CER ESSAY SERIES

Rail-Related Services: Evolving markets in Europe

Aad Veenman
NEDERLANDSE SPOORWEGEN (NS)

APRIL 2008

The Voice of European Railways

COMMUNITY OF EUROPEAN RAILWAY AND INFRASTRUCTURE COMPANIES
COMMUNAUTÉ EUROPÉENNE DU RAIL ET DES COMPAGNIES D'INFRASTRUCTURE
GEMEINSCHAFT DER EUROPÄISCHEN BAHNEN UND INFRASTRUKTURGESELLSCHAFTEN

Aad Veenman

Dr Aad Veenman has been President-Director of NV Nederlandse Spoorwegen (NS) since 1 November 2002. In 2005 he has been elected Chairman of CER.

Dr Aad Veenman obtained his degree in mechanical engineering at Delft University of Technology, where he continued working as a member of the graduate staff from 1969 to 1981. In 1977 he was employed by Esmil International as project, divisional and marketing manager. In 1986 he transferred to Stork, where one year later he was appointed director of Stork Alpha Engineering, a post he held until 1991. He joined the Board of Management of Stork N.V. in 1990 and chaired that Board from 1998 to 2002. During this time he also held a part-time professorship at his alma mater, Delft University of Technology.

The authors Renée Elzinga and Emile Jutten work in the Corporate Legal Department of NS.

Introduction 2

Rail related services: the current European framework 5

I. The ownership of rail related services 9

II. Nature of the various lists of rail related services 12

III. The terms and conditions of rail related services 13

Are rail related services “essential facilities”? 14

A competition-based framework 17

Conclusion 22

Introduction

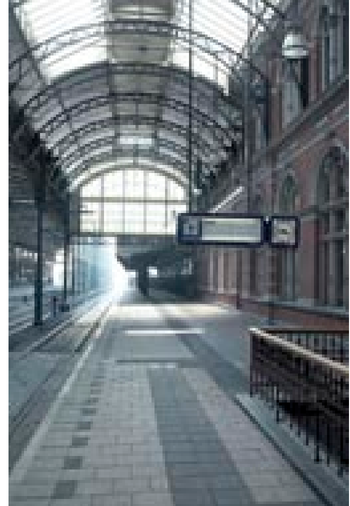
During the past fifteen years, the European institutions concentrated their efforts on setting strong foundations for the liberalisation of the rail transport sector. Over that period of time, three railway packages were proposed, discussed and eventually adopted, the European Railway Agency was created and additional – more technical but essential pieces of legislation deemed to favour the development on interoperable services were enacted.

As a result, the legal framework for rail transport today can take an "honourable" complete shelf in a lawyers' library!

Is this a sufficient argument to say that the rail sector is now fully liberalised? Far from there! I tend to believe that a lot still needs to be done: all this "paper-work" needs to be 'digested' by all operators on the market (new entrants and existing companies) so that they are all able to grasp the opportunities which lie before them in a liberalised market. Real growth in the rail transport sector (as on any other market) is possible when the legislation needed is fully, properly and consistently implemented in the national legal systems. The rights and obligations they contain need to start producing their concrete effects on the market. In other words, the legal framework for business is set at EU level and should be implemented nationally. This legislation defines the size of the playground as well as the rules of game. It is on that predefined pitch that all stakeholders can strive for real business opportunities: business activities that will benefit individual customers as well as the society as a whole.

It is in this context that the European Commission is now questioning the need to tackle "rail related services". "Rail related services" is the technical jargon commonly used to designate all those services surrounding the core infrastructure, that can be necessary and sometimes are even essential for the actual transport service to take place [1].

1. The term 'Rail Related Services' is not defined in Directive 2001/14.
   It is however often used as an overarching term for all track access and services outside the minimum package.



The European Commission finds that the current legal framework (whether under EC transport law or under EC competition law) is not sufficient to allow full access to rail related services to new entrants under normal market conditions. There is therefore today a large debate on the necessity to further address these services with new additional legislation.

