

# **9<sup>TH</sup> CONFERENCE ON COMPETITION AND OWNERSHIP IN LAND TRANSPORT**

## **RAIL TRANSPORT AND COMPETITION POLICY**

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## **NATIONAL RAIL UNDERTAKINGS AFTER THE GVG/FS CASE**

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### **I. INTRODUCTION**

These first years of the XXI century hold important challenges for all modes of transport; but the restructuring of rail freight and passenger transport seems to be of such a magnitude that all operators will have to make a great effort to adapt to the new legal framework in a very short period of time. Rail transport is given priority over other modes of transport out of a number of well-known reasons, e.g., the saving of energy resources, the reduction in environmental pollution or the decongestion of bottleneck infrastructures. Furthermore, within the institutions of the European Union, railways are considered to be a vital element of the Community's transport sector and the improvement of their efficiency is held to be a priority objective.

As a consequence, Community as well as national legislation on this matter has proliferated in the last years and the former flag railway undertakings had to be transformed from monopolistic state-owned entities into commercial undertakings, capable of operating within a liberalized market where competition is expected to be intense. After some careful steps at the beginning, infrastructure management has been almost fully separated from the provision

of transport services and the few undertakings that still take part on both markets are subject to important restrictions to their freedom of action, in order to guarantee a competitive environment in the sector. In a future not too far away, with the liberalization of cabotage services also on the passenger transport market, rail transport will be entirely open to competition and the success of the liberalizing measures depends on the level of compliance of both sector-specific regulation and general competition rules.

The application of EU competition law to the transport sector has had a difficult start; in the rail transport sector the privileged position it had with respect to other economic sectors was due to the absence of competition the Commission and the Courts could watch over. With the opening of the market the role of competition law has to be redefined and Articles 81 and 82 of the Treaty have to be integrated in the network of regulations destined for the defence of competition in the rail sector. This paper will discuss some of the most important issues as regards the application of competition rules to rail transport. After a short reference to the European transport policy as a whole, the author will analyse the relationship between sector-specific (but not necessary competition) regulation and the competition rules in primary and secondary Community legislation. Finally, the impact of case-law will be examined, with a special reference to the so-called “essential facility” doctrine and its implications for the owners of rail infrastructures and rolling stock.

## II. EUROPEAN RAILWAY POLICY

European Union Transport Policy has changed considerably in the last 15 years, being one of the most important issues the revitalization of railways. In this sense, the Commission pursues as one of its goals to increase the rail market share of passenger transport from 6 to 10 % and of goods traffic from 8 to 15 %.<sup>1</sup> This aim can be achieved by various means, being the most important one the renovation of railway legislation in the Member States. This chapter analyses the development of EU transport regulation from its very beginnings to the present days.

### 1) Rules applicable to rail transport

Given the strong state interventions in the transport sector as a whole, the applicable legislation is abundant and not very organized.<sup>2</sup> Certainly, rail transport is no exception and we find numerous Community rules, pertaining to primary as well as secondary legislation. According to Article 2 of the original 1957 Treaty establishing the European Economic Community, the Community’s mission should be “to promote throughout the Community a harmonious development of economic activities, a continuous and balanced expansion, an increase in stability, an accelerated raising of the standard of living and closer relations between the States belonging to it”. The six signing states of this first Treaty were aware of

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<sup>1</sup> See White Paper “European Transport Policy for 2010: Time to Decide”, pp. 27 et seq.

<sup>2</sup> Basedow (1987), p. 63, speaks of the “swamp of transport law” instead of its sources.

the importance of transport for the economic development of the Community and they fixed as one of the prime objectives “the adoption of a common policy in the sphere of transport”, dedicating Section V of the Second Part of the Treaty to transport (Articles 74 to 84). Since then, rules concerning the common transport policy have been present in all the different Treaties of the Community. The consolidated version of the actual Community Treaty<sup>3</sup> refers to it in Title V of the Third Part (Articles 70 to 80) and the text of the Constitution for Europe adopted on 30 September 2003<sup>4</sup> includes it in Section 7 of Chapter III in Part Three (arts. III-236 to III-245).

According to Article 84(1) of the 1957 Treaty, “the provisions of [Title IV] shall apply to transport by rail, road and inland waterway”, but in spite of Article 75 of the same Treaty<sup>5</sup> the Council did not develop, for one reason or another<sup>6</sup>, the common transport policy, and it would not be until the famous judgment of the Court of Justice of the European Communities in the case 13/83, of 22 May 1985<sup>7</sup>, that the Common Transport Policy became noticeable. As an almost immediate response, the Single European Act of 1986 set up a calendar for the achievement of the single market (including the field of transport)<sup>8</sup>, which would finally be reached in 1992, with the signing of the Treaty of the European Union (Treaty of Maastricht). This Treaty also adds a new Title XII<sup>9</sup> to the Third Part of the Treaty, dedicated to the Trans-European Networks (arts. 154 to 156 of the Treaty).

With respect to Secondary Legislation, the transport policy had a late start. Although a certain activity of the Community Institutions could be seen from the mid sixties on<sup>10</sup>, the first important step towards the opening of the rail transport market would be made by Directive 91/440 of 29 July 1991 on the development of the Community’s railways.<sup>11</sup> With the separation of the provision of transport services from the management of the infrastructure the

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<sup>3</sup> Published in OJ C 325 of 24 December 2002.

<sup>4</sup> Its entry into force is, however, more than unsure, taking into account the recent “no”s in France and in the Netherlands.

<sup>5</sup> Article 75 says that “the provisions referred to in a) and b) of paragraph 1 [i.e., common rules applicable to international transport and the conditions of access for non-resident carriers] shall be laid down during the transitional period”. This transitional period should not have been longer, in any case, than 15 years after the entry into force of the Treaty, i.e., 1 January 1973. See Salafranca Sánchez-Neyra, J.I. and F. González-Blanch Roca (1986), p. 31.

<sup>6</sup> The most important reason is national protectionism. In this sense, for example, Collinson, D.S. (1971-72), pp. 221 et seq.; Sales Pallarés, L. (2004), p. 106.

<sup>7</sup> *European Parliament v. Council of the European Communities*, European Court Reports 1985, p. 01513 et seq. See García Pérez, J. (1996), p. 313; Olmedo Gaya (2000), pp. 169 et seq.; Sánchez-Neyra, J.I. and F. González-Blanch Roca (1986), pp. 65 et seq.

<sup>8</sup> Ortiz Blanco, L. and B. Van Houtte (1996), p. 37.

<sup>9</sup> Title XV since the Amsterdam Treaty, which would become Section 8 of Chapter III in Part Three of the “European Constitution” (arts. III-246 y III-247).

<sup>10</sup> Apart from rules with respect to the application of competition law in transport matters – to which we will come back later – the efforts of the Community organs centred on the redefinition of obligations inherent in the concept of a public service, as well as the normalization of the accounts of railway undertakings. See Regulation (EEC) n° 1191/69 of 26 June 1969 and its amendments; Regulation (EEC) n° 1107/70 of 4 June 1970 and its amendments; Regulation (EEC) n° 1108/70 of 4 June 1970 and its amendments.

<sup>11</sup> OJ L 237 of 24 August 1991, pp. 24 et seq. For a detailed analysis see Alexis, A. (1993), pp. 499 et seq. and Idot, L. (1995), pp. 263 et seq.

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Community legislator created the basis for a slow opening of the market to competition. The subsequent amendments of Directive 91/440<sup>12</sup> continued the liberalizing labour, while Directives 95/18/EC and 95/19/EC<sup>13</sup> were dedicated to the solution of ancillary problems, that is, the licensing of railway undertakings and the allocation of railway infrastructure capacity. Finally, Directives 96/48/EC and 2001/16/EC<sup>14</sup> deal with the interoperability of the trans-European conventional and high-speed rail system, while Regulation 881/2004<sup>15</sup> establishes a European Railway Agency.

