Railway infrastructure access charges

- Why competition law does not work -

Jochen Meulman

Dutch Competition Authority / Radboud University Nijmegen

views submitted in this contribution are purely personal and may not reflect the position of the Dutch Competition Authority (NMa).

Premises

- Railway inframanagers are dominant and state owned (both arguable) > art. 102 TFEU applies
- Directive 2001/14/EC:
  - Article 7, third paragraph: access charges (minimum package) comprise no more than marginal or average variable cost /cost of use, at minimum: "wear and tear"
  - Article 7, sixth paragraph: costs may averaged to avoid sharp tariff in- and decreases
  - Article 8: mark ups (cost+) only if the market can bear them

Consequences of rail regulation

- Cost of use do not cover cost of disposing of infrastructure (sunk cost)
- Who should bear "disposal" / sunk costs?
  - Member State acc. to 2001/14/EC > State aid > exempted, but only if proportionate
  - Inframanager: mark ups for certain railway operators, but not for others, i.e. cross subsidy? > cross subsidy may not suffice to cover total cost or aggregation of marginal cost (aggregate of marginal cost < aggregate of common cost)
- Mark ups: who should identify who can bear mark ups?

Regulation vs. competition law

- Interference caused by article 7, 3rd and 6th paragraph, of Directive 2001/14/EC
- Marginal cost is the premise: which margin?
  - Per characteristic (passenger, freight), per operator, per line, per train path, per train?
- Averaging out costs (7'6): some above, some below marginal or average variable cost
- *AKZO/Wanadoo*: price below Avc = predatory
- *Deutsche Telekom*: supremacy of art. 102 TFEU over sector specific law

Reconciling competition law and regulation

- Dominance? Consider all transport modes! (freight)
- Abuse? "Genuine chance of eliminating competition"
  - *AKZO* > yes, incentive to eliminate competition
  - *Deutsche Telekom* > vertically integrated operator, yes, incentive to do so (railways > no vertical integration)
  - *Aeroports de Paris* > burden of proof on plaintiff if no vertical integration
- Objective justification? (*British Airways)* > counter-intuitive > if total welfare ↑, why abusive prima facie?
- Provision of infrastucture is a SGEI (106 TFEU)?