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Transport and Competition Law*

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Abstract

This paper examines the interplay between transport and competition law within the EU, particularly focusing on case law in the context of liberalization. The transport sector, marked by natural monopolies, often requires specific regulation alongside competition law to address issues like exclusionary practices by incumbents. Despite liberalization efforts, dominant players may still hinder competition through control of essential infrastructure. The paper discusses legal and regulatory strategies to ensure fair market access and competition and considers broader socio-economic impacts such as regional development and environmental sustainability.

Keywords: Competition Law, Liberalization, Natural Monopolies, Essential Infrastructure, Vertical Integration, Regulatory Frameworks.

JEL Classification: L41, L43, K21, L51, R48, L92

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1 Introduction

The transport sector, often characterised by natural monopolies and significant externalities, typically gives rise to various forms of legal monopolies. Examples include the railway industry, where monopolistic tendencies are driven by infrastructure costs and operational efficiencies (Finger and Messulam, 2015), and historical instances such as the bankruptcies of several airlines in France during the 1930s (Jones, 1984). Other contributing factors to these monopolies include territorial planning for cohesive development and quality concerns, which may necessitate obligations that compromise profitability (EU Directive 2004/51/EC).

These inherent characteristics of the transport sector do not necessarily demand a legal monopoly but can lead to sector-specific regulation. The transport sector, characterised in part by natural monopolies and significant externalities in activities such as airports and railway networks, is naturally subject to sector-specific regulation. However, the structure of competition and firm behavior can raise competition issues that may hinder the liberalization of these sectors. There is a significant asymmetry between potentially vertically integrated incumbents and new entrants, which can lead to competition distortions. Therefore, it is essential to focus on the specific role of competition policy within the regulatory framework applicable to the transport sector. Conventional wisdom suggests that regulation typically supersedes competition law in such cases (e.g., the U.S. case law, *Trinko*[1]).

However, within the EU competition law framework, competition law often takes precedence over regulatory requirements (as seen in the *Deutsche Telekom* case[2]). Therefore, the intersection of transport and competition law has grown increasingly significant, particularly with the European Union's liberalisation policies in network industries (European Commission, 2011). This paper focuses primarily on the EU context, deliberately excluding the earlier US policies from the 1970s aimed at similar liberalisation (Forsyth, 1998).

Rather than examining the liberalisation process itself, which in the EU is typically implemented via directives (EU Directive 2012/34/EU) and primarily concerns public economics rather than competition law, this paper considers the enforcement of competition law[3] within the transport sector for several reasons. Firstly, the mere enactment of liberalisation directives in the EU is just a preliminary step. The process deepens as legal avenues for competition are leveraged, either by new entrants or by the Commission itself.[4] Secondly, liberalisation alone does not guarantee free and undistorted com-

[1] Verizon Communications Inc. v. Law Offices of Curtis V. Trinko, LLP, 540 U.S. 398 (2004).

[2] Case C-280/08 P, Deutsche Telekom AG v European Commission, Judgment of the Court of Justice of the European Union (CJEU), 14 October 2010.

[3] As a result, our paper is positioned downstream of the European legislation applicable to the transport sector. This legislation is available on the European Commission's website and specifically addresses air transport, road transport, and rail transport, which are the three areas of application we have considered in this contribution. For further details, see `https://competition-policy.ec.europa.eu/sectors/transport/legislation_en`.

[4] Microsoft Corp v Commission of the European Communities (Court of First Instance, Grand Chamber) [2007] ECR II-3601.

petition. Often, liberalisation does not lead to the vertical disintegration of incumbent operators, complicating market entry for new competitors who must access incumbent-controlled infrastructure. Although sector-specific regulations may govern such access, incumbent behaviours can still impair competition, potentially resulting in exclusionary abuses.[5] Similarly, pricing for ancillary services or tariffs for essential services could be viewed as exploitative abuses.[6] Vertical integration, where incumbents operate both network and service segments, can lead to self-preferencing or a relative refusal of access to essential facilities.[7] These issues highlight that liberalisation without vertical unbundling - that is, mandatory separation of infrastructure from services - can limit the effectiveness of competition laws, which are sometimes applied post-liberalisation to address behaviour of still-integrated incumbents or to seek structural remedies. Regulated access regimes for vertically integrated companies, operating both infrastructure and services, present an inherent conflict of interest. Unbundling addresses this problem, albeit sometimes at the expense of efficiency, but it is rarely implemented. Competition rules therefore have a role to play in sanctioning exclusionary abuses facilitated by such vertical integration. This may involve deterrent measures, such as injunctions or binding commitments. A relevant example can be found in the French railway sector, where the Competition Authority had to sanction the historical operator for foreclosure practices in the freight market.[8]