An exhaustive enumeration of all European legislation in the rail transport sector is not the objective of this study. It might be useful, however, to give an overview of the rules that – without being competition rules in a strict sense – are of a great importance to determine the legal framework the application of competition law in the rail sector is based upon. The next chapter shall describe this framework with more detail, so as to analyse the sector-specific competition law afterwards.

### 2) The liberalization of rail transport: Directive 91/440 of 29 July 1991

Just like all sectors based upon a network (network industries), rail transport has some special characteristics that distinguish it from other economic activities. Its dependence on a fixed network determines the presence of natural monopolies, given the immense investments that would be necessary to duplicate the network – apart from other reasons, like restrictions due to environment protection, security or spatial planning.<sup>16</sup> To be able to open the sector to free competition in spite of these difficulties, Directive 91/440 obliges the Member States to grant the railway undertakings the status of an independent commercial entrepreneur and forces the separation of the operations concerning transport services and infrastructure management.<sup>17</sup> Furthermore, according to Article 10 of the Directive, access rights to the infrastructures shall be granted to international groupings in the Member States of establishment of their constituent railway undertakings and, in all Member States, to those railway undertakings that operate international combined transport of goods services, in return for the payment of fees for its use.

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<sup>12</sup> Directive 2001/12/EC of 26 February 2001 (OJ L 075 of 15 March 2001, pp. 31 et seq.) and Directive 2004/51/EC of 29 April 2004 (OJ L 164 of 30 April 2004). The Commission has already proposed a new amendment of Directive 91/440 (COM/2004/139 final) within the scope of the so-called “Third Railway Package”.

<sup>13</sup> Both are of 19 June 1995, OJ L 143 of 27 June 1995, pp. 70 et seq. Those Directives have been amended by Directives 2001/13/EC and 2001/14/EC of 26 February 2001 (OJ L 075 of 15 March 2001, pp. 26 et seq.). Directive 2004/49/EC of 29 April 2004 (OJ L 164 of 30 April 2004, pp. 44 et seq.; *Railway Safety Directive*) amends Directives 95/18 and 2001/14.

<sup>14</sup> Both amended by Directive 2004/50/EC of 29 April 2004 (OJ L 164 of 30 April 2004, pp. 114 et seq.).

<sup>15</sup> Regulation (EC) n° 881/2004 of 29 April 2004 establishing a European Railway Agency (*Agency Regulation*) (OJ L 164 of 30 April 2004, pp. 1 et seq.)

<sup>16</sup> Slot, P.J. and A. Skudder (2001), p. 87.

<sup>17</sup> Recitals 3 and 4, Articles 4 to 8 of the Directive 91/440.

With the exception of the granting of access rights to international groupings and combined transport operators the Directive does not mean too profound a change, taking into account that it does not demand more than an accounting separation between the activities of rail transport and infrastructure management (Article 6). The considerable success of the Directive in some member States that have liberalized their domestic rail transport markets far more than the Directive had provided for, might be due to its function as a supporter of national reforms the European law as a whole and the Directive 91/440 in particular is said to hold.<sup>18</sup> In the great majority of the Member States, however, the incorporation into national law has been quite slow. Furthermore, the limited range of the Directive has been harshly criticized, taking into account that it only demands an accounting separation instead of providing for an organic separation<sup>19</sup> as the Commission had proposed.<sup>20</sup>

Paragraph 3 of Article 10 of the Directive contemplates the conclusion of administrative, technical and financial agreements between the railway infrastructure managers and the international groupings or combined transport operators to grant a non-discriminatory access to the network. To fix homogenous bases for the allocation of railway infrastructure capacity and the charging of infrastructure fees the Council adopts Directive 95/19/EC of 19 June 1995, which had to be incorporated into national law until two years after its entry into force, that is, until 27 June 1997.<sup>21</sup> The *raison d'être* of Directive 95/19 can be found in the fact that the rail infrastructure network is considered to be a natural monopoly; access has to be regulated to avoid abuses on the part of the monopolists.<sup>22</sup>

That first step towards the liberalization of the Community's railways does not necessarily imply their privatization, understood as the "phenomenon of dissociation of the public firm from the state".<sup>23</sup> Actually, Article 295 of the actual Treaty (old Article 222) rules that the

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<sup>18</sup> Among the countries that got ahead of the demands of the Directive are the United Kingdom, the Netherlands and Germany. See Knill, Ch. and D. Lehmkuhl (1998), pp. 9 et seq. The authors point out three mechanisms of support to domestic reforms: 1) European policies provide an additional legitimization to national authorities to defend their own reform projects. 2) Those policies may serve as a conceptual base for reforms that pretend to settle domestic social problems. 3) European legislation may reinforce the national authority's position with respect to possible national vetoes. Although Germany and the United Kingdom are still considered to be two of the most liberalized markets (See the Community's Rail Liberation Index 2004), both have been brought before the Court of Justice because of their delay to incorporate the Community Directives into their national law (Judgements of 7 and 21 October 2004). On 16 March 2005 the Commission published a press release (IP/05/308) announcing further measures against four countries (Germany, Greece, Luxembourg, and the United Kingdom) for their failure to carry out the Judgments of the Court.

In Spain, the reform has been executed quite slowly, and although accounting separation is granted by Section 42(2) of Royal Decree 121/1994 of 28 January, establishing the statutes for the Spanish national railways (Red Nacional de Ferrocarriles Españoles, RENFE) and Section 160 of Act 13/1996 of 30 December, "de medidas fiscales, administrativas y del orden social", the access of international groupings and combined transport operators was not permitted until 1997 (Section 104 of Act 66/1997 of 30 December, "de medidas administrativas, fiscales y del orden social).

<sup>19</sup> Alexis, A. (1993), p. 503; Idot, L. (1995), pp. 269 et seq., who defends his position with the argument that from the point of view of competition law, both activities correspond to different markets.

<sup>20</sup> See Olmedo Gaya, A. (2000), p. 187; García Pérez, J. (1996), p. 326.

<sup>21</sup> In Spain, the incorporation would take place with the passing of Royal Decree 2111/1998 of 2 October, regulating the access to rail infrastructures.

<sup>22</sup> Martínez, M. (1999), p. 54.

<sup>23</sup> Broseta Pont, M. and F. Martínez Sanz (2002), p. 158.

“Treaty shall in no way prejudice the rules in Member States governing the system of property ownership”, obliging the Community institutions to maintain a neutral point of view with respect to privatizations. The privatization process, however, can be considered inherent to the continuous liberalization of economic sectors, due to – among other reasons – the control of state aids and demonopolization.<sup>24</sup> This privatization, for its part, can be authentic or material, when it consists of the sale of public capital, or inauthentic or formal, when the capital is still public but it is subject to private law regulations.

a) *The “First Railway Package”*

Only some few months before the Commission’s adoption of the White Paper *European Transport Policy for 2010: Time to Decide* the Council passed the so-called “First Railway Package”, using a similar expression to that coined in air transport. The Package is, to some degree, fruit of another White Paper (*A Strategy for Revitalizing the Community’s Railways*) the Commission had elaborated in 1996<sup>25</sup> and contains a series of legislative measures of which the author would like to stress the Directive 2001/12/CE of 26 February 2001 amending Council Directive 91/440/EEC on the Development of the Community’s Railways.<sup>26</sup> For the aim of this paper, an important contribution of the Directive has been the expansion of the access rights to the rail infrastructures contemplated in Article 10(3) of the Directive. Whenever an international transport is intended, any railway undertaking shall be granted access to the Trans-European Rail Freight Network (which is defined in Article 10a and in Annex I of the Directive), and from 15 March 2008 on to the entire rail network. But neither has national rail freight transport (cabotage) been liberalized yet, nor passenger transport (neither national nor international).

