DOMINANT POSITION (RAILWAYS): THE DEUTSCHE BAHN CASE

Subject: Abuse of dominant position

Industry: Railways
(Implications for other industries)

Parties: Deutsche Bahn AG
Georg Verkersorganisation
Statens Jarnvagar

Source: Commission Statement IP/01/1415, dated 12 October 2001

(Note. This case epitomises an increasingly important problem in competition law, both in the European Union and elsewhere: namely, the extent to which a trader should be required to open a monopoly or dominant position to his competitors. Mere possession of a dominant position is not an infringement of the competition rules: there must be an abuse. In the present case, the Commission claims that the abuse lies in foreclosing the market in effect, as well as in charging arbitrarily high prices. It is well established that the latter, if proved, is an abuse; it is less well established that the former calls for a remedy. We shall report on future developments in this potentially important case.)

The Commission has sent Deutsche Bahn AG (DB), the German State-owned railway company, a Statement of Objections, alleging that DB has violated European competition rules by refusing to provide traction to a small German competitor. The refusal makes it almost impossible for Georg Verkehrs-organisation (GVG) and its partner Statens Järnvägar (SJ), the Swedish State Railway company, to offer a regular passenger rail service from Berlin to Malmö. As this is a crucial railway link between Germany and Sweden, customers would suffer if the service had to be terminated. The case concerns a passenger night train service from Berlin to Malmö via Sassnitz. Since 25 September 2000, SJ has operated on this route with its German partner GVG on the basis of an international grouping. However, as this service requires a certain type of locomotive, in order to operate between Berlin and Sassnitz, GVG has to rent a locomotive from another source. For the time being, DB, which operates more than 1000 locomotives suitable to carry out this service, is the only company which could provide such a locomotive on a regular basis. This is particularly the case with regard to the necessary back-up service. While DB had provided traction to GVG on earlier occasions, this time it requested a considerably higher price and refused to provide traction after one month. This triggered a complaint from GVG and SJ to the European Commission.

In its Statement of Objections, the Commission considers that DB abused its dominant position in three ways. In the first place, an abuse of dominant position arises by discriminating against GVG/SJ when requiring them to pay a considerably higher price than DB charges Private Wagon Owners for the

provision of the same traction service. In the second place, an abuse arises as, after one month, DB refused to provide traction altogether. In the third place, DB required GVG to hire additional staff, thereby inflating GVG's costs.

If DB/SJ are forced to stop operating on this route, consumers travelling between Germany and Sweden will be deprived of an important railway link. DB has been given two months to reply. If the Commission upholds its position, it may take a decision against DB which includes the possibility of imposing fines. This is the second time the Commission has had to act to prevent national rail companies from abusing their dominant position on their respective markets with regard to passenger transport. In July, the Commission sent a Statement of Objections to Italy's Ferrovie dello Stato after GVG also complained that it was unfairly being denied access to the Italian market for passenger transport.

To provide rail passenger transport services, small private railway companies depend on renting traction elsewhere. DB operates about 99% of all locomotives which are equipped for such a service. Suitable second hand locomotives are generally not available; and the acquisition of a new locomotive incurs a prohibitively high fixed cost. More important, only DB operates a locomotive pool which offers the necessary back-up service if the locomotive in operation needs maintenance or repair. A locomotive pool allows a significant reduction in the overall cost of operation as it limits the time when locomotives remain idle. Since DB has refused to provide traction to GVG/SJ, the latter have found a temporary solution by renting a locomotive from a manufacturer. However, as they cannot obtain the necessary back-up service without obtaining traction from DB, they will not be in a position to continue operating on this route in the future.

The Commission, Council and European Parliament have all urged that rail transport throughout the Community should be revitalised. To encourage the development of the railway sector and increase its competitiveness with other forms of transport, more competition in the railway market is essential. As pointed out in the Commission's White Paper on the Revitalisation of railways in the Community, the steep decline of railway transport in comparison with road and air transport is mainly due to the price policy and the comparably poor railway transport services. Directive EEC/91/440 was a first step in liberalising the passenger rail transport market in the Community. However, in spite of the fact that the Directive came into force more than 8 years ago, there has been almost no competition in the provision of international rail passenger transport in the Community. This is the first case in which a state railway company has entered into a grouping with a private company in competition with another state railway company.

In the Commission's view, more dynamic railways can be achieved only if there is more competition in the sector. New operators will provide new services and a different price/quality mix, key ingredients for winning back passengers to the rail and for reducing European road congestion. The application of the competition rules to the railway sector has therefore become a priority. ■