur

→ **Key to speed up the liberalisation process**

Mergers (*e.g.* Case COMP/M. 5855 - *Deutsche Bahn/Arriva*)

Antitrust (two dawn raids by DG COMP in 2011)

- specific feature of EU competition law: promote the internal market
- since 2004: DG COMP ability to impose structural remedies
Regulation 1/2004. Key in the energy sector

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Thank you for your attention!