This short paper tries to analyse this matter. It does not intend to be exhaustive, but I hope it will contribute to the debate by triggering a certain number of key issues which need further thought before more legislation (and potentially additional red tape!) is imposed upon railway operators, whether new entrants or national companies.

This paper will therefore analyse closely key elements contained in Directive 2001/14[2] which contains the principles for the access and charging rules of railway infrastructure.

The principles laid down in the successive railway packages are essential to allow better accessibility to the market to all operators, including new entrants and lower market entry barriers for freight and passenger rail operators in order to offer more attractive and modern rail transport services to their customers.

The main actors of the railway sector are now all actively involved in the process of making the Third Railway Package into a success. In this context, all stakeholders (the national railway operator, new entrants, rail infrastructure managers, rail industry, regulatory bodies and competition authorities) have a very distinctive role to play.

2. Directive 2001/14/EC of the European Parliament and of the Council of 26 February 2001 on the allocation of railway infrastructure capacity and the levying of charges for the use of railway infrastructure and safety certification

   This Directive was one of the pieces of the Second Railway Package.

When one takes a close look at the "Tableau de la Troupe" at this moment in time, one will be intrigued to see with how much flexibility and vigour these actors are accommodating to the changes taking place and new opportunities that are opening up.

One of these new rail market opportunities is in fact the evolving market for rail related services.

This paper will therefore first analyse the current state of the art on the market for rail related services. The question will then be to analyse whether rail related services can be systematically assimilated to 'essential facilities'. In that context, how apply access rules to these facilities on a competitive market.

The key conclusion of this essay is that the market is currently in transition and that rail related services markets are emerging in Europe. It is for a fact that each national rail market is at a different stage of development.

Some were already opened a decade ago, some are just in the process of opening, in conformity with EU law. The market needs therefore to mature somewhat more before any form of conclusions and any potential initiatives may be validly drawn. In other words, let competition rule the game giving room for full entrepreneurship and innovation.

Aad Veenman

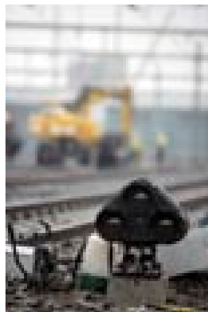
Rail related services: the current European framework

Directive 2001/14 sets out the principles for access to railway infrastructure in the European Union. Infrastructure managers must grant access to core rail infrastructure - the so-called "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.

The legislation on infrastructure capacity allocation and on charges for the use of infrastructure was revised in 2001 with a view to provide railway operators with a framework within which they can have non-discriminatory access to rail infrastructure and to additional and ancillary services. Directive 2001/14 sets out a detailed regime for access to infrastructure. As such the regime is built in successive layers. Each layer does provide more room for market based access principles and room for economic assessment.

To put it otherwise the 2001/14 framework offers a "**menu**" of rail services:

The access to key rail services, the **first layer**, must be provided by the infrastructure manager. They relate to: the minimum access package (list 1 in table 1 below) and track access to facilities and supply of services (list 2).



Besides this compulsory package, the legislation also automatically sets rules for the price which has to be paid – the access charge – for access to the rail infrastructure by the operator to the infrastructure manager. The charges for the minimum access package and track access to service facilities shall be set at the cost that is directly incurred as a result of operating the train service [3].

3. To be precise: the charges for the supply of services - as stipulated in list 2 - do not have to be set at the cost that is directly incurred as a result of operating the train service. When setting the prices for these services account shall be taken of the competitive situation of rail transport.

The **second layer** is constituted by additional and ancillary services (list 3 and 4). They should be explicitly requested for by a rail operator and provided by the infrastructure manager on condition that he is, practically speaking, in a position to offer them. This is not necessarily the case: in practice, the actual offer that can be made by an infrastructure manager for additional and ancillary rail services differs greatly from one Member State to another.

When it concerns additional and ancillary services, as listed in 3 and 4, and when offered only by one supplier – the infrastructure manager –, the Regulation stipulates that the charge imposed for such a service shall relate to the cost of providing it, calculated on the basis of the actual level of use.

One can clearly see the differences between the first and second layer: there is much more room for economic assessment in the second layer, less strict access obligations and there are more market based pricing possibilities.

