

SUMMARY OF CASE S/0511/14 RAIL FREIGHT TRANSPORT BY RENFE & DEUTSCHE BAHN

One of the priorities of Spain's National Authority for Markets and Competition (Comisión Nacional de los Mercados y la Competencia, or CNMC) is to guarantee that the liberalization of economic sectors that were run by a legal monopoly becomes effective in practice. In order to achieve this goal, the CNMC has opened formal proceedings for anticompetitive conduct against incumbent operators that have put in danger this liberalization process. Case S/0511/14 *rail freight transport* provides an example of the enforcement activity of the CNMC in this area.

On the one hand, as a result of this investigation, the CNMC fined *RENFE OPERADORA* and *RENFE MERCANCIAS S.A.* (jointly, RENFE), along with *Transportes Ferroviarios Especiales, S.A.*, *Transfesa Rail, S.A.*, *Pool Ibérico Ferroviario A.I.E.*, *Hispanauto Empresas Agrupadas A.E.I.E.*, *Sociedad de Estudios y Explotación de Material Auxiliar de Transportes, S.A.*, *Deutsche Bahn Ibérica Holding, S.L.*, *DB Mobility Logistics AG*, and *DB Schenker Rail Deutschland AG* (jointly, DEUTSCHE BAHN), for a single and continuous infringement of Article 1 of the Spanish Competition Act (hereinafter LDC) and Article 101 of the Treaty on the Functioning of the European Union (henceforth TFEU). According to the decision in this case, RENFE and DEUTSCHE BAHN participated in a complex web of agreements and concerted practices that had the effect of restricting competition because they led to market sharing between both group of firms, that is, they preserved the status quo in the market for traction used in rail freight transport and in the market for rail freight transport prior to its liberalization.

On the other hand, the CNMC also fined RENFE for abuse of a dominant position in the Spanish market for traction used in rail freight transport, which constitutes an infringement of Article 2 LDC and Article 102 TFEU. This abuse took the form of discrimination to third operators who demanded rail traction services with respect to the commercial conditions that RENFE offered to DEUTSCHE BAHN.

The case was opened following a complaint from the *Asociación de Empresas Ferroviarias Privadas* (AEFP) in March 2014, against RENFE and its subsidiaries active in rail freight transport, and also against some companies from the DEUTSCHE BAHN group. According to the AEFP, RENFE had engaged in an abuse of a dominant position in the following markets: rail freight transport, traction used for rail freight transport and freight wagon rental. In addition, the AEFP complained that RENFE and DEUTSCHE BAHN had signed a restrictive agreement affecting the rail transport of automobiles. As a result of this complaint, the CNMC undertook a preliminary investigation during which it requested information from RENFE and DEUTSCHE BAHN. After a close examination of the submitted information, the CNMC initiated formal proceeding against RENFE and DEUTSCHE BAHN in October 2014.

RENFE is the incumbent operator in the Spanish rail freight market. Before the liberalization of this market, operated by the Railways Act 39/2003, of 17 November (which came into effect in 2005), RENFE had the legal monopoly in traction services used for rail freight transport in Spain.

As regards TRANSFESA, which was acquired by DEUTSCHE BAHN in 2008, it is the main competitor of RENFE in the market for rail freight transport, a situation which predates the liberalization operated by the Railways Act 39/2003. In addition, RENFE and TRANSFESA hold cross-shareholdings in several firms belonging to these groups, which give them the right to participate in the board of directors of the undertakings concerned.

RENFE and TRANSFESA were the only two significant competitors in the Spanish rail freight transport sector until 2007: RENFE accounted for more than 80% of the market, while TRANSFESA 20%. Since

2007, RENFE's market share has dropped to 70%, while TRANSFESA's to 15%. Irrespective of this, there are some segments of this market, such as automobiles and steel products, where RENFE and TRANSFESA still hold jointly 100% of the market.

Concerning the market for traction services used in rail freight transport in Spain, RENFE held 100% of the market in 2007, which subsequently dropped to 80% in 2013.

It should be emphasized that TRANSFESA had taken several steps in order to develop its own rail traction capacity before its acquisition by DEUTSCHE BAHN. After becoming part of the DEUTSCHE BAHN, TRANSFESA undid this strategy.

One of the main elements analyzed by CNMC in this case was the complex web of agreements signed by RENFE and DEUTSCHE BAHN in 2008 just after the acquisition of TRANSFESA by DEUTSCHE BAHN. A summary of the most salient anticompetitive features of these agreements is provided in what follows:

1. TRANSFESA delayed the use of its newly acquired rail traction capacity, already available in autumn 2008, due to its decision of renting the ten locomotives it had recently leased for a period of 10 years:
 - a. five of these locomotives were rented to RENFE (RENFE owned by far the highest number of rail freight locomotives in Spain at the time),
 - b. while the other five locomotives were rented to a subsidiary of DEUTSCHE BAHN that had no activity in Spain before the agreement and who used these locomotives to provide rail freight transport services to new customers not catered by TRANSFESA.

