The opening up to competition of passenger rail transport in Europe

Conference report

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Aurore LAGET-ANNAMAYER,
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The opening up to competition of passenger rail transport in Europe

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The welcoming words from the two organising entities of this conference are in French and the synthesis of the presentations and discussions are in English, as it was the case during the conference.

Welcoming words

Claudie BOITEAU | Professor of Law, Director of the Law Research Center (CR2D), Université Paris Dauphine-PSL

Ce colloque est le second volet d'un diptyque consacré à l'ouverture à la concurrence du transport ferroviaire. Le premier volet, dédié au cas français, nous avait réunis au printemps 2021 à l'université de Rouen. Pour ce second volet, de dimension européenne, nous sommes heureux d'accueillir les régulateurs et les opérateurs du secteur ferroviaire, des représentants de la Commission européenne et des universitaires. Nous nous sommes limités à quelques pays – le Royaume-Uni, l'Italie, l'Espagne, l'Autriche et l'Allemagne –, choisis pour leur exemplarité du système adopté. Nous espérons que le cas d'autres pays sera abordé dans la publication qui suivra ce colloque.

Au cours des derniers mois, le débat s'est focalisé sur le fonctionnement du marché européen de l'électricité. Si celui-ci a continué à permettre la formation des prix et des échanges entre les États membres, grâce aux règles de marché et aux interconnexions européennes, ces prix sont difficilement soutenables pour les consommateurs, qui n'ont sans doute été suffisamment formé au fonctionnement concurrentiel d'un marché. C'est d'ailleurs la raison pour laquelle une réforme du market design est envisagée.

L'analyse montre que la concurrence ne sanctionne pas nécessairement l'ancien monopole si celui-ci adapte ses prix et ses services. L'exemple français en témoigne. Depuis décembre 2020, la SNCF a perdu le monopole sur les lignes à grande vitesse et Trenitalia a investi la ligne Paris-Lyon-Milan. Avec l'arrivée de ce nouvel opérateur, les tarifs ont été contenus alors que les coûts d'exploitation ont augmenté. En outre, les deux opérateurs présentent un taux de remplissage satisfaisant.

Toutefois, sur le marché français du transport de voyageurs, le développement de nouveaux acteurs est long. De fait, l'exploitation ferroviaire est une industrie à coûts fixes élevés et les péages demandés par le gestionnaire du réseau le sont également, ce qui relève le seuil de rentabilité des nouveaux entrants. La concurrence se déploie donc lentement, mais elle devrait permettre la conjugaison des enjeux économiques, sociaux et environnementaux.

Éric BROUSSEAU | Professor of Economics and Management, Scientific Director of the Governance and Regulation Chair, Université Paris Dauphine-PSL

Du point de vue économique, la libéralisation a pour objectif d'instaurer une concurrence organisée, en vue d'obtenir les avantages du marché – stimulation des acteurs à l'efficacité, écoute de la demande, capacité d'innovation – sans ses principaux inconvénients.

La libéralisation ne remet pas en cause et renforce au contraire le rôle des autorités organisatrices de transport qui peuvent faire des choix mieux informés grâce à une plus grande transparence des marchés, et donc une plus grande vérité des coûts et de la répartition des sources de financement (contribuables/usagers).

L'évaluation de la libéralisation ne doit pas s'en tenir à l'évolution des tarifs ou à la ponctualité des trains, mais porter sur l'amélioration du rapport qualité/coûts, la qualité étant appréhendée au sens large : interconnexion des modes de transports, réponse aux besoins des usagers.

Un autre objectif est de permettre des investissements et de l'innovation, a fortiori dans une industrie de coûts fixes comme celle des transports, afin précisément de mieux répondre aux besoins.

Si elle n'induit pas la privatisation des opérateurs, la libéralisation remet en cause l'organisation verticalement intégrée des monopoles historiques. Les gains potentiels à la dé-intégration verticale sont liés à la flexibilité (au sens de l'évolution des structures d'offre), la spécialisation des fournisseurs de services ou encore à la stimulation de l'écoute de la demande. Quant à la dé-intégration horizontale, elle permet d'adapter l'offre de services à la multiplicité des demandes. Le rôle des investisseurs est essentiel, en la matière.

Certes, la transformation d'un modèle monopolistique et verticalement intégré en une industrie impliquant de multiples opérateurs se concurrençant et coopérant au sein d'une même chaine de valeur peut poser des difficultés de transition. Elle impose notamment d'organiser des marchés souvent très complexes. Qui plus est, ces marchés doivent évoluer en même temps que les technologies. En tout état de cause, les difficultés d'ajustement ne doivent pas conduire à une remise en cause de la politique de libéralisation du fait des bénéfices attendus de cette dernière. Ils doivent être pris sérieusement en considération et analysés pour permettre les ajustements et apprentissages nécessaires. Il importe en effet de mettre en place de nouvelles structures organisationnelles, chez l'opérateur historique comme chez les nouveaux entrants ; en tenant compte des délais d'ajustement.

En France, la libéralisation du transport de voyageurs est récente. Toutefois, la trajectoire est connue de longue date. L'efficacité globale de cette politique ne pourra être jugée qu'à long terme, et en comparaison avec les pays voisins.

Bien entendu, les citoyens et les usagers, de même que les parties prenantes doivent être impliquées dans les débats politiques portant sur les grands arbitrages à réaliser en matière d'offre de transport et de répartition des coûts entre contribuables, usagers et employeurs. Les autorités organisatrices et les régulateurs doivent ensuite veiller à favoriser la mise en place des arrangements organisationnels et de marché permettant de répondre aux priorités collectivement choisies.

Introduction remarks

Aurore LAGET-ANNAMAYER | Professor of Law, Université Paris Dauphine-PSL

It is a great pleasure and honour to see so many prestigious players from the rail sector gathered here today. This conference is part of a series which I initiated in 2021. After the first event, which dealt with the French rail landscape, this one is aimed at broadening the study by giving it a comparative European perspective.

To encapsulate the aspiration behind it, I chose Henri Ottmann's depiction of the Luxembourg Station in Brussels in 1903. This seems to me an appropriate symbol for our conference as the rail liberalisation process was driven by Brussels, while Luxembourg is the seat of the EU Court of Justice. Indeed, Railways have always inspired painters, film-makers and writers.

The railway was one of the last network sectors to be covered by EU law. The opening of competition was initiated more than 30 years ago, with the first railway packages that would be followed by multiple others. Competition was gradually introduced, specifically as an instrument of integration of both freight and passenger services. In this regard, the most fundamental objective of the Directive 2021-34, the Recast Directive establishing a single European railway area, is to promote competition in the provision of rail transport services by ensuring non-discriminatory access to rail infrastructures. The fourth and final railway package, adopted in December 2016 (directive 2016/2370/UE) completed the opening process.

The EU regulatory framework can be said to have reached maturity: seven years after its adoption, this Directive has been transposed in the Member States. France was one of the last to open its passenger transport services to competition with the new rail pact of June 2018, with a difference timetable between open access and PSO services, after the opening up of international freight in 2003, domestic freight in January 2007 and international rail passenger services in 2009.

The moment for a conference on this topic is ideal, as passenger services are emerging or should emerge, even in the most recently joining member States. It is time not only to evaluate the process, but also to highlight the new challenge of sustainable mobility in line with the European Green Deal Ambition.

To gain an overview of the diversity of situations in Europe in domestic rail transport, I chose to focus on countries emblematic of this moment: the United Kingdom, which launched the movement in 1993, Germany, Austria, Italy and Spain. This conference is a way to gather interesting feedback from various players across the sector, to feed into our reflections on the strength and weaknesses of competition, with a focus on two topics: the legal framework or the opening to competition in each of the selected countries; and its evaluations by academics and players represented today; the disputes arising at both the national and European level stemming from these developments.

Opening up to competition through the lens of sector's organization

Chair : Aurore LAGET-ANNAMAYER | Professor of Law, Université Paris Dauphine-PSL

This panel is aimed at highlighting the specific features of each State, whether with regard to the chosen method for opening and organising the sector, in particular the statutes of the infrastructure manager, as well as the reforms under way or to come.

Presentation of the legal framework

Tony PROSSER | Professor of Law, University of Bristol, United-Kingdom

Organization and competition *for* the market

The UK was a pioneer in rail privatisation, adopting a model very different from that which other European States would go on to use. The market liberalised even prior to Brexit; the 2016 Directive would not have brought about any major changes in the UK.

While the infrastructure is an independent publicly-owned company, Network Rail, the role of open access – services that can compete with the dominant operator – has been kept limited. Until recently, they accounted for less than 1% of passenger miles, and it has been difficult to organise in many areas, seeing the highly congested nature of some parts of rail infrastructure.

As there was little discussion of them in the preparation of the 2021 reform proposals, it appears unlikely that they will play any major part in the future.

The key characteristics of the UK experience have been:

- The use of independent regulation,

- The use of franchising, which offered competition for the market rather than in the market, with companies competing for groups of services and bearing the related revenue-related risks.

While the former was very successful, franchising has been universally acknowledged as a failure, even by the Johnson Government.

- The much-touted and eagerly-awaited competition did not materialise, leaving two-thirds of contracts to be awarded without competition since 2012. In addition, rather than an influx of new private entrants, the market saw other state-owned European rail operators take their place.

- The contracts applied were overly specific and ended up having a far stronger hold on operators than ownership.

- The transfer of revenue risk was significantly overestimated, while very significant risk due to changes in the national economy limited was overlooked. In addition, bidding for franchises was much too optimistic: the related bidders subsequently withdrew from the market, leaving public players to step in, supposedly on a temporary basis. The latter's presence has had a positive effect, thanks largely to the limited degree of detail in the contracts used. Most significantly, the fragmentation and lack of communication and trust between the various parts has been detrimental to rail as a system.

- Covid-19 brought about the end of franchising due to the collapse of revenue, replaced by management contracts for which operators were paid a fixed fee and had the possibility of earning a performance fee.

The Williams/Shapps White Paper

The Williams-Shapps White Paper was the Government's means of introducing reform, proposing a new organisation for the public sector under the name Great British Railways, to act as a guiding mind for all aspects of the system, from infrastructure and system functions such as timetabling. Importantly, it would remain subject to independent regulation by the ORR. It did not suggest any major increase in open-access competition, but did propose that the new GBR would issue concessions through management contracts with fixed fees and limited transfer of risk.

Lack of implementation and inadequate service delivery

Whereas the creation of the new GBR required fresh legislation, the related provisions were removed from Transport Bill due to contextual factors: a shortage of Parliamentary time and the need to respond to crises in energy and cost of living in the UK. Indeed, more broadly, the post-Brexit political chaos has paralysed policy reform: in the last year, the nation has seen the arrival of three Transport Ministers, three Prime Ministers and three Rail Ministers.

At the moment, the Labour Party is over 20 points ahead in the polls, with the general action two years away. It would likely offer changes closer to the proposed reforms, but with a greater role to regional and local government and the reincorporation of services into the public sector as contracts expire.

Meanwhile, major problems have emerged in service delivery. Several different unions have gone on strike in succession, effectively paralysing the system on their targeted days, on which participation is so widespread, that no trains run. They demand greater pay, while their employers aim for efficiency improvements. One major difficulty in this struggle has been the ambiguity about the role of Government: while participating in the talks, it has been reluctant to admit towards what ends it seeks to do so.

The West Coast line (FirstGroup and Trenitalia), the most important long-distance line (London-Birmingham-Manchester-Glasgow) is operated by the main private sector operator, FirstGroup (70%) and Trenitalia (30%). Last August, it rolled out made extensive cuts (20%) to services and cancellations, due to under-recruitment of drivers and unwillingness to perform overtime by those in employment, due to poor industrial relations. Similar problems have since arisen on another FirstGroup contract, the TransPennine contract.