From the point of view of competition law, however, the most important innovation of the First Railway Package seems to be the “regulatory body”, which has to be created according to Article 10(7) of the Directive 91/440:

Without prejudice to Community and national regulations concerning competition policy and the institutions with responsibility in that area, the regulatory body established pursuant to Article 30 of Directive 2000/14/EC [sic], or any other body enjoying the same degree of independence shall monitor the competition in the rail services markets, including the rail freight transport market.

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<sup>24</sup> Devroe, W. (1997), pp. 268, 278 et seq.

<sup>25</sup> COM(96) 421 final. The White Paper, for its part, is based upon the report “The Future of Rail Transport in Europe”, presented by a high level advisory group at the instance of the Commission.

<sup>26</sup> See, with more detail, Ende, L. and J. Kaiser (2004), pp. 27 et seq.; Parejo Alfonso, L. (2004), pp. 24 et seq. In Spain, the Directive has been incorporated by Act 39/2003 of 17 November, regulating the railway sector, and the corresponding Royal Decree 2387/2004 of 30 December. For a detailed analysis see Carlón Ruiz, M. (2004), pp. 339 et seq.; Martínez Sanz, F. (2004), pp. 41 et seq.

That body shall be set up in accordance with the rules in Article 30(1) of the said Directive. Any applicant or interested party may lodge a complaint with this body if it feels that it has been treated unjustly, has been the subject of discrimination or has been injured in any other way. On the basis of the complaint and, where appropriate, on its own initiative, the regulatory body shall decide at the earliest opportunity on appropriate measures to correct undesirable developments in these markets. In order to ensure the necessary possibility of judicial control and the requisite cooperation between national regulatory bodies, Article 30(6) and Article 31 of the said Directive shall apply in this context.

According to the first paragraph, the regulatory body with more general faculties can be different from the body that has to be created in accordance with Article 30 of Directive 2001/14/CE<sup>27</sup>, although it has to have the same independence. This might generate some difficulties when trying to reconcile both Directives<sup>28</sup>: there can be situations in which up to four organs are simultaneously competent, for example when in vertically integrated undertakings the results of the process of allocation of infrastructure capacity favour the railway undertakings pertaining to the same group in a discriminating manner. In that case various bodies could intervene: on the one hand, both regulatory bodies (as far as they exist), and on the other hand, the corresponding national competition authority (applying both its national competition law and Articles 81 and 82 of the Treaty, in accordance with Regulation 1/2003) and the European Commission, who reserves the right to investigate cases with special relevance. All in all, it will be the national legislators who will have to foresee possible problems when incorporating the Directives to their domestic legal system. The creation of a regulatory body is, however, of vital importance as can be seen from the experience in, for example, the telecommunications or energy sectors and the requirements for its independence laid down in Directive 2001/14 should be taken into account seriously.<sup>29</sup>

Another important amendment to take into account is the modification of Article 6 of Directive 91/440, introducing a new paragraph 3:

Member States shall take the measures necessary to ensure that the functions determining equitable and non-discriminating access to

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<sup>27</sup> Compared to the regulatory body of Article 10(7) of Directive 91/440, the body that has to be created according to Article 30 of Directive 2001/14 will be competent with respect to the following items: “a) the network statement; b) criteria contained within it; c) the allocation process and its results; d) the charging scheme; e) level or structure of infrastructure fees which it is, or may be, required to pay; f) safety certificate, enforcement and monitoring of the safety standards and rules”.

<sup>28</sup> See paragraph 7 of Article 10, which expressly refers to this situation: “Without prejudice to Community and national regulations concerning competition policy and the institutions with responsibility in that area ...”. See also Carlón Ruiz, M. (2004), p. 315.

<sup>29</sup> In accordance with Article 30 of the named Directive the regulatory body “shall be independent in its organisation, funding decisions, legal structure and decision-making from any infrastructure manager, charging body, allocation body or applicant. The body shall function according to the principles outlined in this Article whereby appeal and regulatory functions may be attributed to separate bodies”. In Spain, there are doubts regarding the independence of the regulatory body, as it is integrated in the corresponding ministry (Ministerio de Fomento), to which both the infrastructure manager as well as the major rail transport undertaking (RENFE-Operadora) are assigned. See Carlón Ruiz, M. (2004), pp. 412 et seq. For the situation in other regulated sectors see Slot, P. and P.J. Skudder (2001), pp. 100 et seq.

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infrastructure, listed in Annex II, are entrusted to bodies or firms that do not themselves provide any rail transport services. Regardless of the organisational structures, this objective must be shown to have been achieved.

Member States may, however, assign to railway undertakings or any other body the collecting of the charges and the responsibility for managing the railway infrastructure, such as investment, maintenance and funding.

Annex II contains a list of the essential functions Article 6(3) refers to:

- preparation and decision making related to the licensing of railway undertakings including granting of individual licenses,
- decision making related to the path allocation including both the definition and the assessment of availability and the allocation of individual train paths,
- decision making related to infrastructure charging,
- monitoring observance of public service obligations required in the provision of certain services.

These provisions are of a special importance for those countries in which the infrastructure management is entrusted to an undertaking that provides rail transport services at the same time. The Directive does not prohibit vertical integration, but in the interests of a further unbundling in the rail transport sector the Community legislator fixes a series of functions that have to be carried out by an independent body or firm.

### *b) The “Second Railway Package”*

Directive 2004/51/CE of 29 April 2004, set within the framework of the so-called “Second Railway Package”, newly expands the access rights granted to railway undertakings, shortening the deadline for the opening of the national rail networks. Thus, from 1 January 2006 on, all railway undertakings<sup>30</sup> should be granted access to the entire rail network for the means of international transport, while 1 January 2007 is the deadline for permitting the provision of all rail transport services. All in all, within less than one year and a half all rail services have to be liberalized, including the so-called cabotage.

### *c) The “Third Railway Package”*

The “Third Railway Package”, adopted by the Commission on 3 March 2004, has not yet been passed by the Council. The different proposals focus on the certification of train crews, passenger’s rights and obligations, the liberalization of the international passenger transport market and the quality requirements in freight transports. The most outstanding innovation in

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<sup>30</sup> As defined in Article 2 [sic] of Directive 91/440. The reference should be to the second Article, i.e. Article 3 since the repeal of Article 1.

the sphere of this study is the third modification of Directive 91/440<sup>31</sup>, which pretends to open the international rail passenger transport market to competition. In case of being passed, there would no longer be a reference to international groupings and the access rights would be granted to all railway undertakings interested in providing such services. The Commission, however, is fully aware that liberalization in passenger transport – unlike what happens in freight transport – is conditional on the fact, that the great majority of international passenger transport services include national transport services, that is, cabotage services<sup>32</sup>, since profitability is increased by picking up and putting down passengers in the same state.<sup>33</sup>

By liberalizing passenger transport, and specially cabotage services, there may be a violation of certain exclusive rights granted by virtue of a contract on the provision of public services, if the undertaking offering an international transport offers the same routes to its clients that had been given to the public service provider before. To solve these problems, the Commission pretends to introduce a modification in paragraph 3 of Article 10 of Directive 91/440, which would say:

Member States may limit the right of access defined in paragraph 3(b) on services between a place of departure and a destination which are covered by a public service contract conforming to the Community legislation in force. Such limitation may not have the effect of restricting the right to pick up passengers at any station located on the route of an international service and to set them down at another, including stations located in the same Member State, except where this is strictly necessary to maintain the economic equilibrium of the service defined in a public service contract and has been approved by the regulatory body referred to in Article 30 of Directive 2001/14/EC.

