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First Stop Regulatory Body, Second Stop National Civil Courts: Jurisdiction to Apply Article 102 TFEU After DB Station and The Future of CityRail

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Jurisdiction after DB Station

At the end of last year, the ECJ rendered a much-anticipated ruling in the DB Station case (C-721/10), which fundamentally clarified the hierarchy between regulators and civil courts in abuse of dominance cases relating to regulated infrastructure sectors.

After lengthy national proceedings, the ECJ decided that national civil courts can only rule on disputes relating to the reimbursement of infrastructure charges based on Art 102 TFEU and national competition law, once the competent regulatory body has previously ruled on the lawfulness of the charges in question. Only after the regulator has decided can plaintiffs bring a case to the civil courts.

The ECJ's decision and reasoning are noteworthy for a number of reasons.

The ECJ rejects AG ?apeta's April 2022 opinion (for a brief review see here) that suggested:

1. To discard as incompatible with Art 102 TFEU the *CTL Logistics* (C-489/15) jurisprudence according to which national civil law provisions (315 BGB) enabling the civil courts to set a fair amount in the case of unfair charges (in equity);
2. That national courts can review regulated infrastructure charges under Art 102 TFEU independently of a regulatory authority and;
3. That national courts do not need to await for a regulatory authority to take a decision before reviewing regulated infrastructure charges under Art 102 TFEU.

The ECJ introduces a hierarchy between regulators and civil courts that is not laid down explicitly in relevant railway market directives (Directive 2001/14/EC and Directive 2012/34/EU), let alone competition law (in particular, Regulation 1/2003/EC). Article 30 Directive 2001/14/EC and Article 56 Directive 2012/34/EU provide that applicants shall have a right to appeal to the regulatory body if they believe that they have been unfairly treated, discriminated against or in any other way aggrieved. A right to appeal to a regulatory body logically does not entail the exclusion of the right to bring a claim in civil court. Yet, to paraphrase Justice Holmes, the life of competition law and railways has not been logic; it has been experience.

Plaintiffs in the DB Station case have sought a decision for more than ten years. The German regulatory body, *Bundesnetzagentur*, had initially rejected competence to review the dispute and a decision by the competent Administrative Court Cologne was still pending at the time of the request for the preliminary ruling.

Several German civil courts, including the *Bundesgerichtshof* (Germany's Supreme Civil Court), had ruled that plaintiffs could bring claims based on Art 102 TFEU even if the regulatory body had not yet taken a decision (cf. BGH 19 October 2019, KZR 39/19, *Trassentgelte*) and that the regulatory body does not have the competence to adjudicate on charges which have already been paid or to order reimbursement of such charges (cf. Paragraph 14f German General Railway Act (relevant parts translated in the DB Station judgment)). While regulation lays down conditions for the use of railway infrastructure ex-ante, competition law can grant damages ex-post (BGH 1 September 2020, KZR 12/15, *Stationspreissystem II*).

Does this experience justify overriding the *Bundesgerichtshof*'s case law? The core of the ECJ's reasoning prioritizes pragmatic considerations and attempts while attempting to reconcile them with demands of doctrinal coherence.

With reference to CTL Logistics, the ECJ finds that the regulatory bodies have exclusive competence for appeals under Articles 30 of Directive 2001/14/EC and 56 of Directive 2012/34/EU (DB Station, para 55). The ECJ purports to derive ("*thus*") that therefore plaintiffs are required to apply to a regulatory body when they seek compensation for any damage related to the infrastructure charges (another *non-sequitur*: a regulatory body's exclusive jurisdiction for disputes brought under Article 30 of Directive 2001/14/EC and Article 56 of Directive 2012/34/EU does not entail exclusive jurisdiction for all subject matters for which the regulatory dispute resolution mechanism has been created).

The second argument put forward by the ECJ is stronger: a regulatory body's exclusive competence is justified by the technical constraints specific to the railway sector (para 57) and the regulatory body's authority and objective to ensure non-discriminatory access to the railway structure (paras 59 et seq.).

At the same time, railway regulation does not claim primacy over the competition rules laid down in the TFEU. Hence, railway managers must comply with Art 102 TFEU. Against this background, the ECJ reasons that a regulatory body cannot decline competence to decide appeals based on Art 102 TFEU on the grounds that national railway legislation (such as Paragraph 14f German General Railway Act) does not provide for an ex-post review of infrastructure charges already levied (para 74).

In contrast to the CTL Logistics case, which turned on an equity-based review of infrastructure charges based on German civil law, in DB Station the German courts were asked to apply EU primary law. In a delicate balancing act between preserving the primacy of Art 102 TFEU and recognizing the need for consistent management of the railway network, the ECJ finds a mediating solution (paras 79 and 80).