Lessons

The proposals in the White Paper, while difficult to implement, were viable responses to the current complicated situation. Until similarly strong responses can be rolled out, it is important that lessons be drawn:

- fragmentation connected to lack of coordination is a major problem,

- over-specification of service requirements undermines trust and the ability to innovate, while also making monitoring most difficult,

- lastly, and most basically, rail is a system that requires communication and trust rather than detailed rules, incentives and adversary relationships.

Monica DELSIGNORE | Professor of Law, University of Milano Bicocca, Italy

The horizon of rail refers not only to competition: it is one of the most sustainable means of transport available and, as such, an essential part of the European Union's efforts to become carbon neutral by 2050. The legislation establishing the single European railway area is thus a must.

Europe has, in its various legislative and regulatory enactments, fostered competition through the separation of the infrastructure manager and the railway undertaking. The result is a three-fold system, with State, (single) infrastructure manager, railway companies competing in the transport service business.

However, as most Member States have the infrastructure manager and State as a single entity, the European policy had to find a compromise solution, in which separation would be possible, even in the holding structure.

The Italian context before the adoption of Fourth Package

In Italy freight transport was liberalised quite early, in 2001, while that of the high-speed network is widely considered an example of success in the rail market.

Today, both private operator Italo and the public operator's line Frecciarossa are using the experience accumulated over more than ten years to replicate this model beyond the Italian borders.

The Italian high speed trains have even revolutionized lifestyles and mobility in the nation, thanks to greater capacity and increased frequencies, lower prices (-30%), and better services for users. Nevertheless, Italy was part of the infringement procedure started by the Commission in 2008 on the correct implementation of railway packages, and in October 2013, the EU Court of Justice declared that Italy was failing to ensure the independence of the infrastructure manager, with regard to the setting of charges for access to the infrastructure, due to the role played by the Ministry in the administrative procedure.

Fourth Railway Package

This jurisprudence was the basis for the adoption of the Fourth Package, which nonetheless opted for a compromise solution, not requiring full separation between rail undertakings and infrastructure managers, as many expected.

The creation of a new European railway area, the subject of the present discussion, is based on two pillars:

- the technical pillar, which affects competition to the extent that decisions on standards can limit access to the market (reduction of administrative barriers in vehicle authorization and safety certification of railway undertaking);

- the market pillar, the more impactful of the two pillars (open domestic passenger market, improvement of regulatory oversight and access to infrastructure).

Some issues are still open as the package leave space to grey areas, especially considering that the interest of each State is defending its monopolies

I will try to show you criticism considering 3 aspects.

Infrastructures managing body vs supplying companies

- the ongoing conflict of interests within the Italian integration model

The 2016 Directive assumes the previous company model, allowing vertical integration, but only with a set of appropriate safeguards to guarantee the impartiality of the infrastructure managers on the essential functions, traffic management and maintenance plan. These safeguards, taken together, are referred to as “Chinese wall” arrangements

In 1992, the public entity Ferrovie dello Stato Italiano was turned into a joint stock corporation fully owned by the Ministry of Economy and Finance. It was put into restructuring from 1996 and, since 2011, has been the holding company known today. In this vertically-integrated infrastructure, the manager Rete ferrovia italiana (RFI) is a subsidiary of the holding company, along with Trenitalia, the main national and regional rail company. and others companies.

The Italian legislation copies the 2016 Directive, establishing the primary requirement for impartiality as “the absence of decisive influence” – an expression ambiguous enough to leave the door open to opportunistic behaviour. Likewise, the provisions on financial transparency are loosely-worded enough to enable various uses for cross-subsidies and the unclear distinction in the use of public funding by infrastructure manager and railway undertaking. The absence of a clear distinction in the activity of Trenitalia, concerning business on the market and business for the market (i.e., public service activities) creates a further problematic issue.

The existing difficulty of a fair competition

- the existing difficulties in introducing fair competition, with open access on one side and public service contracts on the other,

RFI, the Italian infrastructure manager, publishes a yearly network statement to inform railway undertakings of the criteria, procedure, methods and deadlines for allocating infrastructure capacity. The regulatory authority for transport plays an important part in the drafting of this statement, replacing the Ministry and system condemned by the Court of Justice.

- and the insufficient power of the Italian transport regulatory authority

Established in 2011, the Italian transport regulatory authority should be able to implement new stringent parameters to open the infrastructure to new undertakings, as well intervene in the supply of public services. The authority is expected to act “also taking into account the relevant economic analysis, having ascertained that the economic equilibrium of the public service contract is compromised, shall indicate any limitations that make it possible to fulfil the conditions for granting the right of access to the new operator”.

Furthermore, RFI “*may* require the railway undertaking to pay appropriate transparent and non-discriminatory compensation charges determined autonomously by RFI after the opinion of the transport regulatory authorities”.

Lastly, “as a general rule, it is the task of the authority to ensure fair and non-discriminatory access conditions”. Therefore, the “authority identifies the criteria for the determination of charges by the infrastructure manager”. Nevertheless, the law provides that tariff is finally set by the infrastructure manager under the supervision of the Ministry of Transport.

In conclusion, considering the Italian discipline and, more generally, the substance of the full European railway packages, the full liberalisation immediately establishes a regime of economic freedom and formal equality. However, the benefits of this measure differ over time, depending on complex transformational processes, and have no guarantee of being effectively brought into action.

Asset regulation alone is often not enough to prevent opportunistic or discriminatory behaviour on the part of the infrastructure manager, where the latter is part of a group active upstream or downstream in segments of services.

The holding structure allowed in European law guarantees formal independence since the group entities have legal personality, and organisational independence, as they are different structures. Concerns remain with regard to independence in decision-making and therefore the role of the Transport Authority must be enhanced.

Christian SCHNEIDER | Partner, BPV Hügel, Germany and Austria

Market overview et legal sources

Germany and Austria may speak the same language, but have decidedly not structured their rail markets in the same manner.

ÖBB Personenverkehr, the passenger traffic branch of the Austrian Federal Railways holds a 90% share on its market, alongside private concerns operating on the nation's private infrastructures, with only two relevant exceptions (WestBahn and Regiojet). In Germany, the situation is totally different: the incumbent Deutsche Bahn holds 60% market share, while private operators maintain a 33% market share. DB similarly is dominant on the rail services market, but not to the extent that other prominent players (FlixTrain, Thalys, etc.) cannot maintain a place for themselves.

In Austria, the Railway Act governs the entirety of the rail system and implements in particular the EU railway framework. In Germany, the system is defined by the General Railway Act on the Licensing of Undertakings, Railway Security, Vehicle Authorization on the one hand, and the Act on Railway Regulation on the other, whereby the latter addresses unbundling charges, access to infrastructure, and the organisation of the regulatory authority.

On unbundling, it can be noted, the two countries both allow a holding structure where the infrastructure operator belongs to the same group as the incumbent passenger services operator.

Licensing

The criteria of the Directive on the Single European Railway Area have been fully implemented both in Australia and Germany, with particularities. There remains margin of discretion regarding the detailed licensing criteria, as in this regard, the Directive is quite vague. However, due to mutual recognition, this is not a problem. In Germany, the main problem, and one detrimental to competition, lies in the irrefutable assumption that State-owned or regionally-owned authorities will build the licensing criteria without proof, a principle which is discriminatory.

Capacity rights and access

Both in Austria and Germany, quite a literal implementation has been chosen for articles 10-13, 26-28, 38-54 of Directive 2012/34/EU, albeit with national particularities that have a negative impact on competition. In Austria and Germany, liberalisation was fully-achieved before the current directive, recast and 2016 amendment.

However, Austria makes use of articles 11 regarding the possibility to restrict pick-up and set-down of passengers to ensure the economic equilibrium of PSO contracts. In particular, services on either of these aspects must be the subject of notification eighteen months in advance. Germany, in contrast, did not invoke this provision, causing frictions between the two. Insofar as infrastructure manager may grant priority of access to clock-face timetable trains at junction stations, Austrian Fedral Railways are de facto favoured.

Meanwhile, in Germany, certain particular regimes on access to stations are de facto not in line with EU law: the ECJ has made the regime regarding platforms part of the minimum access package to some extent.

Infrastructure and service charges

Both Austria and Germany have fully implemented the European regime (Articles 29 and seq.) which calls for some exemption from the principle that infrastructure charges to be based on the principle of social marginal cost. Also interesting in the past have been charges for traction current, due to cross-subsidies between the traction current network and the delivery of electricity. Today, however, separated bills are required for the use of infrastructure and the delivery of current.

National particularities exist, above all in Germany, which subjects infrastructure charges to an incentive-based regulation known from electricity and telecom regulator ion. In doing so, it in effect goes against the European framework, which exhaustively covers the charging principles. A link can be seen also between PSO financing and infrastructure charging, also not foreseen by the Directive and possibly discriminating to open-access operators.

Public service obligations

Indeed, most passenger railway services are provided below costs, making financial contributions by public authorities a necessity. Therefore the public service obligations regime is essential on whether competition will work or not. Here, the regimes in Germany and Austria differ tremendously: in the former, long-distance passenger services are generally provided on a commercial basis, with subsidies limited to local and regional services; public service obligations are awarded by means of tenders, and to promote competition, rolling stock is often purchased by the contracting authorities and let to the operators.

In Austria, both local and regional services, and long-distance operations are subject to public service obligations, the Vienna-Salzburg line being the only relevant exception. Furthermore, Austria invoked one important transitional provision in the public service regulation of the EU: in Austria, the contract on public service obligations was awarded without tender for 10 years shortly before expiry of the transitional provision.

Private operators often work on an open-access basis, not receiving any compensation under the PSO regime. The only exemptions are certain tariffs in transport associations and the “climate ticket”: having the character of a general rule under the PSO Regulation, private operators are entitled to compensation for these.

Railway security, vehicle authorization

Further obstacles to competition result from divergent security provisions in different countries. The absence of grandfatherisation of authorisations for rolling stock in Italy has, in particular, had significant implications for passenger services between Austria and Italy. In the latter, a tunnel evacuation concept was implemented according to security standards not attained by existing coaches. In the past, differences in vehicle authorisation rules between Germany and Austria have also caused sometimes incongruous bureaucratic situations.

Juan José MONTERO PASCUAL | Professor of Law, UNED/University of Madrid, Spain

On its path to opening the railway sector to competition, Spain implemented the Recast Directive in literal form and established a fairly standard legislative framework. Opting for vertical separation, it maintains separation between the infrastructure manager and railway undertaking, is equipped with an independent regulator, actively regulates access to the infrastructure, and principles on pricing and non-discrimination.

The introduction of a tender element in 2018 changed the scene, but by no means removed competition. Quite to the contrary, today, three different rail companies, one with two subsidiaries, can be found on the infrastructure. The latter is divided into multiple corridors branching from Madrid to the coasts. The details in this presentation apply only to Madrid, Barcelona, the East Corridor and the South Corridor; the North corridor and remainder of network do not fall within this framework, at least at this stage.

Competition exists on the high-speed infrastructure, which is the largest in all of Europe, and the second-largest in the world, yet network usage in terms of numbers of passengers per kilometre is very low. Paradoxically, the stations are afflicted by congestion.

Reform to increase passengers

The main scope of the liberalisation process was thus to attract more passengers. The model adopted has two unique features:

- **the optimisation of the timetable by the infrastructure manager, ADIF**. to the infrastructure manager determined the best means of extracting the maximum potential from the system, and accordingly increased the number of potential services rate by 60%. Similar examples of pre-planning can be found at a smaller scale throughout Europe, reflecting on a trend to rely less on markets and instead to organise and optimise more, to the benefit of newly-arriving railway.

- **market planning** with the future undertakings, through a round of discussions. With the optimised timetable in hand, the manager created three access capacity packages, one for an incumbent (70% of capacity), another for a hypothetical head-on competitor (20%), and one for a low-cost operator (10%). It important to note that these packages were developed in the form of framework agreements, which by definition enable contracting of capacity for an extended period of time, in the case of Spain ten years.