Table 1: Annex II of Directive 2001/14

The minimum access package shall comprise (list 1):	Track access to services facilities and supply of services shall comprise (list 2):
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	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
Additional services may comprise (list 3):	**Ancillary services may comprise (list 4):**
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	a) access to telecommunication network b) provision of supplementary information c) technical inspection of rolling stock

The rationale for regulating first a minimum package of services (first layer) and then the additional and ancillary services (second layer) is twofold:

1. railway infrastructure is in most cases a natural monopoly with public prerogatives: operators must have access to those services falling under the natural monopoly in order to be able to provide railway services.
2. certain ancillary services may de facto prove to be essential for supplying rail transport services and these ancillary services might be part of the monopoly: operators may need access to additional and ancillary services when no market has yet developed (or is not likely to develop in reasonable time) for such services i.e. when such services are only provided by one infrastructure manager on a given territory.

The price for the minimum package has to be published in the Network Statement. In principle the same goes for the prices to be paid for the additional and ancillary services, if offered at all by an infrastructure manager. It is, however, very important to recall that the offer made by each infrastructure manager will greatly differ per Member State.

It should be stressed that the expression of “rail related services” is neither mentioned nor used in Directive 2001/14/EC. Moreover, the Directive – which from both its title and content is primarily targeted at infrastructure managers – can easily create confusion of interpretation, if one is not familiar with it original purpose and structure. Confusion may arise as to (i) whether access to these “rail-related services” needs to be granted (ii) by whom and (iii) on what terms. However, on closer look, the carefully drafted Directive 2001/14 gives to all of the actors on the rail market, at least for now, some basic guidance.

When analysing the current situation with regard to rail related services in Europe there are at least **three factors** which should be borne in mind:

I. The ownership of rail related services

A first critical issue to bear in mind is that it is not necessarily the infrastructure manager that owns or operates the various rail services that are listed in Directive 2001/14. This is due to the way in which the Member States have vertically separated the incumbent rail operators at national level. Infrastructure managers are organised in a different manner throughout the EU and have competencies that can also greatly differ from one Member State to the other. Some are integrated while others are separated from the operator company. Some have a semi-exclusive status as in other EU Member States there can be two or more infrastructure managers. Some are very closely linked to the State and others privately owned.

In summary, the boundaries between infrastructure managers and operators have been set differently in the Member States of the European Union today, and they are bound to evolve in the coming years, as the markets for rail transport services will further open up.

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 and platforms where ProRail (the infrastructure manager) owns and manages the access for all operators. The same goes for maintenance facilities and maintenance workshops. Track access to these facilities is managed by ProRail, but the maintenance services themselves have never been offered by ProRail nor does ProRail own maintenance workshops. These services are provided by NS which owns the workshops. But currently are also being provided by other companies, newcomers on the maintenance market.

When applying Directive 2001/14 one should take note that it has been written with the focus on the Infrastructure Manager. Directive 2001/14 provides in its Annex II the four lists of rail services "to be supplied to the railway undertakings". This wording leads to believe that the obligation to supply rail services listed in the Annex is addressed to infrastructure managers only. This reasoning fits perfectly with the main objective of Directive 2001/14 which regulates the allocation of infrastructure capacity and the levying of charges for the use of the infrastructure. So it is upon the infrastructure manager that the obligation to grant access to rail related services lies. Of course the question of whether the infrastructure manager is able to grant access to stations or refuelling or maintenance facilities will depend on their ownership as explained above.

Most of the ancillary or additional services listed in Annex II of Directive 2001/14 can be bought directly from the market and not just from the infrastructure manager. Such examples can be seen in the provision of energy supply (Annex II sub 3.a.) where competition has developed in some countries. In the Netherlands, ProRail does not purchase and has never offered to purchase energy for railway operators. The operators purchase the energy themselves on the market.

Another example can be found in the market for maintenance services. For example in Germany, a 2006 study by SCI Verkehr found that a dense network of facilities and workshops has developed, providing for an almost complete geographical coverage. In addition to roughly 100 facilities and workshops belonging to the DB Group, there are similar establishments operated by other maintenance service providers at about 140 locations. Competition on the maintenance market is also quite developed in the Netherlands and it is functioning well.