The dominance of incumbents, especially without horizontal unbundling, can also skew the downstream market. Although the liberalisation process often entails a functional separation of infrastructure and services to prevent distortions and opens downstream markets to new operators, the regulation only aims to make the market contestable, not to alter property rights significantly. As a result, newly liberalised markets exhibit strong asymmetries and significant barriers to expansion, where enforcement of competition laws plays a crucial role.[9] Incumbency-related advantages extend to economies of scale and scope, which enable established players with critical market size to more easily overcome financial investment barriers compared to new entrants. Additionally, incumbents often have access to quasi-essential facilities, such as data or specific locations within rail stations or airports, and typically benefit from a strong reputation. Several cases in competition law, particularly within the energy sector (*EDF Photovoltaic* and *Gaz de Bordeaux* cases),

[5] *Ibid.*

[6] Deutsche Telekom AG v European Commission (Court of Justice, Second Chamber) [2010] ECLI:EU:C:2010:603.

[7] An essential facility is an asset indispensable for an economic operator to access the market, implying that there are no available alternatives within a reasonable timeframe or that it is neither technically nor financially feasible to develop a new asset. A party controlling an essential facility may be sanctioned if it refuses access to a third party without objective justification. The criteria for qualifying a refusal of access as an abuse of dominant position were established in the *Bronner* ruling by the Court of Justice. In the transport sector, the essential facility is commonly network infrastructure (see Konkurrensverket v TeliaSonera Sverige AB, Court of Justice, First Chamber, [2011] ECLI:EU:C:2011:83). However, it is also possible to consider that certain tangible or intangible assets controlled by an incumbent may be indispensable for market access by new entrants within the context of sectoral liberalization. For further discussion, see Section 3.

[8] Decision 12-D-25 of 18 December 2012 on practices implemented in the rail freight transport sector.

[9] Oscar Bronner GmbH & Co. KG v Mediaprint Zeitungs- und Zeitschriftenverlag GmbH & Co. KG and others (Court of Justice, Sixth Chamber) [1998] ECLI:EU:C:1998:569.

demonstrate how incumbents can strategically leverage their reputation and consumer habits to direct customers towards their own downstream subsidiaries. This strategy effectively challenges new entrants in competitive markets. An example is seen in the decision by the French Competition Authority in its Decision No. 13-D-20 of 17 December 2013, which addresses practices employed by EDF within the photovoltaic solar power sector. In the *Gaz de Bordeaux* case, the former holder of exclusive rights was sanctioned for improperly steering its customers through its commercial infrastructure towards a market offer it was developing in parallel, thereby preventing them from accessing the regulated offer.[10]

These various examples reflect abuses of dominant positions. However, other areas of competition law can also play a crucial role in the transport sector's economy, notably the sanctioning of coordinated practices, the regulation of state aid,[11] and the control of mergers.

The rest of the paper is structured as follows: subsequent sections will explore competition law issues related to access to infrastructure identified as natural monopolies or essential, the specific conditions under which non-essential infrastructure affects competition in services, emerging concerns like competition for the market, vertical integration, and inter-modality issues, concluding with an analysis of the persistent competitive risks in such liberalised industries.

2 Issues Related to the Access to an Essential Infrastructure

This section transitions into a focused examination of the regulatory and competition law tools available to address access issues at essential infrastructures within the transport sector. As the sector navigates the complexities of liberalisation and market competition, understanding the mechanisms that can control or mitigate anti-competitive behaviour becomes crucial. The following subsections will detail specific legal frameworks and enforcement strategies that have been employed to ensure fair access to essential transport infrastructure, examining how incumbents may exploit structural advantages and what regulatory responses can help maintain market health and competitiveness. This discussion will lay the groundwork for a deeper exploration of the principles and tools that regulators and competition authorities use to oversee and intervene in the transport market.

[10] French Competition Authority, Decision No. 22-D-17 of 11 October 2022, regarding practices implemented by the company Gaz de Bordeaux in the gas sector.