Competitive allocation of capacity

The infrastructure manager then surveyed the potential newcomers for interest. With six railway undertakings filing capacity requests for framework agreements, it saw that there was potential for market congestion and, thus, the need to proceed via a competitive procedure – not to grant a license to enter the market, to which every player was entitled, but specifically for these ten-year framework agreements.

The priority allocation criterion was defined as most intensive use of infrastructure: the higher the capacity sought, the greater the bidder’s change of winning the tender.

Competition already a reality

Three competitors already in operation took part in the tender: Renfe, the incumbent, won the largest package, having requested 80% of the available capacity in Package A; Iryo (50%-owned by Trenitalia and a local regional airline), applied for 70%, and was awarded package B; while the SNCF's Ouigo won 100% of the smallest package.

As a result of Covid, the latter two have not yet fully deployed their operations, but have the rolling stock and capacity necessary.

As consequence of this initial opening:

- the share of travel by rail has been gaining on aviation,

- passenger numbers have been increasing, very noticeably in the newly-arriving rail companies,

- prices are now determined by aggressive yield management on the part of all competitors, and thus lower on less-competitive lines and virtually unchanged on the most popular lines.

Win-win result?

This reform has benefited different players

- high-speed passengers enjoy more services, with a 55% increase in the number of trains, and lower prices (-40%).

- ADIF AV expects that its revenue will increase by 2 billion over a ten-year period, through track access charges.

- The newcomers too have gained, as they enjoyed greatly-facilitated access to the market. Thus, they can compete with the incumbent on multiple frequencies, including at peak times of the day.

Only the incumbent has reason to doubt the utility of the reform: it has not seen an increase in its overall number of passengers, its overall revenue has likely diminished, and cross-subsidisation of public services is no longer possible, but costs have not been compensated.

Questions from the floor

Karsten OTTE, German Federal Network Agency

Are the allocation criteria not a hidden means of grandfathering?

Juan José MONTERO PASCUAL

This would have been the case had only one package been put up, as opposed to three, with the provision that bidders could only win one. As a consequence, the effect has been rather the contrary: the model accelerates market entry.

Olivier SALESSE, French Transport Regulatory Authority

Is the ten-year duration suited to pure players, which already have rolling stock, as opposed to a shorter renewable duration?

Juan José MONTERO PASCUAL

Insofar as the tender favoured those who placed the highest bids in terms of capacity, those with rolling stock were already at an advantage. under the present conditions, after the ten-year period, renewable contracts could be rolled out.

Patricia PERENNES, Trans-missions

With France opening regional rail services to competition, there has been debate as to the appropriate stance for the public incumbent. Can you say more about the need for balance between trust and specification, against this backdrop?

Tony PROSSER

This is a central and hugely-important issue. “Smart” and “responsive” regulation have been forgotten in UK Rail franchising, which seems to see ever-greater specification as its only means of guaranteeing outcomes. Even negotiation brings about better results, as the ORR’s response to funding of infrastructure has demonstrated. This afternoon, I will discuss how it has examined the efficiency and economy of the use of funds by the infrastructure operator, not through rules but through an open process of debate and discussion, which brings about the transparency that is so important.

Stefan REMMERT, Deutsche Bahn

According to the most recent figures, the market share of competitors in German regional transport is around 40%.

As to the conformity of the legal framework in Germany with EU law, it is no longer a subject for debate, since the 2021 rail reform. Track access is authorised by the regulatory authority and would not be possible if the German framework were not conform.

Christian SCHNEIDER

As to the charges regime, the particularities related to incentive-based regulation, which link to transport association regarding PSO regimes are not in line with the Directive: the latter sets the network-charging principles exhaustively. The exceptions in the Directive would not make sense were this not true.

The authorisation of charges is further cause for contestation: the Directive provides only for a prior authorisation requirement by the regulatory authority, for some elements of the charging regime, but not the charges as such.

Stefan REMMERT, Deutsche Bahn

Addressing Professor Montero, I would say that debate is underway in Germany about an even more active role for the German infrastructure manager, including components of pre-planning in view of a capacity allocation reform in the near future.

Antoine LOUVARIS, professor of law

What would the other speakers identified as the winners and losers in regulation, a matter of efficiency by essence?

Tony PROSSER

In the UK, passengers have won in certain ways, thanks to innovation. As to losers, I would list the Government, as the public support for the rail network is now much higher than it was before privatisation and partial liberalisation.

Monica DELSIGNORE

Regulation is aimed at making passengers and consumers the winners in the final adopted framework; it is not only a matter of competition in the railway sector, but of sustainable mobility, in which of course railway with its low emissions impact plays a strategic role.

Roberto RINAUDO, Trenitalia France

In Italy, the opening up of the market was indeed a win-win endeavour: passengers enjoyed greater infrastructure and prices; infrastructure managers significantly increased their revenue; Trenitalia has improved its economic performance and been able to reinvest profits to further improve its rail activities.

Round table about the point of view of operators and regulators

Moderator : Patricia PERENNES | Consultant, Trans-missions

European Operators

Caroline CHABROL | Project Director for International Development, SNCF Voyageurs

Andrea GIURICIN | Transport economist, CESISP-UNIMIB, CRO, TRA consulting

Alix LECADRE | Director of Railways offers and professions, Transdev

Stefan REMMERT | Head of general regulatory policy, Deutsche Bahn

Roberto RINAUDO | President and CEO, Trenitalia France

National Regulators

Grahame HORGAN | Head of competition, Office of Rail and Road (ORR), United Kingdom

Karsten OTTE | Head of Department, Rail Regulation, Federal Network Agency, Germany

Luisa PERROTTI | Head of European affairs and international relations, Italian Transport Regulation Authority (ART), Italy

Olivier SALESSE | Director of Rail transport, French Transport Regulatory Authority (ART), France

Ivan SANTOS | Head of the Railway Unit, Transport Regulation Dpt, Comision Nacional de los Mercados y de la Competencia (CNMC), Spain

The point of view of operators

Patricia PERENNES

As a new entrant, did you face difficulties, or barriers to entry? If you are a national operator, how did competition affect your behaviour?

Andrea GUIRICIN

Italo was the first high-speed rail system in Europe to make the move to open access, on 28 April 2012. It invested 1 billion euros towards enabling this transition over the four years prior to the actual opening, and thus needed seven years to achieve profitability.

It was able to improve its access charges, but most importantly, saw major improvements on the operational end. In 2019, it recorded 20 million passengers and Ð700 000 million in revenues. Ticket prices fell by 35%, while demand doubled in a few years – all within a context of rising GDP.

Thanks to competition, traffic shifted from aviation to rail, and long-planned improvements to rail infrastructures become possible. Truly, this was a win-win operation: passengers enjoyed greater frequency and quality, while the rail system itself improved to the point that it was able to enter new markets, thus benefiting Italy as a nation. At the highest level, rail itself gained, as a mode of transport.

This was a learning-by-doing experience, for all: through mistakes, discussion, joint problem-solving, etc.

Alix LECADRE

Based on its operational experience in Germany, Sweden and today France, Transdev deems that staffing considerations are of central importance to all new entrants: the success of opening up to competition requires sufficient train staff on the day services begin.

The regulatory framework in our three environments differs:

- Employees of the Swedish incumbent operator have no specific status. Their contracts fall under private law. The collective agreement signed between the trade unions and employers in the railway sector therefore acts as a framework for the whole sector.

- The new operator is under no obligation to take on the employees of the previous operator, unless otherwise specified by the public authorities. Should it choose to do so, it must apply the same terms as that previous operator.

- In Germany, railway staff are governed by a collective agreement, renegotiated every two years. Rail transport companies taking up responsibilities on a line are required to take over the staff of the previous operator. The staff has no obligation to transfer and can remain in his former company, working on another line.

- In France, the situation is more complicated as the opening move is more recent. Volunteers are sought amongst the SNCF staff assigned to the operation of regional trains. Should their numbers prove insufficient, employees are designated by their organisation. Where more than 50% assigned to a line, they must accept this new assignment. Below that threshold, they may refuse the transfer and request redeployment within SNCF.

In all three cases, the new entrant company must ensure it has enough qualified staff to operate services. The crisis on the Swedish, German and French labour markets encourage new operators to take over the existing employees, so as to be sure they can count on a minimum level of qualification, after which they can train workers to deliver services in line with their cultural models. In Germany, recruitment and training tend to be industrialised, especially for the driver population.

The lack of qualified staff in all three countries calls for greater attention to the conditions under which staff are taken on. As a matter of fact, there cannot be any social dumping in such a labour market condition and operators need to be socially attractive to be able to have enough staff to operate their new contracts.

Roberto RINAUDO

Trenitalia decided to join forces with SNCF a few years ago to launch high-speed trains between France and Italy, with the aim of developing business beyond all its international borders and supporting by a complementary role to the incumbent, in developing the rail market in France.

As successful as it has been, the project was a very complicated project, due to two main types of constraints:

- technical constraints, due to the different infrastructures, security standards, signalling tools, and certification rules between countries.

- Economic constraints, resulting from track access charges, where fares in euro/kilometre are several times higher in France compared to Italy and other European countries.

Two main factors gave enormous benefits, to all the rail sector in Italy: the arrival of a new competitor, which stimulated the engagement of rail operators, including the incumbent, to improve services and prices; the 38% reduction of track access charges, which enabled more trains, more offers, more passengers and greater price drops.

However, despite a great success of our business and very positive feedback of our customers, in 2023 all rail companies in France are hardly hit by energy crisis. In fact, energy prices have increased by more than 800% compared to the beginning of 2022. This could not be charged to consumers if we want to develop the rail business. As a result, it is a great problem that compromises the business model of all rail companies because of the unbearable level of energy costs. So far, there are not possibilities to obtain some grants by the government in order to drop these costs. Maybe there will be the opportunity to close the contract of energy supply with the infrastructure manager, in order to find new suppliers who could enable rail companies to pay the energy cheaper.

Other difficulties concern the language barrier among infrastructure managers which entail difficulties to coordinate themselves above all for cross border services; and the specificity of skills in the rail sector, which generates shortages of staff in this sector. Therefore, the wish is to create training schools, in order to encourage young people to enter this market and avoid boosting wages excessively in the rail sector.

In conclusion as already lived in Italy, the opening up of the market is a great opportunity in terms of greater quality and more volumes of rail services, cheaper prices and better performances of all rail players. It encourages the acceleration of the green transition thanks to more and more travellers who prefer trains to polluting means of transportation.

Caroline CHABROL

Opening a sector beyond its initial borders is an exciting endeavour, but one also fraught with constraints and difficulties, especially in rail, which is characterised by fixed costs and large assets that must be able to operate profitably.

SNCF required the internal demonstration that this venture beyond its borders would be both profitable and successful, demanding: visibility, predictability and a long-term business plan.

In this successful operation, SNCF Voyageurs faced multiple constraints:

- above all, technical constraints, e.g., the unpredictable difficulties on the Madrid-Valencia route, which required sizeable investments to adapt and homologate new software, and to mobilise the related know-how in-house, and in some cases, develop its own technology from scratch;

- the sector's limited maturity, at a time when liberalisation was still ongoing at the national level;

- the lack of information (inventory, live feeds, statuses).

It is important to give the opportunity for visibility and predictability to all operators as, in this context, public operators cannot lose sight of profitability. Macroeconomics as a whole should be regarded as very important, and public policies should be more oriented to help the entire sector.

Stefan REMMERT

The German railway market was completely opened to competition 29 years ago today, on the rail freight market, long-distance passenger market and regional passenger market (PSO).

The challenges were multiple: Two of them required a complete change of mindsets:

- the need to integrate two very different railways, respectively those of East and West Germany, stemming from a completely different political and economic environment, but both run as administrations and in a monopolistic structure;

- the transformation of the two railways into a private law company.

