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INNOVATIONS AND COMPETITION IN LAND TRANSPORT

-- Note by Spain --

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More documents related to this discussion can be found at: <http://www.oecd.org/daf/competition/competitionand-innovation-in-land-transport.htm>

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-- SPAIN --

1. Transport plays an important role in today's economy and society and has a large impact on growth and employment both at a national and at a supra-national level. In this sense, economic growth and the companies' ability to compete are often dependent on a region's capacity to develop efficient networks within its territory and with other regions, being the transport network also crucial to strengthen the territorial and social cohesiveness of a country and its competitiveness. For these reasons, an efficient public transport policy is of utmost importance for the development of the economy and the society. The optimal use of the various modes of transport is thus crucial for the productivity of the economy as a whole.

2. At present, the dynamics of competition in the transport sector are undergoing significant changes, mainly due to the development of the digital economy and the information and communication technologies, whose innovations are applied to this sector, both to transport services and to transport infrastructures. These new developments generate opportunities, disruption and a potential paradigm shift in this market, by which both competition, structure and business dynamics could significantly change. This will provide new challenges for the Competition and Regulation Authorities, which will face a number of issues brought about by these developments in the transport markets. Therefore, this new innovative framework will further provide an opportunity for the CNMC to intervene through enforcement and advocacy powers (i.e. drafting general reports on sectors or make proposals for liberalization, deregulation or regulatory amendment in the markets), in order to promote greater competition in the transport sector, maximizing consumer welfare with innovation, quality, variety and prices and, in a nutshell, making society aware of the advantages deriving from competition policy.

3. The transport sector represents in Spain 5.5% of GDP and ca. 850 000 jobs in 2014. It plays a substantial role in economic and social cohesion, due to its forward and backward linkages to other industries and to consumer welfare. As a result, the transport sector generates positive carry-over effects in other economic sectors. Traditionally these effects were considered as direct, as in the case of locomotive and carriage manufacturing, or indirect, as in the tourist sector, for example. However, the new technological developments and novel business models based on information and communications systems (digital data) have dramatically changed the market landscape. Not only these technological developments have already had an important impact in the transport sector, but have a potential to further change the transport services and infrastructure, with further digitalization: digital platforms development, driverless vehicles, new traffic control and security systems, improved infrastructure management or new customer services, such as ticketing, an app that allows customers to buy train tickets from their mobile devices.

4. The above mentioned innovations would benefit from an increased level of competition in the market that is quickly becoming "permissionless" from an economic and technical point of view, but not yet from a legal perspective. To that end, it is crucial to further liberalize the transport sector and to boost intermodality between the different means of transport.

1. Passenger transport

5. Among the transport sectors, the passenger transport segment is where the most significant innovations and profound effects on final users have taken place. Nowadays, both drivers and passengers could easily and readily be geo-localized via the use of specific technology. This increases the information available for all actors involved and third parties. Moreover, in the case of road transport, passengers could also have access to information about the drivers' past performance and the behavior of both sides of the digital platform through rating and reputation systems online. Both innovations increase the level of security in the provision of transport services for passengers, and have the potential to be used in the railway and maritime sectors, too.

6. In this sense, it should be underlined that the main innovations for the provision of transport services for passengers appeared in the road transport segment, surely due to its greater flexibility and lower operational efficient scale as opposed to railway passenger services. That allowed the entrance of new operators in the segment, which encouraged fierce competition in the market and put pressure on prices, quality, variety and innovation rates. Among these changes, the most important were the introduction of car automatization (especially electric cars) and innovative passenger services based on sharing economy platforms. Finally, with the data available on passengers, their routes, needs and preferences, more accurate pricing mechanisms could be used. The cheap access to big data, thus, should also be mentioned as one of the main innovations that help to explain the passenger transport market revolution.

7. All the above innovations have increased the level of competition in the markets, increasing the choice available for consumers, the level of safeness in the market, increasing the pressure on prices and introducing better price mechanisms and improving the overall efficiency in the passenger transport market.

