**Railways between sector specific and competition regulation -
a view from Deutsche Bahn**

3rd European Rail Transport Regulation Forum,
Florence/Italy, 5 December 2011

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I. Introduction

1. Wherever sector specific provisions on the regulation of infrastructure access and access charges have been introduced the question arose whether these provisions would be complementary to general competition law or whether the applicability of general competition law should be restricted. In this respect the railway sector is well in line with other regulated network industries such as electricity, gas, telecommunications or postal services. These sectors enjoy a number of differences. They have in common, though, that the relationship between sector specific regulation and competition law is never sufficiently clear. This not only raises the question if there is *any* room for the application of competition law – a question to which the answer presumably would be "yes". It particularly remains unclear to which extent the two legal regimes are applicable, what competencies the respective public authorities may claim, and also what the advantages and disadvantages of the legal situation are or whether the applicability of two regimes to protect and foster competition really leads to better market results or improve the performance of the market participants.

2. These questions are usually answered in a comparative perspective. However, legal analysis reveals that the sector specific provisions vary to a degree that does not necessarily allow answers based on overall principles. Thus this paper attempts at an answer for the sector we are dealing with today, i.e. railways – with its provisions significantly different from those governing other network industries on national as well as European level.

II. Legal Basis

1. On national level, *German competition law* contains provisions on the abuse of a dominant position, on the prohibition of discrimination as well as of unfair hindrance: From their pure wording sec. 19 and 20 of the Act against restraints of competition (ARC) may apply to cases concerning access to railway infrastructure and access charges. An abuse of a dominant position may be held, if the conduct of an infrastructure operator constitutes an abusive exploitation of the respective market position. This can be he case, e.g. if according to sec. 19 (4) no. 4 ARC access to networks or other - essential - infrastructure facilities is refused, even against adequate remuneration.

At the same time, *German regulatory law* contains provisions governing the access to railway infrastructure and infrastructure access charges. The provisions of the General Railway Act (GRA) distinguish between railway track operators and operators of service facilities. Service facilities operators are obliged to grant non-discriminatory access to their service facilities and related services (cf. sec. § 14 (1) GRA and 3 (1) EIBV). Railway track operators have to grant non-discriminatory access and provide for a minimum access package comprising of the handling of requests for infrastructure capacity, the right to utilise capacity which is granted, the use of running track points and junctions, the train control and all other information required to operate the service for which capacity was granted.

Similar to the access provisions the provisions on railway infrastructure access charges distinguish between railway track infrastructure and service facilities. Sec. 14 (4) GRA contains the provisions for track access charges. It is set forth that the charges of a railway track operator must not exceed the costs incurred for the supply of the minimum access package plus a reasonable rate of return (cf. sec. 14 (4) 1 GRA). Charges for access to railway infrastructure apart from railway tracks, in particular with regard to service facilities, are governed by sec. 14 (5) GRA. Service facilities access charges have to take into account the competitiveness of railway undertakings claiming access. They have to be non-discriminatory and must not be abusive.

2. Similar provisions apply on EU level: The *EU competition law* provision of Art. 102 TFEU prohibits any abuse by one or more undertakings of a dominant market position within the internal market as far as it affects trade between member states.

   Moreover, there is of course also a set of *EU regulatory law* rules laid down in directives, mainly Directive 91/440 on the development of the Community's railways - as amended by the so-called "Infrastructure-" or "First Railway Package" with its three subsequent directives. One of them, Directive 2001/14/EC, contains principles on infrastructure access and charging. The directives are based on Art. 90 ff. TFEU, i.e. the treaty provisions on the common transport policy.

III. Resolving conflicts of laws

1. With regard to access to railway infrastructure and access charges the question arises whether there may be cases in which one or more of these legal regimes could be applied in parallel – and what the consequences may be. The first and most easy observation in this context is that the applicability of the sector specific *regulatory provisions in national law*, i.e. the GRA is uncontested. Not only does the wording of these provisions show that they have been specifically enacted for such cases. It is also their historic origin, their systematic context and the purpose the legislator followed that clearly account for their applicability.

2. The second, similarly easy observation is that at the same time we may exclude the direct applicability of *EU regulatory law,* i.e. the directives on which the national regulatory law is

based. Notwithstanding the pending infringement procedure against a number of member states on the alleged incorrect implementation of the railway infrastructure package it remains a fact that all directives have been formally transformed into national law. Thus there is no room for any direct applicability of provisions in these directives under EU law. At least this observation reduces the theoretical number of legal regimes from four to three.

