



Competition and dominance in the railway market

The role of incumbent infrastructure managers and incumbent railway undertakings

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Legal Basis of the economic concept in the European Union

- *“The Union shall establish an internal market. It shall work for the sustainable development of Europe based on balanced economic growth and price stability, a **highly competitive social market economy**, aiming at full employment and social progress, and a high level of protection and improvement of the quality of the environment. It shall promote scientific and technological advance.”*

Article 3.3, Lisbon Treaty

Ordoliberalism (1)

- Social market economy
- Concept of ordoliberalism (School of Freiburg)
- „Wirtschaftswunder“

Ordoliberalism (2)

- **Historical experience:** free markets never find equilibrium due to the intervention of different powers (state or privately run monopolies, oligopolies, private sector, state, war or natural catastrophe)

Ordoliberalism (3)

- Overall task of the state: form an **“economic order”** instead of directing **economic processes**

Ordoliberalism (4)

- Keynesianism
- Monetarism (Friedman)

Point of departure in the railway sector

- Natural monopoly
- Market dominance
- Supply of essential facilities

Legal Basis for competition and dominance in the EU (1)

*„Any abuse by one or more **undertakings of a dominant position** within the internal market or in a substantial part of it **shall be prohibited** as incompatible with the internal market in so far as it may affect trade between Member States.*

Such abuse may, in particular, consist in:

- (a) **directly or indirectly imposing unfair purchase or selling prices or other unfair trading conditions;***
- (b) [...];*
- (c) **applying dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage;***

Article 102 – Lisbon Treaty

Legal Basis for competition and dominance in the EU (2)

„[...] it is necessary to prohibit in principle for the three modes of transport specified above all agreements between undertakings, decisions of associations of undertakings and concerted practices between undertakings and all instances of abuse of a dominant positions within the internal market which could have such effects“

Regulation 169/2009/EC, preamble (6)

Legal Basis for competition and dominance in the EU (3)

“Certain types of agreement, decisions and concerted practice in the transport sector the object and effect of which is merely to apply technical improvements or to achieve technical cooperation may be exempted from the prohibition on restrictive agreements [...]”

Regulations 169/2009/EC, preamble (7)

Principles of EU Competition Law

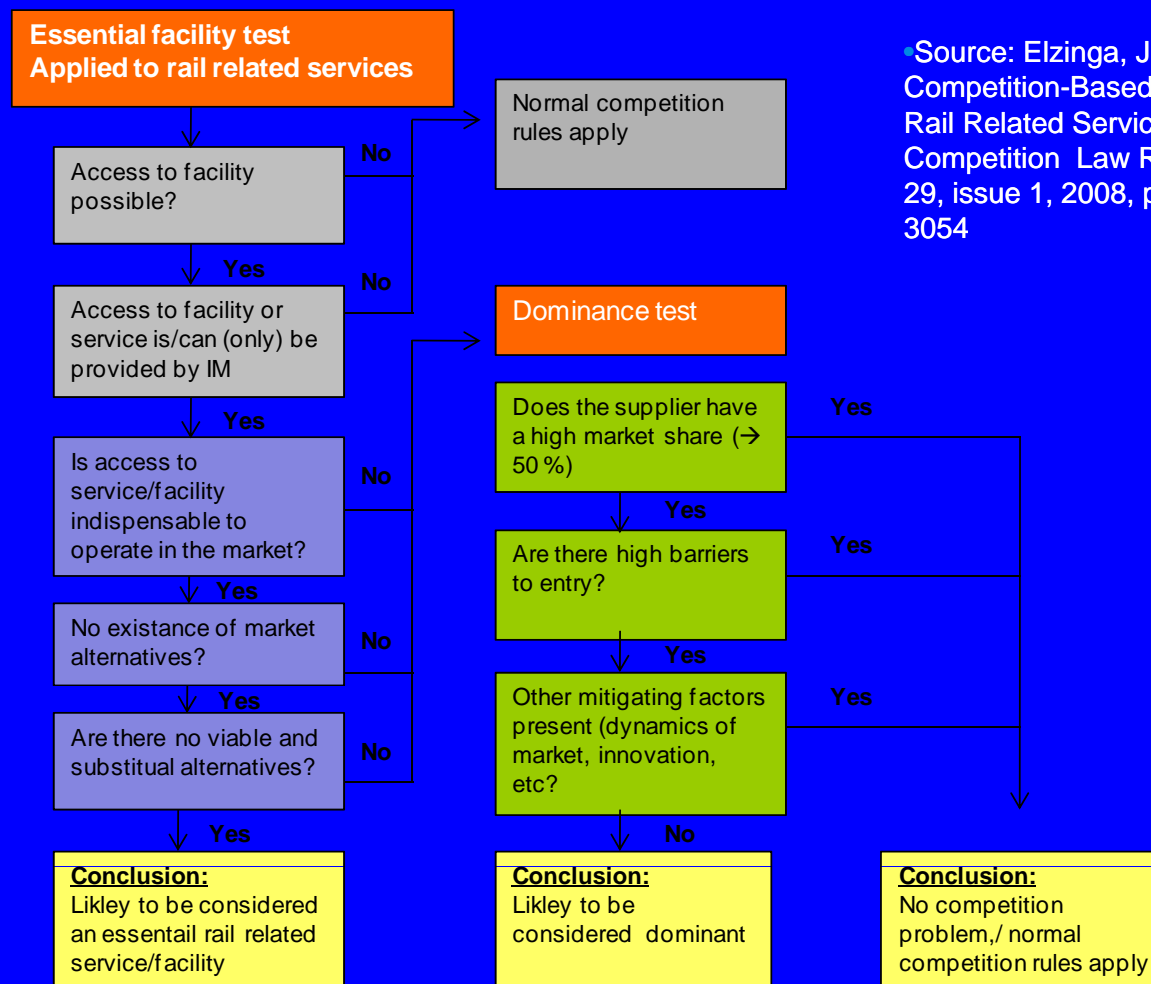
- 1) **Correct** abusive behaviour
- 2) **Avoid** foreclosure of market entry
- 3) **Foster** commercial initiative and competition