1.1 Road transport: Innovation and technological developments

8. The recent technological changes and IT technologies, as well as the appearance of the so-called sharing economy phenomenon, are likely to further change existing market dynamics and create new business models in different markets in the near future. These innovations have massively impacted the transport sectors, where models like Uber, Lyft, Blablacar or Car2Go appeared and disrupted the traditional businesses, and will definitely continue to disrupt this market with innovative services tied to technological advances (as 5G and Internet of Things) and new business models at present unforeseen. In that regard, public administrations have the responsibility to allow innovation, and sometimes even to foster it when justified, and to increase the level of competition. To that end, they might further downregulate those markets where liberalization processes have not taken place yet, as well as to remove, limit or modify those obsolete regulations that restrict innovation and/or competition and that constitute unjustified barriers to access the market.

1.1.1 Car automation and electrification

9. Vehicle automation or self-driving cars have not yet reached the market place in Spain, but will be in the future. It is well known in this sense the efforts that Google, Tesla and many different entities are making¹. Also manufacturers are introducing innovative technologies at the production level, such as the electrification of cars, or hybrid cars, which will change the industry landscape and will have implications

¹ For instance, as of October 24, 2016, the Department of Motor Vehicles (DMV) of California (USA) has issued Autonomous Vehicle Testing Permits to 19 entities, many of them European
<https://www.dmv.ca.gov/portal/dmv/detail/vr/autonomous/testing>

in neighboring markets and markets that were before unrelated, as electricity production or distribution. Different levels of vehicle automation are likely to require different types of regulation by public administrations. It is important, nonetheless, to analyze the main implications of full and partial automation in order to have a clearer idea about the regulatory challenges and how to tackle them on a supra-national basis. It is thus to be avoided a myriad of national or regional regulation that could restrict the expansion of this type of cars and to limit competition in the market.

10. Another technical and economic revolution already taking place in the market is the introduction of electric cars, which cohabit and will continue to do so with gasoline and diesel fueled cars, at least for some time. Electric cars, as opposed to combustion cars, have a number of advantages: they have lower CO2 emissions, and thus pollute less (also noise pollution), and they are more energy efficient.

11. One of the main spill-over effects of these new developments will be in the road fuel market. Both hybrid and electric cars have the potential to have a significant impact in this market by substantially reducing its demand and therefore to influence fuel prices. In turn, this reduction in the fuel demand would have implications beyond the fuel retail segment, since it would influence the entire value chain of the petroleum industry, from retail to refining markets. Similar implications will be found in related markets, such as car and engine manufacturing, which would dramatically change, and supply of electricity to electric cars, as new and adequate infrastructure would need to be built as electric car use expands and electricity becomes increasingly storable.

12. In Spain the use of electric cars is still low, but the market is growing faster. The Spanish urban landscape is changing, and residents are exchanging their old cars for new electric ones. According to Anfac, the association for Spanish trucks and car manufacturers, 3 284 electric cars were sold from January to September 2016 alone, which represented an increase in terms of sales of 79% compared to the same period of 2015². Retailers reported that most of the buyers came from large cities, such as Madrid, Seville and Malaga. Anfac believes that there are two main factors for this phenomenon: companies are starting to use electric cars for their car company fleets, and MOVEA³, a government plan that incentivizes the electric car sales via subsidies.

1.12 Sharing economy platforms

13. Road transport for passenger is undergoing massive changes at the moment in many developed countries, and in particular, in urban areas where access to vehicles, rather than ownership brings new opportunities to the transport industry.

14. In Spain, in particular, new models offering new urban and intercity transport solutions have recently emerged for prosumers. The premise of these new models is using mobile applications to put users in contact with available vehicles in order to request short-distance urban transport within the locality. These new services offer an alternative to the services traditionally offered by the taxi and the chauffeur-driven passenger car hire services and include reputation systems that improve the level of information, trust and security in the market. The emergence of these new online models is a source of innovation with a significant effect on past and present markets. These include effects favouring competition, arising from an increase in the number of operators, the size and greater variety of the offer, more efficient price-setting, higher quality and the fostering of innovation (new forms of payment, new services, etc.). Other important effects are lower transaction costs, mainly searching costs; access to more information at a reduced or virtually no cost; improving the efficiency and competitiveness of the economy by a higher average use of existing resources; and greater traceability and transparency in economic transactions.