3. The third issue is less easy to tackle: It concerns the relationship between national regulatory provisions and *national competition law*. Admittedly there might be cases in which a strict reference to the *wording* of sec. 19 and 20 ARC would lead to an applicability parallel to the regulatory law provisions of sec. 14 GRA. Subsection 4 of sec. 19 ARC, by which the denial of access to an essential facility is legally defined as an abuse of a dominant position may be regarded as particular evidence for such theory.

   However, the *historic* legislator of the 6th amendment to the ARC, by which this subsection was introduced back in 1998, has stated in the legislatory process that in cases of a conflict of laws sector specific provisions shall prevail. The nature of sec. 19 ARC was explicitly described as “subsidiary”, thereby allowing adaptions by sector specific regulation.

   From a *systematic* point of view the legislator should have reflected this result in its 3rd amendment of the GRA in 2005. However, unlike in the energy sector the wording of the GRA does not contain any statement regarding the prevailing nature of the GRA’s provisions on infrastructure access and access charges. Only sec. 14b GRA sets forth that the GRA leaves any tasks and competencies of the antitrust authorities “untouched”. This lead some commentators to the conclusion that both regulatory and antitrust law always should be applicable if it comes to access to railway infrastructure and access charges.

   However, the *wording* and *systematic* context of sec. 14b GRA indicates that this conclusion might be rather far-fetched. The provision is part of a set of rules exclusively dealing with tasks of authorities. It must therefore be regarded as an institutional rule rather than a rule of substance. Sec. 14b GRA simply does not answer the substantial question how a conflict between national competition law and national regulatory law is to be resolved.

   A thorough interpretation of sec. 14b GRA reveals, though, that the legislator of the General Railway Act clearly wanted to exclude the applicability of competition law within the scope of the regulatory provisions: This decision was already taken upon the enactment of the very first version of the GRA back in 1993, which established the competence of the Federal Railway Authority with exclusive powers over the sector. The transport committee of the German Parliament commented on this decision at the time, so we have sound *historic* evidence. This is supported by *systematic* arguments and by the specific *purpose* of the regulatory provisions which aim at opening markets to enable competition rather that securing competition. The GRA contains specific procedural rules of *ex ante*- and *ex post*-regulation which differ from the general proceedings before the antitrust authorities. The same applies to procedures of judicial review respectively. Moreover, the substantial tests of the regulatory provisions are strict but slightly different from the concept of abuse of

dominance so that parallel application of both regimes would bear the risk of contradicting results.

Consequently, there are a number of court decisions in place in which national regulatory law has prevailed over competition law. Most decisions have been taken by the *Regional Court of Berlin* in civil proceedings regarding the access charges for passenger stations. There have been contradicting decisions, however, taken by a number of other regional courts in Germany, but they largely go back to the 1990ies, i.e. ancient times of sector specific regulation. None of the findings has been tested before the *Federal Supreme Court* so far.

The preliminary conclusion at this stage is that for various reasons national regulatory law must prevail over national competition law if issues of infrastructure access or access charges are at stake. Above and beyond the scope of the GRA competition certainly remains applicable: Denial of infrastructure access or excessive infrastructure access charges therefore would be subject to regulatory law, whereas making the conclusion of a contract subject to supplementary obligations etc. would clearly lead to a competition law case.

4. Having resolved the conflict of laws on national level leads us to the fourth and last issue in this context: Does the doctrine of prevailing sector specific regulation also apply in relation to *EU competition law* rules? The first answer would certainly be “No” as we are all aware of the doctrine of supremacy of EU law, in particular primary law provisions such as Art. 102 TFEU. Certainly national legislation may neither explicitly nor implicitly change or modify primary law provisions such as the prohibition of abuse of a dominant position.