II. Nature of the various lists of rail related services

A second element to bear in mind is the purpose and the nature of the list of services in Annex II of the Directive.

One could wonder whether the list is exhaustive or simply indicative. One might also easily fall into the trap that the Annex heading “services to be supplied to railway undertakings (by the infrastructure managers)” automatically implies that access should always, under all circumstances and against all possible conditions be granted and to all services listed. But isn’t it more the case that, before regulating any service on the list, a thorough economic assessment of the relevant market and level of competition should be carried out? One should test whether a certain remedy is needed, and if so which remedy is the most proportionate and whether remedying does foster competition in the long run.

The need for an economic assessment might not, or to a lesser extent, be necessary for the minimum access package, since it is evident that it comprises a natural monopoly.

The most common approach now used in the different EU Member States is that the minimum package services (list 1 and list 2) should always be provided by the Infrastructure manager, on payment of the infrastructure charge. For the other services the approach in the Member States is not clear cut: the other two lists are, as clearly stated in the text additional and ancillary services. So and clear economic assessment is needed, taking into account dynamic, future developments.

Thus, the additional and ancillary services listed could, by there nature, not be fixed or exhaustive. Nor should it be the case that they are regulated in that way that access automatically must be granted against a predefined price.

III. The terms and conditions of rail related services

Some argue that the Directive is unclear with regard to the terms and conditions under which 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? In other words, which services should be considered as "essential" and which ones are not "essential"?

While some distinction is drawn between these services and the minimum access package (and track access) in Annex II (see Box 1 above), there is a risk, for example, that "rail-related services" will automatically be placed in the same category as core infrastructure – i.e., that "rail-related services" are naturally 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.

As stated in the beginning as the most important concept: rail related services should be framed in a way that will help foster entrepreneurship in the development of the market of such services. A reasonable return on investment should therefore be permitted where privately offered rail services use privately owned rail facilities; otherwise desirable investments might be deterred.

Are rail related services "essential facilities"?

As noted above, the Directive does not use nor define the term rail-related services, nor does it label them as essential facilities. Moreover, the Directive gives just basic guidance on the circumstances under 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 is very important because it indicates 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.[4]

The reference in the Directive - even if somewhat implicit - to competition principles provides clarity. Competition cases dealing with the issue of access to essential facilities in the European rail sector, although relatively rare, shed some clarity on how one should assess the situation. Most of these cases do however concern access to the core railway infrastructure, rather than rail-related services[5].

One of the leading principles is that an undertaking could not be obliged to implement measures in favour of competitors that would not be economical from a business point of view. Moreover, even in the situation where an incumbent railway undertaking is found to have a dominant position, for example on a (sub)-segment of a relevant market for rail related services, it cannot be forced to facilitate the activities of a competitor to its own detriment. This is, amongst others, stated in recent German case law[6].

In the few court cases available, it becomes clear that a balance must be struck between the parties' competing interests. Among other things, this balancing of interests must take account of whether the owner bears considerable entrepreneurial risks in creating the infrastructure in question, or whether it was created in the framework of a legally protected monopoly.

4. 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."

5. 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.

6. Landgericht Berlin (regional court of Berlin), case on timetables Deutsche bahn, 27 April 2004.

After considering all these factors, the court concluded in only two national court cases, that a service[7] was an essential service that could not be adequately substituted by alternatives.

Although the Directive does not define rail related service, does not explicitly stress how the level of competition should be assessed and does not label the rail related service as essential facilities, this does not mean that the stakeholders active on the European rail market do not have various tools available already today to ensure the proper functioning of the market for rail related services and access to rail related services. There is a trade-off between entrepreneurial freedom and regulating access to all kinds of services. This trade-off should be examined very closely and the decision should be carefully struck. Some examples are provided below:

- Marshalling yards or maintenance shops were originally set up while taking into account the capacity needs of the operator who built them (or for which they were built depending on the Member State concerned). In case a new entrant wishes to have access to such facilities, before imposing access to these facilities, market alternatives should be first identified, i.e. any form of market solution for the structural problem, maybe through innovation or the creation of joint ventures for example. Innovative solutions however can often take time to develop and they should be provided this necessary time. Indeed, this development should not be frustrated by fierce up-front regulation of the relevant markets.