² http://www.anfac.es/noticias.action?idDoc=13069&accion=noticias_anfac

³ <https://www.boe.es/boe/dias/2015/11/28/pdfs/BOE-A-2015-12900.pdf>

15. There are also positive implications, or spill-over effects, of these new developments in related markets, such as platform data and information could be used by public administrations to better manage traffic control, improve infrastructure management or to manage services more efficiently.

16. As an example could be quoted the appearance of Bridj in Boston (a start-up mass transit system), that uses telecom user information to reveal information about the routes used by the citizens that can be employed to draw up a new urban transport network based on a flexible fleet of vehicles.

17. The service provided by these platforms has substantially increased the security for passengers: (i) they include a rating system by which every driver is rated by each of her customers about the taxi service provided; (ii) the customer pays directly via the platform where the card details were introduced in advance; and (iii) the platform has its drivers and customers geo-localized, which means that they can track where they are at any moment in time, and to report a problem if the geo-localization system stops working or any incidence is observed.

18. These new models are thus capable of generating a number of advantages and benefits to consumers. As briefly mentioned before, the establishment of unnecessary or disproportionate barriers to doing business diminishes dynamism in the market and erodes consumer surplus. In this context of innovation and dynamism, the competition and regulatory authorities have an opportunity, particularly in competition advocacy and efficient economic regulation (data based smart regulation), to foster less restrictive regulations that favour dynamic and competitive markets, much to society's advantage.

19. Innovation in the Spanish market has been random and too often Public Administrations, traditionally close to the sector main incumbents, have prevented entry in the markets, hindering competition.

20. Car2Go entered the Spanish market November 2015 offering its car sharing services with electric cars in the capital, Madrid. Their cars are available anytime and anywhere, and can be parked anywhere on public parking spaces within the Madrid area for free. This model has had an unprecedented success in Madrid. In less than a year the company reached more than 100 000 users, more than 5.8 million kilometers were driven with its cars⁴. In addition, given the success the company had in Madrid, Car2Go is envisioning an expansion to other Spanish cities⁵.

21. On the other hand, Uber entered the Spanish market in 2014. However, after the adoption of preliminary measures against its activity by a Spanish Court, Uber decided to leave the Spanish market in December 2014. In 2016, Uber started its activities in Spain under Uber X, a chauffeur-driven passenger car hire alternative with a more limited scope, as the number of licenses for this service is very limited and dependent on the number of taxi medallions in the proportion 30 to 1.

22. These new services have been developed in a context where the regulations of the taxi and chauffeured car rental markets have major unjustified restrictions on entry and practice of the activity in the market in Spain.

⁴ Car2Go Press Release: https://www.car2go.com/media/data/spain/microsite-press/files/20160922_car2go-alcanza-los-100.000-usuarios-en-madrid.pdf

⁵ <http://www.elperiodico.com/es/noticias/economia/car2go-mira-barcelona-expansion-5477457>

23. Concerning these new online services, the CNMC decided back in 2014 to (i) study the sharing economy phenomenon, with an emphasis on the transport sector and accommodation⁶, (ii) to challenge the ordinances of Córdoba and Málaga on taxi as they include some harmful effects for competition. The challenge included the welfare loss calculations resulting from the municipal ordinances for both municipalities, which were, respectively, ca. EUR 4.36 million (Euros) for Málaga and ca. EUR 2.5 million for Córdoba,⁷ (iii) to challenge the land transport regulation (chauffeured car rental) that imposes obstacles to competition. According to the economic report for court, the annual welfare loss calculations resulting from this regulation amounts to EUR 324.3 million.⁸

24. On the other hand, the preliminary findings published by the CNMC included a number of recommendations. The CNMC concluded that trying to limit or prohibit the development of these new models and the entrance of new players in the market via restrictive regulation is not only problematic, but impossible to implement in practice. In a world where all consumers are interconnected through their mobile devices and where operators provide more flexible and targeted solutions to their transport needs. In this context, innovation cannot be stopped neither by public administrations, nor by traditional incumbents. The alternative to competition in these new permissionless markets will not be to maintain the *status quo* introducing incumbent tailored restrictive regulation. On the contrary, public prohibition will more likely lead to underground economic exchanges without public sector supervision, when needed, or tax payments.

