BRUSSELS RAIL TRANSPORT BRIEF: APRIL 2020

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ANTITRUST AND COMPETITION

Network Rail Loses Achilles Appeal

On 30 January 2020, the Court of Justice of the EU ('CJEU') has rejected A judgment rendered on 5 March dismissed Network Rail's appeal on all grounds. Network Rail, the biggest UK's rail infrastructure manager, lost its appeal against a Competition Appeal Tribunal (CAT) decision, which had ruled in favour of Achilles, a company that alleged Network Rail had abused its dominant position. The decision is the outcome of a dispute that started in 2018, when Achilles sued the rail infrastructure operator Network Rail for competition damages over the provision of its mandatory supplier-assurance program under the Railway Industry Qualification Scheme.

Network Rail, Achilles argued, locked it out of supplying the assurance program by using only one scheme, at the expense of potential rivals. The British CAT sided with Achilles in July 2019, which prompted Network Rail to appeal the decision of the Court of Appeal. In answer to the appeal, Achilles argued that Network Rail should set reasonable and proportionate standards of assurance for providers to meet instead of unreasonably locking them out. In its decision, the Court of Appeal upheld the CAT's decision.

Particularly, the court ruled that being granted access to rail infrastructure, which is an economic activity, is an essential part of Achilles' operations and could not be dissociated from it. Moreover, the court ruled that Network Rail's arguments relating to market definition were “hopeless” and that the CAT, as a specialized tribunal, was entitled to its preferred market definition.

Seven Jurisdictions to Review the Alstom/Bombardier Merger

In February, Bombardier announced it had reached an agreement with French company Alstom on the transfer to the latter of its rail business, for an amount of €6.2 billion. Given the magnitude of the deal on the rail market, the transaction will be reviewed by seven jurisdictions, namely Australia, Canada, China, the EU, Russia, Turkey, and the United States. The timing of these submissions is yet to be determined. The merger will face hurdles at home in the EU, where Alstom is already in a dominant position – something that prevented its planned merger with German company Siemens last year. Similar concerns are expected to arise again with this new merger plan, although some Member States have been lobbying the European Commission to allow such “mega-merger” and foster the rise of “European champions”, with a view of countering the growing influence of Chinese companies, such as, in the rail sector, CRRC.

Spanish Court of Appeal Rules in Favour of Temporary Suspension of Electrén Fines

Spain's Court of Appeal has agreed to suspend the payment of two fines imposed on energy systems railway company Electrén, one on the company and one on the general production director.

The rulings refer to a decision taken in March 2019 where the Comisión Nacional de los Mercados y la Competencia ("CNMC") imposed a fine of €102.5m on 14 companies and 11 executives for bid rigging in public tenders for rail electrification and electromechanical infrastructure. The National Authority also banned the participating cartelists from being awarded public contracts.

Electrén and the general production director have argued that an immediate payment would cause unrecoverable damages to both the company and the concerned director. For Electrén, the fine amounts to 8.8% of its 2018 turnover and for the general production director 68.16% of his 2018 income. The court agreed to suspend both payments on the condition that the parties provide a sufficient guarantee to ensure the payment in the future.

Similarly, construction-engineering firm Comsa Corporación de Infraestructuras appealed its €2.8m fine. However, the court rejected the request arguing that the company did not provide enough evidence to prove that an immediate payment of the fine would cause serious and unrecoverable damage.

Swiss Combi-SBB Cargo Deal Approved

On 2 April, the Swiss Competition Commission gave the green light for the planned acquisition by Planzer and Camion-Transport of a 35% stake in SBB Cargo, through their joint subsidiary Swiss Combi. The Swiss authority ruled that the acquisition would not impede competition. With the merger, the two companies "want to use their knowledge in logistics to optimize existing SBB Cargo products and develop new ones", the Swiss authority said. Although the merger will lead to a dominant position in some sectors of Swiss freight transport, the authority ruled that this situation does not give the companies involved the opportunity to reduce competition on the affected markets.