Together with strong competitive pressure right from the outset the results of this transformation have been very positive: between 1994 to 2019 (before the Covid pandemic), rail passenger kilometres increased by approximately 56% (thereof PSO services by 89% and long-distance services by 28%); rail freight transport volumes in ton kilometres increased in the same time by 83%; the market share of non-DB operating companies on the network grew to 37% in 2021.

Moreover, the public burden was significantly reduced, thus achieving one of the main objectives of the rail reform in a period not only with a railway sector, but also the German economy in general in deep crisis.

A huge backlog in rail infrastructure investments is still being absorbed today and remains a major challenge. To compensate losses of market shares to rail competitors and to become financially more independent, as expected by the Government, DB group had to expand its' activities abroad in the first decade of the 20th century and realize important acquisitions.

However, over the years and decades, infrastructure has not kept pace with the rise of operational performance. Thus, paradoxically, the success of the rail reform in combination with a significant and long-lasting backlog in infrastructure investments has become a severe problem in terms of capacity and quality.

The most recent phase has been shaped by the recognition of the key role of rail in addressing the existential challenge society sees today in climate change. Necessary decisions on heavy investments in the rail system including its digitalization finally have been taken. Very intense but necessary construction and modernization works are underway to improve punctuality and quality and create high performance corridors. A new approach of organizing and bundling construction works will guarantee rail corridors being free of larger works for up to ten years.

The point of view of regulators

Patricia PERENNES

What barriers to entry have you identified on your national markets? What was your main focus to help the opening of the market, given all the benefits just listed?

Karsten OTTE

The Federal Regulatory Agency is in charge of energy, postal services, rail and telecommunications. It is not all-powerful, however. At most, it can attempt to give guardrails for the market, through the three benchmarks on which it is empowered: transparency, non-discrimination and adequacy.

Basic statements shall be given as to access to infrastructure and markets, about access to essential infrastructure and about data.

Germany opened the market on all transport services at an early stage, and did not follow the restrictive path of economic equilibrium tests. As a result, apart from long-distance passenger transport, it has a lively competitive landscape, both in terms of competition for train paths and for markets.

Today, Germany presently counts 630 authorised railway undertakings and 346 active railway undertakings, with competitive shares of 58% in freight trains and approximately 33% in local passenger traffic – but only 4-5% on long-distance passenger traffic. As to the modal split, it stands at 20% for freight transport and 6% for passenger transport.

But market opening alone is not enough. The technically incompatibilities between infrastructures in Europe must be addressed, as they increase investment costs and worsen competitive opportunities for the rail sector. Good investment requires comparable technical infrastructures. EU law especially provides for these differences, as we have grandfathering rights to technical materials that have been approved officially. Looking at the long life cycle of wagons and rolling stock, by this way a systematic problem arises.

In addition, new entrants are not always granted their requested paths, necessary for viable business. This is the result of making train path allocation on individual requests. Barriers to access now exist less on the side of access rules and more on that of capacity problems caused by congestion, decommissioning and construction sites. Consequently, new approaches such as TTR and long-term pre-construction have emerged, with the idea of a hierarchical capacity management, intended to enable more efficient use of infrastructure through greater forward-planning, but combined with longlasting framework agreements entail the risk of grandfathering of access right and thus make market access again more difficult.

Presently, difficulties to entry in long-distance traffic are seen in the uncertainty of securing track access on profitable paths, in high train access charges and in the lack of rolling stock combined with high investment costs.

There are attempts to ease the situation on charges, e.g. by the introduction of point-to-point only services on so-called low-cost segments, by discounts on night trains and by reductions on freight chains. The regulator strives to contribute so that these models are workable. Also, the level of government subsidies for infrastructure costs is influencing access charges. However, there is limited scope for regulating charges downward in favour of the railway undertakings, as far too little money has been spent on infrastructure in the past. In the end, criticism of user financing tends to point to: excessively high user charges, excessively high mark-ups, a too high market rate of return. The more standardised an “incentive regulation” of track access charges is, with multiple adjustment possibilities to lift track access ceilings, the less there is individual incentivisation of infrastructure managers, but may prevent an excessive rise only.

Access to service facilities suffers from the fact that the use of service facilities often is bound by long-term contracts and thus immobilises capacity for protracted periods of time.

Lastly, whether access data, passenger data or the data administration platforms are still not subject to regulation and will be disputed in the near future, both at the national and European level.

Ivan SANTOS

In approaching the opening of the markets, we strived to balance competition on the network, ensuring responsive regulation on access conditions, while still maximising the profitability of investment-intensive infrastructures.

The market was opened simultaneously on all the networks. The infrastructure manager offered framework capacity on three corridors, and six players expressed interest. After initially establishing no clear prioritisation criteria and allowing them to vie for any of the corridors that interested them, the degree of use of the network was singled out as the reference priority criterion. Considering a period of ten years in case of having to prioritise was aimed to reduce the advantage of already having rolling stock to enter in the market.

We have witnessed real changes on the market, with an important increase in the demand a reduction in prices and innovative commercial policy such as rates designed to incentivise the use of rail by families.

The challenge today lies in managing the huge increase in the supply, as the number of services per day is set to increase from 52 to over 90.

The framework agreements have proven to provide guarantees to new entrants on the availability of capacity for a given period; however, they should foresee flexibility clauses to accommodate changes in de market during their duration as well as unexpected events such as Covid and Ukrainian situations.

Olivier SALESSE

ART is a multimodal transport regulator, in charge of regulating the railway system, the RATP (metros in Paris), France's largest airport, highways and bus traffic. With regards to the railway sector, the regulation of the railway sector by ART is mainly focused on the regulation of the wholesale market, i.e. access to the railway infrastructure and service facilities, and have been entrusted with responsibility for observing the market for proper functioning, and providing recommendations and studies where we see fit. Among its core mission, ART issues binding opinions regarding access tariffs for infrastructures and service facilities, and non-binding opinions on the technical aspects of the reference offers (Network statement, etc.) with regards to the access to the same. Public Transport Authorities have also the possibility to ask the ART to settle disputes relating to data transmissions from railways undertakings that operate PSO services in the context of the preparation of calls for tenders.

France is one of the last european countries to open up its passenger services markets, and can thus learn from its colleagues. While each country has its own model, the issue of barriers to entry is the same everywhere and offers a valuable pool of knowledge across borders. Specifically in the context of commercial services that operate under open access competition regime, the barriers to exit, too, deserve to be noted, given the very high investments required at the outset of operations and incompatibility of rolling stock across borders.

The types of barriers can be in particular financial. The French infrastructure manager, SNCF Réseau, charges among the higher track access charges in Europe. In order to be bearable for the users of the railway infrastructure, the track access charges structure has to be properly designed and sufficiently refined to reflect correctly the different market segments of the retail market with their respective capacity to bear different levels of mark-ups in addition to the coverage of the marginal cost. The track access charges structure shall not exclude services which could only pay the marginal cost of using the railway infrastructure. For instance, regarding passengers high speed services, the track access charges structure is based on the principles of the Ramsey rule, with aim of enabling optimal and balanced use of infrastructures in France. In the context of its role to promote the developement of competition, ART has published a consultation on framework agreements with regards to railway network capacities, which appears to be a useful tool to provide visibility for new entrants and for investors to invest in rolling stock.

Grahame HORGAN

As we have heard, for a variety of reasons, essentially political, the UK's programme of reform has been slowed and the ultimate shape of the regime remains uncertain. From the consultation process as well as the original plans set out in the White Paper in May 2021, certain indications have nonetheless emerged, as to the intended for the regime and the role of the ORR in that.

There has already been a move from franchise to passenger service contracts as the vehicle for providing passenger services on a concession basis. The major architectural change to the regime architecture lies in the fact that for the first time in many years government intention is to bring together infrastructure and trains under the guiding mind of Great British Railways.

Indications are that the organisation for which I work will continue to be a transparent and independent regulator for the whole of the rail sector. The new entity that brings together track and train will operate under license, which the regulator will be able to oversee, and produce a business plan to which it will be held account by the regulator.

to consider the potential challenges and possible unintended consequences for competition, including for competition between future open access operators.

We are currently also the body that deals with applications for track access in general, and approval of open access operators. We are, as our name suggests the regulator for road as well as rail.

In addition to our regulatory functions, we have powers to enforce competition law with regard to services related to rail which we hold concurrently with the UK's Competition and Markets Authority. It is likely that we will continue to be the sectoral competition regulator, with powers to enforce national competition law broadly similar to Articles 101 and 102 of the Treaty and powers to conduct market studies.

As to open access, in the in the UK, we have only a very small, albeit growing proportion of passenger service performed by open access operators. The 1-2%% approximately of passenger service delivered by open access operators punches very significantly above its weight and provides an important competitive constraint. It is noteworthy that during the Covid period, while all the other passenger services operators were essentially taxpayer funded, the open access were not. Performance under covid despite this was comparable to that of other operators and bounce-back from Covid also looks comparable.

We have granted one application for open access in the last six months, with two more pending. As we enter a period of greater clarity on the new arrangements, it is the intention that open access will remain. It is noteworthy, however, that a significant part of the aspiration around reform is increased cooperation and collaboration. This has potentially significant implications for competition: to achieve the benefits of cooperation, there will likely be pressure for train operating companies to share information with one another and collaborate with one another on areas of potentially key importance to competition (e.g., fare-setting, timetables). While doing so may bring some benefits, it will also be important

Luisa PERROTTI

I wish to underline the wonderful opportunity, provided today, to combine an academic understanding of the opening to competition of rail passengers' services in Europe with more operational considerations by regulators and the industry.

Taking up the request by our moderator to briefly introduce the Italian transport regulation authority, ART has been a multi-industry regulator from the outset, with responsibility for ex ante regulation of access to infrastructure, services and passengers' rights in all dimensions of transport (air, land, sea).

In Italy the opening to competition of rail passenger services was underpinned by at least three enabling factors. First, significant investment was made in the network. Secondly, the necessary legislative framework was put in place , providing for outright open access in the long-haul market, including high-speed. Thirdly, the Authority was established to regulate, among others, rail transport and ensure that the opening of the market proceeded in an equitable and non-discriminatory manner.

Liberalisation is, indeed, a process; as such, it requires enduring action to sustain its effects. To this end regulation is currently in place to promote efficiency, transparency in capacity allocation, regulatory accounting and accounting separation, the independence of the infrastructure manager, better quality of services and the protection of users' rights.

Open, participatory processes have been instituted, in which all the parties are involved, making it possible, among others, to overcome information asymmetries. In rail, regulation by an independent authority has replaced regulation by the central administration and is equally subject to judiciary scrutiny. Litigation in court follows the same rules and procedures that apply to other public administrations.

Benefits from the opening of markets are identifiable in high-speed services and include: greater freedom of choice for passengers with a higher number of services per route and per day; over time, a reduction of average prices; better quality of services and of passenger caring policies. Less apparent but not less important are the benefits for the IM, among others, in terms of controlling costs and better capacity management; railway undertakings, too, in their turn, benefit therefrom.

More generally, the opening of competition has induced behavioural changes and the levelling-up of demand and expectations, which could overflow to other types of services upon the integration of routes and services and with other transport modes, the improvement of quality and enhanced protection of passengers' rights and the transformation of stations into multimodal hubs. Not least, the rapid growth of data management as a new industry per se triggers and steers change.

Against this background, looking forward, consideration may be given to the rationale for awarding exclusive rights in the provision of PSOs.

Questions from the floor

Elisabetta GAROFALO, European Commission

The regulatory framework is not a panacea. We cannot force operators to invest in the infrastructure, a pre-condition for creating capacity. Likewise, on the technical barriers, there is no European standardization.

Juan José MONTERO PASCUAL

National specificities significantly change outcomes.

Karsten OTTE

We can but wait to see how the future unfolds.

Litigation on the opening to competition

Chair : Antoine LOUVARIS | Professor of Law, Université Paris Dauphine-PSL

"*No regulation without litigation!*" In the end, the judge can appear a meta-regulator, without prejudice to the intervention of non-judicial public institutions, regulatory agencies, or the European Commission.