1.2 Intercity passenger transport

25. In the case of transport between different cities (intercity) in Spain, regulation in the sector is based on a concessionary scheme ("competition for the market"). In 2008, the former Spain's National Competition Commission (CNC) published a report on "Competition in Intercity Passenger Transport by Bus in Spain". At the time, the CNC drew attention to the inadequate framework for competition in which the renewal of concessions was going to take place in light of the bidding procedures in the coming years and sought changes in order to introduce greater competition into them.

26. Following the 2008 Report, changes were made, but not enough, and thus, the CNC decided to publish two reports, the first monitoring the process of renewing state concessions that has taken place since 2008, and the second one dealing with the extension of concessions where they are in the hands of the autonomous communities. Both reports concluded that there was very little competition in the bidding procedures and that the autonomous communities have been granting 10 year concession extensions to the current concessionaires by using various regulatory instruments.

27. The current Spanish regulation not only limits competition among the intercity passenger transport by bus, but it hampers the entrance of any alternative innovative model, such as Blablacar, whose business model offers more alternatives to consumers, quality, innovation and sustainability in covering the transportation needs of citizens. In fact, two Blablacar users have at present open administrative procedures in the autonomous Region of Madrid which are still pending, but that could end up in the imposition of administrative fines⁹.

⁶ <https://docs.google.com/document/d/1n65MjUaTmRLuZCqTllqyWvobVqreR-iAzsz1mxy2y0/edit#heading=h.30j0zll>

⁷ Málaga [welfare loss](#) calculations, and Córdoba [welfare loss](#).

⁸ https://www.cnmc.es/Portals/0/Ficheros/Promocion/Informes%20Legitimación%20Activa/2016/160608_Informe%20Económico_LA_ROTT_UM_085_15.pdf

⁹ <https://www.blablacar.es/blablalife/novedades/blablacar-comision-europea>

1.3 *Railway: Liberatisation process and vertical separation in Spain*

28. Railways are also benefiting from innovations, although at a lesser extent due to its lower flexibility in comparison with road transport, and the high sunk costs to enter the market linked to the infrastructure. Nonetheless, railway passenger services have also adopted some of the innovations brought about by the new digital technologies. This is the case, for instance, of a new customer service called *renfeticket*,¹⁰ an app developed by RENFE, the Spanish incumbent, and monopolist in the passenger railroad market, that allows customers to buy train tickets from their mobile devices.

29. New technologies have also facilitated access and management of a large amount of information and data that has been used by the railway companies to better manage traffic control, improve punctuality, safety and the overall management and service efficiency.¹¹ Also, and from a customer point of view, companies are now putting an emphasis on the final customers and their experience when travelling. With this regard, companies such as Amadeus, are embracing the principles of the sharing economy and the disruptive potential of technological innovation and focusing its interest on the final customers and their needs.

30. Despite of the above, the main innovation in the railway passenger transport in Spain is the development of the high-speed and long-distance services, which have seen the greatest growth in the last decade. The Spanish high speed network has increased the level of competition in the transport market and constitutes, in some instances, a viable alternative to other means of transport, increasing the level of competitive pressure in the overall transport market (including air transport at national level). This is the case, for example, of the high speed train that connects the main two cities in Spain: Barcelona and Madrid.

31. In addition to the current and future innovations mentioned above, there exist two main challenges in the railway sector: liberalization and an increase of the overall efficiency level in the market.

32. As regards liberalization, the configuration of the Spanish railway model is based on the vertical separation of the infrastructure (ADIF Alta Velocidad, for High Speed infrastructure, and ADIF for Iberian gauge and metric gauge infrastructures), and the provision of the service (RENFE-Operadora as the only company for passenger services). However, both the infrastructure managers and the railway undertaking are public companies dependent of the same Ministry, the Ministry of Development.

33. In terms of competition, the Spanish rail passenger transport market is almost completely closed to competition, except for the so-called services operated on their mainly tourist value, which were legally liberalized in 2013. Even in the case of touristic services, the liberalization process has had zero entries.

34. Before the conclusion of the Fourth Railway Package negotiations in the EU, the Spanish Government announced the beginning of the liberalization of the passenger transport in 2014 but the process has not yet started.