EU Ministers Agree on Electronic Freight Transport Information Rules

On 7 April, the European Council adopted new rules to digitalize freight transport information, which will make it easier for companies to provide information to public authorities in a digital form. The rules still need to be approved by the European Parliament before entering into force.

The Regulation aims at providing companies across the EU with a uniform legal framework for the use of electronic freight transport information for all modes of transport. Moreover, it will create an obligation for competent authorities in EU Member States to accept information made available electronically on certified platforms, when companies are required to provide proof that they respect their regulatory obligations. Companies will still be able to provide authorities with information on paper if they choose to.

Freight information digitization is part of an effort at EU-level to alleviate the administrative burden that businesses, transport operators, and public authorities experience as most of the documentation is exchanged in paper format. The Regulation follows a 2017 Resolution from the Parliament, which called to "encourage the use of digital technologies", including paperless and standardized documents. The new Regulation comes at the right point in time as freight transport is expected to rise by 50% before 2050.

Commission Calls on Companies to Hold Off Non-Urgent Mergers

On 7 April, the Commission sent out guidance to merging companies urging them to delay their planned transactions. In the guidance, the Commission admits it is facing difficulties given the magnitude of the impact the COVID-19 outbreak had on its activities. In the guidance, the Commission calls on merging companies to "hold off non-urgent merger filings", but says it "stands ready" where firms provide it with compelling reasons to proceed to the review. The difficulties the Commission and its Directorate-General for Competition face pertain to information collection, particularly from third parties like customers, competitors, and suppliers, who all have been hit by the disturbances caused by the pandemic. Further disruptions are expected in the future, as the COVID-19 outbreak is set to slow down the Commission's activities in the coming months.

Lithuania Issues Dominance-Abuse Guidelines

On 8 April, the Lithuanian Competition Authority has adopted guidance on its approach regarding abuse of dominance, in which it mentions the principles and criteria it will use when assessing whether a company holds a dominant position or not, as well as its market power. In its guidelines, the authority summarizes the Court of Justice of the European Union's case law, and emphasizes the importance of the overall circumstances in which a company finds itself when assessing its market power. Among other things, the authority cites barriers to expansion and entry, countervailing buyer power, and the market's position in relation to other markets as indicators. The guidelines are set to be applicable starting 1 May 2020.

New Transit Service Trial and Train Service Launched Between China and Europe

Russian Railways (RZD), United Transport and Logistics Company Eurasian Rail Alliance (UTLC ERA) and DB Cargo, have launched a transit service trial for delivery of goods from China to Europe. The rail route, consisting of forty-nine 40-foot containers, starts in Xi'an, passes through Kaliningrad Sea Commercial Port, and reaches Rostock and Duisburg in Germany. The test train left Xi'an on March 25 and arrived at Kaliningrad on April 5. This new multimodal route would significantly reduce delivery time, estimated at 14 days, compared to 45 days to ship by sea. Russian Railways Logistics (“RZD Logistics”) in collaboration with Sinotrans, one of China's largest logistics companies, and Far East Land Bridge (“FELB”), have also launched a new container transport service from Shenyang in China to Enns in Austria. The container transport service crosses through the Zabaikal'sk border (Russia/China border). The first train left China on 14 March and arrived to destination in a record time of 18 days.

Rail Baltica Saga, Last Two Design Contracts Signed

Rail Baltica Rail (RB Rail) recently signed two contracts for a value of €20.4 million, on behalf of Latvia's Ministry of Transport, for the design and supervision of the remaining two sections of the Rail Baltica main line located in Latvia. With these two contracts, 643 km of the Rail Baltica main line are being designed in all three Baltic States, marking an important step toward the realization of the final project. The EU is providing 85% of the funding for this project, the remaining part is being given by the Latvian Government. More specifically, Ineco-Ardanuy consortium was awarded the first contract for a value €5 million for the longest design section (94 km) in Latvia from Vangaži to the Latvian-Estonian state border, while Idom Consulting Engineering Architecture was awarded the second contract a €6.9 million contract for the railway section from Misa to the Latvian-Lithuanian state border. The EU had previously said that it would have ceased providing funding for the project if changes in management had not been made.