Railway undertakings must first take their case to the regulatory body, which also apply Art 102 TFEU (paras 81 et seqq. and paras 67 et seqq.). National civil courts are not bound by the decision of the regulatory body. Still, they are required to take such a decision into consideration (DB Station, paras. 82 et seq. with reference to ECJ rulings issued in 2010 in *Deutsche*

Telekom v *Commission* –C?280/08 P-, para 224, and in 2021 in *Deutsche Telekom* v *Commission* - C?152/19 P-, para 57) and to cooperate with the regulatory bodies in good faith. However, national civil courts do not need to await the outcome of judicial proceedings brought against decisions of the competent regulatory body, before taking a decision (DB Station, para 85).

An itinerary for railway regulation and competition after DB Station

Much of DB Station is good sense, but as the ECJ attempts to reconcile CTL Logistics with the necessities of the regulated railway sector and the primacy of EU primary law, new issues arise.

Since the hierarchy, which the ECJ established, is not inscribed into the Directives of the railway sector, transposing national law does not explicitly provide for such a hierarchy. Coherently applying DB Station in the national jurisdictions will be a challenge.

DB Station did not settle the competence of the regulatory bodies and the national competition authorities. The logic of DB Station that justified entrusting the regulatory body with primary jurisdiction entails excluding the competence of national competition authorities to take action in the railway sector with regard to abuse of dominance cases. At the same time, it should not exclude the national competition authorities' competences to pursue horizontal cartel cases. Regardless of how this issue of competence will eventually be resolved (if at all), the ECJ has shown that parties should expect pragmatic considerations to trump doctrinal coherence.

In 2012 the ECJ recognized that regulatory bodies qualify as "*a court or a tribunal within the meaning of Article 267 TFEU*" so that they can refer questions for a preliminary ruling to the ECJ (*Westbahn Management GmbH*, C-136/11*,* para 31).

In 2022, the ECJ ruling produced as a Grand Chamber distinguished a new line of jurisprudence (not to say, *reversed* its Westbahn ruling) (*CityRail*, C-453/20). In a dispute between CityRail, a.s., a railway undertaking, and Správa železnic, státní organizace ('Správa železnic'), a railway infrastructure manager in the Czech Republic, concerning the conditions laid down by Správa železnic for access to the network and certain related facilities, the ECJ held that "*the activity of regulating the sector and supervising the markets is essentially administrative in nature*" (para 45). Although CityRail had applied for a ruling of the regulatory body based on national law transposing Article 56 of Directive 2012/34/EU, the ECJ ruled that the regulatory body does not qualify as a tribunal, because it could also initiate the proceedings ex officio (paras 64 et seqq.).

The interplay between CityRail and DB Station will require further adjustments. In DB Station, the ECJ based the exclusive jurisdiction of the regulatory body on Article 56 of Directive 2012/34/EU and entrusted the regulatory body to apply Art 102 TFEU when ruling on appeals under the relevant national law. In CityRail, the ECJ decided that the regulatory body does not qualify as a tribunal, because it could also initiate proceedings *ex officio*.

Does that mean that although regulatory bodies are required to apply Art 102 TFEU, they cannot request preliminary rulings on its interpretation? Can it be correct that:

- On the one hand, the competent authority has exclusive competence over disputes under Article 30 of Directive 2001/14/EC or Article 56 of Directive 2012/34/EU, because of the "*the objectives to allow for fair competition in the provision of railway services in light of the natural monopoly*

character of railway infrastructure" (DB Station, paras 57 et seqq.) and that;
- On the other hand, "*the activity of regulating the sector and supervising the markets is essentially administrative in nature*" (CityRail, para 45) and that therefore even independent regulatory bodies cannot request preliminary rulings on questions arising from an appeal brought by a railway undertaking under national law transposing Article 30 of Directive 2001/14/EC or Article 56 of Directive 2012/34/EU simply because the regulatory body could also initiate infringement proceedings ex officio? (CityRail, para 48 et seq.).

Perhaps, to guarantee the uniform application of Art 102 TFEU in the railway sector and to avoid conflicting decisions in a system of parallel powers of regulatory bodies who apply Art 102 TFEU within their exclusive jurisdiction (cf. Recitals 1 and 22 and Article 16 of Regulation 1/2003/EC), a further distinction could be required. If pragmatics trump doctrinalism a reversal for CityRail may be the next stop. Will the ECJ arrive on time?

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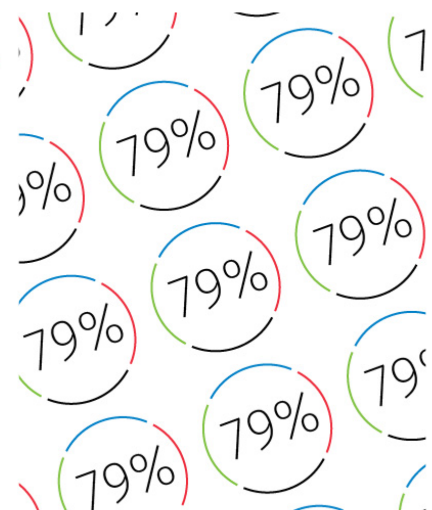

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