35. A greater openness in the market by which access to it is granted would allow an increase of real and effective competition, which would positively impact on prices, customer choice and quality and frequency of the service. The opening up of the market would also bring the fostering of innovation (new services, new forms of payment, etc.) and the arrival of new entrants. Within this context, it is particularly important to ensure the removal of all obstacles to access to the market in favour of the "incumbent" operator, in order to boost competition and maximize the transfer of efficiencies to the end user.

¹⁰ <http://www.renfe.com/CA/viajeros/movilidad/renfeticket/descarga.html>

¹¹ http://international.adif.es/documents/20182/0/cpidi_eng_OK.pdf/4f0759c2-cb0b-4386-81df-897fc247e2dc

36. For the opening up of the market to succeed, the CNMC proposed several recommendations on the passenger rail transport.

37. First of all, the government announced the liberalization of one corridor (Madrid-Levante) with the entrance of a new railway undertaking to compete with the incumbent, with no specific schedule of the liberalization of the rest of the corridors. In response to that proposal, the CNMC considers that the model must include at least the initial opening-up of the routes with the greatest demand (Madrid-Barcelona and Madrid-Seville) in order to encourage the entry of new operators. Also, the geographical scope of the temporary license must be as broad as possible so that the utmost benefit can be obtained from economies of scale.

38. The liberalization of the Public Service Obligations should be carried out through public tenders that take into account the principles of efficient economic regulation and require more powers for the regulatory authority.

39. Second, it is important to foster the entrance of new competitors eliminating any privilege that the incumbent may have and level the playing field. In the case of the railway market in Spain, this means i) an effective liberalization process must guarantee the neutrality of the companies that lease rolling stock and the companies that maintain and repair the rolling stock. There is an important presence of the incumbent in these two related markets that must be watered down in order to remove incentives for anticompetitive behaviors. This implies the separation of these activities and the decoupling, preferably by a privatization process in a competitive procedure; ii) The process of restructuring RENFE-Operadora should also be accompanied by its separation of the Ministry of Development and ADIF, the infrastructure manager, in order to foster credibility and facilitate the entry of new operators into the Spanish rail sector.

40. Third, technical protocols and rail compatibility must be fostered in order to increase efficiency. In Spain, technical protocols are available in English, albeit only the Spanish version of the protocols is valid. In this sense, the ADIF International Division is in charge to provide global assistance regarding technical documentation and engagement protocols. However, not all protocols are readily available via the ADIF website. As a consequence, potential operators and/or other relevant stakeholders have difficulties to access those technical protocols, which could hamper competition. In the case of Spain there is an additional barrier with the different gauges. Spain has three different gauges that hinder the interconnections within Spain and with our European partners. Other factors such as the insufficient electrification of the networks exacerbate those interconnection problems.

41. In this regard, (i) a common international protocol, similar to the protocol used in aviation services, should be used and enforced in the rail transport; and (ii) investments to adapt the Spanish gauges to the European standard should be made. This would further improve the interconnectivity and intermodality with other countries and modes of transport, as well as the safety of the rail transport.

1.2.1 Role of the railway regulator

42. The CNMC is in charge of the supervision and oversight of the proper functioning of the railway sector, however, the CNMC considers that its role as regulator is limited at the moment, and confined to supervisory functions. For that reason, along with the opening of the railway market to competition, the role of the CNMC, as regulator, should be significantly strengthened: i) the CNMC should be able to verify the analytical accounting and the net cost of the operator or operators designated to provide Public Service Obligations (PSO) services and determine, independently of ministerial departments and companies, the compensation needed to provide the services under certain pre-established public requirements; ii) the specifications for the public tenders for PSO services must include the conditions and requirements that the winning bidder must meet, which must be subjected to subsequent control by the regulatory authority; and iii) the design, calculation and supervision of the rail fees should be allocated to the CNMC.

43. In this sense, the CNMC is in the position to perform these tasks, given its legal independence from any operator in the market and from the government. In the CNMC's opinion, the independence of the authority both in charge of the rail fees and on the supervision of the tenders is necessary for the viability of the liberalization process.