Železničná Spoločnosť Cargo Slovakia Will Finalise the Implementation of Noise Reduction Wagon in 2021

Železničná spoločnosť Cargo Slovakia (ZSSK Cargo), the Slovakian state-owned rail company, has announced that by 2021 it will implement noise reduction wagons, reducing rail noise by 50%. The project aims at finalising the conversion of 2,050 S-type wagons by retrofitting their braking system with composite brake blocks. The EU has contributed €512,000 to the project.

RAIL REGULATORY AND POLICY

European Commission Unveils New Industrial Strategy

On 10 March 2020, the European Commission (the "Commission") unveiled its Industrial Strategy for a Green and Digital Europe, which provides the EU's industry with a strategy to lead the digital and green transitions. The strategy is part of a broader "European Green Deal" policy aiming at a net-zero emissions goal by 2050 and at enshrining climate neutrality into law. The Commission identifies three key priorities for Europe's industry: maintaining its global competitiveness, making it climate neutral by 2050, and shaping its digital future. In that regard, the Commission set out a comprehensive set of actions. It intends to, among other things:

- Review the EU's competition rules, including the Commission's State aid guidelines and the EU's merger control regime;
- Adopt of a White Paper on the distortive effects caused by foreign subsidies in the single market by mid-2020, and based on this, a legislative proposal in that regard in 2021;
- Prevent distortions caused by foreign access to EU public procurement and EU funding and ensure reciprocal access to foreign markets for EU companies;
- Take measures to decarbonize energy-intensive industries, support sustainable and smart mobility industries, promote energy efficiency, strengthen carbon leakage tools, and secure a supply of low-carbon energy at competitive prices;
- Set up stakeholder platforms such as the Clean Hydrogen Alliance platform, groups on low carbon industries, industrial clouds and platforms, and raw materials;
- Create a Common European Energy Dataspace and reap the benefits of big data in the energy sector, in particular to improve its capacity.

These comprehensive actions will be horizontal. To complement this, the Commission will assess all industrial sectors' risks and needs in close cooperation with relevant stakeholders. To that end, it will set up an Industrial Forum, which will open in September 2020. The Industrial Forum will bring together "representatives from industry, including SMEs, big companies, social partners, researchers, as well as Member States and EU institutions."

Interpretation of Regulation (EC) 1370/2007 on Public Passenger Transport Services by Rail and by Road Clarified by EU Court's Judgment

In the case Compañía de Tranvías de La Coruña SA v Ayuntamiento de A Coruña, the Court of Justice of the European Union was handed the opportunity to clarify the interpretation of Article 8 of Regulation (EC) 1370/2007 on public passenger transport services by rail and by road. That article, which sets out provisions regarding the application of the Regulation to pre-existing contracts, states that contracts entered into before the entry into force of the Regulation "may continue until they expire, but for no longer than 30 years."

In the case at hand, the Municipality of La Coruña sought to terminate a concession contract it had entered into with the Tranvías company, which operates the city's bus and tram network. In a letter, the Spanish municipality announced its intention to terminate the contract at the contractual date, which was set out to be 2024 for the contract signed in 1987. Tranvías argued that Regulation (EC) 1370/2007, when enacted, had set out a 30-year period for existing contracts to continue to operate, and that this period started running at the Regulation's entry into force – an analysis which considerably extends the application of its contract with La Coruña. In response, the municipality argued that the start of the 30-year period was not the entry into force of the Regulation, but rather the start of the contract.

Presented with this contentious point, a Spanish administrative court decided to refer this particular question to the Court of Justice of the European Union, which had to shed light on the starting point of the 30-year period at hand. In that regard, the court starts by noting that to interpret the Regulation as meaning that the starting point of the maximum term of 30 years set therein corresponds to the date on which the public service contract is awarded would mean that the Regulation would prevent the contracts covered by it from having a term of more than 30 years, which is not stated in the Regulation. With regard to the purpose and effective application of the Regulation, the court concludes that the 30-year period mentioned in the Regulation must be calculated from the entry into force of the Regulation, not of the contract – which considerably extends the application of contracts concluded before its entry into force.