If TRANSFESA had not delayed the use of this newly leased locomotives:

- c. it would have reduced its dependence on RENFE in terms of rail freight traction (RENFE was at the time –and still is- the main supplier of rail traction to TRANSFESA) and would have increased its autonomy vis-à-vis RENFE in the downstream market for rail freight transport in Spain, and
 - d. it could have become a new service provider in the rail freight traction market, at least potentially.
2. RENFE and DEUTSCHE BAHN granted each other preferential treatment regarding rail freight traction services in Spain: RENFE became the preferential provider of these services to DEUTSCHE BAHN in Spain and conversely DEUTSCHE BAHN the preferential customer of RENFE for a period of almost 6 years. As a result, RENFE was able to secure that it would profit from DEUTSCHE BAHN's customers in the downstream market for rail freight transport (through the rail traction services supplied), since
 - a. RENFE was going to provide the rail traction services to these customers,
 - b. while DEUTSCHE BAHN was going to focus on transport management and customer relationship.

In particular, this preferential treatment agreement has had a significant impact in the rail freight transport of automobiles, which constitutes the main business activity of TRANSFESA. In this segment TRANSFESA has always used rail traction provided by RENFE.

It should also be taken into account that, between 2005 and 2013, DEUTSCHE BAHN represented almost 50% of the turnover that RENFE made in the provision of rail traction services to third parties.

3. A DEUTSCHE BAHN subsidiary secured from RENFE an extension of the rental agreement of two open-air storage depots with railway access (located in Madrid and Barcelona). This agreement strengthened TRANSFESA's position in the Spanish market for rail freight transport, especially in the automobile segment .

This rental agreement limited RENFE'S ability to expand into the rail transport of automobiles, given the relevance of these depots in order to provide rail transport services of automobiles when automobile manufacturers demand additional services linked to the transport (such as logistics).

Even though TRANSFESA's acquisition by DEUTSCHE BAHN paved the way for TRANSFESA becoming a vertically integrated operator (with its own rail traction capacity and freight wagons) and thus becoming less dependent on RENFE, the agreements and concerted practices that have been summarized prevented this, since they enshrined the market situation prior to the liberalization of the Spanish rail freight market. As a result, these agreements and concerted practices prevented the emergence of competitive pressures between the parties in the markets covered by the investigation, with special emphasis on the Spanish rail freight market.

In other words, DEUTSCHE BAHN stopped TRANSFESA from using the locomotives it had leased, while at the same time DEUTSCHE BAHN obtained preferential treatment as a customer from RENFE regarding rail traction services for a period of almost 6 years. This preferential treatment included prefixed annual price increases (which were inferior to CPI increases) and flexible contracting conditions (for example, DEUTSCHE BAHN did not have to pay any penalty for modifying or cancelling traction services from RENFE).

In addition, the CNMC did not appreciate any objective justification for these agreements and concerted practices. For instance, the CNMC found that RENFE did not have any commercial need to rent locomotives from TRANSFESA.

As already mentioned, these agreements and concerted practices were in place for almost 6 years, from November 2008 to October 2014, taking into account that they were orally extended after their formal termination in December 2013. As a result, the CNMC concluded that these agreements constitute a single and continuous infringement of Article 1 LDC and Article 101 TFEU, and fined RENFE EUR 49.962.000 and DEUTSCHE BAHN EUR 10.513.000€ .

Separately, the CNMC also found that RENFE had infringed article 2 LDC and article 102 TFUE by abusing its dominant position in the Spanish market for traction used in rail freight transport. This abuse took the form of discrimination to third operators who demanded rail traction services (in particular, undertakings that were members of the AEF), with respect to the commercial conditions that RENFE offered DEUTSCHE BAHN (for instance, in terms of price and the possibility to cancel any service without penalty). As a result of this commercial discrimination, third operators were limited in their ability to compete in the Spanish rail freight market without an objective justification.

The above-mentioned abuse took place from November 2008 to October 2014, and the CNMC fined RENFE EUR 15.129.000 for this infringement.

Lastly, it is worth noting that the CNMC opened talks with RENFE and DEUTSCHE BAHN in order to settle this probe in September 2015, with the aim of reversing the effects of these anticompetitive practices while preserving the public interest.

However, in April 2006, these talks failed because RENFE withdrew the main commitment that according to the CNMC could have restored competition in the market, that is, the commitment to provide the same wholesale offer of rail traction services to all operators under clear, fair, reasonable and non-discriminatory conditions.

Madrid, 8th March 2017