Finally, state authorities will have to analyse the problems inherent in financing public services as well, taking into account the judgment of the Court of Justice of 24 July 2003 (case 280/00 – *Altmark Trans*), establishing rules for the financing of local and regional transport services.

#### *d) Other regulation systems*

It cannot be the objective of the present paper to analyse all national law systems. The author, however, would like to put special emphasis on the influence of European legislation on other regulation systems. In this sense one should mention the Convention establishing the European Free Trade Association, in its consolidated version of 2001 (*Vaduz Convention*) that

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<sup>31</sup> Proposal for a Directive of the European Parliament and of the Council, amending Council Directive 91/440/EEC on the development of the Community's railways, COM(2004)139 final of 3 March 2004.

<sup>32</sup> Commission of the European Communities, *Further integration of the European rail system: third railway package*, Communication COM(2004)140 final, of 3 March 2004, pp. 9 et seq.

<sup>33</sup> In the explanatory statement to the Proposal for a Directive (p. 5) the Commission cites the example of the line Brussels – Cologne, on which the trains “are very full between Brussels and Liège, but much less so from Liège to Cologne”.

creates the obligation for its Member States<sup>34</sup> to liberalize the access to transport markets in the scope of passenger and freight transport by road, rail and air. In a similar way, the Agreement on the European Economic Area, in which participate all EFTA states with the exception of Switzerland, establishes a non-discrimination principle in favour of the carriers of other Member States in its Article 48(1). The Member States can, however, deviate from that principle, notifying the EEA Joint Committee. In that case, the other Contracting Parties which do not accept the deviation may take corresponding countermeasures.

Furthermore, the liberalization on Community level has been one of the reasons for the last revision of the Convention concerning International Carriage by Rail (COTIF). The Convention currently in force (COTIF 1980) incorporates a transport obligation – incompatible with the liberalizing efforts of the European Union – since it presupposes cooperation and not competition between the different railway undertakings.<sup>35</sup> This obligation has been withdrawn in the last Protocol to modify the COTIF Convention, which has been signed in Vilnius on 3 June 1999. This Protocol has not entered into force yet.<sup>36</sup>

On the other hand, Community legislation has had a certain effect on Swiss national regulations, since these permit the access of more than one railway undertakings to the Swiss infrastructure from 1 January 1999 on.<sup>37</sup>

### III. RAIL TRANSPORT AND COMPETITION LAW

As one of its principal consequences the liberalization of rail transport permits the application of the Community competition rules in a sector that has traditionally been governed by statutory monopolies. This chapter intends to trace an outline of the development of competition law in the transport sector as a whole, and in rail transport in particular [*sub 1*], to analyse afterwards the impact of the rules applicable to rail transport today [*sub 2*].

#### 1) Competition policy in the transport sector

The transport sector has always been considered to be a special field to which some rules – to be applied imperatively to other economic sectors from the start – could not be brought to bear. Competition law is certainly no exception, which is proved to be true by Regulation 141/1962/EEC of 26 November 1962 exempting transport from the application of Council

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<sup>34</sup> Apart from the Member States of the European Union, the remaining Contracting Parties are Switzerland, Norway, Liechtenstein and Iceland.

<sup>35</sup> For the impact of Directive 91/440 and its modifications on the COTIF Convention see Desfougères, E. (2003), pp. 7 et seq.; Llorente Gómez de Segura, C. (2003), pp. 4 et seq.; Mutz, G. (1999), pp. 552 et seq.

<sup>36</sup> Since the ratification of Portugal on 7 April 2005, there are already 25 states that have ratified, accepted or approved the 1999 Protocol. To enter into force, the ratification, acceptance or approval of at least 27 states is required.

<sup>37</sup> See Hamerschmiedová, E. (2001), pp. 13 et seq. Switzerland is a Member State of COTIF as well, having ratified the Vilnius Protocol on 7 May 2002. Please note as well the *Agreement on the Carriage of Goods and Passengers by Rail* between the European Union and the Swiss Confederation, published in OJ L 114 of 30 April 2002, pp. 91 et. seq. See Breitenmoser, S. (2003), pp. 1174 et seq.

Regulation No. 17.<sup>38</sup> The legislator justified the exemption of the transport sector from the application of the procedural Regulation No. 17 with the “distinctive features of the transport sector” (recital 1), although Regulation 141/1962 itself envisages the elaboration of competition rules for transport by road, rail and inland waterway “within a foreseeable period” (recital 2). The Commission should present a proposal before 30 June 1964 (Article 2) and Article 3 establishes a maximum duration of Regulation 141/1962 until 31 December 1965. This deadline would be extended, however, first until 31 December 1967<sup>39</sup> and a second time until 30 June 1968<sup>40</sup>.

In accordance to its Article 1, Regulation 141/1962 declared inapplicable Regulation No. 17 to some of the most anticompetitive conducts, i.e., the fixing of transport rates and conditions, the limitation or control of the supply of transport or the sharing of transport markets, or abuses of a dominant position within the scope of Article 86 (present Article 82) of the Treaty. One of the “distinctive features of the transport sector” that gave rise to such a peculiar regulation was the presence of many national railway undertakings that had, for their part, emerged from a great number of smaller undertakings<sup>41</sup> and that had consolidated their presence as statutory monopolies in the different Member States. It seems that the principal reason for this generalized nationalization movement lied in the fact that private entrepreneurs had limited the construction of new infrastructures to profitable lines and that the decreasing return on infrastructure investments would have caused the bankruptcy of many operators.<sup>42</sup>

The same phenomenon can be observed in other sectors (postal services, telecommunications, energy, etc.); and here as well, the same reasons that quite some time ago motivated the nationalization of railway undertakings would be named to liberalize the market once again. The next reference to competition law and transport can be found in Council Decision 65/271/EEC<sup>43</sup> whose Article 5 asks for a reduction of the obligations inherent in the concept of a public service imposed on transport undertakings, while Articles 7 and 8 pursue a normalization of the accounts of railway undertakings, as well as their financial autonomy. The organs of the Community echoed that obligation and adopted two Regulations on common rules for the normalisation of the accounts of railway undertakings (Regulation

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<sup>38</sup> OJ L 124 of 28 November 1962. It refers to Regulation 17/1962/EEC of 6 February 1962 implementing Articles 85 and 86 of the Treaty (now Articles 81 and 82; OJ L 013 of 21 February 1962). Both Regulations have been repealed by Regulation 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty (OJ L 001 of 4 January 2003).

<sup>39</sup> Council Regulation No. 165/65/EEC of 9 December 1965 extending the delay for the non-application to rail, road and inland waterway transport of Council Regulation No 17.

<sup>40</sup> Council Regulation No. 1002/67/EEC Of 14 December 1967 extending the delay for the non-application to rail, road and inland waterway transport of Council Regulation No 17.

<sup>41</sup> See for example the Prussian *Gesetz über die Eisenbahn-Unternehmungen* of 3 November 1838 (*Gesetz-Sammlung für die königlichen preußischen Staaten*, 1838, pp. 505 et seq.) that had been elaborated to regulate the coexistence of more than one railway undertakings. Curiously enough, this Act already articulates access rights to rail undertakings different from the owner of the infrastructure.

<sup>42</sup> v. Kunowski (1978), pp. 68 et seq.; García Pérez, J. (1996), pp. 92 et seq.

