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Agenda

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Essential or nice to have? A competition-based framework for 'rail-related services'

Directive 2001/14 sets out the principles for access to railway infrastructure in the EU. However, it also covers services outside the core railway infrastructure, including access to maintenance facilities and stations. There is considerable confusion about whether access to these 'rail-related services' needs to be granted, and on what terms. This article, jointly written by Dutch train operator NS (Regulatory Affairs and Compliance), White & Case LLP and Oxera, discusses recent case law and proposes a competition-based test for access to 'rail-related services'

The basic access and charging rules for railway infrastructure in the EU are set out in Directive 2001/14/EC.[1] Infrastructure managers must grant access to core rail infrastructure—the 'minimum access package'—at cost-based charges. The Directive explains that 'it is desirable to define those components of the infrastructure service which are essential to enable an operator to provide a service' (recital 33). The core reason for this type of regulation is the fact that 'railway infrastructure is a natural monopoly' (recital 40).

Yet the Directive also contains a number of provisions on services that, arguably, lie outside the core infrastructure, including maintenance, refuelling and access to stations. Annex II of the Directive contains a list of various services; some within the minimum access package (similar treatment is also given to track access) and some outside it (see box on p. 2). The latter services have become known as 'rail-related services' (although this term cannot be found in the Directive itself). The fact that the Directive—which from both its title and content appears to be primarily targeted at infrastructure managers—also contains obligations for services outside the core infrastructure creates considerable confusion in at least three ways.

– First, it is not necessarily the infrastructure manager that owns or operates these 'rail-related services'. Various Member States have vertically separated their rail industries, but among these, the boundaries between the infrastructure manager and other operators have been set differently. For example, the infrastructure manager, Network Rail, owns and operates the largest UK stations, while in the Netherlands, NS, the main train operator, fulfils these functions (except for public transfer areas, which are owned and managed by ProRail, the infrastructure manager). The question that arises, therefore, is whether the obligations established in the Directive (in our example, access to stations) are addressed only to the infrastructure managers or also to other parties.

– Second, the status of the list of services in Annex II of the Directive is uncertain. Is it an exhaustive or indicative list? Does the Annex heading—'services to be supplied'—mean that access should always be granted? Is the list fixed, or is refinement possible after a thorough competition and market analysis?

– Third (and relating to the second point), the Directive is unclear about the terms and conditions under which

Directive 2001/14

- **Directive 2001/14 sets the rules for access to railway infrastructure across the EU.**
- **It creates considerable legal uncertainty by also referring to services outside the core infrastructure ('rail-related services'), such as access to maintenance facilities and stations.**
- **It should not be automatically assumed that access to these 'rail-related services' is 'essential'. A competition-based test should be applied, using the principle of essential facility, before imposing any access obligations.**

This article, jointly written by the Regulatory Affairs and Compliance Department of NS (the Dutch train operator), White & Case LLP and Oxera, is based on a legal and economic analysis of Directive 2001/14.

access to 'rail-related services' must be granted. Do the same access rules apply to the minimum access package and the other three categories of service (supply of services, additional services and ancillary services), or is there a continuous sliding scale? While some distinction is drawn between these services and the minimum access package (and track access) in Annex II (see box below), there is a risk, for example, that 'rail-related services' will automatically be placed in the same category as core infrastructure—ie, that they are assumed to be 'essential'. In that case strict access conditions could be imposed on the operator of these services and facilities. However, it is questionable whether some, or even any, of the 'rail-related services' are in fact essential or, referring back to recital 40 of the Directive, constitute a natural monopoly. Overly intrusive access obligations may not be the most efficient outcome from an economic and public policy perspective, nor from a private sector perspective. A reasonable return on investment should be permitted where privately offered rail services use privately owned rail facilities; otherwise desirable investments might be deterred.

While access to core railway infrastructure raises a number of important, and sometimes controversial, questions, such as which cost principle to use for setting access charges, this article is primarily concerned with the treatment of 'rail-related services'. It looks to competition policy for guidance, reviewing some relevant European case law and proposing a competition-based decision framework that regulators could use when choosing adequate and proportionate regulatory measures.