National litigation : selected examples

Tony PROSSER | Professor of Law, University of Bristol, United-Kingdom

In the UK, the heading "litigation" appears strange: relatively few regulatory disputes actually reach the courts, which are a last resort, expensive, and without strong jurisprudence on public-law contracts. Franchises, for instance, have been treated as private law contracts, with their own internal arrangements for disputes.

There exists a role for the review of administrative action of the regulators and indeed of the award of franchises, the most important example being the 2012 awarding of a franchise for the very important Intercity West Coastline line, in a manner clearly biased against the operator. Threats of judicial review were voiced, action was started and the award was withdrawn: thus began the collapse of the franchising process.

This presentation will deal instead with other institutional mechanisms relevant to dispute handling.

The courts and the Competition authorities

Some of the institutions likely to be involved include:

- The Competition and Markets Authority, the predecessor of which notably undertook a major review of the rolling stock leasing markets (2009) and produced a report recommending a major increase in Open Access (2016) and thus replace franchising on the main lines,

- The ORR, which holds concurrent powers to enforce competition law, has proved highly valuable, in particular through the market reviews which it takes, but also the decisions it takes on open access using the non-abstractive and equilibrium tests. Interestingly, insofar as it will continue to be appeal body on track access and charging if reforms implemented, its existence sustains the tension between the franchising model and increased competition.

Dispute resolution between operators

Fragmentation and complexity create the need for a range of different types of dispute resolution mechanisms between the players in the system. These mechanisms have not worked well to date, while the absence of a body for coordinating them was heavily criticized by William/Shapps as "a costly, inflexible spider's web of often adversarial relationships, penalties and disconnected incentives", resulting in a "focus on blame rather than achieving solutions".

One outcome is train delay attribution under Schedules 4 and 8 of the Railways Act. Four hundred full-time staff had to be mobilised to address the disputes raised on 40% of delays, escalations of continuing disputes and many intricacies threaded through the hundreds of pages of guidelines. While such an arrangement may create incentivization, it has in reality focused attention on blame, limited cooperation and generated high opportunity costs.

ORR scrutiny of infrastructure spending

Notwithstanding, the current system does have its strengths: the powers granted to the ORR emphasise the central role of regulation in opening up financial decisions to outside scrutiny, in this instance, the expenditure requirements of the operator, earlier met partly through access charges, but mainly now through a direct grant from the Treasury. This role extends well beyond ensuring that charges are not discriminatory, into the very economy and efficiency of network operators in their action.

The scope of the review, conducted every five years, is defined by the Government, in its "high level output specification", along with a statement of funds available, which specifies the amount which the Treasury is prepared to provide to the infrastructure operator. The role of the ORR will be to assess what can be done with that money to meet those objectives.

This system should, in principle, lead to stability for future planning. In addition, it gives the regulator to opportunity to use a highly open and participatory process to develop collaborative approach with those involved, as well as avoid adversary forms of dispute resolution.

Recommendations on improvements to the infrastructure system were removed from the remit of the ORR and entrusted to the Government and this has been much less transparent.

Lessons

When rail was privatised, it was assumed to be a declining industry that needed to be made more efficient by economic incentives, fragmentation and competition for the market. That fragmentation has instead led to highly-complex dispute resolution and made cooperation difficult. While it is unknown how these problems will be resolved in the future, the continuing central role of ORR offers encouragement in light of the value of independent resolution of disputes.

Paola CHIRULLI | Professor of Law, University of Rome, Italy

The context

The rail infrastructure and management system is based on a national publicly owned company, with small private operators active at the local level, including the increasingly-important companies that manage station spaces.

Competition operates differently at three levels:

- the national level, which includes high-speed rail, particularly important in Italy, where long-distance commutes between major cities are frequent;

- the regional level, where we mostly have competition *for* the market;

- and the already long-liberalised freight sector;

In the passenger rail sector, competition is evolving: while large market share remains in the hands of the incumbent, Italo is now a challenging competitor on the high-speed sector.

The Transport regulatory authority and the regulatory measures

The regulatory authority has been entrusted with a broad remit and a variable geometry set-up, being competent for all means of transport but maintaining in each transport sector a different relationship with the central administration.

In the rail sector, the authority quickly took on a key role, due to the concentration of powers on a single regulatory body. Consequently, since its institution in 2014, it has been very active, with a broad range of powers: regulatory, prescriptive, investigative, supervisory, complaint handling, inhibitory, provisional, and sanctioning. It furthermore cooperates with other authorities, such as the National Competition Authority (AGCM) and the Anticorruption Authority (ANAC).

The most important aspects of its action are: ensuring the independence of the infrastructure manager, granting access to the infrastructure, defining criteria for the charging schemes, supervising the network statement, and setting the criteria for the award of regional rail services.

The role of litigation in the Italian rail landscape

Litigation plays a key part in the Italian landscape: firstly, because threats are not enough; in addition, court proceedings are the main means for challenging unsatisfying administrative decisions.

Litigation makes it possible to: clarify open-textured legal provisions; balance out the “triangle of regulation”, a duty all the more important with the arrival of new competitors; ensure judicial scrutiny of regulatory public powers.

The parties to litigation are the infrastructure managers, the service operators and the authorities. Disputes arise most often in order to question the exercise or non-exercise of regulatory powers, or the schemes or charges defined by the authorities.

Jurisdiction has been granted to the administrative regional court based in Turin (where the Authority is based as well). It operates de *facto* as a specialised court, which ensures greater quality and consistency to judgments.

Litigation can deal with procedural or substantive points. Initially narrow in focus (details of infrastructures or charging schemes), its scope has extended to the access to areas in stations, lounges, or advertisements. Recurring themes now include: conditions of access to the infrastructure, fairness of the network statement, charging schemes, access to station areas and other essential facilities, perimeter of regulation and regulatory powers, and proportionality of fines.

Independent experts may be heard during judicial proceedings, but the courts sometimes delve into complex economic assessment, for instance when they scrutinise the methodological correctness of the models used to determine costs or charges.

The contribution of litigation

Litigation is of great importance, for multiple reasons:

- It clarifies the regulatory perimeter and, especially when settled by commitments, is the result of a constructive, proactive dialogue.

- It creates a more level playing field for railway undertakings.

- It serves as a quasi-specialised court and benefits from fast-track judicial proceedings.

- It enables procedural and substantive scrutiny of regulatory powers.

Regulation by litigation (judicial review by the court and complaint handling by the Rail Authority) implies the existence of a lively, healthy process and has helped improve the overall quality of regulation. Despite what some have called the “pathological length” of some regulatory decisions, which adds to the complexity of litigation, the system is on the whole effective.

Christian SCHNEIDER | Partner, BPV Hügel, Germany and Austria

Competent regulatory body

Austria is endowed with two closely interrelated regulatory bodies:

- Schienen Control Kommission (SCK), an independent public body, the bylaws of which were designed to ensure it is free of conflicts of interest, as well as sheltered from instructions by other Ministries;

- and Schienen Control GmbH (SCG), a private limited company, the 100% shareholder of which is the Republic of Austria.

The former is responsible for all regulatory tasks, while the latter fulfils all execution for the SCK, as well as reporting requirements foreseen by national law and the Directive, and serving as a conciliation board with customers.

Regrettably, with this structure, the independence criteria under Art 55 are not fully satisfied.

In Germany, meanwhile, regulation is the responsibility of the Bundesnetzagentur (BNetzA), located in Bonn and competent for several regulated sectors. Decisions are generally taken by Ruling Chambers with three members. The degree to which it is actually independent is unclear.

Powers of the regulatory body

In Austria, SCK is vested with all powers to supervise competition regarding discrimination, distortion of competition and further adverse developments on the market. In addition to this general clause, written into the Austrian Railway Act, further ex officio powers are entrusted to it, in particular in the event of disputes on access to infrastructure and charges.

Important competences of the Austrian regulator are access conditions and the declaration of access conditions null-and-void. In the case of denial of access, the regulator's decision substitutes for the agreement otherwise concluded.

In Germany, the body's powers are quite similar: BNetzA may, ex officio, take all necessary measures in order to correct or prevent violations of the EisbRegG and directly applicable EU law. In contrast, Germany is characterised by much more ex ante regulation, e.g. a prior authorisation requirement for access charges, the EU conformity of which can be disputed.

Judicial review

In Austria, decisions by SCK can be appealed before BVwG (federal administrative court), but the jurisdiction of the court is limited where the discretionary powers of the regulatory authority come into play. Complaints have no suspensive effect, though such effect may be granted by the court. Decisions of the BVwG may be appealed before the Supreme Administrative Court and the Constitutional Court.

In Germany, decisions by BNetzA can be appealed before Köln Administrative Court or, in ascending order, the Münster Superior Administrative Court, the Federal Administrative Court and Federal Constitutional Court.

Practical cases

Most of the cases subject to judicial review in Austria concern discrimination against WestBahn by ÖBB infrastructure (e.g., blatantly excessive rental rates for point of sale space in stations, or inequitable notification requirements for the deployment of personnel in stations). It is common for decisions by the regulatory authority and court to be extremely lengthy.

In Germany, case law is also manyfold. Where general terms and conditions are subject to complaints and review, it appears to be common practice that all affected operators are called as party into the proceedings, as Art. 56 para. 9 of the Directive seems to require.

Of note is a recent German case which raised the question as to whether decisions by the regulatory body exclude intervention by the competition authority. On the merits of this case, the ECJ ruled it was the duty of the latter to at least take the former's decision into account.

Juan José MONTERO PASCUAL | Professor of Law, UNED/University of Madrid, Spain

Since 2013, Spain has been engaged in a life-size experiment, having merged all its regulatory bodies into a single entity, thus encompassing: railways, airports, media and energy. Furthermore, this body is the competition authority, hence its being referred to as the "super regulator".

Four broad types of litigation cases have been identified, namely those pertaining to:

- access to infrastructure, the main component of the regulatory framework. In Spain, the regulator demanded ex ante control of the network statement, a demand which the infrastructure manager strongly refused, taking some decisions to court.

- freight traffic. Here, the target is not the infrastructure manager, but the incumbent. The four outstanding cases today hinge on: the provision under Spanish law that RenFe must have autonomous subsidiaries responsible for providing access to rolling stock and the related facilities, according to non-discriminatory terms; the regulator's legal basis for intervening on the provision of drivers, by virtue of a clause to "preserve pluralism in supply".

Access of infrastructures

There has been no litigation, or legal claim in this respect: On the competitive allocation of capacity, three of the six applicants for capacity were satisfied and the other three raised no disputes. Likewise, on track access, no players have lodged any complaints.

Where an active manager of infrastructure is in place, pre-arranging the landscape, it is essential to have an active, involved regulator, as is the case in Spain. When the system has been effectively pre-planned, there is little reason for legislation.

In contrast, Spain does see complaints from competitors, as is only healthy in a landscape of real competition. Today, with electricity prices becoming a more relevant consideration for viability of operations than track access charges, there is extensive and effective dialogue between the players and the regulatory authority.

Ticketing and data

In this arena, the questions arising pertain to whether newcomers should have access to information from infrastructure managers and railway undertakings, in the name of competition and multi-modality.

Is there truly no regulation without litigation? Perhaps Spain has focused for the time being on the powers of the regulator and less on the substance. It is hoped that the existing framework, which allows solutions to be developed before problems explode, will continue to be strong enough to stand up to reality.

Élisabeth COTTE | Director of Legal affairs, ART, France

En France, le contentieux de l'ouverture à la concurrence est assez nourri. Il recouvre toutes les problématiques de barrières à l'entrée : financières, techniques et informationnelles.