<sup>43</sup> Decision 65/271/EEC of 13 May 1965 on the harmonisation of certain provisions affecting competition in transport by rail, road and inland waterway (OJ 088 of 24 May 1965).

1192/1969/EEC) and on the granting of aids for transport by rail, road and inland waterway (Regulation 1107/1970/EEC).

In the field of competition law and policy an important – and until last year definitive – step would be taken with Regulation 1017/68/EEC<sup>44</sup>, trying to ensure that the competition on the common market is not distorted by “agreements between undertakings, decisions of associations of undertakings and concerted practices between undertakings and all instances of abuse of a dominant position within the common market which could have such effects” (recital 7). Although the ambiguity of the preamble of the Regulation does not make it clear whether the Council adopts the universality or minimalistic principle with respect to the applicability of the general provisions of the Treaty (among them the competition rules) to the transport sector<sup>45</sup>, the problem is somehow eluded by repeating the description of the prohibited conducts in Articles 2 and 8. Finally, it would be the Court of Justice who should decide whether the interpretation of Regulation 1017/68 should take into account Articles 85 and 86 (81 and 82) of the Treaty and Regulation No 17 or whether Regulation 1017/68 should give rise to a jurisprudence of its own.<sup>46</sup>

The question on the applicability of the general rules of the Treaty would be resolved by the Court of Justice in the “French Merchant Seamen” case<sup>47</sup>. The Court held that (at least) the rules of Part Two of the Treaty are applicable to the transport sector as well. As the Court did not rule about the applicability of the remaining provisions of the Treaty to transports, it had to pronounce a new judgment<sup>48</sup> declaring the applicability of the Articles comprised in Part Three (competition rules in particular) to the sector. It should not be forgotten, however, that Regulation 1017/68 contains sector specific competition rules for the transport by road, rail and inland waterway. Thus, the Court of Justice confirmed in its judgment in case 264/95 the thesis defended by the Court of First Instance that once determined the applicability of Regulation 1017/68 to a case by virtue of its Article 1, Regulation No. 17 cannot be applied any more, due to the “fundamental differences” between both Regulations (paragraphs 59 et seq.).<sup>49</sup> That does not imply, however, that the interpretation of Regulation 1017/68 cannot be based upon the interpretation of Articles 85 and 86 (81 and 82) of the Treaty. With respect to

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<sup>44</sup> Council Regulation 1017/68/EEC of 19 July 1968 applying rules of competition to transport by rail, road and inland waterway. Please note that the Regulation has recently been repealed by Regulation 1/2003. Regulation 1017/68 was adopted after the period of suspension granted by the subsequent modifications of Regulation 141/62 had expired; Article 30 of Regulation 1017/68 therefore dates its entry into force back to 1 July 1968, i.e., 19 days earlier.

<sup>45</sup> Blonk, W.A.G. (1968-69), p. 454; Sales Pallarés, L. (2004), pp. 97 et seq.

<sup>46</sup> Blonk, W.A.G. (1968-69), p. 455.

<sup>47</sup> Judgment of 4 April 1974, case 167/73 - *Commission v. France*.

<sup>48</sup> Judgment of 30 April 1986, joined cases 209-213/84, *Ministère Public v. Lucas Asjes and others*, “Nouvelles Frontières”.

<sup>49</sup> One of the most important differences stems from the fact that under Regulation 1017/68 the undertakings can judge by themselves the licitness or illicitness of their agreements, without having to notify them to the Commission (recitals 14 and 15 of the Regulation). Furthermore, the list of exceptions to and exemptions from the prohibition rules contained in Articles 2 and 8 is quite long; it should be enough to mention the special rules with respect to technical agreements, agreements intended to improve the quality of transport services or the productivity of undertakings, as well as the exemptions referring to the so-called “crisis cartels”.

rail transport, the Court of Justice admitted this possibility in its judgment of 21 October 1997 (case 229/94 – *Deutsche Bahn AG v. Commission*).

Articles 2 (cartel prohibition) and 8 (prohibition of abuses of a dominant position) square with Articles 85 and 86 (81 and 82) of the Treaty, and they can be considered to be purely declaratory.<sup>50</sup> With the entry into force of Regulation 1/2003 this debate loses its base since the major part of Regulation 1017/68 is repealed. Apart from some transitory dispositions only three articles are preserved. The first of them is Article 1, defining the Regulation's field of application:

The provisions of this Regulation shall, in the field of transport by rail, road and inland waterway, apply both to all agreements, decisions and concerted practices which have as their object or effect the fixing of transport rates and conditions, the limitation or control of the supply of transport, the sharing of transport markets, the application of technical improvements or technical co-operation, or the joint financing or acquisition of transport equipment or supplies where such operations are directly related to the provision of transport services and are necessary for the joint operation of services by a grouping within the meaning of Article 4 of road or inland waterway transport undertakings, and to the abuse of a dominant position on the transport market. These provisions shall apply also to operations of providers of services ancillary to transport which have any of the objects or effects listed above.

The remaining two articles refer to legal exceptions for technical agreements and the exemptions for groups of small and medium-sized undertakings (Articles 3 and 4). The exemptions for agreements aimed at improving the quality of transport services, at increasing the productivity of undertakings or at further technical or economic progress, however, disappear, as well as the reference to the “crisis cartels” (Articles 5 and 6 of Regulation 1017/68). This means that agreements that might have been exempt under Article 5 of the Regulation will have to be analysed under the general provisions of Article 81(3) of the Treaty, following the procedure laid down in Regulation 1/2003. Just like under Regulation 1017/68, and in counterposition to the procedure laid down in Regulation No. 17, the transport undertakings will have to evaluate the licitness of their agreements by themselves, without having to wait for a favourable Decision of the Commission (Article 1(2) of Regulation 1/2003).

Thus, since the entry into force of Regulation 1/2003 the application of competition rules to the transport sector is as follows: In the first place, Articles 81 and 82 of the Treaty will be applied to determine whether a certain conduct should be considered prohibited. If the requirements of Article 82 are met, the conduct will be deemed to be an abuse of a dominant position without any possible exemptions.<sup>51</sup> On the other hand, an agreement that would be

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<sup>50</sup> At least since the Court has adopted the universality principle. Stehmann, O. and G. Zellhofer (2004), p. 335.

<sup>51</sup> Souty, F. (2003), pp. 64 et seq.

prohibited under paragraph 1 of Article 81 can be considered licit if one of the exceptions laid down in Article 81(3) can be applied.<sup>52</sup> If the requirements for the application of one of the exceptions of Article 81(3) are not met the agreement could still be considered exempt by virtue of Articles 3 or 4 of Regulation 1017/67, whenever the conditions of its Article 1 are fulfilled. Taking into account that Article 4 can only be applied to transport by road and inland waterway, the only speciality of rail transport with respect to other economic sectors is the exception for technical agreements in Article 3 of the Regulation. The author considers, however, that the exceptions contemplated in letters a) to g) can be considered to be mere examples of the general rule of “efficiency improvements”<sup>53</sup> contained in Article 81(3) of the Treaty. Thus, at least with respect to rail transport, there is no specificity left.<sup>54</sup>

## 2) Antitrust and rail transport – Article 82 of the Treaty

Traditionally, national railway undertakings held a monopoly with respect to the provision of rail transport services on their network. The possible infractions of competition law were thus restricted in the great majority of cases to the state where the railway undertaking was seated, with little effect on the trade between Member States.<sup>55</sup> Article 85 (now 81) could only be applied to agreements between different national undertakings, Article 86 (now 82) only to national undertakings as statutory monopolies. But the importance of cartel and antitrust rules was not due to the prohibition of conducts that restricted the competence within the rail transport market (which was not liberalized) but to their holding a wake over competitors on other transport markets (road transport for freight and air transport for passengers); the fact that the plaintiff in the *Deutsche Bahn AG* case (paragraph 118) pretended a reduction of the imposed fine attending to the absence in the rail transport sector of any infringement of competition rules prosecuted by the Commission in the previous 20 years is a good proof of the little incidence of Articles 81 and 82 of the Treaty until the entry into force of Directive 91/440 and its incorporation into the different national laws.