[11] State aid regulation aims to prevent market distortions from selective governmental support. Two scenarios can illustrate this point. The first corresponds to aid granted by airports to specific airlines for operating routes, which may lead to competition distortions (Ryanair, 2019, Montpellier `https://ec.europa.eu/commission/presscorner/detail/en/ip_19_4991`); the second relates to actions taken following the COVID-19 crisis, where some airlines initiated proceedings against Member States' support to legacy carriers (Judgment of the General Court in Case T-146/22 — Ryanair v Commission (KLM II; COVID-19)).

2.1 Principles and tools

The incumbent may benefit from imperfect unbundling, which impairs new entrants' access to the downstream market. Enforcement of competition laws can address these issues through the application of Article 102. There are two main enforcement options to consider.

The first is a prohibition decision under Article 7 of Regulation 1/2003 and equivalent legal provisions of the Member States. The Commission, or the relevant national competition authority, can sanction exclusionary or exploitative abuses. In such cases, the competition authority can impose fines on the incumbent to produce a deterrent effect and may issue either behavioural or structural injunctions to restore conditions for undistorted competition or to prevent new competitive harm.[12]

These tools require careful analysis. Behavioural injunctions, the most common type, constrain the incumbent's freedom to contract but do not affect property rights. Such injunctions require the incumbent to ensure that its downstream competitors have access to infrastructure on an equal footing. In the United States, there is scepticism regarding the ability of antitrust courts to define and monitor behavioural remedies, which is why they are primarily applied in the regulatory domain.[13] These remedies, while beneficial to new entrants, impose long-standing and intrusive requirements and must be carefully monitored. For example, consider the clear delineation between antitrust and sector-specific regulation in the United States, as defined by the Supreme Court in its *Trinko* ruling[14] Structural remedies, which entail vertical de-integration, are considered radical and, to our knowledge, have not been implemented in the EU for abuses of dominance. These remedies are viewed with suspicion as they affect companies' property rights and are generally seen as more appropriate for legislative provisions than for competition law enforcement.

The second option for enforcing Article 102 is the commitments procedure under Article 9 of Regulation 1/2003. In this context, there is no judicial review to assess whether less restrictive behavioral remedies could achieve the same outcome as structural remedies (Marty and Mezaguer, 2018). Here, no fine is imposed, as firms voluntarily propose corrective measures to address the concerns of the competition authority. These commitments can be both behavioural and structural. In this context, structural remedies are easier to obtain as the judicial review of the decision does not need to assess whether a less

[12]See for instance the French Competition Authority decision in the rail freight case in which SNCF was ordered to pay €60.9 million and was subject to several behavioral injunctions for practices that hindered new entrants' access to the market, ranging from targeted micro-predation strategies, over-booking of tracks, difficulties in accessing quasi-essential facilities and the implementation of strategies to disorganise competing companies. Decision 12-D-25 of 18 December 2012 concerning practices implemented in the rail freight transport sector.

[13]For a perspective specific to U.S. antitrust, see Majumdar (2021).

[14]Verizon Communications, Inc. v. Law Offices of Curtis V. Trinko, LLP [2003] 540 US 398. In the United States, there is skepticism regarding the ability of antitrust courts to define and monitor behavioral remedies, which is why they are primarily applied in the regulatory domain. For a perspective specific to U.S. antitrust, see Majumdar (2021).

demanding remedy could have restored free and undistorted competition. The possibility of obtaining structural remedies through injunctions under Article 7 has been discussed (Willis and Hughes, 2008). Conversely, numerous commitment decisions have led to structural remedies in the energy sector (Ioannidou, 2018).[15] To our knowledge, no decisions in the transport sector have resulted from this procedure.

Other areas of competition law, such as merger control, can lead to divestitures (Bougette, 2022). In cases where incumbents in a domestic market decide to merge with another former holder of exclusive rights, the merging firms may be required to propose a divestiture of an infrastructural asset. In these instances, judicial control does not impede such a remedy as it is voluntarily proposed by the firms.

A specific case of structural remedy occurs in the very specific context of UK market investigations.[16] In this context, it is also possible to obtain structural remedies without a decision characterising an anti-competitive practice. In the transport sector, this corresponds to the breakup of the managing company that operated London's airports (Littlechild, 2018). This example leads us to now turn to the relevant case law.

2.2 Case law

2.2.1 Railways[17]

Several cases highlight competitive distortions arising from the behaviour of vertically integrated incumbents to the detriment of downstream competitors. These competitors require access to the incumbent's network and infrastructure to serve their customers in both the freight and passenger transportation sectors (Bougette et al., 2021).