Il existe à la fois un contentieux devant l'Autorité, qui contribue à la levée des barrières à l'entrée, et un contentieux des décisions de l'Autorité, devant le Conseil d'État ou la Cour d'appel de Paris (pour les règlements de différends), qui contribue à clarifier le droit. Dans le premier cas, l'Autorité a un pouvoir quasi-réglementaire, en ce sens qu'elle peut prononcer, en matière d'accès, des injonctions à caractère contraignant, ayant vocation à bénéficier à l'ensemble du secteur. Elle a à traiter de deux grands types de contentieux : celui de l'accès aux infrastructures essentielles et celui de l'accès aux données.

Le contentieux de l'accès aux infrastructures essentielles

Ce contentieux concerne aussi bien l'accès tarifaire, que l'accès technique et opérationnel.

L'Autorité a un pouvoir d'avis conforme sur les tarifs d'accès à l'infrastructure ferroviaire et aux installations de services. Après avis conforme, les tarifs deviennent exécutoires.

Le contentieux tarifaire

En 2019, l'Autorité avait émis un avis portant sur le document de référence de SNCF Réseau pour 2020. En l'occurrence, cet avis était favorable pour l'ensemble des redevances à l'exception de la redevance de marché applicable aux services conventionnés, pour laquelle l'Autorité avait émis un avis favorable à hauteur de +1,8 % (vs les 2,4 % voulus par SNCF Réseau).

SNCF Réseau a contesté l'avis, lequel a été annulé par le Conseil d'État le 27 novembre 2020 car il n'était pas, selon le Conseil d'Etat, motivé correctement. Toutefois, cette décision a permis trois avancées jurisprudentielles. D'une part, le Conseil d'État a reconnu à l'Autorité la capacité à émettre un avis « à hauteur de » (ce qui signifie fixer le tarif *in fine*). D'autre part, il a reconnu que l'Autorité n'était pas liée par la trajectoire financière du contrat de performance liant SNCF Réseau à l'État. Enfin, il a précisé les critères d'analyse de la soutenabilité de la redevance marché : la majoration tarifaire ne doit pas conduire les autorités organisatrices de transport à prendre des mesures susceptibles d'affecter l'utilisation de l'infrastructure. Par la suite, l'Autorité a rendu le même avis favorable à hauteur de +1,8 %, mais en le motivant différemment.

Un autre exemple concerne le document de référence des gares (tarif d'accès aux gares). Le 11 février 2021, l'Autorité a rendu une décision d'incompétence à l'encontre de la région Nouvelle Aquitaine qui l'avait saisie d'une demande de règlement de différend portant sur le tarif pour 2020. De fait, l'Autorité a considéré qu'ayant un pouvoir d'approbation *ex ante* du tarif, elle ne pouvait pas le remettre en cause *ex post* à travers un règlement de différend. La Cour d'appel lui a donné raison : l'Autorité ne peut pas intervenir à la fois *ex ante* et *ex post* sur un même tarif.

Le contentieux technique et opérationnel

Le 28 juillet 2022, l'Autorité a adopté une décision portant règlement des différends opposant quatre entreprises ferroviaires de fret à SNCF Réseau en ce qui concerne le processus capacitaire et les indemnisations y afférentes. Les principaux griefs des entreprises de fret portaient sur un manque de transparence, d'efficacité et d'incitation à la performance du processus capacitaire, et des principes et des procédures d'indemnisation inéquitables. L'Autorité a fait droit à deux tiers des demandes, et prononcé des injonctions et des recommandations dont elle s'assurera du suivi à travers plusieurs vecteurs – notamment l'avis simple rendu tous les ans sur le document de référence de SNCF Réseau. À travers les injonctions prononcées, l'Autorité a précisé des conditions d'accès équitables, en exerçant un pouvoir quasi réglementaire. De fait, le non-respect des injonctions pourra donner lieu à l'engagement d'une procédure de sanction.

Par ailleurs, le 20 octobre 2022, l'Autorité s'est prononcée dans le cadre d'une procédure en manquement ouverte par cinq entreprises ferroviaires de fret à l'encontre de SNCF Réseau pour méconnaissance de décisions de l'Autorité rendues en 2013 en matière d'accès à l'infrastructure ferroviaire. Seules trois des quatre injonctions prononcées ayant été satisfaites, la Commission des sanctions a été saisie en ce qui concerne la quatrième (qui portait sur la transparence des motifs de refus d'attribution des sillons).

Discussion

Patricia PERENNES

Is ticketing in the scope of most regulators? I was informed that some new players do not want to be on the same platform as the incumbents in this respect: what has your experience been in this regard?

Paola CHIRULLI

The Italian Competition Authority recently dealt with a case on ticketing, where Trenitalia was charged with the abuse of dominant position, since it could sell on its platform both high-speed and regional tickets, with an exclusionary effect on Italo, the high-speed operator, who was prevented from selling regional transport tickets, with a consequent loss of clients. The procedure is going to be closed without a finding of infringement, since Trenitalia proposed commitments which should soon be accepted by the Competion Authority.

Juan José MONTERO PASCUAL

The distinction needs to be made between two scenarios: traditional and digitalised. In the past ticketing was about level playing field for competitors The existence of platforms today is a game changer, creating a vertical debate between digital platforms and service providers.

Severin GRANDCOLAS, European Commission

Regulatory action will be taken by the Commission in the near future, its aim being to enable simple solutions and non-discriminatory conditions that ultimately boost the market. This action will extend beyond the scope of competition alone.

Andrea GIURICIN

Italo built its system very intelligently, combining pricing mechanisms, high-speed rail and buses, and understandably fought to secure its territory. In contrast to other similar players in other countries, it has not yet released an insurance product enabling passengers to travel by bus, for instance, when they have not been able to make their train. The market is evolving.

Luisa PERROTTI

These discussions have brought to the fore the very diverse structures of litigation systems across Europe, particularly the scope of judicial review. Where the judge comes close to replicating the work performed by the independent regulator, there is little room for real independence on the part of the latter, and more broadly, little scope for harmonisation of EU principles.

Antoine LOUVARIS

French's Council of State takes a liberal view of the extent of the competence of the regulator. However, its scrutiny is rather precise.

What is the percentage of cases pertaining to general law of competition and the special law of regulation?

Karsten OTTE

Competition law is a response to imbalance, including perhaps damages. Regulation law endeavours to bring order to the market, to prevent unbalances. Where the latter have been identified, the regulator tries to do away with them. In that, regulation law is a special form of competition law. One could imagine a time when there is no longer space for the latter to be raised.

Elisabetta GAROFALO

This is a topical issue, with the line between the powers of the courts versus the regulatory bodies, as demonstrated by cases such as CTL Logistics GmbH v DB Netz AG and DB Station & Service AG v ODEG Ostdeutsche Eisenbahn GmbH.

Severin GRANDCOLAS

The treaty addresses transport on the one hand and infringement on the other.

In addition, national competition authorities are also competent, and instrumental in providing mechanisms for redress. The national judge is the first point of entry for concluding on State aid.

Christian SCHNEIDER

I agree that regulation law is a special form of competition law. I also wonder about the relationship between railway regulation and competition law from the viewpoint of the ECJ, which acknowledged a supremacy of the former, contrary to the fact that competition law is primary law. It also fulfils a catch-all function, as seen recently in the Austrian rail environment.

Élisabeth COTTE

Le droit de la régulation économique poursuit les mêmes objectifs que le droit de la concurrence et constitue en cela une application sectorielle du droit de la concurrence. L'objectif est toujours le bon fonctionnement du marché à travers la promotion de la concurrence, que ce soit *sur* le marché ou *pour* le marché, et les compétences sont complémentaires, même si les outils ne sont pas les mêmes. Le régulateur économique intervient *ex ante*. Il intervient en prévention, tandis que les autorités de la concurrence sont davantage dans la répression – sauf en matière de contrôle des concentrations.

L'autorité de régulation sectorielle compétente peut faire cesser mais ne peut pas sanctionner des pratiques passées, par exemple. En revanche, l'Autorité de la concurrence peut prendre son relais pour le faire ou pour sanctionner, plus largement, des acteurs économiques qui pourraient être à l'origine de barrières à l'entrée mais sont hors champ de compétence de l'Autorité de régulation sectorielle – les constructeurs, par exemple, sur lesquels l'autorité régulatrice n'a aucun pouvoir.

Ivan SANTOS

This question was one of the reasons for the creation of the "super authority" in Spain: prior to its advent, different decisions had been made for very similar situations, leading to inefficiencies and contradictions. Today, when complaints arrive, we evaluate the whole of the data accumulated internally to find the best response.

Antoine LOUVARIS

I would not liken regulation law to competition law, as the former was designed to serve the public good.

Karsten OTTE

Competition law results in damages, fines and private enforcement, while regulation acts on market conditions. The pre-requisites for both these types of laws to be activated are inadequacies and imbalances. It is for this reason that the jurisdiction between these two laws are unsettled. They should not define inadequacies differently.

Severin GRANDCOLAS

In some cases, for instance Articles 6 to 8 of the Recast Directive, it is difficult to see how provisions are applied by the regulator: the complementarity of action is not clear.

European litigation

Litigation before the European courts

Stéphane RODRIGUES | HDR Lecturer in Law, Paris 1 Panthéon Sorbonne University

Le rapport commandé par la Commission en 2012 pour les dix ans de la mise en œuvre de la première directive de 1991 insistait sur les barrières à la formation du marché du transport ferroviaire. Il faisait référence à seulement trois ou quatre arrêts ou conclusions d'avocat général de la Cour de justice, signe que le rôle du juge était assez limité. Dix ans après, les résultats d'une telle analyse seraient-ils les mêmes ?

À première vue, il n'y a pas eu d'explosion du contentieux, qui reste encore assez rare, et la mobilisation des règles de concurrence du traité n'est pas légion dans la jurisprudence. Toutefois, si l'on élargit le concept de concurrence à la mise en œuvre de l'objectif plus général de marché intérieur, l'interprétation est différente.

Il existe deux catégories de contentieux : celui lié à l'achèvement du marché intérieur et celui lié à l'application des règles du traité sur la concurrence.

Le contentieux lié à l'achèvement du marché intérieur

Dans son considérant n°2, la directive de 2012 met en avant le lien entre intégration (donc concurrence au sens implicite du terme) et réalisation du marché intérieur. Or il existe deux approches complémentaires pour parachever le marché intérieur : l'intégration dite négative (qui pose des interdictions, telle que ne pas abuser de sa position dominante, par exemple) et l'intégration positive (poser les règles d'harmonisation des législations nationales pour éviter les barrières réglementaires à l'entrée du marché).

Il n'y a pas de jurisprudence significative appliquant directement les règles d'interdiction par application du principe de libre circulation dans le domaine du transport de voyageurs.

Reste la question de l'interprétation des textes, notamment la directive de 2012.

Le rôle clé du principe de libre circulation

La Cour met en avant plusieurs considérants de la directive (notamment les considérants n°3, 7, 8 et 26) pour faire le lien entre efficacité, intégration dans un marché concurrentiel et stimulation d'une concurrence loyale.

S'agissant du champ d'application du marché de l'infrastructure ferroviaire, par exemple, la Cour considère que les quais de voyageurs relèvent des infrastructures. Elle n'a pas voulu aller aussi loin concernant l'accès non discriminant aux services, en considérant en 2021 que seuls sont concernés les exploitants des installations de services – pas les propriétaires.

Quant à la question des redevances d'infrastructures et de services, avec la notion de compétitivité optimale de segment du marché, la Cour a jugé que compétitivité et concurrence ne doivent pas être confondues. Ainsi, l'objectif de compétitivité demeure, y compris sur des lignes sous contrat de service public.

L'importance des conditions d'une régulation sectorielle adéquate

L'interprétation au cas par cas de certaines notions de la directive de 2012 ne suffit pas à permettre une totale ouverture à la concurrence. Encore faut-il qu'existent aussi les conditions d'une régulation sectorielle efficace.

