Briefing

Rail

BURGES SALMON

Market Access Infraction Proceedings: **The European Court's Decisions on Member State Compliance with The First Railway Package of Market Liberalisation Directives**

The European Court is continuing to clarify national obligations under European Railway liberalisation law in relation to charging, allocation, incentives to improve performance and the permitted structure of Infrastructure Managers and Railway Undertakings.

Key points

- The European Commission brought infringement proceedings in 2010 against 13 Member States for not liberalising their railway industries sufficiently.
- Following opinions from Advocate General Jääskinen, the European Court has now issued judgments on most of these allegations.
- A number of member states have been penalised for failure to ensure transparent access charging, sufficient incentives for improved performance and independence of the Infrastructure Manager from the state.
- Despite the Commission's challenges, the holding company structure for Infrastructure Managers and Railway Undertakings has been permitted in some circumstances.

Infraction Proceedings

In June 2008, the European Commission sent 24 Member States formal letters of notice for their alleged failure to correctly implement the First Railway Package and preceding European law on liberalising the railway industry (principally EC Directives 91/440 and 2001/14). Almost two years later, in June 2010, the Commission launched infringement proceedings against 13 of these. In early 2012, Bulgaria was added to the list.

Another two years down the line, from September 2012, CJEU's Finnish advocate general Niilo Jääskinen began to deliver his non-binding but influential opinions. These opinions were then followed closely, both in terms of timing and content, by decisions of the General Court (Court of Justice of the European Union - CJEU). Most of the CJEU's decisions on infringement have now been given and the obligations (principally on Infrastructure Managers and Member States) arising from the first round of market liberalisation have been clarified. This happens to coincide with the replacement of the First Railway Package directives which were the subject of these proceedings with consolidated directive 2012/34 and the finalisation of the Fourth Rail Package.

Prior to replacement by Directive 2012/34; Directives 91/440 and 2001/14 governed railway infrastructure for domestic and international passenger rail services across the European Union. Key features include:

- the establishment of a regulatory body for each Member State empowered to hear appeals;
- an obligation to publish network statements including allocation and charging obligations in accordance with specified rules;
- a requirement for Railway Undertakings to have separate management, administration and internal control from the state;
- a requirement that Infrastructure Managers and Railway undertakings must be separately managed and operate distinct accounts.
- the need to give Infrastructure Managers incentives to reduce costs and therefore charges.

The CJEU decisions tackle certain issues connected to the requirement under the First Railway Package to liberalise the former state monopoly railways in order (eventually) to create a common and transparently accessible European

Railway industry. These issues included the degree of separation required between governments and the national infrastructure managers, and between infrastructure managers and train operators.

CJEU Decisions so far

Holding companies

The actions against Germany and Austria focussed on an issue on which the Commission has historically taken a strong stance: arrangements in which infrastructure managers and operators are part of the same group of companies. The Commission argued these arrangements cannot guarantee the institutional separation of the infrastructure manager, as required under the directives, in part because these organisations are sometimes reliant on parent company funds, and also often share directors with other group companies.

Both the Court and the advocate general rejected this allegation and took a narrow interpretation of the separation principles. These apply to a number of "essential functions" (which are strictly reserved to infrastructure managers) but they do not necessarily prohibit group structures where the other requirements of independence and separation can be met.

Independence from the Member State

In Portugal, a law restricted the ability of the incumbent railway operator to sell or acquire company shares without prior government approval. The Court ruled that the directives guarantee the independent decision-making of state-owned operators and infrastructure managers in all matters relating to staff, assets and procurement and consequently the law was unacceptable.

Power to set charges

Similarly, Spanish legislation permitted the government to set the level of access charges, thus limiting the role of the infrastructure manager to collection of charges only. Although some tension was recognised between the description of a Member State's role in directives 91/440 and 2001/14 the advocate general and the CJEU both preferred an interpretation requiring the Infrastructure Manager to set access charges in accordance with a framework laid down by the government. In doing so the advocate general, observed that under the first directive, it was permissible for a government ministry (usually Transport) to act as the regulator. The independence of this regulator as an impartial adjudicator would be meaningless if an aggrieved operator challenged the charges before the body which also decided these charges.

In contrast, Hungarian legislation was permitted. Two national railway undertakings were entrusted with the levying of charges from the other operators. The Commission alleged inappropriate discretion over the level of charges they actually collected. The Court disagreed. Collection was a mechanical exercise, akin to invoicing, and was not a reserved "essential function". The Hungarian operators merely applied their infrastructure manager's charging rules which were open and transparent.

Level of charges

One of the more interesting arguments brought against Germany was its alleged failure to encourage caps for overall infrastructure costs, and to reduce the level of charges reflecting its direct costs.

The Court's decision did not lay down a definition of direct costs (preferring instead to leave the detail up to the Member States) but, helpfully, confirms that access charges are subject to a minimum level (equal to 'direct costs') and a maximum level ('total costs' but only if the market can bear it). The level of charges levied must fall within this range. The actual charge can also fluctuate with optional charges reflecting scarcity of capacity, long-term investment projects, and optional discount schemes.

Another CJEU decision does, however, intervene in the notion of 'direct costs'. In the case against Slovenia, the Court rejected the application of charges for transport infrastructure in other sub-systems, in particular road transport, insisting this component has no direct relationship to the operation of railway services.

Powers of the regulator

Germany successfully resisted further allegations in relation to its regulator. The Court rejected the Commission's natural instinct that a regulator must be able to actively monitor compliance with competition rules. Their role is to ensure fair and non-discriminatory access to the network, in relation to capacity allocation and charging. The scope of the Regulator's powers has been expanded under the consolidating directive 2012/34 with effect from 2015.

Network access and allocation

Meanwhile, Spain was also found to be in default on issues of access and allocation. The government retained a discretionary power to discriminate against new entrants. The Court ruled that preferential access was only permitted within a general framework agreed by the infrastructure manager with the government.

The two Hungarian operators tasked with collection also took part in operational traffic management, including post-emergency usage allocations. The Commission alleged their role crossed the line into decision-making on allocation, which is a reserved "essential function". Here too the Court sided with the Member State. Traffic management is essentially a task which involves managing rights already granted to operators by the infrastructure manager.

Conclusion

These decisions have been closely watched by industry players, governments and the European Commission, at a time when negotiations over the Fourth Railway Package are continuing. In particular, reform of the holding company model advocated by the Commission remains under discussion.

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