- Access to the cleaning facilities[8] is another example. In some Member States cleaning facilities are provided by the national railway undertaking to new entrants, while in other Member States, such as in the Netherlands, these cleaning services are also provided by privately owned companies offering their services to all rail operators.The same reasoning applies to innovative initiatives with regard to short term maintenance services, which are for example offered by NS to the market but also by privately owned new entrants to this relevant rail related service market.

7. Namely, the inclusion of competitors in the timetable of the company in question.
8. It should be noted that in the ServRail study cleaning facilities seem to be denoted as rail related service they are not listed in the Directive 2001/14. The ServRail study was ordered by the European Commission in 2005.The final report was published in December 2006. It can be found on the European Commission internet site.
   See http://www.ec.europa.eu/transport/rail/studies/doc/servrail_final_report.pdf

> Clearly, private companies are detecting market opportunities and are progressively developing them into a profitable commercial activity.

Such market developments show that rail operators are now-a-days less or not at all (in some Member States) dependent on the infrastructure manager for the provision of certain rail related services. More importantly, new players have been entering the market without experiencing insurmountable obstacles. Especially not of such a nature that access to maintenance facilities and service are in acute need of detailed ex-ante regulation of price and or terms and conditions.

Directive 2001/14 provides that infrastructure managers must give access to certain services. Two issues are crucial in interpreting this statement:

- How can one check whether the services at stake are really essential for supplying rail transport services and whether there exists viable alternatives under "market conditions". Economic and legal assessments have to be applied in considering whether rail railed services must be provided, and
- If so, the circumstances under which a railway undertaking or third party owner of a facility[9] should be required to grant access.

Existing EU competition law, and particularly the essential facilities test and the dominance test, provide the right and adequate basis to resolve this problem.

9. Third parties other than the RU or the IM can be providers of rail services. In some cases, it is even desirable that such a market develops in future.

A COMPETITION-BASED FRAMEWORK

It should be recalled that EC competition law and policy was set up to correct abusive behaviours whereby a strong undertaking imposes its conditions on the market, pushes competitors off the market or prevents them from accessing the market. It is not aimed at setting rules that result in preventing the development of economic initiative; to the contrary!

Available competition case law indicates 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. EU case law suggests two possible tests.

Essential facility – a service or facility will be deemed essential when three conditions are fulfilled: [10]

- the refusal of the service is likely to eliminate all competition—ie, 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" [11];
- there is no objective justification for the refusal to supply the facility or service [12].

The conditions for a facility or service to be deemed essential are thus relatively strict. It should be noted that the European Court of Justice has applied this principle in a strict manner in order to avoid any possible abuses whereby companies with a strong market share are eventually sanctioned by having to give away the value added they built over time. Eventually, in the rail sector, these conditions appear more likely to apply to core infrastructure than to "rail-related services" [13].

10. These conditions were confirmed by the European Court of Justice (ECJ) in Case C-7/97 Oscar Bronner v Mediaprint [1998] ECR I-7791.
11. 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.
12. 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.
13. 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.