Existing competition case law

As noted above, the Directive does not use the term 'rail-related services', nor does it give much guidance on the circumstances in which a provider of such services should be required to grant access to a competitor or a third party. However, the Directive does require certain services to be supplied unless there are 'viable alternatives under market conditions' (Article 5(1)). This suggests that a competition-based test should be adopted to determine when and how access should be imposed. Indeed, at least one national regulator, the Office of Rail Regulation in Great Britain, has interpreted this test in competition policy terms.[2]

The reference in the Directive—even if somewhat implicit—to competition principles might have provided clarity if not for the fact that competition cases dealing with the issue of access to essential facilities in the European rail sector have been relatively rare. In

Services 'to be supplied to railway undertakings'

1

The minimum access package shall comprise

a) handling of requests for infrastructure capacity
b) the right to utilise capacity which is granted
c) use of running track points and junctions
d) train control including signalling, regulation, dispatching and the communication and provision of information on train movement
e) all other information required to implement or operate the service for which capacity has been granted

2

Track access to services facilities and supply of services shall comprise

a) use of electrical supply equipment for traction current, where available
b) refuelling facilities
c) passenger stations, their buildings and other facilities
d) freight terminals
e) marshalling yards
f) train formation facilities
g) storage sidings
h) maintenance and other technical facilities

3

Additional services may comprise

a) traction current
b) pre-heating of passenger trains
c) supply of fuel, shunting, and all other services provided at the access services facilities mentioned above
d) tailor-made contracts for: control of transport of dangerous goods, assistance in running abnormal trains

4

Ancillary services may comprise

a) access to telecommunication network
b) provision of supplementary information
c) technical inspection of rolling stock

Source: Annex II of Directive 2001/14.

addition, most of these have concerned access to the core railway infrastructure, rather than 'rail-related services'.[3] The relative immaturity of sector-specific legislation and competition law in this area may be due to some extent to the newness, and as yet low degree, of liberalisation within many of the national rail markets in the EU. An increase in the number of cases may be expected over the next few years, and this should provide more guidance on how courts across the Member States view the concept of 'essential' within the railway industry.

Possibly the most important European competition case law in the rail sector—but outside the core infrastructure—in which essential facilities have played a pivotal role concerns the two timetable cases involving Deutsche Bahn AG (DB), the railway infrastructure manager and main train operator in Germany. In February 2003, the German competition authority, *Bundeskartellamt*, initiated investigation proceedings against DB on account of its refusal to include timetable and fares information on two long-distance routes operated by the Connex group (Gera–Berlin–Rostock and Zittau–Berlin–Stralsund) in its information and timetable systems. Until then, DB had been the sole provider of long-distance passenger rail services in Germany. Connex was the first competitor to enter this market, on a limited scale. DB's refusal was directed specifically at Connex because the timetables of rail companies operating in the short-distance rail passenger sector were included in DB's information systems.

Since Connex had also brought proceedings against DB before the civil law courts, the case was ultimately resolved by a decision of the Berlin court of appeals, the *Kammergericht*, on June 26th 2003.[4] The *Kammergericht* concluded that DB had a dominant position in the market for the provision of services to railway undertakings, notably in respect of the provision of customer information via timetables. DB was not permitted to discriminate against competitors by refusing to include their services in the timetables. However, the *Kammergericht* also concluded that Connex had no right to ask DB to publish its fares in addition to the timetable information, because it was not essential for fare information to be supplied via the incumbent's information systems in order for the new operator to be successful. Fare information could also be communicated to customers by the new operator itself.

In a second timetable case, on April 27th 2004, the regional court of Berlin, the *Landgericht Berlin*, confirmed DB's obligation to include the train services of competitors in its timetables. Again the court stressed that DB had a dominant position in the market of customer information via timetables. In light of the expectations of the general public as regards the exclusivity and completeness of the timetables provided by the former monopolist DB, the service offered by it could not be substituted in any appropriate way by competitors' own services. According to the court, there was no de facto competition to the information services offered by DB. Furthermore, the court found that there was no objective justification for DB excluding the train services of competitors from its timetables and other information sources.

The court acknowledged that a dominant undertaking could not be obliged to implement measures in favour of competitors that would be uneconomical from a business point of view, and could not be forced to facilitate the activities of a competitor to its own detriment. However, according to the court, in this context, a balance needed to be struck between the parties' competing interests. Among other things, this balancing of interests had to take account of whether the owner bore considerable entrepreneurial risks in creating the infrastructure in question, or whether it was created in the framework of a legally protected monopoly. After considering all these factors, the court concluded that the inclusion of competitors in the DB timetable was an essential service that could not be adequately substituted by alternatives.

Towards a competition-based framework

The (as yet limited) case law suggests that competition policy can provide guidance and establish relevant principles for access obligations regarding 'rail-related services'. This still leaves open the question of which competition-based threshold to apply. Guidance from EU case law suggests two possible tests.