Since then the situation has radically changed. Infrastructure management has been separated from the provision of rail transport services and access to the network has been granted gradually to non-resident railway undertakings. Adding the possible presence of new railway undertakings<sup>56</sup> the competition in the sector should rise considerably, giving way to the

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<sup>52</sup> See Communication from the Commission, *Guidelines on the application of Article 81(3) of the Treaty*, OJ C 101 of 27 April 2004, pp. 97 et seq., paragraphs 32 et seq.

<sup>53</sup> *Idem*, paragraphs 48 et seq.

<sup>54</sup> Taking into account, before all, that Article 1(2) of Regulation 1/2003 substituted the Commission’s exemption prerogative for a system of legal exception. On the advantages and disadvantages of the new system see Hamer, J. (2004), pp. 11 et seq.; Pijetlovic, K. (2004), pp. 356 et seq. For some authors, the introduction of an *ex post* control instead of the traditional *ex ante* control converts the application of Article 81 as a whole “in a *rule of reason* that contains all elements that enable the undertakings to evaluate the positive or negative aspects a certain agreement could have for the competition by themselves” (Calvo Caravaca, A.L. and J. Carrascosa González (2003); translation from the Spanish original by the author).

<sup>55</sup> A good proof of that is the small number of Court judgments on rail transport.

<sup>56</sup> In Spain there are already four enterprises that have applied for a licence under Directive 95/18/EC.

corresponding improvements with respect to the quality of the service, the profitability of the undertakings and the rates to be paid for rail transport services. It will be the mission of Articles 81 and 82 to preserve and defend the incipient competition, in the hope that a complete liberalization fulfils the expectations pinned on it.

This paper is not dedicated to the analysis of all questions raised by the application of competition rules to rail transport. The author wants to discuss just some of the special features with respect of the relation between competition and ownership in rail transport. Although the prohibition of collusive agreements in Article 81 of the Treaty is quite important for rail transport as well <sup>57</sup>, it is of little interest for this study. We should therefore analyse without further delay the impact of Article 82 on rail transport, taking as a reference the decision of the Commission in the *GVG/FS* case <sup>58</sup>.

The *GVG/FS* case “was initiated by a complaint from the German railway undertaking Georg Verkehrsorganisation GmbH (hereinafter “GVG”) against Ferrovie dello Stato SpA (hereinafter “FS”), the Italian national railway carrier. GVG complained that since 1995 FS had been refusing to provide access to the Italian infrastructure, to enter into negotiations for the formation of an international grouping and to provide traction”.<sup>59</sup> The intention of GVG was to provide international passenger transport services between different German cities and Milan, proposing a direct line between Basle and Milan that would cross the Italian border in Domodossola. It should use the rail infrastructure of SBB (Switzerland) and the Italian FS. To make its service different, GVG would cover the route Basle – Milan without stops, saving up to one hour.<sup>60</sup>

#### *a) Relevant markets*

The Commission distinguishes between relevant product markets and relevant geographic markets. The relevant product market “comprises all those products and/or services which are regarded as interchangeable or substitutable by the consumer, by reason of the products' characteristics, their prices and their intended use”.<sup>61</sup> In this sense, the Court of First Instance hold in *Deutsche Bahn AG v. Commission (DB)* that the rail services market as an upstream market is different from the rail transport market in general, as a downstream market. To this effect, the rail services market “offers a specific range of services, in particular the provision

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<sup>57</sup> See for example: Judgment of the Court of First Instance in case 229/94 – *Deutsche Bahn AG v. Commission*. For a detailed review on the application of Article 81 to rail transport see Zellhofer, G. (2003), pp. 221 et seq. The cartel prohibition has traditionally been of less importance, given that the impossibility to gain access to other countries' networks made agreements between the different national railway undertakings inevitable and, what is more, their intention was to make a competitive rail transport possible. See Freise, R. (1992), pp. 120 et seq.

<sup>58</sup> Decision of the Commission of 27 August 2003, relating to a proceeding pursuant to Article 82 of the EC Treaty (2004/33/EC) – *GVG/FS*.

<sup>59</sup> Paragraph 1 of the Decision.

<sup>60</sup> A description of the facts can be seen in Stehmann, O. and I. Mackay (2003), p. 23.

<sup>61</sup> *Commission Notice on the definition of relevant market for the purposes of Community competition law* (OJ C 372 of 9 December 1997, pp. 5 et seq., paragraph 7.

of locomotives, traction and access to the railway infrastructure which, while admittedly provided according to the demands of the railway transport operators, is in no way interchangeable or in competition with their services” (paragraph 55).

In apparent contradiction to this finding, the same Court of First Instance ruled in *European Night Services (ENS)*<sup>62</sup> that “the market for rail services can in fact be split into only two service markets: an integrated market for passenger services on which only railway undertakings and international groupings of railway undertakings operate, and a market for access to and management of railway infrastructure, controlled by infrastructure managers within the meaning of Directive 91/440”. The Court overcomes the differences to its *DB* judgment stating that in *DB* combined transport was concerned, while *ENS* was on passenger transport.

The locomotive market is of little interest for the present study.<sup>63</sup> It has to be analysed, however, whether there is a separate market for traction<sup>64</sup>, independent from the downstream transport services market. Before Directive 91/440 called for a separation of infrastructure management and provision of rail transport services, the markets for traction and for access to the infrastructure had made up one single market. The national railway undertakings owned the network as well as the rolling stock and besides, they were beneficiaries of a statutory monopoly on the exploitation of their network. This union has been broken up by Directive 91/440, either by creating a new and independent infrastructure manager or by constituting two undertakings within the same group<sup>65</sup>. The infrastructure and the rolling stock have to be property of two different entities, at least from an accounting point of view, separating the markets for access to the infrastructure and for traction. In any case, all type of cross subsidies between companies of a same group are strictly prohibited and the functions determining equitable and non-discriminatory access have to be entrusted to a body or firm that does not provide any kind of rail transport service (Article 6(3) of Directive 91/440 as amended by Directive 2001/12).

In international passenger transport, the access rights laid down in Article 10 of Directive 91/440 have been restricted to international groupings, which are defined in Article 3 of the same Directive as “any association of at least two railway undertakings established in different Member States for the purpose of providing international transport services between Member States”. Given the definition of “railway undertaking” in the same Article, any undertaking has to ensure the traction. Thus, the international grouping does not have to resort to any other undertaking, as the undertakings that form the international grouping can provide

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<sup>62</sup> Judgment of 15 September 1998 – *European Night Services et al. v. Commission*, joined cases T-374/94, T-375/94, T-384/94, T-388/94, paragraph 220.

<sup>63</sup> Although it is true that Article 3 of Directive 91/440 states that every railway undertaking has to ensure traction, it is not necessary for the undertakings to be the owner of the locomotives. It is sufficient for them to “ensure traction” by the way of other means, e.g., renting or leasing locomotives (see Idot, L. (1995), p. 275).

<sup>64</sup> For a definition of the traction market see Stehmann, O. and G. Zellhofer (2004), pp. 337, as well as paragraphs 51 et seq. of the *GVG/FS* decision.