   This principal statement, however, is not final: A closer look to the set of rules in question shows that under certain circumstances the answer to the question may be different:

   - First, there may be cases in which Art. 102 TFEU is not applicable because the relevant conduct does not affect trade between member states. Although the interpretation of this criterion is not extremely strict especially the railway sector with its local and regional markets or market segments may create cases in which it cannot be fulfilled. This has been confirmed by a decision of the *Regional Court of Berlin* recently with regard to access charges for passenger stations
   - Second, there may be cases in which the individual conduct of an undertaking does not fall under Art. 102 TFEU because it does not assume responsibility. This may namely occur when the conduct constitutes a pure reflection of a public bodies’ decision, e.g. the decision of a regulatory authority. This so-called “state action defence” has been accepted in principle by the *European Court* in *Deutsche Telekom*, a decision from 2008 which is still being contested before the ECJ. However, if the decision is upheld the criteria established by the *Court* will be very strict: The relevant conduct must be exclusively based on state action. Art. 102 TFEU is applicable if any “room for maneuver” remains on the side of the undertaking, etc.

- The decision of the *European Court*, following a decision of the *German Supreme Court*, has attracted much controversy: Some authors have even argued that the existence of regulatory regimes as such would be in question as it would violate the principle of proportionality if undertakings try to comply with regulatory provisions first and learn later that their conduct was anticompetitive and therefore unlawful. Likewise principles such as legitimate expectation, legal certainty and good faith could be mentioned in this context. Moreover, it must be kept in mind that sector specific regulation cannot be seen independent from the relevant EU provisions, particularly in the various directives implemented into national law.

After all, the resolution of a conflict of laws in the context of infrastructure access and access charges therefore raises the fundamental issue of consistency - which should be secured by interpretation of the relevant provisions, i.e. Art. 102 TFEU as part of primary EU law and sector specific directives which are themselves also based on primary law provisions such as Art. 90 TFEU. Three observations in this context:

- The first observation in this context is that neither the EU antitrust provisions nor the directives contain an explicit and general rule on the conflict to be resolved. However, some articles in Directive 2001/14 contain certain provisions “without prejudice” to antitrust provisions. I would like to draw your attention to Art. 9 (1), 10 (4), 17 (1) and 24 (2) of Directive 2001/14, which all explicitly provide for a parallel application of antitrust law. The reverse argument drawn from this says that wherever such a provision is missing the legislator accepted implicitly that those provisions may well contain a prejudice for the application of Art. 102 TFEU.
- One may argue that this result leads to an interpretation of primary EU law according to secondary law provisions which may be against the hierarchy or sources of law. However, even the ECJ has accepted this method, e.g. in “classic” cases like *Royer*, *Walrave und Koch* and *Bosman* to ensure consistency of EU law as a whole. Even if secondary law cannot “prescribe” the content of primary law provisions it nevertheless contributes important guidelines for their interpretation.
- Another argument against this result might be that Art. 102 TFEU should be regarded more fundamental that general policy articles such as Art. 90 ff. TFEU, particularly as their set of rules does not even empower the legislator to deviate from antitrust provisions. This, however, is also the case in other policy areas, e.g. the common agricultural policy, where the applicability of antitrust law has never been an issue.
- The last and final observation relates to a comparative remark: The necessity of consistency between regulatory and antitrust law is no issue exclusive to EU law. It has also arisen in the U.S. legal system, where the Supreme Court decided in a telecoms case called *Verizon/Trinko* in 2004 in favour of the prevailing nature of regulatory law: Verizon Communications Inc. was the incumbent local exchange carrier (LEC) serving New York State. The New York City Law firm of Curtis V. Trinko, LLP, alleged that Verizon had applied anticompetitive practices to discourage customers

from becoming or remaining customers of competitive LECs. Having in mind the applicability of the Telecommunications Act of 1996 the court concluded *"… that Verizon's alleged insufficient assistance in the provision of service to rivals is not a recognized antitrust claim under this Court's existing refusal-to-deal precedents."*

IV. Conclusions

1. Having said this, I would like to conclude by answering the first key questions as follows: Under the present law there is some room for the applicability of competition law in the railway sector, but it is limited to cases falling outside the scope of regulatory law provisions. If the legal analysis is accepted it will not be necessary to discuss further statutory reforms. Otherwise a clear delimination between the two regimes should be clarified.

2. Sector specific regulation captures – or should capture, respectively - all issues regarding infrastructure access and access charges whereas competition law enforcement deals with all other issues which may arise in the railway infrastructure or transport markets.

3. Legal certainty and consistency of the various regimes would be of a clear advantage to all market participants. Above that it would also be advantageous to legislators as well as regulators as they would be able to implement a policy according to sector specific objectives. Parallel applicability bears the risk of various regulators, competition authorities and courts overruling each other.

4. The implementation of sector specific policy safeguarded by a consistent legal framework will contribute to an increase the overall performance of the sector.

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