Railway Paths as Essential Inputs Railway paths represent a quintessential example of essential inputs. Incumbents can impair the access of new entrants through pricing or technical practices. Pricing strategies are complex to implement as tariffs are typically regulated, often based on costs and constrained by price cap schemes. However, the scenario might differ if an auction process were used to allocate paths. In such cases, a dominant player could propose prohibitively high prices to secure a large share of these paths, consequently raising the costs for rivals and creating barriers to entry. This strategy might be sustainable if the incumbent possesses pricing power or benefits from a soft budget constraint, often due to support from government shareholders. This is the case

[15] Commonly, under Article 7 of Regulation 1/2003, behavioral remedies are favored over structural remedies, and the adequacy and proportionality of these remedies are closely monitored under judicial review. The situation may differ in procedures under Article 9, where remedies are voluntarily proposed by firms. In the energy sector, the use of Article 9 has led to network divestitures, which have been viewed as quasi-regulatory remedies, effectively achieving through competition decisions what could not be accomplished through Directives (see Dunne (2014)).

[16] For insights on market investigations beyond the transport sector, refer to the study by Fletcher (2021).

[17] For the European legislative framework applicable to railways, see the four railway packages of 2001, 2004, 2007, and 2016 (`https://transport.ec.europa.eu/transport\-modes/rail/railway-packages_en`).

with the overbooking of single-track routes for SNCF freight in France (see below for further details).

Non-Price Based Refusals to Access Access can also be restricted through non-price-based practices. This often involves 'relative' refusals to access based on unjustified technical restrictions or discrimination, which indirectly raises the costs for new entrants or directly degrades the quality of service provided to their own customers.

There are also cases of absolute refusal of access based on the dismantling of part of the network without objective justification, aimed at inflicting almost irreparable harm on a new entrant wishing to access the market by forcing them to use an alternative route that is particularly penalizing in terms of time and cost. See the case from October 2, 2017, where the European Commission (EC) fined Lietuvos geležinkeliai AB (Lithuanian Railways). The Court of Justice confirmed by a judgment[18] on January 12, 2023, that such an access refusal could be sanctioned under Article 102, even if an alternative infrastructure could be used. In this sense, the Court's judgment in this case relaxes the Bronner criteria,[19] according to which access must be indispensable to enter the market.

One method to limit market access for new entrants is to overbook rail paths, providing a superficially 'objective' reason to deny access. This tactic has been employed in the French freight sector, where incumbents booked unnecessary paths to block access to key industrial sites. This was particularly effective on single-track lines, where new entrants could not guarantee timely transport of consignments. Even if financial penalties were imposed for unused tracks, incumbents preferred to incur these costs to maintain their monopoly, especially since they could micro-target their practices based on detailed knowledge of their customers and leverage safety rules to their advantage.[20]

Another method to restrict access is to complicate the booking process for rail paths, making the new entrant's scheduling uncertain and thereby reducing their ability to guarantee services to new customers.[21] This exposure to reputational damage is significantly greater for new entrants than for incumbents. While no specific cases are reported in the transport sector, particularly railways, EU competition case law in other network industries, such as the gas sector,[22] may provide relevant examples.

Data as an Essential Facility In railways, as in other network industries, data on track availability and commercial schedules can be considered quasi-essential facilities.[23]

[18] Case C-42/21 P, Lietuvos geležinkeliai v Commission, EU:C:2023:12.

[19] Oscar Bronner GmbH & Co. KG v Mediaprint Zeitungs- und Zeitschriftenverlag GmbH & Co. KG and others (Court of Justice, Sixth Chamber) [1998] ECLI:EU:C:1998:569.

[20] See, e.g., the French competition authority, Decision 12-D-25 of 18 December 2012 on practices implemented in the railway freight sector.

[21] See, e.g., the French Transport Regulation Authority (ART), Decision No. CS-2023-001 of June 27, 2023, by the sanctions committee of the Transport Regulatory Authority imposing sanctions on the company SNCF, Official Journal of the French Republic No. 0171 of July 26, 2023.

[22] European Commission, Decision COMP/39.315 – ENI (29 September 2010).