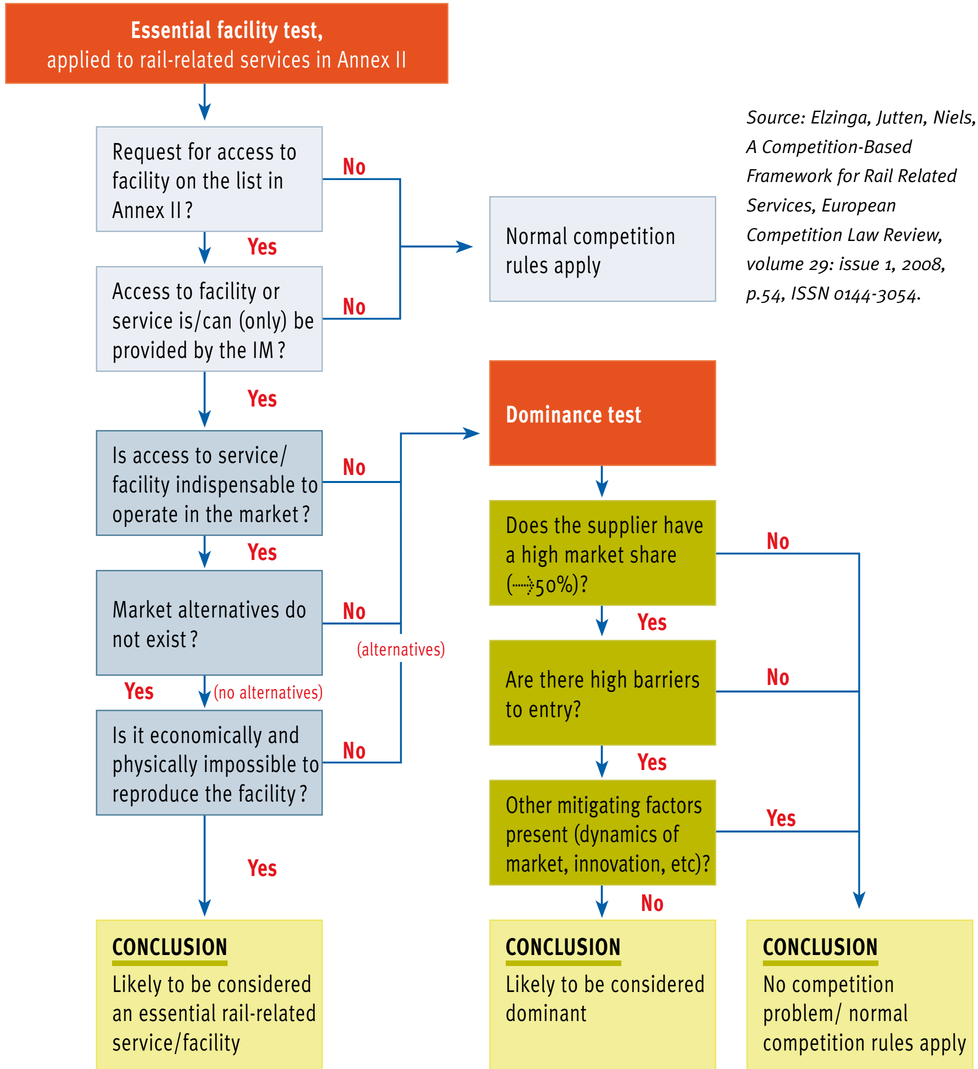
Dominance—this is a lower threshold than the notion of 'essential facility' formally defined in EU case law as: a position of economic strength enjoyed by an undertaking which enables it to prevent effective competition being maintained on the relevant market by affording it the power to behave to an appreciable extent independently of its competitors, its customers, and ultimately of its consumers[14].

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'[15].

A competition-based framework that combines these two tests is illustrated in the figure below.

14. Case 27/76 United Brands v Commission [1978] ECR 207.

15. 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.



Source: Elzinga, Jutten, Niels, A Competition-Based Framework for Rail Related Services, European Competition Law Review, volume 29: issue 1, 2008, p.54, ISSN 0144-3054.

Harsh restrictions on commercial freedom unless objective justification for refusing access:

- access obligations
- non-discrimination
- cost-based pricing

Depending on level of dominance and facilities/ services in question, some restrictions on commercial freedom might be imposed, unless objective justification for refusal of access:

- possible access obligations
- possible non-discrimination
- (much) more pricing freedom

No restriction should be imposed

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 the notion of abuse of dominant position [17].

Alternatively, competition law could be relied on directly instead of setting sector-specific rules. If no abuse of dominance is found, no restrictions are needed on the commercial freedom of the operator. This principle is based upon the idea that competition law should not have deterrent effects on companies by systematically sanctioning economic initiative and prosperity.