Mechanisms to apply the principles

- **Essential facility test**

- **Dominance test**
 - **Dominance and superdominance**
 - **Single and collective dominance**

Testing procedure



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

Viability and substitutability

- Viability
 - Art. 10(6) of 91/440/EEC
 - Art. 5(1) of 2001/14/EC
- Substitutability

Conclusion

- **Trade-off** between entrepreneurial freedom and regulating access
- Entrepreneurial risks
- Asymmetric competition

Examples

- DG COMP :10 informal complaints on railway matters within the last 2.5 years, e.g. homologation of locomotives in France
- Unbundling provisions in Third Energy Package (2009/72/EC electricity and 2009/73/EC gas market)
- Georg Decision under EU Competition Law
- Südbahnhof case (construction of the new main railway station in Vienna)



Judgement European Commission against Deutsche Bahn (T-229/94)

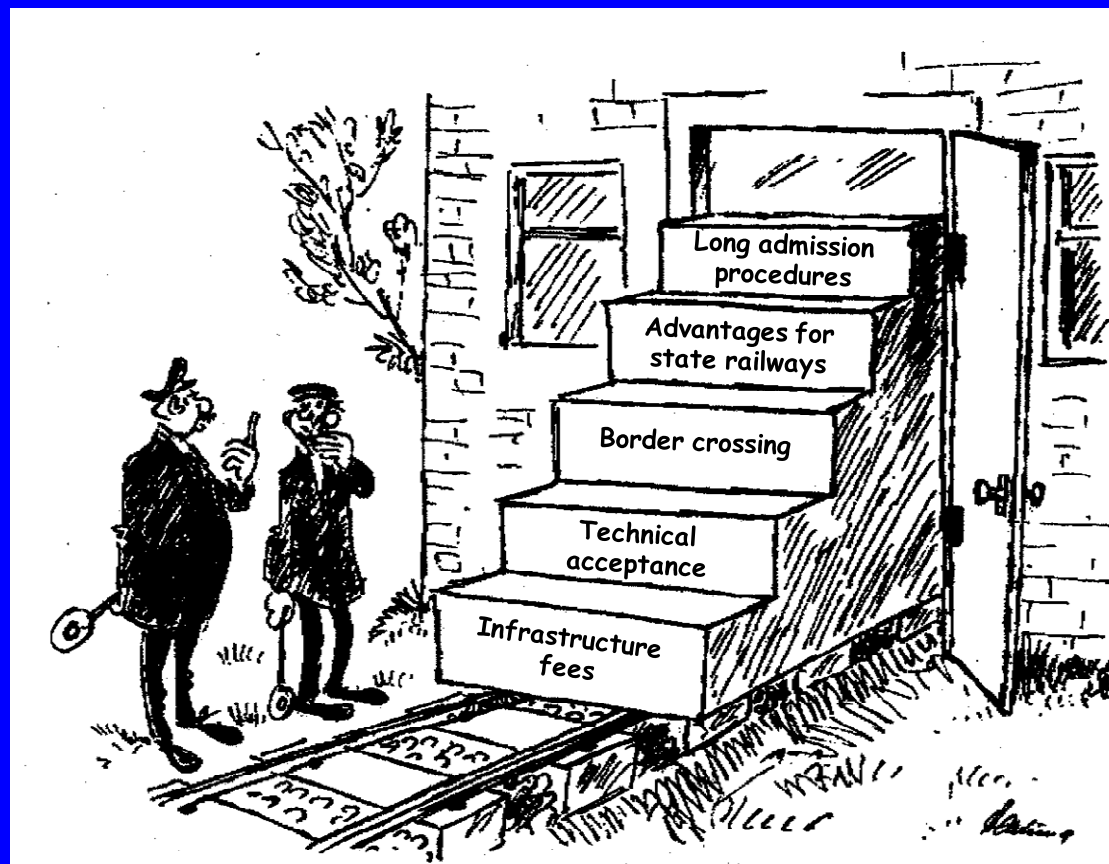
- 'Maritime Container Network (MCN)'
- **Abuse of a dominant position**
- **Infringement of Article 105 of the Treaty,
(no ex-officio measures by the
regulator)**



Judgement European Commission against Liner Conference (T-18/97)

- Trans-Atlantic Agreement (the 'TAA')
- Fixation of tariffs for maritime transport and intermodal transport
- Infringement of Article 105(1)

„We have improved access to the railway market.“



Thank you.