[23] We use the term "quasi-essential facility" rather than "essential facilitie" *per se* because the qualification criteria as established in the Bronner case law do not fully apply here. It is important to recall that

New entrants' development may be hindered by absolute or even relative refusals of access. Conversely, incumbents can exploit their data-based advantages to extend their dominant position into adjacent markets through vertical integration or joint ventures with companies possessing complementary resources, as illustrated by the Conseil de la Concurrence 2009 SNCF/Expedia case.[24]

2.2.2 Airports[25]

Monopoly Position and Regulatory Constraints Like railway stations, some airports enjoy a monopoly position due to their unique passenger catchment areas or strategic locations in highly prized cities. These locations are often better connected than other airports for accessing a city centre or are of intrinsic importance to airlines for hub services (Malavolti and Marty, 2023). The monopoly power of major hub airports,[26] however, is moderated by two primary factors: first, airport charges are capped by sector-specific regulators; second, airports do not control the 'core essential facility' – the slots (Lee et al., 2024). Slots are not reallocated every season through auctions but can be reused by airlines according to the rule of grandfather rights, provided they were utilized 80% in the preceding period (Haanappel, 2020). Slots reallocations may occur under specific conditions such as airline bankruptcy, restructuring remedies in the context of State aid, or corrective measures to clear a merger, though airports cannot reallocate slots at their discretion.

Impact on Competitive Dynamics The strategies implemented by airports can significantly influence the competitive landscape in the downstream market where airlines operate. Unlike railways, there has never been a case in the EU of vertical integration between airports and airlines. However, the decisions made by airports can profoundly affect airline activities and thus distort competition in the market for air passengers or freight transportation. Discrimination might occur when a particular company receives

the *Bronner* criteria are: 1) the refusal is likely to eliminate all competition in the market on the part of the person requesting the service; 2) the refusal is incapable of being objectively justified; and 3) the service itself is indispensable to carrying out that person's business, meaning there is no actual or potential substitute for the requested input. In the case of sectors undergoing liberalization with a vertically integrated incumbent, the material and informational advantage held by the incumbent would make it impossible for an equally efficient competitor to access the market. Thus, access to these quasi-essential facilities can contribute to a logic of asymmetric competition regulation (Bougette et al., 2021).

[24]French Competition Authority, Decision 09-D-06 of February 5, 2009, concerning practices implemented by SNCF and Expedia Inc. in the online travel sales sector (`https://www.autoritedelaconcurrence.fr/fr/decision/relative-des-pratiques-mises-en-oeuvre-par-la-sncf-et-expedia-inc-dans-le-secteur-de-la`). Numerous other cases exist outside the transportation sector, such as French Competition Authority, Decision 22-D-06 of February 22, 2022, which addresses practices by EDF in the electricity sector.

[25]See the dedicated website of the Commission: `https://transport.ec.europa.eu/transport-modes/road_en`.

[26]The monopoly in question here is that of a congested hub airport, in which case the airport operator enjoys market power vis-à-vis the airlines, which would not be the case for an uncongested airport or for an airport whose catchment area overlaps with that of competing airports. This is therefore a specific case (Paris, Frankfurt, London, etc.).

more favorable treatment than its competitors under similar operational conditions. This could happen, for instance, if an airport favors a legacy airline which uses its infrastructure as a hub or brings in numerous passengers that generate significant non-aeronautical revenues (see below for the Frankfurt airport case).

Investments and Exclusive Benefits A distortion may arise when an airport makes investments that benefit primarily or exclusively one airline. The 'partnership' between an airport managing company and a specific airline, often observed with low-cost carriers, may afford the airline better access to airport services than its competitors, both in terms of costs and service quality, leading to competition distortions. For example, the Commission had to rule on the compatibility with competition rules of a set of support measures for low-cost operators, including the development of a specific terminal in Marseille. The Commission concluded that in this particular case, the €7.2 million invested in the MP2 terminal did not constitute aid for a specific airline but contributed to the development of the airport. However, this case illustrates the need for a case-by-case assessment of the balance between gains for the operator and benefits for the economy as a whole.[27]

Discussions around State aid often begin by assessing if the economic interventions align with the 'private investor' principle. This principle considers whether public investments are made with the same considerations a wise private investor would have regarding costs, risks, and expected revenues. This approach, exemplified by the Nîmes airport case in France, reflects the EU Treaty's impartiality towards public or private ownership.[28] If the EU Commission finds that an investment decision does not mirror what a private market economy investor would decide, the arrangement is evaluated under state aid rules. These rules require prior notification and fulfilment of several criteria such as necessity, adequacy, proportionality, and incentivizing effect. Non-compliance can lead to demands for reimbursement by the EU Commission if the aid is found to distort competition unfairly.[29]

3 Issues Related to Access to 'Quasi' Essential Infrastructure or Cases in Which There Are No Essential Facilities at Stake

In this section, we explore complex issues surrounding access to 'quasi' essential infrastructure in the transport sector, particularly in cases where no explicit essential facilities are

[27]European Commission (2014). "State aid: Commission approves investment aid for Marseilles Provence airport and airport charges." Press release, Brussels, 20 February 2014. Available under case number SA.22932 in the State Aid Register on the DG Competition website.