S'agissant de la régulation des contrats de service public, la Cour a confirmé par un arrêt de septembre 2022, relatif au secteur du transport par bus mais applicable par analogie au secteur ferroviaire de passagers, que des obligations de service public peuvent aussi être imposées par voie de règle générale, en dehors d'un cadre contractuel et d'un mode conventionnel, mais avec des compensations.

Concernant l'indépendance du régulateur, la Cour a rappelé dans une décision de juin 2018 qu'il n'existe pas de régulation sectorielle effective sans régulateur indépendant. Le cas échéant, elle n'hésite d'ailleurs pas à aller très loin dans la vérification de l'indépendance, en passant au crible le budget, la mise à disposition de personnel ou les liens avec les opérateurs.

Le contentieux lié à l'application des règles du traité sur la concurrence

Alfredos THEODORAKOPOULOS | Legal Assistant, Court of Justice of the European Union

Competition law related litigation at EU level in the passenger railway sector is rather limited when compared to national litigation; and/or actions brought before national/EU (antitrust) regulatory authorities.

Such litigation has mainly focused on the interplay between sector-specific railway regulation and competition law as well as certain instances of anti-competitive conducts investigated by the European Commission (and national regulatory agencies). Another angle of competition law regulated litigation at EU level relates to support measures taken by EU governments in favour of domestic railway operators – theses interventions have been assessed by EU Courts under the relevant State aid provisions of the TFEU.

The implementation of both antitrust and State aid rules contribute to the opening up pf the passenger railway market in the EU as anti-competitive practices and unlawful measures taken by Member States have the potential to delay or block the liberalisation of the relevant railway market.

1) The interaction between competition law and sectoral regulation: implication of the CJEU judgment in DB Station & Service AG on the parallel enforcement of competition law and EU railway regulation

At the end of last year, the CJEU rendered a much-anticipated ruling in the DB Station case which raised interesting points on the interaction between competition law and the EU railway regulation. The said judgment also clarified the relationship and the hierarchy between regulators and civil courts in antitrust cases relating to regulated infrastructure sectors.

This case originated from a dispute between railway companies and the infrastructure manager (which happened to be part of the same company as Deutsche Bahn) before national courts in relation to the prices that had been set by the latter.

The Court engaged in a delicate balancing exercise between preserving the primacy of Article 102 TFEU and recognizing the need for consistent management of the railway network.

The Court recalled that Article 102 TFEU has direct effect and the logical corollary of this was that any undertaking harmed by an abuse of dominance has a right to seek redress in national courts.

It then examined the powers of the regulator and found that on the basis of Article 30(5) of Directive 2001/41, it is competent to take any measures necessary to remedy infringements of that directive, if necessary of its own motion.

Against this background, the Court made three interlinked points about the powers of the regulator, the rights of railway undertakings and the obligations of infrastructure managers:

- by using its power, the regulator not only secures compliance with the Directive but also ensures compliance with Article 102 TFEU prohibiting abuse of a dominant position.

- railway undertakings may invoke, before the regulatory body, a violation of Article 102 TFEU.

- infrastructure manager must comply with Article 102 TFEU when taking decisions on capacity allocation and setting access fees.

As regards the relationship between national courts and the regulator, the Court set a rule requiring that private litigants first seek redress with the railway regulator before going to the national courts with a claim based on EU competition law. According to the Court, such a procedure is justified by the technical constraints specific to the railway sector and the key role allocated to the regulatory body to ensure non-discriminatory access to the railway structure. The Court finally emphasised on the need for loyal cooperation between national courts and the relevant national regulatory bodies.

2) EU case law on anti-competitive practices in the railway sector: the example of the Lithuanian Railways case

Another interesting judgment illustrating the implementation of competition law in the railway sector, in particular with respect to anti-competitive unilateral conduct was recently rendered by the Court in the so-called “Lithuanian Railways” case.

The facts of this case can be summarised as follows: Lithuanian Railways – the national railway company which manages railway infrastructure and also provides rail transport services in Lithuania – concluded a commercial agreement with an oil company to provide rail transport services in Lithuania.

That agreement concerned in particular the transport of oil products from a refinery located in Lithuania close to the border with Latvia, to the Lithuanian seaport of KlaipĐda. Following a dispute between the two companies in 2008, Lithuanian Railways suspended traffic on a 19-km section between Lithuania and the border with Latvia before removing it completely.

In October 2017, the European Commission fined Lithuanian Railways EUR 28 million for abusing a dominant position on the Lithuanian freight market. According to the European Commission, such a conduct was capable of foreclosing competition on the market for the provision of rail transport services without there being an objective justification.

The General Court dismissed the appeal brought by Lithuanian Railways – this judgment (as well as the European Commission decision) were upheld, in substance, by the CJEU.

It is important to note, first, that, in line with its case law, the Court held that a regulatory obligation to grant access to infrastructure is particularly relevant for the assessment of an abusive conduct in the context of the interpretation of Article 102 TFEU.

Second, the Court provided useful clarifications on the scope of application of the “essential facilities” doctrine and in particular, the conditions laid down in its Bronner case law.

The Court held that the said case law - which imposes access obligations to the owners of so- called “essential” facilities, while allowing them to refuse access under certain conditions when objectively justified - would not be applicable in the present case.

The Court recalled that the criteria identified in the Bronner case are be applied in the event of refusal of access to infrastructure which the dominant undertaking owns and has developed by means of its own investments and reserved for the needs of its own business.

Thus, that case law did not apply to the deliberate destruction and dismantling of infrastructure to prevent market entry – such a conduct constituted an independent form of abuse which should be distinguished from the refusal to grant access to that infrastructure under the Bronner case law.

Furthermore, the Bronner criteria could not apply in this case where the infrastructure in question was financed by means not of investments specific to the dominant undertaking, but by means of public funds and that undertaking is not the owner of that infrastructure.

A dominant company managing State-owned infrastructure has a special responsibility not to allow its conduct to impair competition. In this case, this meant that Lithuanian Railways should have maintained the asset so it could be returned to service in the short term, in particular where the delay in doing so was capable of having anticompetitive effects

3) State aid considerations in EU litigation in the railway sector

State interventions, including in the form of State aid have the potential of delaying or hindering the opening up of railway markets across the EU.

A case illustrating this phenomenon was recently brought before the CJEU by way of a preliminary ruling originating from the Italian Council of State which led to the Court's judgment in case C-385/18 (*Arriva Italia Srl and others*).

The applicant in the main proceedings, *Arriva Italia*, a subsidiary of Deutsche Bahn was interested in acquiring a domestic company which was providing passenger rail transport services in the Region of Apulia and which had also been entrusted by the local authorities with the operation and maintenance of the local rail infrastructure. In this context, *Arriva Italia* contested before domestic courts a series of measures taken by the Italian government and local authorities in favour of that undertaking which had run in financial difficulties. These measures included an allocation of an amount of €70 million made to ensure the continuation of the operator's activities as well as the transfer of the entire shareholding held by the State in the capital of that undertaking to another public undertaking.

Arriva Italia argued that both measures constituted State aid and that, by failing to notify them to the Commission and by implementing them, the Italian State had infringed Article 108(3) TFEU.

The analysis by the European Commission of the fourth conditions laid down in Article 107(1) TFEU, namely the effect on competition, is particularly in the context today's discussion.

The Court observed that, in order for such a distortion to be excluded in certain circumstances, it is necessary for the statutory monopoly to exclude not only competition on the market, but also for the market, in that it precludes any potential competition in order to become the exclusive provider of the service in question. However, there were no elements, in the present case, suggesting that the Region of Apulia was required by law or regulation to award the operation of that infrastructure and those services exclusively to that undertaking, so that it would appear that it would also have been open to that Region to award that operation and those services to another provider.

It follows that the fact that a company enjoys exclusive rights and operates in a sector covered by a legal monopoly does not necessarily insulate it from State aid rules. Therefore, the allocation of State aid to a public undertaking is capable of affecting trade between Member States and distorting competition reducing the chances of undertakings established in other Member States of obtaining management of the railway infrastructure entrusted to a domestic company or providing passenger transport services on that infrastructure.

Litigation before the European Commission

Elisabetta GAROFALO | Legal officer – Unit A4 – Legal Unit, DG Transport and Mobility, European Commission

A broad overview

Infringements and enforcement of EU law are the intended to be reserved for dialogue between the Member States and European Commission.

Rather than referring to infringement, this discussion will focus on enforcement. Concretely, the EU Commission enforces the regulatory framework, namely: the market pillar, the technical pillar, and the PSO Regulation.

It does so in two main ways: ex officio and complaints. Complaints are much more efficient, as they relate to problems on the ground. They concern not so much the transposition, but the practice, indeed the sole grounds on which the PSO regulation is reviewed.

One main area is problematic: the autonomy, the power and the resources of the regulatory bodies. We are extremely attached to the latter, because they do our work. It is our responsibility to preserve their power and supply sufficient resources, as difficult as that task may be.

Autonomy, too, is a very challenging material with which to work, being shaped to a large extent by reality and cultures: in some cases, there are no national bodies with which to work, in others, the rail companies are in severe debt, and in still others, existing rules and contracts slow down national-level cooperation.

This problem exists for the market side, but also for the technical side. Nations can show little acceptance of the requirement to pay, be reluctant to apply principles, and apply priority rules, limiting access to service facilities.

In most cases, we are eventually successful in our aims, though sometimes less so, in part, due to the weak rules we have at our disposal. Liberalisation cannot, in any case, be rammed down Member States' throats. They must be willing to embrace it.

Severin GRANDCOLAS | Case Handler and Policy Officer – Unit F2 – State aid transports, DG Competition, European Commission

The types of infringement with which the Commission deals can concern: abuse of dominant position, cartel/agreement between undertakings, over-compensation, and cross-subsidization. The instruments at its disposal are competition law (that comprises antitrust/ cartel law, merger control and State aid control, which itself relies on specific legal instruments such as State aid Railway Guidelines and the PSO Regulation) and sectorial rules that govern the Single European Railway Area (notably the "Recast" Directive 2012/34).

The enforcement bodies include:

- The European Commission

- national competition authorities for Articles 101 and 102,

- national rail regulatory bodies, which ascertain compliance with sectorial rules, notably the absence of cross-subsidization, the proper financing of the infrastructure manager, conclusion of intra-group loans at market terms, etc.

- and the national judges, whose powers should not be underestimated, both for Antitrust and State aid.

Antitrust infringement

Examples of anti-competitive practises are bid-rigging and customer allocation and price fixing. and these of course can be addressed either in the Commission or at the level of national competition authorities.

Examples of abuse of dominance under Article 102 TFEU include the Lithuanian Railways' removal of its own tracks, predatory pricing (for which the Commission has published a Statement of objections concerning the Czech rail incumbent).

Most common public support measures

For incumbent companies, the most common public support measures are as follows:

- aid to infrastructure ,

- intra-Group financial flows (transparency, separation of accounts, cross-subsidisation),

- State financing (capital injection, debt relief, public guarantee, restructuring),

- monitoring of public service compensation,

- investment aid (rolling stock, service facilities, private sidings, etc)

- other operating aid (Track Access charges reduction, aid to the Single Wagon Load, aid to intermodality).

Infringement of regulation 1370/2007 and other possible State aid issue

Three main types of infringement can be distinguished in this regard:

- correct definition of PSOs (using the SNCM test – existence of users' demand, absence of market failure, selection of least-distorting measure),

- overcompensation (definition of eligible costs and revenues, level of reasonable profit),

- proper allocation of costs and revenues between PSO and open access services,).

Other State aid issues pertains to cross-subsidisation within the vertically integrated companies, unjustified investment aid, unjustified operating aid.

How to litigate: complaints

Step 1: use of the complaint form in State aid and Antitrust

This enables our staff, limited in number, to identify the most important cases and focus our resources on them.

Step 2: collection of information

For Antitrust, information is gathered from anti-trust authorities and the complainants, as well as through on-site inspection. For State aid, information is gathered through notification from Member States, complainants and market information.