2. Freight transport: The importance of intermodality

44. Innovations in freight transport would also benefit from an increased level of competition in the market. To that end, it is crucial to further liberalize the transport sector and to boost intermodality between the different means of transport.

2.1 Intermodality

45. In addition to the innovations brought by the technological changes and the new information and communications system, another capital aspect for both the development of the competition in the transport sector and the economy as a whole, is the intermodality between the different means of transport.

46. The Spanish transport market is characterized by the underdevelopment of intermodality, both between rail and road and between rail and maritime transport. The underdevelopment of intermodality deters market entry by the major logistics operators and operators with a significant presence in other means of transport, which could exert effective competitive pressure in the rail sector.

47. Taking into consideration the geographical position of Spain, liner shipping market plays an important role in the transport system. Therefore, we could talk about connections between liner shipping market, railway transport and road transport.

48. There are a number of factors that have delayed the development of intermodality in Spain, being some of the most relevant ones linked to the rail system:

49. First of all, there has been little development of intermodal transport, both with road, due to lack of logistics facilities, and with maritime transport, in so far as the rail access at a number of general interest ports is yet to be completed and electrified, although in the last years electrification at the main ports has been carried out.

50. Second, virtually access to rail at the ports is inadequate and management of the intermodal terminals in Spain could be improved. It should be noted however that electrification at the port facilities has significantly improved in the last few years, so port facilities are easily reachable by rail transport now.

51. Third, regarding intermodality between road and freight rail transport, the last leg of the supply chain, or "*last mile transportation*" by road is often inefficient and more costly than the sea and the freight rail transport. Increasing the intermodality between freight railway transport and road transport is thus important for the competitiveness of the markets. In this sense, the Spanish transport and logistics' system have important areas for improvement in order to address the last mile problem, such as boosting the use of information technology (IT), which today is still small.

52. It light of the above, and given the little development of intermodal road transport due to lack of logistics facilities, the CNMC considers that new and greater investments in logistic facilities should be made in order to increase intermodality in between other modes of transport.

2.2 Competition in the rail freight transport

53. In 2012, the CNMC published a report on competition in Railway Freight Transport in Spain¹². The report analyzed in detail the competition structure of the main markets and activities involved in rail freight, such as: the infrastructure, the rail freight service, the availability of rolling stock, maintenance and repair of rolling stock and the provision of services at rail terminals. The structure of those markets revealed the preponderant position of the incumbent, RENFE-Operadora, which held a market share of nearly 77.69%¹³ of the market for rail freight and had a predominant position in the related necessary activities for the provision of transport service (i.e. the availability of rolling stock and maintenance and repair services). The report also showed that services at terminals are provided on a practically exclusive basis by ADIF, which administers most of the infrastructure.

54. In addition, the proportion which rail represents of all means of freight transport in Spain is much lower than the average for European countries (in 2014, rail represented 5% of inland freight transport in Spain, compared to an average of 17.8% in the EU-27 in 2013¹⁴), and in particular much lower than the proportion it represents in the main EU economies. Furthermore, that proportion has fallen considerably in the last decade, and has done so more steeply in Spain than the average in the EU and in the main European economies. Taking into consideration that transport is a necessary input for domestic and international trade in goods, the fact that development of rail transport in Spain is sub-optimal undermines the competitiveness of the Spanish economy and has adverse external consequences, such as the advantages in terms of cost and pollution that rail has compared to other modes of transport.

55. The report also concluded that there exist a number of barriers to enter and expand in the railway market. In particular the report identified the following problems in the freight railway transport in Spain:

- The international isolation, which is due to the fact that Spain has three different gauges¹⁵ that hinders the interconnections within Spain and, particularly, with the countries of central Europe¹⁶. Other factors such as the electrification of the networks exacerbate those interconnection problems.
- The costs of rail transport are lower in Europe than in Spain as a result of the greater train capacity (longer trains) and the greater distances travelled. In Spain, neither the line infrastructure nor the nodal infrastructure is prepared to take 750 m trains, giving raise to problems at the border crossings (difficulties in connecting with Europe).
- Charges do not stimulate efficient infrastructure use, are complex and are relatively more onerous in structure for new entrants than for the incumbent.