[28]European Commission, 'Commission Decision (EU) 2016/633 of 23 July 2014 on State aid SA.33961 (2012/C) (ex 2012/NN) implemented by France in favour of Nîmes-Uzès-Le Vigan Chamber of Commerce and Industry, Veolia Transport Aéroport de Nîmes, Ryanair Limited and Airport Marketing Services Limited' [2016] OJ L113/32.

[29]See Communication from the Commission – Commission Notice on the recovery of unlawful and incompatible State aid, C/2019/5396. For an example, see Montpellier Airport, quoted supra. `https://ec.europa.eu/commission/presscorner/detail/IT/ip_19_4991`.

at stake. This discussion focuses on how control over specific, hard-to-replicate assets can create significant competitive barriers, especially in sectors like railways and airports. We examine various instances where regulatory interventions have been necessary to ensure fair competition and maintain service quality, drawing on notable case law and specific regulatory challenges faced by new market entrants.

3.1 Railways

In certain situations, a vertically integrated incumbent may distort competition by obstructing access to difficult-to-replicate and very specific assets for competitors. This could involve artificially reducing the information available to competitors about various assets or infrastructures that, while not defined as essential, are critical to ensuring high-quality service. An example is the freight decision in the French rail market by the Autorité de la concurrence.[30]

Moreover, some assets, such as locomotives or specific types of wagons for freight, can be very difficult for new entrants to obtain and finance (Pittman [2005]). New entrants may struggle with funding due to their limited size and the high perceived risks associated with financing such specific assets, which represent substantial sunk costs in the event of market exit. Unless the legislator mandates the incumbent to create a pool that allows all market players access, or if the incumbent offers only low-quality assets to its challengers, market contestability can be significantly impaired. Mandating access to these assets may conflict with the criteria defined by EU case law (*Bronner*[31]) to implement the Essential Facilities Doctrine (EFD): accessing the market without these assets is not impossible, but prohibitively costly. However, asymmetries in initial positions in recently liberalised sectors may justify some asymmetric treatments aimed at equalizing competition conditions. This 'subsidization' of new entrants to compensate for cost asymmetries and to limit sunk costs - and thereby reduce barriers to entry – can be illustrated by the GVG case in 2003,[32] a commitment decision (Bougette et al., 2021). In this instance, the new entrant benefited from required rail paths, access to locomotives, and a secondment of railway workers from the incumbent operator to provide qualified personnel on Italian tracks.

This example illustrates how broadly the definition of 'quasi-essential' inputs can extend. Human resources, especially if an economic activity requires specific qualifications or accreditations, can act as barriers to entry. The French freight case of December 2013 also illustrates a strategy of rival disorganisation through the hiring by incumbents of newly trained railway workers.[33] A 'quasi-essential' facility might also relate to commercial or

[30]French Competition Authority, decision No. 12-D-25 of 18 December 2012 on practices implemented in the rail freight transport sector. See `https://www.autoritedelaconcurrence.fr/fr/communiques-de-presse/lautorite-rend-une-decision-structurante-pour-le-secteur-du-fret-ferroviaire`.

[31]Oscar Bronner GmbH & Co. KG v Mediaprint Zeitungs- und Zeitschriftenverlag GmbH & Co. KG and others (Court of Justice, Sixth Chamber) [1998] ECLI:EU:C:1998:569.

[32]European Commission, 'Decision 2004/33/EC of 27 August 2003, Case COMP/37.685 GVG/FS' [2004] OJ L11.

[33]French Competition Authority, decision No. 12-D-25 of 18 December 2012 on practices implemented in the rail freight transport sector.

maintenance activities, where having dedicated spaces and equipment within rail stations at a strategic location can be crucial to attracting customers and providing high-quality service. Several EU cases in the field of airports, such as the Flugshafen Frankfurt case,[34] may illustrate this point.