The hypothetical example of a rolling-stock maintenance facility could be used here as an example. It might be easy or even commercially beneficial for a train operator to have access to the nearest facility. The question is however whether such access is essential for the operator to function effectively. This depends upon whether there are other maintenance facilities that the operator could use, even if these are somewhat further away - maybe even abroad - or if they offer significant less attractive terms and conditions. If there are economically reasonable alternatives, there would be no case for imposing strict access obligations on the owner of the maintenance facility [18].

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 test for defining which rail-related services should be offered by the infrastructure manager.

In line with recital 33 of Directive 2001/14, 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 elements that constitute a natural monopoly.

17. Article 82 of the EC Treaty.

18. If there are no alternatives there is still no case for any "forced" access or access against cost based pricing if the facility is privately owned. There is then even more a need for market forces to play in the form of investing in more capacity on the market, f.e. forming a joint-venture.

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. The most important positive element when applying these tests is the fact that the outcome can vary substantially. Competition law is applied directly at the national level either by national competition authorities or regulatory bodies and/ or by the national courts. This suits perfectly the current situation in the Member States where the degree of liberalisation differs when this essay was drafted. In one Member State a certain rail related service could still only be provided by a supplier having a dominant position on the relevant market in question. While in other Member States the market situation for a particular rail related service could be one where demand meets several competing offers.

In other words, this framework allows for sophisticated and market oriented assessment of the rail market sector determining the different rail service segments as well as taking into account changing market dynamics on either a national or, where appropriate, a European geographical market for a particular rail related service. Such an approach will necessarily foster entrepreneurship and market initiatives and innovation which, in turn will favour the emergence of new liberalised market segments.

It goes without saying that a pivotal role lays in the hands of the Regulatory Bodies. Rail related services which are essential must, of course, be monitored by these Regulatory Bodies. The European Commission has a key role to play in ensuring that effective and independent Regulatory Bodies are established and appropriately equipped in every Member State in line with the Directive 2001/14. Regulatory Bodies should be entrusted with sufficient powers to be able them to secure effective market opening.

Conclusion

Directive 2001/14 gives the European rail sector some basic guidance on how to tackle rail related services. Although the Directive can easily lead to confusion as it does not use the term rail related services and extends the rules on access obligations to services beyond the core railway infrastructure, it appears too early to amend it.

Rail related services markets are evolving in Europe. New entrants, innovative developments and a decline of dependence from infrastructure managers for certain rail related services can be detected already today.

Whichever approach is taken towards the rail related services, it is important that it is not automatically assumed that access to such services 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.

When a rail service turns out to be an essential facility national competition authorities, appropriately equipped and with adequate powers, must act to secure access for any actor, whether new entrants or national companies. Ex ante conditions on access are already quite clearly stipulated for the minimum package in de Directive. Any further enlargement of "must offer" services and as such imposing fierce remedies seems, at this moment in time, not necessary. One should first assess whether long term structural issues and behavioural problems are likely to exist and to persist.

If a service on the list of Annex II of the Directive does not turn out to be an essential facility, then "normal" competition law should prevail. Adequate measure can be taken ex post either on the basis of a complaint or request addressed to the competent Regulatory Body or competition authority or by requesting national courts to intervene.

A key element in securing the proper application of EC competition and railway law is in setting up proper Regulatory Bodies. Similarly and in parallel, Competition Authorities must take up their responsibilities, under national and the European Court of First Instance's supervision. In his regard the European Competition Network set up by the European Commission's directorate general for competition serves as an excellent tool to share best practice.

Titles previously published in this series:

Jan Sundling : “Developing rail logistic operations in Europe: Perspectives from Sweden”, September 2005.

George Muir : “The Railway in Britain: on the right lines”, February 2006.

Yoshio Ishida : “The break-up and privatization of Japan National Railways and management reforms at JR East”, December 2007.

Henry Posner III : “Rail Freight in the USA : Lessons for Continental Europet”, January 2008.

Design : whitespirit.be

CER - Avenue des Arts, 53 - B-1000 BRUXELLES - Tel.: +32 2 213 08 70 - Fax: +32 2 512 52 31 - contact@cer.be - www.cer.be

This brochure has been printed on 100% recycled and non-bleached paper