<sup>65</sup> Paradigmatic is the German example, where the infrastructure manager and the main railway undertaking pertain to the same group of companies (vertical integration).

the traction themselves. But this is true only insofar the international transport does not access to the network of a country where none of the undertakings that make up the international grouping usually provides transport services, taking into account that Article 10 of Directive 91/440 envisages a transit right in all the other Member States, i.e., that the international grouping is allowed to cross a third country using its rail infrastructure.<sup>66</sup> And even if there were a railway undertaking of the grouping in all the countries implied in the transport, the grouping might want to turn, for any reason whatsoever, to another undertaking so as to obtain traction services.<sup>67</sup>

From all this we can infer the existence of a separate traction market, different from the transport market, not only in combined transport but also in rail passenger transport. As regards the relevant geographic market<sup>68</sup> the argumentation of the Commission can be followed<sup>69</sup> taking into account – at least until the interoperability of the trans-European conventional and high-speed rail network is achieved – that neither the locomotives nor the crew can be used in more than one Member State. The relevant geographic market would therefore normally be the country where the traction services are provided.

The same statement can be made with respect to the geographic market for the access to the rail infrastructure. As for the product market, the legislation here not only allows the existence of a single infrastructure manager in every Member State, but this situation is considered to be the most usual and should not put free competition at risk. The market for access to the infrastructure is considered to be a separate product market by the Court of First Instance as well as by the Commission, and no further explanation is required.

#### b) Dominant position and *essential facilities*

As a general rule, the control of market power in sectors that are being liberalized – especially in network bound industries – is carried out with the help of sector-specific regulations. These provisions usually regulate at least the access of third parties to the network and the determination of the fees to be paid for the use of the infrastructure. The control of the performance of these rules is normally conferred to a specific regulatory body. But the control of market power can also be carried out by competition rules.<sup>70</sup> Once verified the existence of

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<sup>66</sup> It is not allowed, however, to pick up or put down passengers in this third country, which can be deduced from the distinction between “access rights” and “transit rights”. See Alexis, A. (1992), p. 508.

<sup>67</sup> The German railway undertaking *Deutsche Bahn AG* provides traction services for an international grouping made up of the equally German *Georg Verkehrsorganisation GmbH* and the Swedish *Statens Järnvägars*.

<sup>68</sup> In accordance to the *Commission Notice on the definition of relevant market for the purposes of Community competition law*, the relevant geographic market “comprises the area in which the undertakings concerned are involved in the supply and demand of products or services, in which the conditions of competition are sufficiently homogeneous and which can be distinguished from neighbouring areas because the conditions of competition are appreciably different in those area”.

<sup>69</sup> Paragraphs 57 et seq. of the *GVG/FS* Decision.

<sup>70</sup> Geradin, D. (2001), pp. 115 et seq.; Basedow (2000), p. 33. Please note also Article 10(7) of Directive 91/440: “Without prejudice to Community and national regulations concerning competition policy and the institutions with responsibility in that area, the regulatory body [...] shall monitor the competition in the rail services markets, including the rail freight transport market.”

a specific regulation of the rail transport sector<sup>71</sup>, this chapter analyses the markets for access to the infrastructure and for traction from the point of view of competition law.

As regards the dominant position, the infrastructure managers hold – given the difficulties to duplicate the network – a monopoly, either natural or statutory. The Court of Justice holds<sup>72</sup> that Article 82 of the Treaty applies even when the dominant position is not due to the activity of the undertaking in question but to a legal provision. The activity of the national rail infrastructure managers has to be analysed, consequently, according to Article 82 of the Treaty, even when the monopolistic power has been conferred to the manager by virtue of a legal rule. As for the access to the rail infrastructure the different national managers – whether they are public or private entities – possess, without any doubt, a dominant position within the rail infrastructure market.

The market for traction services had to be liberalized by virtue of Directive 91/440 and the monopolies of the national railway undertakings to provide traction services on their own network<sup>73</sup> have been broken up to allow that all railway undertakings compete in equal conditions. However, this does not mean that the heirs of the former monopolists do not have a dominant position within the market any more; quite the opposite, the majority of the former flag companies still reach important or quasi-monopolistic market shares within the traction market.

As for the possible abuse of this dominant position, it has been shown that both markets are so-called upstream markets, different from the rail transport market. Under certain circumstances, however, the holding of a dominant position on one market can imply a peril to competition also on another market, so that the access of third parties to services provided on the first market can be essential for the existence of competition on the second market. This problem has been dealt with in numerous occasions, and as a response some organs with jurisdiction in competition matters (courts as well as national and supranational authorities) have developed the so-called “essential facility” doctrine<sup>74</sup>, that has its origins in the *Terminal Railroad* case of the US Supreme Court, which precisely dealt with a railroad case.<sup>75</sup>

While as a general rule it can be asserted that it favours competition to allow that undertakings are the sole users of the assets by them constructed or acquired and that undertakings that want to compete on the same market have to construct or acquire their own assets, it is also true that there should be an exception to that general rule with respect to those undertakings that own or control assets access to which is essential for other undertakings to compete on a downstream market. “In other words, the exception applies when *only*

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<sup>71</sup> We should stress Regulation 95/19/EC and its amendments. As for the regulatory body see II.2.a).

<sup>72</sup> Case 311/84, *Télémarketing*. European Court Reports 1985, p. 03261 et seq.

<sup>73</sup> Basedow (1989), p. 167, talks of partial markets with territorial monopolies in the different states.

<sup>74</sup> Or “bottleneck theory”. The naming seems to go back to Neale (1960), pp. 68 et seq., quoted by Schommer, T. (2003), p. 14, note 56.

<sup>75</sup> For the facts of the case see Capobianco, A. (2001), pp. 548 et seq.; Doherty, B. (2001), pp. 398 et seq.; Schommer, T. (2003), pp. 14 et seq.

“downstream” competition is possible, and when *that* is possible only if access to the facility is given.”<sup>76</sup>

A dominant position on the relevant market can only be assumed when there is no competition at all on the downstream market, or when the refusal to grant access to certain assets can eliminate all competition on that downstream market.<sup>77</sup> That is, “a single firm’s facility [...] is «essential» only when it is both critical to the plaintiff’s competitive vitality and the plaintiff is essential for competition in the marketplace”.<sup>78</sup> Glasl<sup>79</sup> suggests the following characteristic criteria for essential facilities in EC antitrust law:

- (1) Facilities consist in infrastructure, or infrastructure combined with services related to them, which are of an auxiliary nature to an economic activity in a related but separated market. [...]
- (2) It is practically or reasonably impossible for any new competitor to duplicate such facilities.
- (3) Such facilities, access to which is necessary in order to compete, are considered essential facilities.

Nevertheless, a fourth criterion should be added: The owner shall not have a legitimate business justification for the refusal.<sup>80</sup> These requirements are certainly fulfilled as regards to infrastructure assets; as we have seen, it is reasonably (or even legally) impossible to duplicate them and a refusal to grant access rights can eliminate competition on the downstream market. The access to the rail infrastructure and the fees to be paid for its use have been regulated, however, in sector specific legislation, and it is improbable for competition law to be applied to grant supply of train paths for rail transport in general, and passenger transports in particular.<sup>81</sup> Especially when infrastructure manager and transport service provider are separated in their organic structure, i.e., when they are not vertically integrated in the same undertaking, there is little probability of abuses enforceable under Article 82 of the Treaty and besides, further unbundling demands can reduce the risk of abuses to a minimum.