Step 3: commission's preliminary assessment

Step 4: formal investigations

Less than 3% of cases reach this point, which can culminate in few negative outcomes.

Last discussion

Juan José MONTERO PASCUAL

I would have liked to hear more about the State aid guidelines, on the one hand, and the notion of excessive pricing on track access charges on the other.

Alfredos THEODORAKOPOULOS

Excessive pricing was the legal basis cited under German civil law to receive reimbursement. Article 102, in essence, requires that a price be determined legitimate in the context of the aims at hand.

Elisabetta GAROFALO

In my memory, it was not a case of track access charges, but station charges. It was more likely that the player be cited for abuse of dominant position, something no longer possible in the same manner with the new Directive.

Concluding remarks

Stéphane DE LA ROSA | Full Professor of Law, Paris-Est Créteil University, Jean Monnet Chair

Permettez-moi d'entamer ces conclusions par quelques mots en français, notamment pour remercier très sincèrement la Pr. Aurore Laget Anamayer, l'équipe du CR2D ainsi que la Chaire Gouvernance et Régulation de m'avoir convié à ce très beau colloque et d'avoir fait l'amitié de prononcer quelques mots conclusifs.

L'image utilisée pour incarner cette manifestation est un tableau du peintre belge Henri Ottman, peignant en 1903 la gare – aujourd'hui souterraine – du Luxembourg à Bruxelles ; par la multitude des trains et les fumées des vapeurs des locomotives, le tableau évoque la révolution industrielle et le rôle central du transport ferroviaire.

Presque à la même époque, au début du siècle dernier, Marcel Proust écrivait : « je ne pouvais sans que mon cœur palpitât lire, dans les réclames des Compagnies de chemin de fer, les annonces de voyages (…). Elles m'invitaient à parcourir les pays et l'Europe mais, au-delà, elles ouvraient un indescriptible voyage intérieur ».

En 2023, l'ouverture à la concurrence du rail nous invite également à des voyages, peut-être moins introspectifs mais tout aussi stimulants intellectuellement, sur le plan du droit, de l'économie, plus généralement du fonctionnement des marchés en réseau.

L'ouverture à la concurrence du marché ferroviaire de voyageurs est porteuse de nombreuses promesses : stimuler le marché et la compétitivité ferroviaire par un accroissement ordonné de l'offre de transports ; promouvoir une concurrence par la différenciation et par la qualité, en cohérence avec les modèles établis d'oligopoles et de duopoles ; améliorer la performance des réseaux et leur attractivité pour des nouveaux entrants ; faire du ferroviaire le mode de transport majeur et incontournable pour réaliser la transition écologique et tenir les objectifs du Green Deal européen, qui prévoit une neutralité carbone en 2050.

Mais, aussi louables soient-ils, ces objectifs renvoient à des réalités très hétérogènes suivant les États. La valeur ajoutée scientifique de cette journée est précisément d'avoir mis en lumière cette diversité de règles et de pratiques selon les régulateurs.

Such diversity can be highlighted trough two main ideas: the legal diversity of paths for opening up to competition and the identification of new grounds for considering the evolution of the legal framework.

I – Legal diversity of paths for opening up to competition of passenger's rail

A common thread emerged from all the interventions: there is an incredible discrepancy, even a gap, between, on a one hand, a common legal pattern which has been laid down in the EU directives (from the 1st to the 4rd railway package), and, on another hand, a significant legal diversity and practice at the national level.

One of the reason of this discrepancy has to be found in the incomplete and imprecise harmonization for the legal framework. This is particularly true for the key concepts underlying the operation of the rail market and the opening to competition. Three particularly topical examples, which were discussed during the symposium, can be highlighted on this point.

I.A. – *Calculation of charges*

As pointed out by several representatives of national regulators, the calculation of the railway toll, determined by the network manager and paid by the railway operators, is based on a very general notion: «the cost is directly incurred as a result of operating train service» (in French: "coût directement imputable à l'exploitation du service").

This very broad formula gives a real leeway to manager infrastructure, especially to define and to add "market segments", which encompasses:

- Geographical segment following the identification of corridors, in order to optimize the network (together with a differentiation between incumbent / head on competition / low cost model) – like in Spain, as explained by Pr. Juan Montero;

- The capacity to pay and a strategy of sub-segmentation, crossing geographical considerations and the performance of specific lines – as the strategy follow with the "Ramsey Boiteux" model, as explained by O. Salesse;

- A pricing method which combines open access and constraint of PSO (public service obligations) line and thus mixing the segments, as demonstrated by C. Scheider for Austria ;

There is little doubt that such leeway will continue in the future: as S. Rodrigues pointed out, the Court of Justice emphasized, in the case Lat Rail Net (CJUE, 9 septembre 2021, AS Lat Rail Net, C-144/20), that " the 'optimal competitiveness of rail market segments', as provided for in Article 32(1) of Directive 2012/34, must also be taken into account in the case of market segments where there is no competition, in particular where the segment concerned is operated by a public service operator which, under a public service contract, has been granted an exclusive right, within the meaning of Article 2(f) of Regulation No 1370/2007 ; that interpretation is confirmed, moreover, by the fact that the third subparagraph of Article 32(1) of Directive 2012/34 expressly provides that the list of market segments defined by infrastructure managers to enable the relevance of the charging mark-ups to be evaluated must take account of passenger services within the framework of a public service contract, which, as recital 19 of that directive states, may, in application of Regulation No 1370/2007, 'contain exclusive rights to operate certain services ".

I.B. *Access to the network*

Another illustration of the legal diversity can be found the different form of access to the network. Again, the EU legal framework includes a very general formula (dir. 2012/34), saying that railway operators enjoy a right of access to the market that has to be "non-discriminatory, transparent and fair". This wording allows different appraisals to define the type access:

- A franchising system, in UK, presented by G. Horgan - this system operated until 2019 with a system of 16 geographic franchises assigned to a single monopoly operator. The compatibility of this system with the legal framework was not certain. The franchises originally lasted at least seven years and covered a defined geographical area or type of service. The competition is carried out through calls for tender to which any ad-hoc railway company with a certain number of certificates and authorizations can respond. This system, which is adulated by the advocates of opening up to competition, has shown its limitations, not only in terms of the consistency of franchise contracts, but also in terms of their financing.

- A model of framework agreements including competitive capacity, presented by J. Montero for Spain, which combine asymmetric packages, covering the congested routes, the geographical constraints and the low number of passengers – this model intends to foster the attractiveness of the Spanish rail network, which remains underused despite massive investments.

- A more "classical" access to the network, as it has been presented for France (E. Cotte) and Italy (P. Chirulli), which rely on a "path contract", with a one year duration (for the open access) and the possibility to define a case by case rail charge.

I.C. *Powers and duties of the regulatory authorities*

Again, one shall observe an incredible diversity of functioning for regulatory authorities. Article 55 of directive 2012/34 recalls that each Member State has to establish a single national regulatory body for the railway sector – "it shall be independent in its organization, funding, decision, legal structure and decision making". The regulatory body has to perform a list of core functions enacted at art. 56.

On the basis of this common ground of prerogatives, regulatory authorities demonstrate a diversity of practices:

- Firstly, regarding the general orientation of their policies: for instance the Spanish and the Italian authorities assume a "market orientation", aiming at increasing the performance of the network, with a real attention to the charges and the costs;

- Secondly, on the way to consider general competition law: some regulatory authorities consider that they only have to apply the sectoral regulation on rail market (mainly dir. 2012/34, as amended by the 4th rail package), while other authorities have a wider understanding of their duties and take into account the general rules of competition law (trust, art. 101 TFUE and abuse of dominant position, art. 102 TFUE). These different approaches can be explained by the duality of the legal bases applicable to competition: since the «New Frontiers» judgment (ECJ, 30 April 1986, AsJes), it has been accepted that the rules relating to transport are based both on general competition law and on sectoral rules.

This duality was recently reaffirmed by the Court of Justice. In the DB Station case (CJEU, Oct. 27, 2022, DB Station), mentioned several times during this conference, the Court ruled that a national court can apply, at the same time, sectoral law and article 102 TFEU, in order to appraise the lawfulness of the charges, "but with a duty of sincere cooperation with the regulator": this statement shows that the two components of competition law, general and sectoral, are inseparably linked.

II- Issues common to most national rail markets

Beyond the legal diversity, all the presentations and the discussions highlighted issues which are common to most national rail markets, such as the articulation between the modes of regulation (open access vs. PSO regulation in the meaning of regulation 1370/2007), issues of financing and the implementation in practice of competition.

II.1 – *Issues of articulation between two different modes of regulation: PSO/ open access*

Insufficient attention has been given to the PSO Regulation, which has nevertheless a significant scope in many Member States, reaching up 72% in France, and even more in the Netherlands and Belgium. Thus, we must endeavour to define a proper articulation between open access and PSO.

One issue with the current normative framework is that it is excessively binary: either the operator's access is open access or it is based on a public service contract. On the one hand, open access can also contain a public service dimension (for example, an operator in France, Rail Coop, plans to operate neglected rail lines in the territories), and, on the other hand, the public service contract is based on a specific financial equilibrium, which is supposed to be preserved by the test of the contract's economic equilibrium.

This interplay between the two modes of regulation raises several issues.

Firt of all, one can consider an evolution of the of PSO in itself. At the current stage of the case law, a public service obligation is seen as a market failure, namely an obligation assumed by a company but which could not be assumed if the company were pursuing its commercial interest alone (general definition, beyond the specific scope of transports: e.g. CJUE, 19 dec. 2019, Engie Cartagena).

Secondly, we shall also appraise the relevancy of the award of exclusive rights for open access regulation. Within the current legal framework, exclusive rights are awarded for PSO lines, on the ground of a contract, after a competitive tendering. Nevertheless, a form of exclusive right could be also relevant for open access, especially for small lines or lines with an uncertainty of attendance.

II.2 – *New landscape for state aid*

Following the Covid-19 crisis and the geopolitical transformation, the landscape of State aid law is at a cross road. In the current stage, the Guidelines of 2008 on State aid railway undertaking are obsolete and inadequate to the new issues of the rail sector. The legal framework needs to be relaxed, in order to favour public funding for the modernization of rail network, but also to support rail undertaking for freight services or to secure new entrants, especially for the funding of the rolling stock.

Recently, the Commission did propose a Council regulation (6.7.2022) for the application of art. 93, 107 and 1088 TFEU in the field of rail transport. Such proposal is quite similar to the mechanism of the GBER (Regulation (EU) No 651/2014 declaring certain categories of aid compatible with the internal market in application of Articles 107 and 108 of the Treaty) – but there is a need to consider whether such proposal is adequate regarding the economic needs of the sector.

II.3 – *Execution and implementation of competition*

Apart from the case of Italy, where there has long been an alternative rail operator to the main operator (Italo), it appears that the arrival of new operators is relatively recent, whether in Spain (Ouigo, Italo) or in France (only Trenitalia on the Lyon/Paris route).

In addition to the well-known issues of barriers to entry, the proper functioning of the rail market will also require anticipating market balances once operators are in place. A significant issue is, for example, the price of energy - mentioned several times - which has consequences for the pricing of train paths and therefore for the attractiveness of rail transport. This is a crucial problem for which we lack legal tools at the level of EU law and which goes beyond the problems of competition law alone. On that topic, a legal articulation should be consider with rules applying to public contract law, for instance the theory of imprevision or the ground of the modification of a contract regarding about circumstances which a diligent contracting authority or an economic operator could not foresee (dir. 2014/24 on public procurement, art. 72).

To conclude

Pour conclure, je citerais cette formule de Jean Giraudoux dans La guerre de Troie n’aura pas lieu : « le droit est la plus puissante des écoles de l’imagination. Jamais poète n’a interprété la nature aussi librement qu’un juriste la réalité ».

Puisse cette journée contribuer à interpréter librement et avec imagination toute la diversité du droit ferroviaire en Europe ! Je vous remercie.

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