- *Essential facility*—a service or facility will be deemed essential when three conditions are fulfilled:[5]
  - the refusal of the service is likely to eliminate all competition—eg, because it is physically and economically impossible to replicate the facility or service;
  - the service or facility is indispensable to the operation of an equally efficient company's business—ie, access is essential rather than simply 'nice to have';[6]
  - there is no objective justification for the refusal to supply the facility or service.[7]

  The conditions for a facility or service to be deemed essential are thus relatively strict. In the rail sector, these conditions appear in general more likely to apply to core infrastructure than to 'rail-related services'.[8]

– *Dominance*—this is a lower threshold than essential facility, formally defined in EU case law as:

> A position of economic strength enjoyed by an undertaking which enables it to prevent effective competition being maintained on the relevant market by affording it the power to behave to an appreciable extent independently of its competitors, its customers, and ultimately of its consumers.[9]

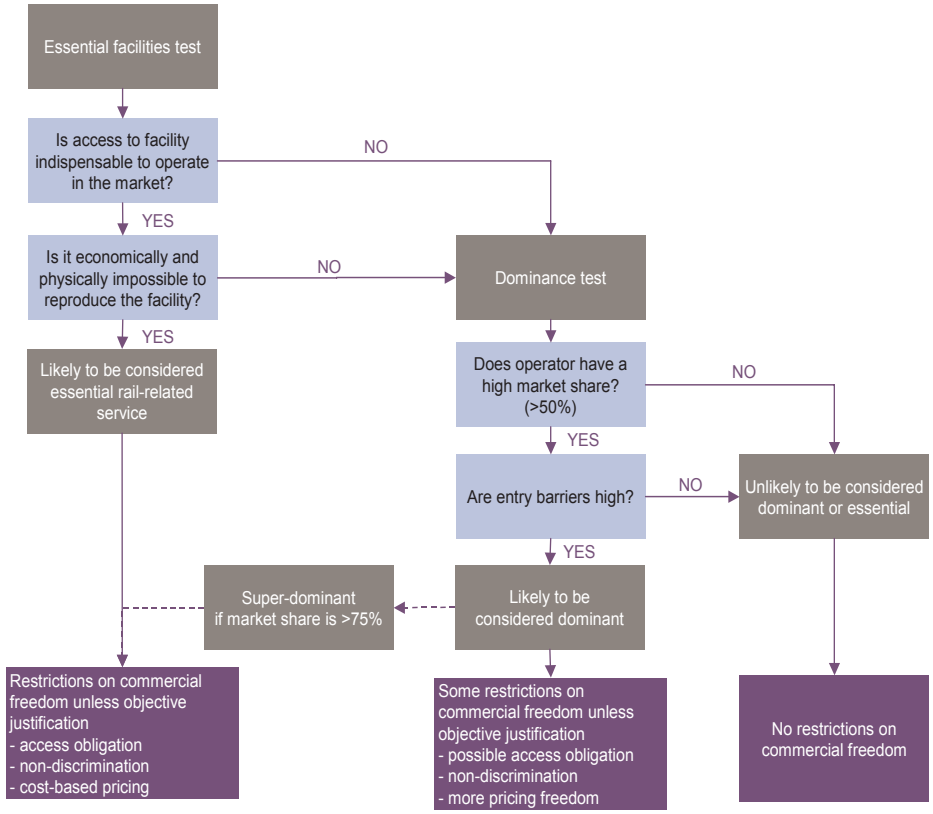
To a large extent, dominance has typically been established on the basis of market shares, with a presumption that a firm holds a dominant position when it has over 40% or 50% of the market in question on a persistent basis. The dominance test clearly sets a lower threshold for intervention than the essential facility test, although a possible variant could be 'super-dominance'.[10]

A competition-based framework that combines these two tests is illustrated in Figure 1. The framework first assesses the question of essential facility. If the service is found to be essential, potentially strict access obligations (possibly including cost-based pricing) might be imposed on the basis of sector-specific rules. If not, the dominance test is applied, and if the operator is found to be dominant, less onerous obligations might be placed on it if it refuses access to services, in line with current case law on Article 82. Alternatively, competition law could be relied on directly instead of setting sector-specific rules. If no abuse of dominance is found, no restrictions should be placed on the commercial freedom of the operator.

Consider the hypothetical example of a rolling-stock maintenance facility. It might be commercially beneficial for a train operator to have access to the nearest facility. However, the question is whether such access is essential for the operator to function effectively. This depends on whether there are other maintenance facilities that the operator could use, even if these are somewhat further afield—maybe even abroad—or if they offer less attractive terms and conditions. If there are alternatives, there would be no case for imposing strict access obligations on the owner of the maintenance facility.