On the other hand, the market for traction deserves quite a different treatment: firstly, because traction service providers usually operate both on the upstream traction market and on the downstream transport market; secondly, because the traction market has been liberalized by

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<sup>76</sup> Temple Lang, J. (2000), p. 375. Doherty says that “the doctrine of essential facilities in its simplest form suggests that a monopolist can be forced to sell a product or service when another person needs it to do business” (Doherty, B. (2001), p. 397).

<sup>77</sup> Hohmann, H. (2001), p. 187.

<sup>78</sup> Areeda, Ph. (1989), p. 852.

<sup>79</sup> Glasl, D. (1994), p. 308.

<sup>80</sup> Temple Lang, J. (2000), p. 375; Doherty, B. (2001), pp. 428 et seq.

<sup>81</sup> The Court of First Instance ruled in *ENS* that there is no necessity to oblige the implied undertakings to supply train paths, as the only undertakings that can provide international passenger services are international groupings, which are already granted access by virtue of Article 10 of Directive 91/440 (paragraph 211). See Zellhofer, G. (2003), p. 281.

virtue of Directive 91/440 and its subsequent amendments. The Commission held in its *Sea Containers v. Stena Sealink*<sup>82</sup> decision that “the owner of an essential facility which uses its power in one market in order to protect or strengthen its position in another related market, in particular by refusing to grant access to a competitor, or by granting access on less favourable terms than those of its own services, and thus imposing a competitive disadvantage on its competitor, infringes Article 86 [Article 82]”. The difficulty lies therefore in defining traction as an essential facility. Traction certainly is no infrastructure, but being “of an auxiliary nature to an economic activity in a related but separated market” it might nevertheless be regarded a facility<sup>83</sup>, the problem being to determine the grade of difficulty to duplicate these facilities, as a second requirement for the application of the doctrine.

As many authors have underlined, the application of the essential facility doctrine entails a severe intervention in the property rights of the railway undertakings.<sup>84</sup> Therefore, the requirements to take into account when essential facilities are being investigated have to be interpreted in a very strict way. The duplication of the traction facilities is far easier than the duplication of the rail infrastructure, and the liberalizing measures adopted by the Parliament and the Council are intended to permit and to promote the creation of companies providing traction services. Certainly, the rail transport market in the European Union is not fully liberalized yet and, what is more, interoperability has just started to be achieved. As a consequence every railway undertaking that wants to operate an international transport service has to count with traction in every state whose infrastructure it wants to use. Taking into account that cabotage has not yet been liberalized and that making the investments in assets profitable without being able to operate on the implied domestic markets constitutes a heavy entry barrier, it may be justified to consider traction an essential facility.<sup>85</sup>

That, however, does not necessarily justify that access rights are forced either by national competition authorities, either by the Commission or the Courts. If the core of property rights lies within the faculties to use ones own assets for private benefit and to freely dispose of them<sup>86</sup> the forced access to another undertaking’s assets can only be considered to be valid if the reasons furnished to justify this measure are of the utmost importance. Therefore, traction can in no case be considered an essential facility *per se* and the situation has to be analysed on a case-to-case basis<sup>87</sup>, since retribution is not always enough to justify an interference in the owner’s property rights.

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<sup>82</sup> Commission Decision of 21 December 1993 relating to a proceeding pursuant to Article 86 of the EC Treaty (*Sea Containers v. Stena Sealink*, 94/19/EC).

<sup>83</sup> In the judgments in the *Magill* and *IMS Health* cases, the Court of Justice even considered the possibility to oblige an undertaking to share intellectual property rights, (judgments of 6 April 1995 and of 29 April 2004).

<sup>84</sup> Bergman, M.A. (2000), p. 59; Haus, F.C. (2002), pp. 179 et seq.; Hohmann, H. (2001), pp. 138 et seq.

<sup>85</sup> In this sense, the Commission holds in *GVG/FS* that the refusal to provide traction can constitute an abuse of a dominant position: “FS’s refusal to provide traction to GVG eliminates a potential competitor and thereby hinders the growth of competition in the downstream market. This harms consumers, who will not benefit from alternatives to existing rail passenger services.”

<sup>86</sup> See Haus, F.C. (2002), pp. 181 et seq.; Hohmann, H. (2001), pp. 143 et seq.

<sup>87</sup> Stehmann, O. and G. Zellhofer (2004), pp. 341 et seq., 352.

Recently, the Commission has made an extensive use of the essential facility doctrine, and as a complementary measure to promote competition it has been applied in the rail sector as well (e.g. *Eurotunnel*<sup>88</sup>, *ENS* and *GVG/FS*). The Court of Justice – which has never used the expression “essential facility” – and the Court of First Instance, however, have interpreted the cases that could be included in the notion of “essential facility” restrictively and have annulled some of the Commission’s decisions. And finally, although the decision in *GVG/FS* deserves approval, the application of the “essential facility” doctrine has to respect the owner’s property rights to a maximum. Besides, in the authors view, its application to traction services will lose its significance, as the market is further liberalized, with the entrance of new competitors.

#### **IV. CONCLUSIONS**

The European institutions have tried to compensate the late start of the liberalization process in rail transport with an intensive legislative activity in the past 15 years. One of the most important issues, the organic separation of infrastructure management and the provision of transport services has almost been achieved, and the access to the rail infrastructure is supposed to be equitable and non-discriminatory. While most Member States have decided finally to create a separate entity in charge of the infrastructure management, some States preserve the former system of vertically integrated undertakings. The Community legislator is, however, aware of the peril vertical integration may suppose for free competition and has demanded, in its “First Railway Package”, the conferring of so-called “essential functions” to a body or firm that does not provide any rail transport services. Besides, the creation of independent regulatory bodies in the rail sector should further the control of abuses of the existing infrastructure monopolies and guarantee the absence of distortions to competition on the rail infrastructure market.

As regards the application of antitrust law to rail transport, it should be taken into account that the greater part of Regulation 1017/68 has been repealed by Regulation 1/2003. The only remaining Article applicable to rail transport is Article 3, which contains legal exceptions for technical agreements. Before the entry into force of Regulation 1/2003, one of the main differences between Regulation 1017/68 and the general rules (Regulation No. 17) was to be found in the fact, that the agreements under Article 3 of Regulation 1017/68 were conceived as legal exceptions to the cartel prohibition of Article 2. They did not have to be notified to the Commission and the undertakings themselves decided on their licitness. This difference has disappeared with the entry into force of Regulation 1/2003, which opts for the legal exception as a general rule. Article 3 of Regulation 1/2003 therefore contains, for the author, mere examples of the exempt “efficiency improvements” of Article 81(3) of the Treaty.

With respect to the application of the competition rules of the Treaty to rail transport, the fact that demonopolization is still in progress implies, in many Member States, the existence of

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<sup>88</sup> Commission Decision of 13 December 1994 relating to a proceeding under Article 85 of the EC Treaty and Article 53 of the EEA Agreement (94/894/EC - *Eurotunnel*).

dominant undertakings both on the upstream markets (access to rail infrastructure, traction services) and on the downstream market (rail transport services). To oblige dominant undertakings to grant access to the infrastructure or to provide traction services, the Commission has made an extensive use of the so-called “essential facility” doctrine. Although its importance has been considerably reduced on the infrastructure market by passing sector-specific access regulations, it can still be applied to traction services – whenever traction can be considered to be an essential facility.

To force the provision of a certain service against the will of the assets’ owner means, however, a serious intervention into the dominant undertaking’s property rights, which cannot always be compensated by paying a reasonable price. The “essential facility” doctrine should therefore be applied only in the last place, interpreting the requirements in a restrictive way.

We shall hope that an increase of competition on the rail transport market entails an improvement of the quality and the efficiency of the services. It will be the role of competition law to create a level playing field for all operators.

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