3.2 Airports

In the Frankfurt Flugshafen case, the essential facility doctrine was applied in a very specific context. New entrants required access to airport facilities to provide their services to airlines. The airport managing company only offered remote facilities, considering all the more conveniently located spaces were already occupied. Although this does not deal with 'essential facilities' in the *Bronner* sense – an alternative solution was proposed, and the airport's decision seemed justified on objective grounds – the EU jurisdictions considered that offering remote facilities impaired the capacity of new entrants to compete on a level playing field. The managing company of Frankfurt Flugshafen was required to reorganise its ground facilities to free up space for competitors.

In summary, a company controlling a 'crucial' asset necessary for downstream companies cannot deny access, even if the services provided by these companies compete with its own and must guarantee equivalent access even if it incurs additional costs.

4 Emerging Competition-Law Related Issues in the Field of Transports

Competition law concerns in the transport sector are multifaceted and extend well beyond the direct effects of liberalisation, encompassing issues related to essential facilities, vertical integration of incumbents, and asymmetries due to the absence of horizontal de-integration. The field of transport is continually evolving, reflecting new regulatory challenges and economic realities.

4.1 Competition for the market

In railways, the liberalisation process aims not only to foster competition within the market—despite significant entry barriers and asymmetrical market positions—but also to promote competition for the market itself (Gutiérrez-Hita and Ruiz-Rua, 2019). According to economic theories such as those proposed by Harold Demsetz, competition for the market can yield welfare benefits comparable to traditional market competition (Demsetz, 1968). This perspective necessitates addressing competition-law issues during the contract competition phase, which includes the choices of contractual arrangements such as concessions versus availability payment schemes, the duration of contracts, and specific performance requirements.

[34] Flughafen Hannover-Langenhagen GmbH v Deutsche Lufthansa AG (Court of Justice, Sixth Chamber) [2003] ECLI:EU:C:2003:549.

The awarding process also requires careful management to ensure fairness and efficiency. It involves establishing criteria, supervising the awarding process to prevent favouritism, detecting collusive patterns, and managing bids that are abnormally low. Furthermore, the supervision of contracts involves managing renegotiations, preparing for contract transfer, or re-internalisation at the end of the initial contract period, and overseeing the relationship with the incumbent operator. The issues at stake are comparable to the ones considered in the economic literature devoted to public-private partnership contracts (Fabre and Straub, 2023).

4.2 The rise of mobility platforms

In railways and airports, competition law enforcement and regulatory supervision can become more complex as managing companies begin to function as two-sided platforms, combining revenues from their core business activities with commercial revenues (Malavolti and Marty, 2017, 2019). This arrangement can complicate supervision, as it requires the adjustment of the pricing structure on each side of the platform.

Intermodality requirements in railways and airports may necessitate forming partnerships with other market players such as airlines, rail companies, or bus operators. Such vertical integration is necessary to coordinate investments and operational programmes, but it can also raise difficulties in terms of competition law, specifically in the enforcement of Article 101-3.

The emergence of Mobility as a Service (MaaS) represents a significant shift towards integrated transport solutions. MaaS platforms, which offer bundled access to various modes of transport through a single digital interface, challenge traditional market analyses due to their multi-faceted nature. These platforms act as two-sided markets, interfacing between transport service providers and users, complicating competition assessments. The multi-faceted market structure of MaaS creates difficulties in regulatory oversight, as authorities must consider cross-subsidization issues, the potential for discriminatory practices, and the impact on competition not just within but between different modes of transport (Murati, 2023).

Besides, some liberalisation initiatives do not pose difficulties in terms of incumbency advantages or access to infrastructures, such as bus transportation or ridesharing platforms. However, these sectors raise specific concerns, including merger control and the compensation of sunk costs for taxis, alongside issues of regulatory capture. For instance, the French long-distance bus market has seen significant consolidation over the past few years, following the liberalisation of the market with the enactment of the Macron Law in 2015 (Blayac and Bougette, 2017). This legislation opened the market to competition, leading to a series of mergers and acquisitions (Blayac and Bougette, 2023)) that shaped the current landscape dominated by two major platform players (FlixBus and BlaBlaBus).

The strategic movements within the French long-distance bus market reflect a broader European trend towards consolidation in transport sectors liberalised in response to EU

directives. This trend underscores the need for ongoing regulatory oversight to ensure that market consolidations do not hinder competition to the detriment of consumer welfare (Blayac and Bougette, 2023). These dynamics within the French long-distance bus market offer a clear example of how liberalisation, while promoting initial competition, can also lead to market concentration if competition policy is not adapted to platform players to maintain a competitive market environment. While the two platforms have leveraged these market dynamics to expand and solidify their presence in France, the absence of a broader merger control—specifically referring to structural thresholds for merger notification—could raise questions about the adequacy of current regulatory frameworks to effectively manage the evolving landscape of transport services.

