

Rail sector comes under EU antitrust and regulatory spotlight

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The European Commission has declared its intention to devote more resources in 2017 to investigating and rectifying what it sees as the endemic competition problems in the European rail sector. It believes that it now needs to prioritise the enforcement of the antitrust, State aid and regulatory rules and obligations in the rail sector through the combined efforts of the Commission's Competition and Transport Services working in close cooperation with the national rail regulators and competition authorities.

Antitrust issues in the rail sector

At a recent competition law conference in the transport sector, a senior official at the Commission's Competition Directorate, Henrik Mørch, outlined the problems the Commission sees in the rail industry.

He said that the share of rail is stagnating against other transport modes; the sector is characterised by national vertically integrated monopolies; there is no innovation; and there are risks of unlawful State aid and of abusive behaviour. He also claimed that despite progressive liberalisation there is little to no effective competition in most passenger and some rail freight markets.

Mr Mørch explained that, in the Commission's view, there are several reasons for this state of affairs: (i) there is a lack of effective implementation by Member States of the rules designed to create a single European railway area; (ii) the EU

legal framework itself does not always provide a sufficient basis for an effective change in the market; (iii) most national rail markets in the EU are dominated by incumbents which in some cases are vertically integrated into infrastructure, in particular train paths; (iv) there are high entry barriers (for example, access to rolling stock and maintenance facilities is difficult); and (v) there is an enormous amount of state subsidies to incumbents, estimated to be in the region of €18 to 20 billion per year, excluding infrastructure investment.

The Commission's approach to enforcement of the competition and single market rules in the energy sector is instructive for the rail sector. Following years of ineffectual regulatory initiatives, the Commission opened a sector inquiry in the European energy sector. The Commission believes that the combination of antitrust enforcement of the antitrust and State aid rules in combination with more robust unbundling obligations under the third energy package alleviated many of these perceived problems. Whilst a sector inquiry is unlikely in the rail sector, the Commission has signalled its intention to create a genuine single European rail area through the "two-pronged enforcement" of the fourth railway package using infringement procedures against Member States, and the enforcement of competition law.

Time for focused enforcement

As Mr Mørch put it, now is the "time for focused enforcement" through closer cooperation with national railway regulators and national competition authorities.

Mr Mørch described the competition issues as falling within three main categories:

1. issues relating to market opening and access: these include concerns relating to non-discriminatory access to key installations such as to rail infrastructure (including stations) and rail-related service facilities, and access to rolling stock;
2. issues relating to financial flows between Member States and rail operators and within integrated groups: these issues concern restructuring aid, contributions not in line with the market investor principle, unjustified or ill-defined public service obligations, and cross-subsidisation as a result of over compensation or from financial flows out of infrastructure management; and
3. abuse of dominant positions, notably through predatory pricing, margin

squeeze and foreclosure techniques.

In his speech, Mr Mørch went out of his way to signal the Commission's desire to attract more complaints and open more cases, and noted the difficulty the Commission has faced to date. State aid cases are politically sensitive and private operators often hesitate to come forward for fear of retaliation by integrated incumbents. He also said that the Commission needs well substantiated complaints based on more than anecdotal evidence. Overcoming these problems is likely to require close cooperation between the Commission, national rail regulatory bodies and national competition authorities.

Current cases

Mr Mørch gave three examples of the kinds of competition cases which the Commission is currently looking into. He mentioned an abuse of dominance case concerning the Lithuanian rail incumbent LG which is alleged to have impeded competition by removing a railway track connecting Lithuania and Latvia. Another abuse of dominance case relates to the Czech incumbent ČD, which is alleged to have lowered prices on the route between Prague and Ostrava to below cost in an attempt to oust two new entrants. As for anti-competitive agreements, Mr Mørch referred to sales restrictions on second hand rolling stock and the use by an incumbent of a condition prohibiting resale to certain countries, thereby preventing new entry. Mr Mørch mentioned that they have one more case on predation and another case on resale restrictions of second hand rolling stock. As for restructuring of railway undertakings in financial difficulties, the Commission is currently investigating railway undertakings in five Member States.

Outlook for 2017

2017 is likely to see more aggressive enforcement by the Commission of the antitrust and State aid rules in the rail sector, as well as more vigorous enforcement proceedings against Member States for failure to implement their regulatory obligations.

As the Commission seeks to build up its portfolio of cases in the rail sector, 2017 represents an "open window" for operators who feel that they have been prevented from competing on a level playing field. This presents an opportunity for new entrants, and a threat to incumbents.