Taking both competition tests into account, and looking at the purpose as well as the wording of Directive 2001/14, it would seem that the essential facility test is the most suitable for defining which 'rail-related services' should be offered (by the infrastructure manager). In line with recital 33 of the Directive, one should be concerned (only) with access problems for 'components of the infrastructure service which are essential to enable an operator to provide a service', and thus only those

Figure 1 Stylised framework for competition assessment of 'rail-related services'



Source: Oxera.

elements that constitute a natural monopoly. In addition, the presence of (potential) viable alternatives should be investigated. The essential facility test approximates this most effectively. When services mentioned in Annex II of Directive 2001/14 cannot be classified as essential facilities, one should ask whether sector-specific regulation is necessary at all, especially since 'rail-related services' are still developing in Europe. Normal competition law—through the provisions on abuse of dominance—should provide sufficient protection against any competition problems arising in that area.

Conclusion

Directive 2001/14 has led to confusion by seeking to extend the rules on access obligations to services beyond the core railway infrastructure. Annex II of the Directive presents a list of services over and above the minimum access package, but it is unclear how this should be interpreted (definitive, indicative, exhaustive?). There is not yet sufficient guidance on how regulators and courts will, or should, apply the rules.

Whichever approach is taken towards these 'rail-related services', it is important that it is not automatically assumed that access to them is essential. A competition-based test seems appropriate. As regards the question of whether to impose an access obligation, the essential facilities test as defined in EU competition case law seems to be most in line with Directive 2001/14, which also mentions the terms 'essential' and 'viable alternatives'. For other possible competition concerns, such as discrimination and tying, the normal competition rules on abuse of dominance could be applied instead of sector-specific regulation.

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[1] Directive 2001/14/EC on the allocation of railway infrastructure capacity and the levying of charges for the use of railway infrastructure and safety certification, February 26th 2001.
[2] ORR (2005), 'Initial Guidance on Appeals to ORR under the Railways Infrastructure (Access and Management) Regulations 2005', November, paras 2.20–2.23. The ORR states that it will: 'interpret the reference to "market conditions" as referring to the commercial viability of a particular alternative as well as simply the operational capabilities of the site. We will, therefore, consider whether access to the particular facility is required, not simply to supply the applicant, but to allow the applicant to supply its customers on competitive terms.'
[3] For example, cases involving Eurotunnel and the Italian rail network. Joined Cases T-79/95 and T-80/95 *Société Nationale des Chemins de Fer Français and British Railways Board v. Commission* [1996] ECR II-1491; and Commission decision COMP/37.685, Georg Verkehrsorganisation GmbH/Ferrovie dello Stato, August 8th 2003.
[4] KG 2 U 20/02 Kart.
[5] These conditions were confirmed by the European Court of Justice (ECJ) in Case C-7/97 *Oscar Bronner v Mediaprint* [1998] ECR I-7791.
[6] For example, in the *Ladbroke* case, the Court of First Instance considered televised sound and pictures of the horse races to be an 'additional' feature to the existing service for those placing bets, not as an essential one. Case T-504/93 *Tiercé Ladbroke v Commission* [1997] ECR II-923.
[7] If the case involves a refusal to license an intellectual property (IP) right, competition in a secondary (related) market must be eliminated, and the refusal must prevent the emergence of a new product for which there is potential consumer demand. These additional criteria for IP cases were confirmed by the ECJ in Case C-418/01 *IMS Health v NDC Health* [2004] ECR I-5039, on the basis of the earlier *Magill* case, joined cases C-241/91 P and C-242/91 P, *Radio Telefis Eireann and Independent Television Publications Ltd v Commission*, [1995] ECR I-743.
[8] See, for example, the Eurotunnel case: T-79/95 and T-80/95 *Société Nationale des Chemins de Fer Français and British Railways Board v. Commission* [1996] ECR II-1491.
[9] This definition is taken from Case 27/76 *United Brands v Commission* [1978] ECR 207.
[10] Super-dominance was first defined as a 'position of overwhelming dominance verging on monopoly', by Advocate General Fennelly in his Opinion of October 29th 1998 in Joined cases C-395/96 P and C-396/96 P *Compagnie Maritime Belge* and *Dafra-Lines v Commission*, [2000] ECR I-1365, para 137. The recent European Commission discussion paper on Article 82 states that 'a dominant company is in general considered to have a market position approaching that of a monopoly if its market share exceeds 75% and there is almost no competition left from other actual competitors in the market'—ie, that 75% is the threshold for super-dominance. European Commission (2005), 'Discussion Paper on the Application of Article 82 of the Treaty to Exclusionary Abuses', December, para 92.