¹² https://www.cnmc.es/Portals/0/Ficheros/Promocion/Informes_y_Estudios_Sectoriales/2013/CNC_TR_ANSPORTE%20FERROCARRIL.pdf

¹³ Net tons transported in 2014. Source: [Observatorio del Transporte por Ferrocarril](#).

¹⁴ Source: [Observatorio del Transporte por Ferrocarril](#)

¹⁵ There are three different track gauges in Spain: i) Iberian gauge (1 668 mm), which includes the conventional network carrying both freight and passenger transport; ii) UIC gauge (1 435mm), which corresponds essentially to the high speed lines, reserved practically exclusively for passenger transport; iii) metric gauge (1 000 mm), found essentially in the autonomous communities in the north of Spain.

¹⁶ The standard gauge, which predominates on central European lines, is 1 435 mm.

- RENFE-Operadora, the incumbent, enjoys some significant advantages over its competitors. First, it enjoys a number of "*grandfather clauses*", which are provisions in the regulations which exempt RENFE-Operadora from complying with certain requirements imposed on its rivals and/or give it priority over its competitors. Secondly, RENFE-Operadora has a series of structural links with some of its competitors, in the form of joint holdings in a number of companies, including undertakings for train and train engine maintenance, a situation which further reduces the ability of those competitors to constitute a genuine source of effective pressure. RENFE-Operadora also has significant links with ADIF and with the Ministry of Development, actors which play an essential role in ensuring effective competition in the market.

56. In light of the above, it could be concluded that there is a need for a structural review of the rules governing the functioning of the rail sector in Spain and its organization. If competition in rail freight transport in Spain is to be increased, isolated or unconnected measures are not sufficient. Rather, the market players must receive a credible commitment by the authorities which effectively eliminates the inefficiencies of the system and, in particular, the favorable treatment given to the incumbent operator and its advantageous position in access to certain services.

2.3 *Conclusions*

57. Transport markets are undergoing, and will continue to undergo, a series of unstoppable innovations that will enable the entry and expansion of new operators to the market and will foster competition.

58. These changes in the market, still incipient in Spain and to some extent unpredictable in their evolution due to their innovative nature, must be accompanied by a review to make sure that regulation does not impede development. This review must be performed in accordance with the principles of efficient economic regulation: the regulation would only be justified if it were needed (i.e. maintains a causal link and is aimed at mitigating a market failure that endangers a point of imperative general interest), is appropriate (i.e. there is no alternative measure that generates fewer distortions in the market) and is non-discriminatory.

59. At present, Public Administrations are applying existing regulations to these new developments in the market. These regulations, aimed at regulating the traditional transport markets, could not be fully in line with the new business models and novel services brought by innovation, and could be hindering or preventing the entry of new operators into the market, with the consequent decrease in the well-being of Spanish society.

60. It is advisable therefore to change, eliminate or modify existing regulations so that transport markets can take advantage of the benefits for users and operators derived from the increased innovation in the transport markets, such as: increased competition, lower prices, higher quality, new and better services, increased consumers' choice, and improved overall efficiency of the transport markets.

61. These benefits would also have positive spill-over effects on neighboring and related upstream and downstream markets, as well as in the society as a whole in terms of cohesiveness.

62. The regulatory response to these innovations should be based solely on general interest, not on routine, alleged acquired rights or the particular interest of established operators or incumbents. Transport regulations must adapt to the new market places, and thus it should be avoided that regulations generate excessive costs or burdens (administrative procedures, requirements, etc.) for operators or act as a barrier to market entry or market expansion. Finally, it is not ruled out *a priori* that the absence of regulation in those cases where there is no market failure is efficient and that free market mechanisms are the most relevant for obtaining efficient economic and social results.

3. Recent enforcement in the transport sector

3.1 Rail Transport

63. The CNMC has recently closed a case in the rail transport sector (case S/DC/0566/15) with no finding of infringement after a trade association of bus operators (CONFEBUS) brought a complaint against Renfe Viajeros, S.A., the incumbent company in the Spanish rail passenger transport sector, for allegedly abusing its dominant position in the market for long-distance transport of passengers and high-speed rail transport in Spain.¹⁷

64. In particular, the complainant accused Renfe Viajeros, S.A. of predatory pricing, cross-subsidization from public funded transport services (mainly local ones) to long-distance transport, and abusive bundling (basically, Renfe Viajeros made available free charge certain local transport tickets when buying a long-distance or high-speed train ticket).