This overview indicates that the transport sector's regulatory landscape is complex and requires a nuanced approach to competition law, addressing both traditional and emerging challenges to ensure fair and effective market operations.

5 Discussion

The liberalisation of the transport sector has perpetuated the need for ongoing competition law enforcement, a requirement that underscores the inadequacies in the liberalisation process itself. The absence of both vertical and horizontal unbundling has led to structural biases and has endowed incumbents with the capacity and incentive to implement anti-competitive strategies aimed at market foreclosure and at extending their market strength into adjacent markets.

5.1 Structural Biases and Anti-Competitive Strategies

The persistence of these issues can be traced back to the liberalisation model adopted, which often leaves incumbents with significant control over essential infrastructure. This control enables incumbents to engage in exclusionary practices that deter entry and expansion by potential competitors, effectively stifling competition. Caselaw presented in earlier sections indicates that in markets characterised by natural monopolies, such as railways and utilities, unregulated incumbents may leverage their market power to the detriment of consumer welfare and the correct functioning of markets.

5.2 Primacy of Regulatory Policies over Competition Laws

In sectors characterised by natural monopolies, such as transport, competition policies often need to yield to regulatory frameworks. This necessity arises because purely competitive models cannot adequately address the unique challenges posed by these markets, where the inefficiencies related to competition can be substantial and detrimental to the public interest. Regulatory interventions are thus essential not only to curb the inherent market power of incumbents but also to ensure service continuity and affordability. Beyond enforcing competition law, sector-specific regulation intersects with addressing structural

market failures, ensuring sustainable market dynamics for stakeholders, and managing externalities alongside certain aspects of industrial policy concerns (OECD, 2022).

Comparing the enforcement of antitrust rules and regulatory interventions, Majumdar (2021) suggests that behavioral remedies may effectively curb the competitive advantages of dominant firms more than structural antitrust interventions, such as divestitures. Given that the distinction between sector-specific regulation and competition law enforcement is less pronounced in the EU, it can be inferred that behavioral injunctions derived from Article 102, along with regulatory interventions, could significantly influence the competitive dynamics in newly liberalized sectors.

5.3 Broader Socio-Economic Considerations

Transport cannot solely be viewed through the lens of competition rules designed to maximize consumer welfare or protect the competitive process. The 'economics of the common good' must also be considered, as transport policies have profound implications across several domains. Transport infrastructure is pivotal in regional development, influencing economic opportunities and enhancing social cohesion. Effective transport networks can mitigate regional disparities by improving access to markets, jobs, and services, thereby fostering territorial planning and cohesion.[35]

Additionally, the transport sector significantly contributes to global carbon emissions, making it essential for policies to promote sustainable transport modes. These policies are vital in the global effort to combat climate change, with transitions to greener transport systems facilitated by regulatory frameworks that incentivize the adoption of environmentally friendly technologies and practices. In the maritime sector for instance, concentrations and alliances may have significant environmental implications, as they also determine the efficiency and environmental impact of shipping operations (Alexandrou et al., 2014). By coordinating on routes, schedules, and technology investments, maritime companies can significantly reduce their carbon footprint and enhance sustainability within the industry.

In terms of industrial policy, transport policies can support the development of national industries and champions, fostering sectors that are strategically important for national economic security and growth. This aspect of transport policy underscores the intersection of industrial strategy and transport regulation, highlighting the need for a coordinated approach that balances competitive conditions with industrial advancement. These broader socio-economic considerations underscore the multifaceted impacts of transport policies, extending well beyond the narrow focus of competition law (Gaffard and Quéré, 2007).

In conclusion, although the liberalisation process in this sector is predominantly driven by directives and operates within a framework of sector-specific national regulation, the enforcement of competition law plays a pivotal role. It complements these directives, en-

[35]This refers to competition issues that extend beyond economic efficiency, including environmental and social concerns, as decision-making in the transport sector increasingly addresses these dimensions. These aspects are already priorities for the European Commission and various competition authorities.

suring the preservation of free and undistorted competition based on merit. Such intervention becomes even more crucial considering the persistent asymmetries between operators within the liberalised sector, which risk undermining a level playing field.

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