UK Takes Railways Into Public Control to Ensure Functioning for Key Workers

On 23 March, the UK government has decided to take over the country's national railways and has announced that the temporary control will last for at least six months. The decision comes as an effort to make sure services continue to run during the COVID-19 crisis, and to ensure their functioning for key workers. The Department for Transport will temporarily suspend normal franchise agreements and transfer all revenue and cost risk to the Government.

PUBLIC GOVERNMENT AND NEW PROJECTS

Singapore Plans €40 Billion Rail Expansion Across City-State

On March 9 2020, Singapore unveiled its ten-year strategy to renew and expand its railway system, with the objective that at the end of the program, 80% of Singaporeans will live within walking distance from a train station. In particular, the Government wants to renew the North-South and East-West Lines and start operating the Thomson-East Coast Line, a North-East Line, as well as a Downtown Line in 2024. By 2029, a Jurong Region Line as well as a Cross Island Line shall start operating. The plan aims at significantly reducing transport time and improving connectivity over the city-state.

European Railway Projects to Receive €690 Million in Funding

The European Commission has approved, through the Cohesion Fund, an investment of more than €690 million to fund railway and urban railway projects across four Member States: Croatia, Poland, Spain, and Portugal. Croatia has received €119.3 million for its state-owned rail passenger operator to acquire 21 EMUs. Poland has received €199 million funding for tram and rail transport projects. A part of this will be used to modernise the tram network in Bydgoszcz. The rest of the fund will be used to support the extension of the Olsztyn tram and bus routes. Spain received €265 million for the completion of the Atlantic Corridor, through the European Regional Development Fund. The fund will improve over 178 km of the rail connection on the 715 km Madrid-Lisbon high-speed line. Finally, Portugal received €107 million to upgrade Porto's metro system.

Funding to be Provided for the Madrid-Lisbon High-Speed Rail Connection

The European Commission has approved funding from the European Regional Development Fund for the improvement of 178 km rail section part of Madrid-Lisbon high-speed line on the Atlantic Corridor expected to be completed in December 2022. The Madrid-Lisbon line will have a total length of 715 km, of which 465 km will be in Spain, running through the autonomous communities of Madrid, Castile-La Mancha, and Extremadura.

PASSENGER RIGHTS

European Commission (EC) Publishes a Notice With Interpretative Guidelines on EU Passenger Rights Regulations

On 18 March, the Commission published a Notice with Interpretative Guidelines (the “Notice”) on EU passenger rights regulations for transport by air, rail, bus, and sea or inland waterways, in the context of the developing situation with COVID-19. The guidelines seem to ease the obligations for air and maritime carriers to provide compensation. Indeed, the Notice clarifies that the current circumstances are “extraordinary”, with the consequence that certain rights, such as compensation in case of flight cancellations less than two weeks from departure date, may not be invoked. “Extraordinary circumstances" also include measures adopted by public authorities intended to contain the COVID-19 pandemic (e.g. prohibition of certain flights, restriction of movement of persons). According to the EC, such measures are by their nature and origin not inherent in the normal exercise of the activity of air and maritime carriers and are outside their actual control and thus free them of their compensation obligations. However, the regulatory regime for rail is different: there the existence of extraordinary circumstances does not affect the right to compensation in cases of delays (including those entailed by cancellations).

Court of Justice of the European Union: Passengers Entitled to More Compensation if Rerouted Flight is Delayed

The Court of Justice of the European Union has ruled on 3 March (Case C- 832/18) that airlines are now obliged to compensate passengers for a delay in their rerouted flight, in addition to their cancelled flight. The facts of the case were as follows: Finnair cancelled the flights of passengers flying from Helsinki to Singapore and offered an alternative route, the latest flight link was delayed by more than three hours; Finnair only compensated the passengers for the first cancellation, and argued that it was not obliged to cover the additional delay. The court, however, ruled that the EU's air passenger rights legislation takes into account situations of rerouting, and as such, Finnair is liable for both the cancellation of the first flight and delay of the rerouting. Furthermore, the defect was a technical issue and could not be considered an “extraordinary circumstance” under the air passenger rights regulation.

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