65. The CNMC dismissed CONFEBUS' complaint on the following grounds:

- Renfe Viajeros, S.A. and bus operators did not operate in the same relevant market, given the travel duration and price differences between bus and train in long-distance passenger transport.
- Even if both modes of transport were to be included into the same relevant market, no evidence of abusive conduct was found:
 - CONFEBUS did not provide proof of profit sacrifice regarding the pricing of Renfe Viajeros, either at a given route or at an aggregate level. In fact, following the introduction of the controversial pricing, Renfe Viajeros saw its travelers, revenue and occupation improve. Furthermore, the price cost test calculated by the complainant suffered from several technical deficiencies.
 - Regarding the cross-subsidization claim, this would amount to state aid and this could not be investigated by a national competition authority, but instead by the European Commission;
 - Finally, the CNMC did not find proof of abusive bundling, given that CONFEBUS had failed to conduct an adequate replicability analysis. Furthermore, the CNMC deemed that the small number of travelers who made use of the bundling greatly limited the extent to which it could distort competition in the market.

3.2 Price fixing in international refrigerate land transport

66. The CNMC has recently investigated and sanctioned one case regarding the international refrigerated transport of goods by road for a breach of Spanish and EU Competition Act.

¹⁷ The details concerning this case are available at <https://www.cnmc.es/es-es/competencia/buscadores/expedientes.aspx?num=S%2fDC%2f0566%2f15&ambito=Conductas&b=renfe&p=2&ambitos=Concentraciones,Recursos,Sancionadores+CCAA,Sancionadores+Ley+30,Vigilancia,Medidas+cautelares,Conductas&estado=0§or=0&av=0>. Unfortunately, there is no public information in English about this case at the CNMC webpage.

67. On 1 July 2013 the CNMC opened formal proceedings under the case number S/0454/12 TRANSPORTE FRIGORÍFICO¹⁸ by restrictive competition practices prohibited in article 1 of Competition Act and article 101 of the Treaty Functioning of the European Union (TFEU), against one Spanish Trade Association (ATFRIE) and twenty one Spanish undertakings, for alleged illegal practices including the fixing of prices and trade conditions in the national and international refrigerated transport of goods by road.

68. The market affected was the international refrigerated transport of goods by road mainly including the export of fresh fruits and vegetables from Spain to the major cities and countries of Western Europe.

69. The defendants agreed prices from 1993 until 2012 through the association Governing Board, and recommended to all its members. For that purpose they call annual meetings from at least 1993 to 2012. The agreements pursued the rates' increase of the refrigerated transport of goods by road from Spain to the European countries and were exchanged between all ATFRIE'S members (and others who were not), unifying their commercial behavior in the market.

70. On December 2012 some of the main companies involved in the refrigerated transport of goods by road from Spain and members of the ATFRIE'S Governing Board, set up a franchiser undertaking in order to fix the minimum prices of the refrigerated international transport by road and to unify their commercial conditions.

71. On 25 June 2015, the CNMC Council declared the illegality of the conducts. They were not considered a cartel but an illegal price recommendation by a Trade Association and some undertakings members of its Governing Board. The fares' recommendation made by ATFRIE was taken after a previous meeting held by some undertakings (members of ATFRIE'S Governing Board). ATFRIE acted as facilitator of the infringement and encourage it whereas the initiative, proposals, projects and the whole structure came from certain undertakings members of its Governing Board.

72. Total fines amounted EUR 8.9 million to thirteen undertakings plus the trade association.

¹⁸

The details concerning this case are available at <https://www.cnmc.es/es-es/competencia/buscadorde/resoluciones.aspx?num=S%2f0454%2f12&ambito=Conductas&b=transporte+frigorifico&p=1&ambitos=Concentraciones,Recursos,Sancionadores+CCAA,Sancionadores+Ley+30,Vigilancia,Medidas+cautelares,Conductas&estado=0§or=0&av=0>